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*A Comparative study of the central administration of justice in France and Tunisia*

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**Abstract:** An in-depth exploration of the French and Tunisian judicial landscapes, tracing the historical trajectories that have shaped their respective legal frameworks. This comparative study delves into the intricacies of the judicial systems in France and Tunisia, shedding light on both their shared features and distinctive elements. In fact, the current analysis highlights the significant role that the national judicial council—also known as the high council of judiciary—may have in protecting judicial independence in the relevant nations. Furthermore, the study scrutinizes the selection and appointment processes for judges in both countries, unraveling the educational qualifications, competitive examinations, and ongoing professional development requirements. Additionally, the study navigates through the realms of civil, criminal, and administrative justice by exploring the organizational structures, competencies, and procedures of the two systems. The examination encompasses the roles of various judicial bodies, such as the Court of Cassation in France and Tunisia. Through this comprehensive analysis, the study aims to offer a nuanced understanding of the legal frameworks and practices that shape the justice systems in France and Tunisia.

Judicial Independence-High Council of the Judiciary-Judges-France-Tunisia

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*Étude comparative de l'administration centrale de la justice en France et en Tunisie*

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**Résumé:** Une exploration approfondie des paysages judiciaires français et tunisien, retraçant les trajectoires historiques qui ont façonné leurs cadres juridiques respectifs. Cette étude comparative se penche sur les subtilités des systèmes judiciaires français et tunisien, mettant en lumière leurs caractéristiques communes et leurs éléments distinctifs. En fait, l'analyse actuelle met en évidence le rôle significatif que le conseil judiciaire national - également connu sous le nom de conseil supérieur de la magistrature - peut jouer dans la protection de l'indépendance judiciaire dans les pays concernés. En outre, l'étude examine minutieusement les processus de sélection et de nomination des juges dans les deux pays, en démêlant les qualifications éducatives, les concours et les exigences en matière de développement professionnel continu. De surcroît, l'étude parcourt les domaines de la justice civile, pénale et administrative en explorant les structures organisationnelles, les compétences et les procédures des deux systèmes. L'examen englobe les rôles de divers organes judiciaires, tels que la Cour de cassation en France et en Tunisie. À travers cette analyse approfondie, l'étude vise à fournir une compréhension nuancée des cadres juridiques et des pratiques qui façonnent les systèmes judiciaires en France et en Tunisie.

Indépendance judiciaire-Conseil supérieur de la magistrature-Magistrats-France-Tunisie

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# *A Comparative study of the central administration of justice in France and Tunisia*

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Wael HAMDI\*

## **Introduction to Magistrates and Magistracy: A Cross-Country Examination**

"The true administration of justice is the firmest pillar of good government<sup>1</sup>."

**-George Washington-**

The independence of the judiciary undeniably constitutes a foundational pillar in the construct of a "state governed by the rule of law<sup>2</sup>," aligning seamlessly with Montesquieu's 18th-century thesis on the separation of powers<sup>3</sup>. The theoretical underpinning of the separation of powers<sup>4</sup>, first articulated by Locke (1632–1724) and further refined by Montesquieu (1689–1755), delineates the distinct roles played by the State. This conceptual framework is intricately woven into the organizational fabric of modern democracies' institutions, driven by the overarching objectives of curbing arbitrariness and mitigating the potential for abuses in the exercise of sovereignty<sup>5</sup>.

As a result, judicial independence is not a privilege claimed by judges for their own benefit, but a fundamental principle<sup>6</sup> established to protect the rights of individuals seeking justice<sup>7</sup>.

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<sup>1</sup> «The Papers of George Washington », *Presidential Series*, vol. 4, 8 September 1789–15 January 1790, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 106–109.

<sup>2</sup> VIALA Alexandre, La notion d'Etat de droit : l'histoire d'un défi à la science juridique, *Revue Européenne de droit public*, 2001, n° 13, vol.1, pp. 673-691.

<sup>3</sup> The traditional theory of the separation of powers distinguishes three essential roles in every political system: the legislative authority that sets general rules governing society; the executive authority responsible for carrying out these laws and overseeing their administrative fallout; the judicial authority that guarantees its application in the context of dispute resolution. This distinction is seen in the Constitution of French republic, which unambiguously guarantees the judiciary's independence from other branches of government.

<sup>4</sup> "There is no freedom if the power to judge is not separate from the legislative and executive powers," MONTESQUIEU, Charles Louis de Secondat, "*The Spirit of Laws*", (Book XI, §6), London: Printed for J. Collingwood, 1823.

