Arab Reform Initiative

ARCHAEOLOGY OF MAGISTRATE CAREER MANAGEMENT: THE COLONIAL LEGACY OF THE FRENCH MODEL IN TUNISIA

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About the Author

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Cover photo: Tunis, Tunisia - Old vintage postcard from the French Protectorate period, printed in the first half of the twentieth century, view of the market in Gabes. (c) Andreas Wolochow - shutterstock

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Introduction

Every year, it is the most eagerly awaited event in the Magistrate Corps:[1] The publication of magistrate movements in the Official Gazette. Although magistrates have various means of checking in advance whether they have obtained the position, region, or grade they desire through informal channels, they are never at the end of their surprises. Since Tunisia's independence, regardless of the political regime, the movement of magistrates has been the preferred means of managing the careers of this body. For a long time, this process was dominated, in whole or in part, by the administration of the Ministry of Justice. The only exception was the laborious and hybrid experiment of the ephemeral Conseil Supérieur de la Magistrature, created by the 2014 Constitution, whose members were elected by their peers.

Every year, hundreds of Tunisia's 2,500 magistrates[2] are promoted[3] and/or transferred,[4] and/or assigned to other functions.[5] This annual meeting could appear to be an administrative formality devoid of any political significance. At least, this is the image promoted by successive governments in charge of this public policy. However, magistrates are no fools: the movement is a considerable lever of influence and subjugation. Indeed, it affects every aspect of their professional careers and personal lives. While salaries increase with promotion from one grade to the next, the position itself affects prestige and standing in the judiciary and, more broadly, in society. Not to mention the impact on personal life when moving to another city or region.

Whether in the form of sanctions or rewards, political interventions in magistrates' careers were discreet and recurrent, and targeted specific individuals. Rarely have they targeted the entire body or a large group of individuals. This has changed since the 25 July 2021 coup d'état by democratically-elected President Kais Saïed, especially since the appointment of Leila Jaffel as Justice Minister.[6] The crucial issues at stake in the movement, and more generally in the management of magistrates' careers, have come to the fore. First, there was the dismissal of the 57 judges in 2022,[7] not to mention the refusal to publish the movement for the 2022-2023 judicial year.[8] We had to wait until 30 August 2023 for the publication of the Journal Officiel de la République Tunisien (JORT) containing the movement for the year 2023-2024 by presidential decree of 29 August 2023.[9] There is no reference to any legal text governing this public policy.

Political control over the judiciary in Tunisia is not limited to the pressure exerted by repeated telephone calls to magistrates, especially judges, to give them instructions and limit their room for maneuver. Even if a magistrate - rebels - and decides to judge "according to the file" and not "according to instructions",[10] alone, there is no way to significantly change the system. Indeed, the double degree of jurisdiction, judicial depatriation[11] , or simply the removal of a case after a transfer, are all opportunities for the judicial hierarchy or the executive to bypass recalcitrant judges.

These targeted methods, aimed at specific individuals, do exist. However, they are not sufficient to explain why some magistrates actively seek instructions, even in the absence of any[12] . Behind this epinal image lies a complex career management system that has been deliberately created, implemented, and perfected over decades. The instrumentalization of careers is not a historical accident or an ephemeral authoritarian drift of successive regimes, but the result of a deliberate policy of subjugation designed to subdue the Tunisian judiciary from its very foundations. The aim was clearly defined: to use magistrates' careers as a means of controlling and even coercing individuals and the entire body.

While we often hear questions about "how the movement should be carried out", we rarely hear the question: "why is the movement happening? When I put this question to magistrates, lawyers, law professors, or other players or observers in the judicial field, the first reaction was as follows: movement is necessary because it allows us to replace retiring magistrates, place new arrivals, and adapt to career advancement. It's important to note that the movement of magistrates in other countries is not as widespread as that of diplomats, for example. Consider the latter. It would be odd or suspicious for a diplomat to stay in the same post or country for longer than the usual four to five years. By contrast, there is no similar practice worldwide for judges. In Switzerland, judicial judges are employees of the cantons, except federal judges based in Lausanne. In the United States, there are as many judicial systems as there are states. The selection process ranges from nomination to election, or both in some cases. In France, however, the movement has been constantly debated and discontinuously applied over the past two centuries. So, this method of managing magistrates' careers is far from being unanimously accepted in different countries or political regimes.

The second response to the movement's raison d'être is to see mobility as a bulwark against clientelism. Being "on the move", magistrates would not have the opportunity to develop relationships with local elites that would compromise their integrity. In other words, the movement guarantees magistrates' independence from the people they serve. But what about their independence from political power and the security services? Silence from the judicial players interviewed. What's more, if the movement were

really a guarantee against clientelism, we would see this scourge widespread in all the countries that do not apply it, and absent in the countries that have adopted it.

This paper explores how this model of management has come to be taken for granted in Tunisia by those who practice it, control it, or suffer from it. It will examine the mechanisms that determine the degree of autonomy or independence, and describe their historical development. To do so, it will look at the situation of the judiciary in Tunisia before independence; go back to the colonial origins of this public policy, examine the continuities, adaptations, and ruptures between the Hexagon and the periphery, in this case, the secular Tunisian judiciary; and finally, I'll shed light on the choice of dependence on the judiciary at the time of the country's independence.

Magistrate career management and movement: the challenge of definitions

Initially, our work focused on texts that were legally classified as "movements". Over time, we have expanded our definition to include the management of magistrates' careers in general. By this, we mean recruitment, and training when it is inherent in recruitment. We also include promotions, transfers, assignments, secondments, retirements, disciplinary actions, and even unconventional variations such as the "shelving" or not valuing certain judges' specialties. As these career changes are both formal and informal, they are not necessarily documented and published in the official gazettes.

In fact, the first instances of "movement" and "eligibility list" occurred[13] took place immediately after independence. The first post-independence eligibility list was published on 26 September 1956, in alphabetical order rather than by merit.[14] This was followed by the first movement in independent Tunisia, published on the same day.[15] The term "movement" was not always used, even when changes were made to magistrates' careers (for example, the purge decree of 3 August 1956, published in the Journal Officiel Tunisien (JOT) on the same date).[16]

The Organic Law on the Organization of the Judiciary was not adopted until 1967, some ten years after independence, a decade during which the Ministry of Justice was mainly governed by the reorganization of 3 August 1956.[17] The management of magistrates' careers was dealt with in a subsidiary manner in the law of 1967.[18] and in the Constitution of 1 June 1959.

The colonial fact: secularization is francization

The secularization of Tunisian justice

Until 1921, Tunisian justice was a form of "retained justice", i.e. it was administered by the Bey, the relatively autonomous representative of the Ottoman Empire in the Regency of Tunis, and exercised by the Ouzara (the Grand Ministry), which depended on him. In fact, he had jurisdiction only over disputes involving Tunisians. Religious law - Maleki, Hanafi, and Hebraic - was not codified and was based on the interpretation of religious men. Europeans, especially Christians, came under the jurisdiction of the French colonial administration, which put an end to the many consular courts.[19]

By 1921, the French colonial authorities had undertaken what they officially termed the organization and modernization of the indigenous judicial system.[20] The Bey relinquished his judicial prerogatives over the local population on 24 April 1921.[21] This marked the end of retained justice and the beginning of delegated justice. Several codes were promulgated during this period[22] . The colonial power set out to guarantee greater control by continuing the unification of the judiciary and, more broadly, by redesigning the institutional architecture in Tunisia[23] . Colonial authority drew on the ranks of religious justice. Some thirty magistrates were recruited under unenviable conditions. The majority were Zitouna graduates, but few had a secondary education. Only one had a law degree.[24] Working conditions and remuneration were unattractive. The lack of training and low income led to tensions between the new recruits, the colonial authorities and the Tunisian administration. Some magistrates wrote to the Bey asking him for financial aid in a charitable, non-requesting capacity.[25]

For those who had completed their secondary education or even obtained a law degree, self-employment was more attractive, as it guaranteed greater financial autonomy and consequent political leeway. Indeed, although the Ministry of Justice had jurisdiction over inter-Tunisian affairs, a government commissioner general was appointed to oversee administrative matters, and the post of president of the Court of Cassation was monopolized by French nationals after having been held by Tunisians (Mansar, 2005).

Magistrates: supply outstrips demand

Let's explore this excerpt by Khemais Arfaoui from "Les origines de la justice judiciaire en Tunisie 1881-1956" where he discusses the criteria for recruiting judges.

> A breakthrough in this field came with the reorganization of the administration of law courses at the Souk Al-Attarine Arabic language school in 1922. These courses will have a major impact on the scientific training of candidates for the position of deputy judge. In this context, in 1928 the Tunisian Director of Justice published the decision enshrining the ordinance of 10 November 1926, concerning the status of Tunisian Regency personnel. According to this text, judges of the courts of justice are appointed by decree on the proposal of the Minister of Justice, and deputy judges are recruited from among French citizens and Tunisian protégés through a competitive examination whose syllabus is drawn up by the Director of Justice, who also appoints a commission responsible for examining the examination subjects. In addition to other conditions, the decision specifies that the candidate must have passed the law examination and may only take part in the competition if he or she has obtained the approval of the Director of Justice. The new Special Personnel Act authorizes participation in the competition, and consults the Supreme Council of the governing body to appoint successful candidates to their new grade on the basis of the length of their administrative work and the importance of the services they have rendered. The decision also requires candidates for the position of deputy judge to submit a detailed file comprising an application form on a stamped sheet of paper, a certified copy of their birth certificate or equivalent document, as well as an extract from their criminal record and a certificate of good conduct and good morals issued by the local authority and dating back no more than six months, as well as a certified copy of university diplomas and a receipt for payment of property tax and documents indicating the candidate's military status and proving that he/she has fulfilled his/her military duty, as well as a medical certificate issued by the doctor appointed by the administration of justice attesting that the candidate is free of illness and fit to exercise the judicial function.

Let's take a look at the criteria for access to the profession of magistrate for Tunisian magistrates in charge of exclusively inter-Tunisian disputes. There is the ability to practice, which is assessed by the validation of knowledge, moral character, as well as various related criteria (military service and state of health). What about independence? Some may consider that the competitive examination is a guarantee of independence for the future magistrate. This idea was the subject of lengthy debate in France in the 19th century, as we shall see later. If this is the case, there are serious doubts about the independence of a magistrate under colonial tutelage.

Although they claimed to offer greater autonomy to the indigenous courts, the colonial authorities soon reversed their position and limited the freedom of action of the first judges of the delegated judiciary. In the case of political trials, the latter were, in the opinion of the colonial authorities, lenient towards nationalist militants. Consequently, with the publication of the scurrilous decrees of 29 January 1926, the French withdrew the handling of such disputes from the indigenous courts.[26] The Cour de Cassation also had to be seized: after being occupied by two Tunisians, the presidency of the highest court was monopolized by French judges. In a colonial context, the organization of the so-called indigenous judiciary was motivated by a desire for control and subjugation, not emancipation.

During the colonial period, there was no question of making "movements" in a structured, regular and systematic way. In fact, the supply of magistrates in the new Department of Legal Affairs was greater than the demand. The management of magistrates' careers resembled classic human resources management on a case-by-case basis, as opportunities and events arose. For Tunisian magistrates, the first movements were not observed until independence.

This idea of movement originated fifteen years before the secularization of the Tunisian judiciary. It was introduced by the "Sarrien Decree". Although it remained in force for only two years, this text left an indelible mark on the management of magistrates' careers in post-independence Tunisia.