<sup>5</sup> "If the same man, or the same body of rulers, nobles, or people exercised all three powers—making laws, carrying out public resolutions, and adjudicating individual crimes and disputes—all would be lost," he said. *Ibid.*

<sup>6</sup> Article 16 of the Declaration of the Rights of Man and of the Citizen (DRMC) of 1789 states that "no society in which the guarantee of rights is not assured, nor the separation of powers is determined, has a point of Constitution." This idea is now acknowledged as a fundamental constitutional principle.

<sup>7</sup> BACCOUCHE Néji, « La justice comme nécessaire garant des libertés », *Justice et Démocratie*, Pulim, 2003, pp. 174-176.

For judges who accept such a role, dependence on political power or hierarchical superiors means peace and the assurance of a quiet life: independence means accountability, confronting opposing viewpoints, embracing public discourse, and rising to the challenge of persuading others not by coercion but by reasoned argumentation combined with professionalism and firmness.

Even though judicial independence is intimately related to the notion of the separation of powers, different legal and court systems across the world do not have the same understanding and acceptance of this idea. Although every legal system acknowledges the court's independence from the legislative and executive branches, at least in its national statutes, not every legal system has yet achieved a satisfactory and long-lasting level of judiciary independence.

Several international documents, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, have aimed to provide valuable insights into how judicial independence and fair trial can be guaranteed through practices and good administration of justice. Notably, the Bangalore Principles stand out as a crucial example, serving as a set of ethical standards for judges to guide and regulate their conduct within the judiciary<sup>8</sup>. Comprising six core values—Independence, impartiality, integrity, propriety, equality, and competence and diligence<sup>9</sup>—these principles meticulously define and elaborate on the expected behaviors that embody each value. With specific instructions provided under each core value, the Principles offer a concrete framework for judges to translate these values into practice. Widely recognized and adopted, several States have incorporated the Bangalore Principles into their own codes of conduct for judges<sup>10</sup>.

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<sup>8</sup> The Bangalore Code of Judicial Conduct was written in 2001 for the Judicial Group on Strengthening Judicial Integrity and submitted to the Round Table Meeting of Chief Justices in November 2002.

<sup>9</sup> The following are some significant judicial values that the Bangalore Principles uphold: 1) Independence: Judges must support and embody judicial independence in both its institutional and individual dimensions. They must carry out their judicial duties impartially, based on their evaluation of the evidence and in conformity with a careful interpretation of the law, and free from any undue influence, pressure, inducement, threats, or interference, whether direct or indirect, from any source or for any reason. They must not only have no improper relationships to or influence from the legislative and executive departments of government, but they also have to seem that way to an impartial observer. 2) Impartiality: When making decisions, judges must act impartially and neutrally, treating all sides equally and refraining from displaying bias or preference. 3) Integrity: Members of the judiciary are supposed to maintain the highest moral and ethical standards; they should behave with honesty, justice, and fairness; they should also refrain from engaging in corrupt or unethical activities. 4) Propriety: In order to uphold the dignity of the judiciary both within and outside of courtrooms, judicial personnel should behave properly and refrain from doing any acts that would cause the public to lose faith in them. 5) Equality: It is important to emphasize that justice should be blind to disparities in rank, income, or personal traits and that all court users, regardless of background, should be treated with equal consideration and respect. 6) Competence and Diligence: To act effectively, justices need to have the information and abilities needed, and they should always be advancing their legal knowledge. Prompt and effective case management is required for diligence in order to guarantee justice without needless delays. See: WEBBERRY W, “JIG –The Bangalore Principles”, *The Judicial Integrity Group* [Online], Available at: < <https://www.judicialintegritygroup.org/jig-principles> >, (Accessed on 15 January 2024).

<sup>10</sup> The United Nations and other international organizations have supported and urged member nations to take these principles into account when creating regulations pertaining to judges' professional and ethical behavior (The United Nations Social and Economic Council's Resolution 23 encourages Member States'

The necessity to take measures to ensure the independence of the judiciary generates a wide variety of significant difficulties pertaining to widely diverse aspects of judges' status, such as their appointment, training, assessment, career, transfer, disciplinary procedures, and so on.

In fact, clarifying the primary focus of our subject is of utmost importance. The central administration of justice refers to the core institutional structure responsible for implementing and managing the overall functioning of the judicial system within a given jurisdiction.

It is a critical aspect of any legal system, and its organizational structure varies across different jurisdictions. In some countries, such as Germany or Austria, the central administration of justice falls under the purview of the Ministry of Justice. Here, the Ministry plays a pivotal role in the appointment, management, and overall functioning of the judiciary. This model is characterized by a more direct influence of the executive branch on judicial affairs.