A little-questioned heritage in Tunisia, an age-old debate in France

Published on 21 August 1906, the decree, named after the Minister of Justice at the time, Jean Marie Ferdinand Sarrien, established "special guarantees of professional ability for candidates for judicial office and established a career ladder for magistrates". It applies in France, Algeria, and Tunisia. By referring to Tunisia, this text is actually addressed to French magistrates based in the Regency of Tunis. It does not, therefore, concern Tunisian customary or religious "judges"

who, as mentioned above, are still under the authority of the Bey. Nevertheless, the "tableau d'avancement" and recruitment by competitive examination will live on in memories and institutions. In essence, it established the competitive examination as the preferred route into the judiciary and the tableau d'avancement as the main tool for promotion. These are still the preferred mechanisms for managing judicial careers in Tunisia. Far from revolutionizing the French judiciary, however, the Sarrien decree was only one stage in the debate over the recruitment and promotion of magistrates that began immediately after the 1789 Revolution.

The competition consisted of two tests: "the first on a question of civil or criminal law and the second on questions of judicial practice". (Art. 8) The candidates are ranked in order of merit, and those who qualify are invited to take the oral examinations. These tests consist of "1. an indictment or a presentation on a civil or criminal matter determined by the jury; 2. questions on the administration of justice, the syllabus for which shall be determined by decree of the Minister of Justice". (Art. 11) Candidates have twenty-four hours to prepare, and each examination lasts no longer than half an hour. Admission guaranteed an unpaid position for a few years before actual integration into the corps and tenure. As for the "tableau d'avancement," it was the sine qua non for promotion to the higher ranks.[27]

What is the background to the decree?

The search for the right mechanism for recruiting and promoting judges in nineteenth-century France has as its corollary the search for the definition of a "good" judge. According to the authors of «Devenir juge, modes de recrutement et crises des vocations de 1830 à nos jours».[28] three qualities were expected: independence, ability, and morality.[29] As much as there was agreement on the nature of these qualities in the republics, restorations, and constitutional monarchies that France experienced, there was disagreement on the hierarchy of the three and whether they were complementary or exclusive. Each configuration implied a change in the winners and losers.

Apart from morality, for which the authorities relied on reports from the hierarchy, it seemed more difficult to measure ability, let alone independence. There was also an unspoken but generally accepted criterion: the wealth of the candidate or his family. In fact, at least two years of unpaid work were required. The duration and names of these stages varied: juge-auditeur, juge suppléant, or juge de noviciat, etc. Their basic premise was the same: to give future judges the opportunity to acquire "skills", knowledge, and experience. However, this provision favors social reproduction and the monopolization of the judiciary by the more affluent.

To strike a balance between capacity and independence, players draw on a repertoire of actions including: election, competition, co-optation, presentation, and inheritance.

If the idea of suffrage appeals, it's because it recalls the ideals of the Revolution of 1789. It is based on the assumption that the right to vote is a guarantee of democratic legitimacy and independence. This path to justice is considered the most uncertain. An election deprives the establishment and the political powers of the opportunity to have their say, to place their relatives, or to avoid recalcitrants. To justify their positions, the opponents of the system denounced the possibility of having judges who, although elected, were somehow incompetent and had little knowledge of law and justice. The peak of interest in the election came at the end of the Second Empire and the beginning of the Third Republic, a time when a large-scale purge took place within the body of judges conciliatory with the previous regime.[30] Co-optation was one of the methods mentioned and consisted of validation by peers, leaving little room for renewal and diversification. As for the transmission from father to son, this was also defended by the elites established in the arenas of power. With the advent of the Third Republic, this idea became increasingly difficult to defend.

> "The triumph of the election was, however, as dazzling as it was short-lived. Its principle, solemnly adopted on 10 June 1882, was finally abandoned in January 1883, after an admirable about-face by Parliament. The most far-reaching purge of the French judiciary had finally been carried out with the brutal law of 30 August 1883, and the time seemed ripe for a reasoned and dispassionate reform of recruitment. Since election had been rejected in 1883, and since any system of co-optation/representation of future magistrates by the judiciary itself was inadmissible in a republican regime, the only alternative to the authoritarian rules inherited from the Empire remained the competitive examination." [31]

An ardent supporter of the idea of competitive examinations was Étienne Flandin, deputy for the Yonne. In 1894, he introduced a bill "to regulate the conditions for admission to and promotion in the magistracy of the courts and tribunals". It was at this point that Jean Sarrien, a member of parliament and co-signer of the bill, became Garde des Sceaux, the French Minister of Justice, twelve years later, and signed the decree on the same subject. But the result was by no means a foregone conclusion. Numerous proposals had been made before and after, with the main aim of defining the methods of access to the profession of magistrate.

The rocky path taken by this bill to end up as a decree is worth the detour, as it testifies to the contingency that led to this text. To force the government out of the status quo, Étienne Flandin "used the technique, known today but then in its infancy, of the budgetary cavalier. He obtained the insertion and the vote in the Finance Act of 17 April 1906, of Article 38

which obliged the government, pending the famous organic law [organizing the recruitment of the judiciary], always promised but never voted, to settle, within three months, by public administrative regulation, the double question of recruitment procedures and the promotion of the judiciary. "The new Keeper of the Seals, Sarrien, complied and issued a decree that was supposed to be provisional, pending an organic law that never came.