On the other hand, numerous countries, including France or Tunisia adopt a system where an independent judicial council oversees the central administration of justice. This approach aims to enhance judicial autonomy and insulate the judiciary from direct executive control. This administration is often presented by independent judicial councils, often made up of judges and legal experts who play a versatile role in guaranteeing the efficiency and integrity of the judicial system. In the context of mitigating the influence of the executive power over the judicial system, judicial councils serve as a vital counterbalance. It is responsible for overseeing various aspects of the judiciary, including appointments, promotions, and disciplinary matters, all of which contribute to safeguarding the autonomy and impartiality of the judicial branch.

In this particular context, we will primarily focus on the second kind of administration, as the countries under the scope of our study have both adopted judicial institutions tasked with overseeing the administration of justice.

By managing the appointment and promotion processes of judges through judicial councils or the High Council of the Judiciary, the central administration of justice works to ensure that these decisions are based on merit, legal expertise, and experience rather than political considerations. This approach helps insulate judges from external pressures, fostering an environment where they can make decisions based on the law and legal principles without fear of reprisal or interference. Additionally, the central administration of justice, often embodied by judicial councils or the High Council of the Judiciary, is involved in establishing ethical standards, codes of conduct, and disciplinary procedures for judges. This oversight ensures that judges are held accountable for their actions while maintaining their independence. The aim is to strike a delicate balance where judges can exercise their

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courts to use the Bangalore Principles). The Bangalore Principles have garnered support from a wide range of organizations, including the American Bar Association, the United Nations Office on Drugs and Crime, the International Commission of Jurists, and judges from member nations of the Council of Europe.

functions without external interference, yet remain accountable to established legal and ethical standards. In essence, the central administration of justice, with the support of judicial councils or the High Council of the Judiciary, is a crucial mechanism for implementing and managing judicial independence by providing the necessary infrastructure, processes, and safeguards to uphold the integrity of the judicial system.

As the latter plays a pivotal role in upholding the rule of law<sup>11</sup>, it is essential to investigate how this hypothesis manifests in different legal systems. In the following exploration, we turn our attention to a comparative study of the central administration of justice in two diverse yet interconnected nations, France and Tunisia. This inquiry delves into contemporary structures and operational dynamics of their respective central justice administrations, with the aim of elucidating the diverse approaches that underpin the pursuit of justice within each jurisdiction.

The central administration of justice in both France and Tunisia has evolved as a reflection of their unique legal traditions and historical trajectories. In France, a legal system deeply rooted in Napoleonic and civil law principles<sup>12</sup> has given rise to a meticulously structured central administration. Historical landmarks, such as the French Revolution and the subsequent Napoleonic Code, have left an indelible mark on the French legal landscape, shaping its emphasis on codification and judicial hierarchy. In contrast, Tunisia's legal system, influenced by a blend of Islamic law and French legal principles during its colonial history, has experienced a journey marked by post-independence reforms that started with the adoption of the French model of jurisdiction duality (Constitution of 1959).

Certainly, Tunisia, whose society has been open to Western legal culture since the mid-nineteenth century and whose economy is inextricably linked to European economies, could not remain apart from the norm of the rule of law and the independence of the judiciary that it entails. The administrative structure of independent Tunisia is derived from Beylical administrative traditions<sup>13</sup>, which in turn gave rise to the French administrative structure inspired by Napoleonic principles.

The effect of Tunisia's colonial past and subsequent democratic changes may be seen in its legal system, whereas France has a longstanding legal heritage. The historical evolution of these two legal systems sets a compelling stage for an in-depth exploration of the complexities surrounding their central administration of justice.

The judicial administration systems in Tunisia and France exhibit not only significant similarities but also notable differences, primarily rooted in the distinctive legal traditions and structures of the two countries, illuminating the complex web of judicial management in both nations.

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<sup>11</sup> HAMON Léo, « L'État de droit et son essence », *Revue France droit constitutionnel*, 1990, pp. 699-712.

<sup>12</sup> The legal system of France is founded on codified laws and is derived from Roman law. Under Napoleon I, the Civil Code was created in 1804.

<sup>13</sup> BEN ACHOUR Mohamed El Aziz, *La Cour du bey de Tunis*, Tunis, Espace Diwan, 2003, p. 98-99.

Through this analysis, we aim to unveil how their respective conceptions of justice have significantly shaped their contemporary legal frameworks and operational procedures.

Before delving into the different parts of our study, we would like to shed light on the importance of the following comparative study of Tunisian and French judicial administration systems in providing a unique chance to analyze the particularities that define each one's view of justice.

For the purpose of this study, we have chosen an analytical approach<sup>14</sup> centered on the examination and analysis of crucial judicial self-governance bodies responsible for the actual recruitment of judges. Additionally, we will thoroughly evaluate the judicial appointment process in both countries. As an integral part of this analysis, we will delve into the existing court structures in both France and Tunisia, emphasizing the numerous common elements they share.

To note, extensive explanation of different court specificities will not be tackled throughout this work. Similarly, issues related to any non-national jurisdictions resulting from member-defined contracts or statutes are excluded from this organization. Therefore, one is only interested in tribunals that are approved by the State administration and are specified by law. The international legal orders, whether African, European or Community-based, that are part of an external legal order will also be excluded because they originate not from State administration but rather from other international organizations (African Union, European Union, United Nations, etc.).

In the same vein, we won't delve extensively into the intricacies of the composition or recruitment procedures for Administrative or financial judges. These roles follow distinct recruitment paths and are governed by a separate set of national legal laws that distinguish them from their counterparts in the judiciary. Recognizing the unique nature of these positions, it is essential to appreciate the nuanced legal frameworks that guide the recruitment and composition of Administrative and financial judges, thereby ensuring a comprehensive understanding of the diverse facets within the broader legal system.

In terms of structure, the first part of this thesis will discuss the critical role played by the respective council of judiciary in both countries. Then, in a second part, we will manage to analyze the mechanisms of appointing judges implemented in France and Tunisia. Then, in a third part, we will address the court structure in the two legal systems. The reasoning behind this division is guided by the desire to analyze each point independently to create a proper understanding about the different mechanisms of judicial administration in the following countries, their historical underpinnings, operational frameworks, and the distinct ways in which they contribute to the pursuit of justice within their legal systems.

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<sup>14</sup> “What is an analytical approach?” *think.org*. [Online], Available at: < <https://shorturl.at/cdtS5> >, (Accessed on 15 January 2024).

## 1) Navigating Judicial Independence: The Role of Self-Governing Bodies in Recruitment

In recent years, there has been a growing call for institutional reforms, primarily centered around advocating for a specific court administration model the Judicial Council model. This paradigm is frequently promoted as the best and most general way to solve problems with earlier administrative setups, most notably the Ministry of Justice's management of the courts. The institutional organization's reform assigns a crucial role to justice, and it doesn't rely on a widespread purging of the judiciary. Instead, the focus is on creating a new higher magistrates council, serving as the cornerstone for developing an independent justice system. The democratic and equitable operation of this council is deemed essential for establishing a legal State. The Judicial Council concept that has been suggested seeks to protect the judiciary from political interference, strengthen judicial independence, and improve the general efficacy of judicial operations<sup>15</sup>.

### 1.1) Le Conseil Supérieur de la Magistrature: Shaping Judicial Recruitment and Independence in France

There has been an undeniable global surge in the establishment of judicial councils, with France adopting the modern version of its “Conseil supérieur de la magistrature” as a constitutional organ in the post-war era. This trend extended to Italy in 1958, marking a significant development in the safeguarding of judicial independence<sup>16</sup>. The judiciary is an independent body established by the constitution in several nations, including France, Spain, Italy, and others<sup>17</sup>. The idea of independence is thereby institutionalized<sup>18</sup>. While France had a High Council of the Judiciary since 1883, it was the 1946 Constitution of the Fourth Republic that formally embedded the Council in the constitutional framework itself for the first time.

The 1958 constitution established the “Conseil supérieur de la magistrature” (CSM) to uphold the President of the Republic's role as the “guarantor of the independence of the judicial authority<sup>19</sup>,” serving as an oversight body for the judicial branch. Following the constitutional amendment in July 2008, the CSM no longer has the President of the Republic as its chair, and the Minister of Justice is no longer its Vice-President<sup>20</sup>.

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<sup>15</sup> BOBEK Michal and KOSAŘ David, “Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe.” *German Law Journal* 15.7 (2014): 257-292.

<sup>16</sup> GAROUPA Nuno, and GINSBURG Tom, “Guarding the Guardians: Judicial Councils and Judicial Independence.” *The American Journal of Comparative Law*, vol. 57, no. 1, Jan. 2009, pp. 106–107.

<sup>17</sup> RENOUX Thierry, *Les Conseils Supérieurs De La Magistrature En Europe: Actes De La Table Ronde Internationale Du 14 Septembre 1998*, La Documentation Française, 1999.