What followed the decree was as uneven as its inception. Not a single candidate took part in the first competition. This lack of interest was predicted by the Lyon prosecutor[32] who, in a column, expressed surprise at the imbalance between the selection tests and their counterpart: unpaid substitution. In fact, according to some historians, the Sarrien decree came at the height of the judicial "vocation crisis". The level of requirements did not match the interest in the profession, and the supply of jobs far exceeded the demand. As early as 1907, preparations were made to repeal the Sarrien decree. It was published in 1908 by the future president of France, Aristide Briand. Judges would henceforth be recruited by a professional examination, no longer subject to competitive examination and aptitude. "Candidates took a direct oral examination with questions on civil law, criminal law, and judicial practice, at the end of which they were not ranked according to merit, but simply in alphabetical order, opening the door to favoritism and recommendation."[33]

This historical overview, albeit brief, gives us an idea of the depth of the debates in France that led to the selection and promotion of magistrates. And yet this was taken for granted in the Tunisian debates. Our historical research, which goes back to the Sarrien decree, shows us the historical and legal origins of the idea of competitive examination, promotion, and movement. Tunisia's judicial architecture and legal corpus were largely inspired or transposed from France in the first half of the twentieth century, with a few adaptations. While the French spent the nineteenth-century questioning and experimenting with different methods of managing the careers of judges, the Tunisians did little to challenge the colonial legacy. In a sense, the Tunisian nationalists finished the job that the French had begun: to unify the judicial system so that it could be subjugated.

We need to delve into the archives of the negotiations for the Judicial Convention resulting from the Internal Autonomy Agreement of June 3, 1955, and the Judicial Convention resulting from the Protocol of Independence Agreement of March 9, 1957. These texts and how they were drafted could shed light on the motivations of the negotiators and their intentions on both sides.

An independent Tunisia renouncing the independence of the judiciary

After the signing of the Protocol of Independence on March 20, 1956, Tunisia was not fully sovereign or independent. Many clauses of the internal autonomy texts of June 1955 remained in force. As the country began to set up its new institutions, negotiations continued, particularly on the Tunisianization of the judiciary. The same was true of the security services. In this context, the members of the Tunisian Constituent Assembly, which drafted the country's first constitution between 1956 and 1959, did not question the French legal and judicial heritage. On the contrary, they drew inspiration from it. Take, for example, the decree of 29 January 1926 on the repression of political offenses[34] which was used to repress nationalist militants under colonial rule. In December 1955, the Bourguibists, who had been installed in government institutions in the wake of internal autonomy, appropriated it and added other offenses.[35] aimed at suppressing their former comrades-in-arms and their current enemy: the Youssefists. Moreover, under the guise of modernization, the colonial authorities introduced liberticidal laws designed to control the indigenous Muslim community (criminalization of homosexuality, prohibition of alcohol for Muslims, etc.). These laws were designed to win the political support of religious institutions and make them more accepting of colonial rule. Similarly, the authoritarian rulers of independent Tunisia preserved this legal legacy and used it to prosecute and imprison political opponents for six decades.

While the colonial legacy is well known in the legal corpus, it is more difficult to detect in the institutions that have recently become Tunisian. The debates on the "Judicial Power" chapter of the 1959 Constitution, which we are about to analyze, show that the Tunisian authorities have chosen to change the crew and the flag when it comes to the judicial institution while maintaining the tutelary system and the operating mechanisms of the previous government. From 1959 to 2011, this chapter was modified only once, in 1993, by the regime of Zine el Abidine Ben Ali, to create a façade constitutional court. Jean-Philippe Bras warns: "Stability here is not a sign of strength, but rather of neglect. It is a subordinate function with no real stakes because, unlike the legislative and executive functions, it is not the seat of power".[36]

Judicial independence: a "philosophical and Byzantine" debate, according to the Executive

In the late '50s, in the early days of the Republic.[37] the judiciary was seen as one power too many. At the time, one-party rule was not yet the norm. Nevertheless, all 98 members of the Constituent Assembly were elected by a single coalition composed of the Neo-Destour and the workers', employers' and peasants' unions. Other political groups, such as the Old Destour and the Youssefists, chose to boycott the elections. With authoritarian rule not yet fully established, there was some freedom of speech within the Neo-Destour party led by Habib Bourguiba.[38] Freedom of speech, however, did not mean freedom of choice. The members of the executive, who held the mandates of deputies, set the course. The parliamentary debates surrounding the drafting of the 1959 Constitution provide a glimpse of this.

In terms of content, the debates within the Constituent Assembly (1956-1959) testify to a constant questioning of any judicial power that might be beyond the reach of politics. It should be noted that the proceedings published on the occasion of the fiftieth anniversary of the Constitution in 2009[39] are a summary of the debates and not an exact transcription of the speeches of the elected representatives. As the Constituent Assembly debated the procedure for recruiting and appointing judges, concerns about the effective independence of the judiciary were ever-present.

During the first reading of the work of the commission in charge of the judiciary, the debate between a direct appointment by the executive on the one hand and the election of judges on the other (Article 95 of the draft Constitution) began. The proponents of appointment argue that the judiciary is a partial repository of State sovereignty and that the Executive, which they consider to be its primary owner, can claim to elect judges. This position has been rejected because "the judiciary is not as independent as it should be". As for the proponents of the idea of elections, they draw inspiration from what is done in many American states and point out that the voters of the Fourth Republic in France debated the issue but did not opt for this method.[40] According to the debates, election carries a great risk: the elected magistrate would owe allegiance to the majority that elected him/her, would represent their interests, and would be beholden to them. It was not clear from the debates whether this risk also affected elected members of the legislative branch (deputies) or the executive branch (President of the Republic). Thus, the deputies seemed to be concerned with guaranteeing impartiality with respect to those subject to the law but were less vigilant when it came to the independence of the magistrate and the judiciary with respect to political power, whether embodied in the government or the President of the Republic. Implicitly, we can see that the dominant position - in a way "by default" - around which the debates revolve is: appointment by decree of the President of the Republic on the recommendation of the Conseil Supérieur de la Magistrature (CSM).

This is undoubtedly why deputy Mohamed Khiari points out two confusions in the debate. The first is that the election of a judge, if it takes place, makes the CSM's proposal of a list to the president null and void. Second, he suggests that a distinction be made between the election of a person and the establishment of a working relationship and assignment to a specific function. Ahmed Mestiri, Minister of Justice and an elected member of the Assembly, replies that "التسمية" the appointment, happens each time the individual is appointed to a new position, and therefore a decree will materialize this appointment each time. In reality, this is a misunderstanding between the elected official and the Minister of Justice. A happy misunderstanding, as the minister sums up the management of magistrates' careers at a time when the constitution is being finalized.[41] and a few months after the Tunisian authorities regained full jurisdiction over Tunisia.