<sup>18</sup> *Ibid.*

<sup>19</sup> Article 64 of the Constitution of the Fifth French Republic guarantees the independence of French magistrates. It states that “The President of the Republic is the guarantor of the independence of the judicial authority. He is assisted by the Superior Council of the Judiciary. An organic law governs the status of magistrates. Judges are irremovable”. This article has remained unchanged since 1958. It is supplemented by the organic law on the status of the judiciary, which has been amended several times.

<sup>20</sup> COLLIARD Jean-Claude. “Quelle Indépendance Pour La Justice ?” *Rendre (La) Justice*, Éditions Sciences Humaines, 2013, pp. 145–157.

Structured into two distinct panels, the first panel, overseeing judges, is led by the First President of the Court of cassation, accompanied by five elected judges<sup>21</sup>, a public prosecutor (Magistrates and Public prosecutors, excluding heads of jurisdiction, are elected on union lists), a State Councilor (appointed by the Council of State), a lawyer, and six qualified individuals appointed by the President of the Republic and the Presidents of the Assemblies (President of the National Assembly and the President of the Senate). When it comes to the external qualified members, respective authority appoint two qualified individuals each. These appointments must be approved by parliamentary committees and must respect the principle of parity. The second panel, focusing on public prosecutors, is chaired by the Attorney General of the Court of Cassation and includes five public prosecutors<sup>22</sup>, a judge (chosen by their peers, with the exception of the head of jurisdiction, as in the first panel) and the eight outside personalities (a State Councilor, a lawyer, and six qualified individuals) who remain the same in both panels.

With the exception of the two Presidents, who remain in office for as long as they are members of the Court of cassation, the members of the Council are appointed for a four-year non-renewable term of office<sup>23</sup>.

Similarly the Council holds plenary sessions, which respond to requests for opinions made by the President of the Republic or the Minister of Justice, comprise seven judges and eight outside experts. It is chaired by the First President of the Court of Cassation, who may be deputized by the Public Prosecutor the above mentioned court. In terms of appointments, magistrates are in the minority on the High council of judiciary. There are eight non-judge members and seven judge members on the two panels that appoint judges and prosecutors.

This distinctive structure delineates the pivotal role of the CSM in safeguarding the independence and integrity of the judicial system in France<sup>24</sup>. The primary objective behind establishing a judicial council is to prevent the court from becoming a tool of political power<sup>25</sup> and to mitigate the influence of corporatism or lobbies<sup>26</sup>.

In this case, the French CSM is in a stronger position. Judges receive their appointments through a decree, with proposals originating from either the CSM or the Minister of Justice: The “Conseil supérieur de la magistrature” puts forward binding proposals for the

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<sup>21</sup> It is composed of 1 senior judge from the Court of cassation, 1 first president of a court of appeal, 1 president of a judicial tribunal and 2 senior judges.

<sup>22</sup> It is composed of 1 senior prosecutor from the Court of cassation, 1 public prosecutor at a court of appeal, 1 public prosecutor at a judicial court and 2 public prosecutors.

<sup>23</sup> Article 6 of the Organic law no. 94-100 of February 5, 1994 on the Superior Council of the Judiciary as amended by Law no. 2017-54 of January 20, 2017.

<sup>24</sup> CLARK Mary L, Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level? *Penn State Law Review*, Vol. 114, 2009, American University, WCL Research Paper No. 2010-01, p. 49-118.

<sup>25</sup> BELL John, "European Perspectives on a Judicial Appointments Commission." *Cambridge Yearbook of European Legal Studies* 6 (2004): 35-54.

<sup>26</sup> *Ibid.*



appointment of judges of the Court of cassation, first presidents of courts of appeal, and presidents of judicial tribunals directly to the President<sup>27</sup>.

For other positions, the Minister of Justice proposes candidates to the President, seeking prior approval from the “Conseil supérieur de la magistrature”. In the case of judges, the Council's opinion is binding on the Minister, who cannot propose the appointment of a judge if the Council's opinion is not aligned. In the case of public prosecutors, the Minister may overrule an unfavorable opinion from the Council<sup>28</sup>, although since 2010, all CSM opinions have been implemented by succeeding ministries.

The “Conseil supérieur de la magistrature” (CSM) functions also as a disciplinary authority for judges, imposing disciplinary measures when needed<sup>29</sup>. When addressing disciplinary issues concerning magistrates, the CSM consists of sixteen members, ensuring an equal representation of magistrates and non-magistrates for fairness. Regarding public prosecutors, it serves as a disciplinary body and offers an opinion on sanctions imposed by the Minister of Justice<sup>30</sup>. The CSM is informed of disciplinary matters by the Minister of Justice or the First Presidents of the Courts of Appeal, who report relevant facts. In contrast, public prosecutors operate under a hierarchical principle, inherent in their role of implementing government-defined penal policies. They may receive general criminal policy instructions from the Minister of Justice.

Despite this, the autonomy of the public prosecutor's office sparks debate due to its subordination to the Minister of Justice within the executive branch. The proposed constitutional law for democratic life renewal in August 2019 suggested aligning the appointment process for prosecutors with that of judges, requiring the assent of the CSM<sup>31</sup>. However, this proposal was not deliberated<sup>32</sup>.

The Organic Law 2023-1058, enacted on November 20, 2023, represents a pivotal development in France's legal landscape. Focused on the themes of opening up, modernization, and accountability of the judiciary, this legislation introduces a set of novel

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<sup>27</sup> « Quel est le rôle du Conseil supérieur de la magistrature ? », *Vie-Publique.fr* [Online], Available at: <<https://www.vie-publique.fr/infographie/282204-infographie-quel-est-le-role-du-conseil-superieur-de-la-magistrature>>, (Accessed on 28 November 2023).

<sup>28</sup> *Ibid.*

<sup>29</sup> In the case of judges, the CSM directly imposes disciplinary sanctions. It is then considered an administrative court of first and last instance, whose decisions are subject to review by the Council of State.

<sup>30</sup> The Minister's decision may be challenged before the Council of State, which then rules in the first and last instance on the grounds of excess of power. If the Minister declares that he will follow the opinion of the CSM, renouncing the exercise of his own decision-making powers, his decision may be annulled on the grounds of negative incompetence.

<sup>31</sup> Projet de loi constitutionnelle pour un renouveau de la vie démocratique (2021), *Vie-Publique.fr* [Online], Available at: <<https://www.vie-publique.fr/loi/273301-reforme-constitutionnelle-2019-pour-un-renouveau-de-la-vie-democratique>>, (Accessed on 28 November 2023).

<sup>32</sup> SACRISTAN Patrick, « Occitanie - Conférence Nationale des Procureurs de la République : l'urgence d'une réforme du statut des parquets », In *la Semaine des Pyrénées* [Online], Available at: <<https://www.lasemainedespyrenees.fr/occitanie-conference-nationale-des-procureurs-de-la-republique-lurgence-dune-reforme-du-statut-des-magistrats-du-parquet/>>, (Accessed on 15 January 2024).

regulations aimed at enhancing the responsibility, ethical standards, and protection of judicial magistrates. One significant aspect of this legal reform is the streamlining of conditions governing the admissibility of complaints filed by litigants with the High Council of the Judiciary (CSM)<sup>33</sup>. It also strengthens the investigative powers of its commission in charge of examining these complaints and revises the scale of sanctions applicable to judicial magistrates. Additionally, the lawmakers have further defined the disciplinary fault, created a code of ethics for judicial magistrates (*la charte de déontologie des magistrats*) to be developed and published by the CSM, established a possibility of ethical control by the CSM in case of a magistrate's resignation to join the private sector or engage in liberal activities, and clarified that public expression by magistrates should not harm the impartial exercise of their functions or undermine the independence of the judiciary<sup>34</sup>. This introductory change sets the stage for a more accessible and transparent judiciary, emphasizing accountability and ethical conduct among judicial magistrates.

Added to that, we want to shed light on the importance on the activity of French judicial associations and groups in shaping the legal landscape features. Three prominent associations representing judges and prosecutors, each aligned with distinct ideologies. The “Syndicat of the magistratures” (SM) leans left, advocating for judicial independence, civil liberties, and social justice. The “Union syndicale des magistrats” (USM) takes a centrist stance<sup>35</sup>, focusing on protecting magistrates' interests and upholding judiciary impartiality. On the right, the “Association professionnelle des magistrats” (Apm) prioritizes professionalism, efficiency, and a robust judiciary. These associations play vital roles in expressing member perspectives, influencing legal discussions, and engaging in conversations about the CSM and broader judicial matters in France<sup>36</sup>.

## **1.2) Functioning Challenges and Prospects: A Spotlight on the Tunisian Judicial Council**

Since its inception in 1959, the High Council of Magistrates in Tunisia has undergone a significant evolution, reflecting the dynamic changes in the country's legal landscape. Originally established to oversee the judiciary, the council has witnessed transformative phases, influenced by constitutional amendments and societal shifts. Over the years,

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<sup>33</sup> “Publication De La Loi Organique Relative À L’ouverture, À La Modernisation Et À La Responsabilité Du Corps Judiciaire.” *Gazette Du Palais* [Online], 22 Nov. 2023, Available at : < [www.gazette-du-palais.fr/actualites-professionnelles/publication-de-la-loi-organique-relative-a-louverture-a-la-modernisation-et-a-la-responsabilite-du-corps-judiciaire](http://www.gazette-du-palais.fr/actualites-professionnelles/publication-de-la-loi-organique-relative-a-louverture-a-la-modernisation-et-a-la-responsabilite-du-corps-judiciaire) >, (Accessed on 3 December 2023).