> "After two or three years, and once they have demonstrated their ability, they are officially appointed. Then, after a certain period, the Conseil Supérieur de la Magistrature, which is chaired by the Minister and sometimes by the Head of State, examines their files. They are particularly interested in the administrative situation, any disciplinary measures, ordinary administrative advancement, and candidacies for high office where applicable. In the event of a vacancy in the office of president, for example, the CSM would have met beforehand to decide which magistrates could be included on the list of suitable candidates for this position. They will necessarily be appointed from that list. The President of the Republic must choose one of the names on the list of suitable candidates[42] . The appointment decree is then published in the official gazette.

This response, which reveals a hint of annoyance on the part of the Minister-MP, retraces a familiar career cycle reminiscent of the Sarrien Decree.

Independence and security of tenure

The independence and guarantees provided for judges were also the subject of debate when it came to defining the irremovability of judges. In the version of article 97 discussed at this session,[43] the Rapporteur points out that in Great Britain judges can only be transferred or disciplined if both Houses agree. As for the Americans, he explains, their judges remain in office if they behave properly.

In his report on articles 95 to 97, the Rapporteur begins by reducing the scope of independence, which should not allow judges to refuse any transfer, claiming to be independent and therefore irremovable. Independence," he explains, "consists in offering guarantees to judges to protect them from the executive power that would like to punish them by transferring them. However, these guarantees do not necessarily mean "immunity or carte blanche" to refuse transfers in the name of independence. He reassured the audience that he would maintain the "default" position that leaves the center of gravity of judicial career management in the hands of political power, particularly the executive.

Independence and the public prosecutor's office

One of the other fault lines in the debate on judicial independence is the role of the public prosecutor's office and the nature of its relationship with the judiciary and the executive. MP Rachid Driss, for example, suggests that a distinction be made between judges and prosecutors. According to him, prosecutors and their deputies should not be proposed by the High Council of the Judiciary to the President of the Republic without specifying the reason or the alternative selection method. The Constituent was likely inspired by the French Constitution of the Fourth Republic[44] which distinguishes between judges and prosecutors in the appointment process.

Should prosecutors and judges be appointed in the same way? If the public prosecutor carries the voice of the government and represents society[45] , why doesn't the government appoint him/her directly? Doubt, even unease, is palpable.

Independence and the CSM

The composition of the CSM was initially to be included in the constitution. In the end, this was not to be the case, but the debates surrounding this issue illustrate how institutional subjugation is taking hold. Indeed, the President of the Republic and the Minister of Justice were assigned the functions of chairman and vice-chairman, alongside the country's most senior magistrates and four of their (elected) peers. Among other things, this council was supposed to oversee the career development of magistrates. The fact that the country's executive - and political - power was at the head of the judiciary showed how little room for maneuver the nationalist militants of yesteryear and the political leaders of the day intended to leave to the magistrates.

According to the minutes of the debates, there was no opposition from the parliamentarians, which is not surprising given the monolithic composition of the Assembly mentioned above. The executive wanted to retain some influence over the Conseil supérieur de la magistrature.To this end, instead of being published in the Constitution as originally planned, the details of the CSM's composition were downgraded to ordinary law, as "it would be easier to define the Council's composition by law than by constitution", read the minutes.

The Executive whistles the end of the game

However, the deputies present in the room did point out some inconsistencies. For example, Mohamed Nafti argued that the President of the Republic could not make an informed choice based on the eligibility list sent to him by the CSM because he did not know the details of the judges' performance. For his part, Amine Chebbi, who justifies himself by the fact that he is not a lawyer, believes that the power of judges and prosecutors comes from the same source: the executive; consequently, prosecutors and judges should be subject to the same legislation. It is important to point out here that the confusion is not limited to the boundary between the two branches of the judiciary, but also between public prosecutors and governors. The commission's rapporteur recalls that there have been recent cases of overlap between the two and that the vagueness stems in particular from the fact that both are linked to the Executive, with prosecutors representing it and governors embodying it, not to mention the fact that governors are the heirs of the Caïds who had judicial police functions in the old regime.

It is interesting to note that the debates on the substance of the issue (i.e. election or appointment) that take place in the hemicycle are often conducted under the guise of linguistic rectification and semantic precision. Undoubtedly aware of this detour, the end of the game was whistled by Bahi Ladgham, a member of parliament who also holds the posts of Minister of Defense and Secretary to the Presidency of the Republic.

He dismissed the question of whether or not there should be a Third Estate out of hand as "a philosophical debate on irrelevant technical issues that would lose the Assembly in Byzantine squabbles." The elected representatives unanimously adopted what he had proposed in his speech. Article 95 was adopted as follows: "Magistrates are appointed by the President of the Republic on the recommendation of the CSM, within the framework of the law". Article 97 deals with the guarantees provided by the CSM with regard to the careers of magistrates. The composition and powers of the Council will be specified by law. Logically, Article 99, which detailed the composition of the CSM in the Constitution, will be deleted.

A speedy second reading

After this first reading, the debate was reopened in a second reading, the debates of which were published in the JORT on 25 April 1959. The situation was urgent.