<sup>34</sup> *Ibid.*

<sup>35</sup> The Union Syndicale des Magistrats (USM) is the main union for magistrates in the French judiciary. Apolitical, it defends the independence of magistrates and their material and moral interests. It is a founder member of the International Union and the European Association of Magistrates.

<sup>36</sup> At the last election for the Higher Council of 2022, the USM obtained 66.6 % of votes compares to 33.3% of votes for SM. See: MESTRE Abel, “Elections Au Conseil Supérieur De La Magistrature : Le Syndicat De La Magistrature Se Renforce.”, *Le Monde.fr* [Online], 2 Dec. 2022, Availabe at: < [www.lemonde.fr/societe/article/2022/12/02/elections-au-conseil-superieur-de-la-magistrature-le-syndicat-de-la-magistrature-se-renforce\\_6152729\\_3224.html](http://www.lemonde.fr/societe/article/2022/12/02/elections-au-conseil-superieur-de-la-magistrature-le-syndicat-de-la-magistrature-se-renforce_6152729_3224.html) >, (Accessed on 28 November 2023).

Tunisia has navigated challenges and reforms, shaping the role and composition of the High Council of Judiciary.

The “Conseil supérieur de la magistrature” (CSM) was first established by law no. 29 of 14 of July 1967, promulgated by President Habib Bourguiba after approval by the National Assembly. Under Bourguiba and Ben Ali, the CSM was a body subject to presidential authority<sup>37</sup>. Composed of nine appointed and four elected magistrates, it was headed by the President of the Republic (President) and the Minister of Justice (Vice-President)<sup>38</sup>.

Following the Tunisian revolution of 2011, most political and judicial forces called for the dissolution of the CSM, deeming it illegitimate; it did not pursue its activities until May 2, 2013, when it was replaced by a temporary supervisory authority for the judiciary in accordance with its Organic Law no. 13<sup>39</sup>.

Since then, a new architecture of jurisdictional power has been adopted by the 2014 Tunisian Constitution (articles 106–107), which broke with the tradition of subjecting jurisdictional authority to administrative power. It states that senior magistrates are chosen solely on the recommendation of the Superior Council of the Judiciary (CSM), and that the majority of judges may only be appointed by presidential decree with the CSM's approval<sup>40</sup>. Magistrates are protected against being moved, fired, suspended, or subject to disciplinary action without the CSM's approval<sup>41</sup>.

On April 28, 2016, the Assembly of People's Representatives promulgated Organic Law n°2016-34 on the CSM. The first elections for its members took place on October 23 of the same year<sup>42</sup>.

This CSM is made up of four organs: the plenary session of the 3 subsidiary councils, the council of financial justice, the council of administrative justice, and the council of judicial justice. Each organ consists of 15 members; two tiers of magistrates who have been elected<sup>43</sup> or appointed based on their qualifications (chosen by their peers, with the exception of the head of jurisdiction) while the remaining tier consists of independent and

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<sup>37</sup> GOBE Éric, “Refonder Le Conseil Supérieur De La Magistrature Dans La Tunisie Post-Ben Ali : Corporatismes Juridiques Et Nouveaux Arrangements Institutionnels.” *Droit Et Société*, vol. 103, no. 3, 2019, pp. 629–648.

<sup>38</sup> *Ibid.*

<sup>39</sup> This body was responsible for ruling on the professional career of magistrates, for issuing an advisory opinion on bills relating to the operation of justice and for the reform of judicial justice as prescribed by article 2 of organic law no 2013-13 of 2 May 2013 related to the creation of a provisional body to oversee judicial justice.

<sup>40</sup> CHAFIK SARSAR Mohamed. « Tunisie : une révolution judiciaire inachevée », *Délibérée*, vol. 4, no. 2, 2018, pp. 63-68.

<sup>41</sup> *Ibid.*

<sup>42</sup> Afrique, Jeune, “Tunisie : Élection Historique Pour Le Nouveau Conseil Supérieur De La Magistrature.” *JeuneAfrique.com* [Online], 24 Oct. 2016, Available at: < [www.jeuneafrique.com/368233/politique/tunisie-election-historique-nouveau-conseil-superieur-de-magistrature](http://www.jeuneafrique.com/368233/politique/tunisie-election-historique-nouveau-conseil-superieur-de-magistrature) >. (Accessed on 1 December 2023).