Indeed, Taieb Mhiri, a member of parliament who holds the position of interior minister and is influential within the party, revealed his reservations about a freewheeling judiciary with these rhetorical questions at the end of the constitutional debates: "Is the judiciary itself an independent power? Or are judges independent? What does independence mean?" He believes that this mention should be relegated to the preamble and that "he will have to be convinced otherwise". Setting the pace, the other deputies followed suit. Article 93 states that justice is an independent power exercised by courts at different levels and which guarantees the rights of the accused.[46] This article was deleted because it was redundant with Article 94, which states that judges are independent. In addition, the final version of the 1959 Constitution will not retain "independence of power. Instead, judges will be described as independent. If only judges are independent and not the judiciary as a whole, the result is a lack or absence of administrative and financial autonomy. The deletion of Article 93 was approved by 53 votes out of a total of 98, a narrow majority far from the usual unanimity. In the end, the chapter on the judiciary in the 1959 Constitution was content with the bare minimum, without any guarantees. In fact, as with the composition of the CSM, the content of each article had to be defined by future laws: as mentioned above, ordinary laws are considered more malleable than constitutional law. Article 95, on the appointment of judges by the President of the Republic and their nomination by the CSM, was retained and adopted unanimously.

Conclusion: There was never any question of independence

The legislative and political choices made in the early years of post-independence Tunisia cannot in themselves explain the subjugation of the Tunisian institution. Other historical events deserve just as much attention for having contributed to shaping not only the identity of the regime but also specifically the shape of the post-independence judicial institution. The first is the civil war that divided the country in the mid-1950s. It pitted two leaders of the nationalist movements within the Neo-Destour party against each other: on the one hand, Habib Bourguiba, the party president; on the other, Salah Ben Youssef, the general secretary who was assassinated in Frankfurt in 1961. The latter had rejected the internal autonomy treaty (signed on June 3, 1955) that the former had concluded with the French colonial authorities. The same applies to the failed coup d'état uncovered in December 1962. Bourguiba, then President of the Republic, was criticized for his handling of the Tunisian-French war of Bizerte (July 1961), whose heavy human toll was deemed avoidable. Each of these events gave rise to accelerated and biased trials for Ben Youssef's supporters and military coup suspects. Even when these issues were examined by transitional justice between 2013 and 2018, the judicial institution was unable to address these two cases without being held hostage to past and contemporary political conflicts. These events have contributed to making the judiciary an auxiliary in legitimizing and legalizing arbitrary state violence.

The Tunisian authorities have done little to challenge the system of judicial careers bequeathed to them by the colonial power. Ahmed Mestiri's memoir on the Tunisification of the judiciary leaves little doubt that the recent Tunisian government sought legitimacy in the eyes of the former colonial power in order to justify and gain its acceptance of the new state's right to try European nationals, particularly French nationals, who were under the jurisdiction of French courts. What were the reasons for this acceptance? Mestiri's memoir suggests that legitimacy was synonymous with "modernity".[47] a notion inherent to the former colonial power, which is why this quest for recognition resulted in little or no questioning of the colonial legacy. In a way, they have completed the work begun by the French: the total unification of justice to better subjugate it. What's absurd is that the post-independence authorities implemented a system that proved to be ineffective and inappropriate in France shortly after its introduction.

The competitive recruitment and movement of magistrates has not spared Tunisia from the subordination of the judiciary to the executive, particularly the security services. However, the demands of magistrates and defenders of judicial independence have rarely challenged the entire career management system. Protests have often focused on isolated abuses. Worse, for some actors and observers of the justice system, the system seems to be taken for granted and therefore little or not questioned. The attraction for them is that it's a system they know and understand, despite its shortcomings. Even when we hear here and there that there are problems with this movement or that individual, it's interesting to note that the system is not questioned. It's as if it were inherently necessary and virtuous. All it takes for the system to show its virtues is for the disturbances and interferences to stop.

There was no shortage of opportunities: Tunisia's independence in 1956 could have been the occasion for a rethinking of the institutional and social order, as well as an overhaul of the judicial system in line with previous institutions. More than fifty years after the first constitution and following a revolutionary moment that swept away the post-independence regime, Tunisians drafted and adopted a new constitution in January 2014. The 2014 constitutional debates were not officially transcribed and published in the Journal Officiel de la République Tunisienne (JORT). As

a result, we do not have an official written document, but rather the General Report on the Draft Constitution, which summarizes the discussions of the commissions. The latter does not mention any career-related aspects. Instead, it focuses on the Constitutional Court and the new High Council of the Judiciary.

While issues related to the management of magistrates' careers were extensively discussed in France in the 19th century, Tunisian voters dealt with them only superficially. Nevertheless, these issues are not obsolete. Every time there is a change of government, or even of regime, there is a new opportunity to question this management model. To do so, we need to consider career management as a nexus in the subjugation of judicial power. At the time of writing, in May 2023, the debate in the activist judiciary was as follows: how to guarantee judges access to the legal profession if they are abusively dismissed by political power. To do this, the National Bar Association (ONAT) must agree. Considering that a magistrate has better access to courthouses than any lawyer, the order lets every request drag on. There's an essential question here: why is the field of possibilities for Tunisian magistrates so narrow? Why is becoming a lawyer the only honorable way out? If judges had options outside the judiciary[48] we might hope that some of them would find it easier to accept their decisions because, in the worst case, they would have alternatives elsewhere. The very existence of such alternatives might, to a lesser extent, discourage the executive from pushing ahead brazenly at the risk of being denounced and publicly disavowed.

On the other hand, lawyers justify their refusal to accept judges by saying that they themselves are not eligible to become judges. This is a legal obstacle. Despite the presence of several dozen lawyers and no judges in the parliaments between 2011 and 2021, there has been no strong mobilization in this direction. What if the judiciary were more open? Not only to lawyers but also to other professions. Accepting the idea of opening this black box is a first step that will open the debate on the ability of individuals to exercise this profession and the criteria that must be met to be independent. This will already be an achievement: a challenge to the rigid, closed path that gives the executive and security services the upper hand in their relations with the judiciary. Appointment, co-optation, election, competitive examination, etc. are all possibilities that should be discussed without being the exclusive preserve of the judiciary. After all, the people subject to the law are the first to be affected. In the Tunisian case, it is not difficult to show that by changing the way one becomes a judge, it is justice that changes.

Challenging the career management of judges may mean reforming or abolishing it. But that will probably not be enough. The problematic role of prosecutors is one of them. In the corridors of the courthouses, they are known as "al bouliss al kabir" (the big policeman). It is through them that inequality before the law becomes a reality. If prosecutors are the voice of the regime and not of the common law, let them be seen as such. Why not put police officers in their place, instead of playing out the tragicomedy of a judge as spokesman for the police-political complex? We must also question other obvious facts, such as the choice of the "civil law" or "common law" system. Was it a choice, or a colonial legacy that was little questioned?

If 25 July 2021 and Kais Saïed's coup have taught us anything, it's that citizens can vote against their own interests and believe in an incredible project precisely because it's incredible and because there is a project. Promising to change humanity is far more exciting and unifying than promising an extra point of growth or simply being less bad than the current coalition. This is because a project, however crazy it may seem, mobilizes people more than realistic, utilitarian reformism. One of the strengths of the Kais Saïed phenomenon is that it proposes to go beyond all the limits previously set by the debate, even if the results of its actions are far from its promises if there are any actions at all.

Finally, if there's one lesson to be learned from this experience, it's that it's important to identify and break totems and to never stop questioning them.

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Endnotes

1 About inclusive writing: Justice in Tunisia was strictly "male" until 1968, well after the period covered by this article. So the absence of inclusive writing is in fact a reflection of (sad) reality. Sana Ben Achour talked about the feminization of the judiciary in her article (cited in biblio), an extract of which follows: "In Tunisia, the movement began in 1967-1968 with the entry of the first female graduate with a modern law degree," says Sana Ben Achour (2007).

2 2477 magistrates were "budgeted" in the Tunisian Finance Act 2021 (Draft) - justice mission". Ministry of Finance and Investment Promotion, October 2020. http://www.finances.gov.tn/sites/default/files/2020-11/.pdf

3 For example, from the second to the third grade.

4 For example, from Kairouan to Tunis.

5 For example, from research judge to prosecutor.

6 Since October 2021. This magistrate was based in Nabeul, and is reputed to be close to Kais Saïed's wife, Ichraf Chebil, herself a magistrate based in Tunis.

7 Described as a "massacre of justice" by the Association of Tunisian Magistrates and civil society organizations campaigning for the independence of the judiciary.

8 Until these lines are written in mid-May 2023.

9 Journal officiel de la République Tunisienne, number 100, year 166, dated Wednesday August 30, 2023.

10 "According to the file" and "according to the instructions" are two expressions that are well established in Tunisian judicial circles.

11 Judicial expatriation involves transferring the case to another court.

12 This is not a generalization about each·e of the 2,500 magistrat·es tunisien·nes, but the observation of an existing practice. The quest for an instruction intervenes as a prior insurance and a rejection of any responsibility or initiative-taking. Interview with un·e avocat·e of political prisoners·ères accused·es of plotting against state security, May 2023.

13 This list includes those who will be promoted in the next movement according to grade, without specifying the place or function of assignment. It was often published in the Journal Officiel Tunisien (JOT) in an order issued by the Minister of Justice, but we have not found any such orders since 2011. Thanks to our interviews with magistrates and members of the Conseil Supérieur de la Magistrature (2016-2020), we can confirm that this procedure continued to be used even without publication.

14 JOT number 77, 100th year, dated September 26, 1956. Unnumbered decree.

15 Idem.

16 JOT number 26, 99th year, dated August 3, 1956. Unnumbered decree.

17 Idem.

18 Law no. 67-29 of July 17, 1967, on judicial organization, the High Council of the Judiciary and the status of the judiciary.

19 "However, the protectorate soon added a parallel judicial structure to the existing situation by abolishing the consular courts and creating, in 1883, a civil justice system (the Tribunal de Grande Instance in Tunis and later in other towns) staffed by French magistrates appointed by the President of the Republic on the recommendation of the Garde des Sceaux. These courts had jurisdiction over French and other nationalities, including the bey's subjects, whenever a French person was a plaintiff or defendant". Ben Achour, Mohamed-El Aziz. n.d. "La justice tunisienne avant 1956 : de la Driba au Palais de Justice." Leaders. Accessed May 22, 2023. https://www.leaders.com.tn/article/32792-la-justice-tunisienne-avant-1956.

20 General residence of the French Republic in Tunisia. 1922. «Rapport au Président de la République sur la situation de la Tunisie en 1921.» Tunisia: French MinistryofForeignAffairs.https://mehdi.name/fr/2018/12/31/rapport-au-president-de-la-republique-sur-la-situation-de-la-tunisie-en-1921/

21 JOT number 35 dated April 30, 1921 (reference cited by Arfaoui)

22 Code des Obligations et des Contrats in 1906, Civil Code 1910, Penal Code 1913, etc.

23 Attempts to unify the judicial system were in vain, as until independence the religious courts remained beyond the reach of the colonial administration, at least from a statutory point of view.

24 Ahmed Al Atki (cf. Khemais Arfaoui, *Les origines de la justice judiciaire en Tunisie 1881-1956,* 2018).

25 Khemais Arfaoui, *Les origines de la justice judiciaire en Tunisie 1881-1956,* 2018.

26 Khemais Arfaoui, *Les origines de la justice judiciaire en Tunisie 1881-1956,* 2018.

27 The decree details the various cases, which would be tedious to reproduce here. It is stipulated that "every year, in the first fortnight of November, and on the basis of these presentations and opinions [of hierarchical superiors], the promotion table is drawn up for each category of judicial function and for each grade. A joint commission between the judiciary and the executive examines the dossiers. It is made up of " 1° the first president of the Cour de cassation, chairman; 2° the public prosecutor at the same court; 3° four members of the Cour de cassation appointed by decree, on the proposal of the Minister of Justice; 4° the directors of the Ministry of Justice. (...) The secretary of the commission is appointed by the Minister of Justice.

28 Fillon, Catherine, Marc Boninchi, and Arnaud Lecompte. 2008. «Chapter I. L'impossible concours (1830-1908).» In Devenir juge, 13-79. Droit et justice. Paris cedex 14: Presses Universitaires de France. https://www.cairn.info/devenir-juge--9782130565284-p-13.htm.

29 As we have seen, these qualities were sought out and evaluated by the colonial authorities in Tunisia to fill the ranks of magistrates in the recently secularized Tunisian justice system.

30 The years 1880-1883 were dominated by the desire to carry out a massive purge of the judiciary, as a prelude to its necessary "republicanization". For three years, the parliamentary debate focused on the irremovability of judges; the competitive examination was then eclipsed by the election of

judges. While this deeply satisfied all those nostalgic for the Revolution, the election also constituted, as Jacques Poumarède has shown, a perfect "alibi for a purge".

31 Becoming a judge…

32 Extract from the article "Devenir juge, modes de recrutement et crises des vocations de 1830 à nos jours" (Becoming a judge, recruitment methods and vocational crises from 1830 to the present day) from Presses universitaires: "In the newspaper *Le Droit, on* October 17, 1906, Advocate General Dagallier wrote of the competitive examination created by the Sarrien decree: 'It is from among the winners of this competitive examination that substitute judges will be chosen as and when required. This is all well and good. But here a serious objection arises: to these distinguished young people, from whom you require, after six years of study or internship, proof of ability resulting from a presumed serious competition, what are you offering as a reward for their efforts and merit? An *unpaid* deputy judge's post [84][84]Emphasis in original. (...) It could well happen that the jury is out of work for lack of candidates!

33 Becoming a judge... (*opus quoted*)

34 "As early as 1926, a Beylical decree was issued on January 29, 1926, to punish political offenses. It defined the political offences falling within the jurisdiction of the French courts. These offences were of various kinds. They included attacks on the external and internal security of the Tunisian State or the French protectorate, and offenses specific to Tunisia as specified by the decree of January 29, 1926, such as incitement to hatred, contempt or disrepute of the sovereign, the government and the administration of the protectorate, French or Tunisian civil servants responsible for overseeing the government or administration of the protectorate, incitement to public discontent likely to disturb public order, press offences, association offences, assembly offences, incitement to racial hatred. in Chekir, Hafidha. 2007. "La justice politique en Tunisie." L'Année du Maghreb, no. III (November): 141–62. http://journals.openedition.org/anneemaghreb/363

35 December 8, 1955.

36 Bras, Jean-Philippe. 2016. "De l'État Légal à l'État de Droit ? Le Statut Constitutionnel de La Justice Au Maghreb." In Des Justices En Transition Dans Le Monde Arabe ? : Contributions à Une Réflexion Sur Les Rapports Entre Justice et Politique, edited by Éric Gobe, 69–93. Description Du Maghreb. Maroc: Centre Jacques-Berque. http://books.openedition.org/cjb/761.

37 Decreed on July 25, 1957.

38 A freedom that would dry up after 1962 and 1974, marked respectively by the failed coup d'état and the establishment of the presidency for life.

39 Chamber of Deputies. 2009. «Débats parlementaires de l'Assemblée Nationale Constituante: 8 avril 1956 au 1er juin 1959.» Bardo: Centre de Recherches et d'Etudes Parlementaires - Chambre des Députés.

40 Pierre Cot, a constituent of the Fourth Republic, was cited as the sole supporter of the election.

41 Official Journal date: November 19, 1958

42 It should be remembered that the President of the Republic chairs the CSM, and that he can steer the discussions leading to the Council's list of suitable candidates.

43 "The CSM, whose composition and operation will be defined by law, works to provide the necessary guarantees to magistrates concerning appointment, promotion, transfer and disciplinary measures." Art. 97 debated on November 19, 1958.

44 "Article 84. - The President of the Republic appoints magistrates, with the exception of public prosecutors, upon presentation by the Supreme Council of the Judiciary." 1946 Constitution of the Fourth French Republic.

45 Le rapporteur, JORT 5/1958, p 184.

46 author's summary

47 Ahmed Mestiri, the first Minister of Justice after the country's independence, repeated the term "modern" more than four times in the chapter of his memoirs relating to his time at the Ministry of Justice: "Three months after Tunisia's accession to independence and the formation of the first Bourguiba government, the "Code du Statut Personnel" was promulgated, along with a text governing the personal status of Tunisians other than Muslims and Israelis, and of foreigners. At the same time, in August 1956, the Tunisian judicial system was unified, with the abolition of the Muslim and Israelite religious courts (the Sharia courts and the rabbinical courts). To finalize all these measures, major changes had to be made to texts and administrative organization, and deadlines set for their implementation.These revolutionary reforms strengthened our case for opening negotiations with the French government with a view to abolishing the French courts, as their continued existence was no longer justified in principle, given that our country had courts with a modern organization, following modern procedures and applying modern legislation, and therefore perfectly qualified to settle disputes concerning all inhabitants, national or foreign. At first, this argument had no effect on our French interlocutors who, while accepting the principle of opening negotiations to revise the 1955 Convention, had shown a certain reluctance, with the obvious ulterior motive of maintaining the old mixed tribunal system in one form or another. It was then that we had to resort to a - limited - means of pressure to bring the French Government to seriously accept the resumption of negotiations."

48 To cite just a few examples of professional reconversions in other countries: lawyer, law teacher, mediator or arbitrator, legal consultant, legal writer legal researcher, in-house corporate counsel, non-profit sector worker, legal compliance expert, public policy analyst, litigation manager, human resources director, contracts expert, risk management consultant, financial analyst, family law consultant, legal writer or journalist, among others.

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The Arab Reform Initiative is an independent Arab think tank working with expert partners in the Middle East and North Africa and beyond to articulate a home-grown agenda for democratic change and social justice. It conducts research and policy analysis and provides a platform for inspirational voices based on the principles of diversity, impartiality, and gender equality.

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