<sup>43</sup> Articles 18 of Organic Law n°2016-34 on the CSM states that candidates must be sitting judges with at least five years' seniority in the judiciary and three years' seniority in the judiciary for administrative and financial judges.

specialized non-magistrates<sup>44</sup> (Elected by their peers as well). A majority of the members of these bodies must be elected<sup>45</sup>. The members only carry out their duties during a single six-year mandate.

Nevertheless, various incidents occurred during the historical council election. Firstly, there is an ongoing vacancy in the position designated for researchers in public finance and fiscality due to a lack of nomination. Additionally, even when certain magistrates reached retirement age, the council never convened for the first time.

Numerous attempts to unblock the situation have been made, but in vain. It is only via an organic law that was passed a year after the first, the Organic Law No. 2017-19 of April 18, 2017, pertaining to the CSM, that the situation has been largely unobstructed.

Despite the law's provisions, certain obstacles persist within the High Council of Judiciary (CSM). The council has yet to elect a permanent president, finalize its internal regulations, establish an executive apparatus, or develop procedural manuals. This situation is particularly detrimental given that the existence of an independent and representative CSM is crucial to Tunisia's democratic transition.

Since the decisions of July 25, 2021<sup>46</sup>, President Kaïs SAÏED has come into conflict with the Superior Council of the Judiciary (CSM), criticizing its performance and its handling of corruption cases. This conflict began when the President began to consider the advantages and indemnities that CSM members get to be unjust. Few days later, President Saed revoked subsidies and privileges<sup>47</sup> awarded to members in accordance with the

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<sup>44</sup> Articles 19, 20, 21 and 22 of Organic Law n°2016-34 on the CSM state the following conditions for independent and specialized non-magistrates candidates: 1) Lawyers must be practicing lawyers, registered with the National bar at the court of cassation, and have at least fifteen years' seniority in the profession; 2) Teacher-researchers must be tenured professors, specialists in one of the specialties listed in article 2 of the law, and have been working in higher education establishments for at least fifteen years; 3) Chartered accountants must have been practicing and registered with the Order of Chartered Accountants for at least five years; 4) Bailiffs must have been practicing and registered with the Order of bailiffs for at least fifteen years.

<sup>45</sup> Candidates may not be nominated for more than one judicial council. The election is described as free, direct, honest and secret, and is organized on a first-past-the-post basis. Voters choose their representatives from the class to which they belong, and judges choose their representatives from the same class and grade.

<sup>46</sup> President Kais Saied of Tunisia declared a state of emergency on July 25, 2021, citing the perceived deterioration of the State. Among the measures taken, the Assembly of the Representatives of the People bore the brunt, being suspended and resulting in the loss of parliamentary immunity for its members. Furthermore, he swiftly removed Hichem Mechichi's government from power. See; "Tunisian president sacks PM, suspends parliament after violent protests", *France 24* [online], 25 July 2021, available at: < <https://www.france24.com/en/live-news/20210725-tunisian-president-saied-sacks-prime-minister-mechichi-suspends-parliament> >. (Accessed on 29 November 2023).

<sup>47</sup> The benefits in question consist of a monthly bonus estimated at 2,364 Tunisian dinars, plus 400 liters of fuel. See: S.B. "Kaïs Saïed Décrète l'annulation Des Avantages Et Autres « Privilèges » Accordés Aux Membres Du CSM." *Le Temps News* [Online], 19 Jan. 2022, Available at: < [www.letemps.news/2022/01/19/kais-saied-annule-les-avantages-et-privileges-accordes-aux-membres-du-csm](http://www.letemps.news/2022/01/19/kais-saied-annule-les-avantages-et-privileges-accordes-aux-membres-du-csm) >. (Accessed on 30 November 2023).

adoption of Decree-Law No. 2022-4 on the Supreme Judicial Council (CSM) on 19 January 2022, revising Organic Law No. 2016-34 on April 28, 2016.

On February 5, 2022, following his repeated statements against the CSM, he announced its dissolution, which was rejected by CSM members<sup>48</sup>. Its president, Youssef BOUZAKHER, announced that security forces had prevented administrators and agents from entering the CSM headquarters on February 7, 2022, stressing that he and the other members would continue their work, whether at headquarters or outside. This dissolution incited numerous international organizations to issue some notice reports including the International Commission of Jurists declaring on February 7 that the proposal to dissolve the CSM should be abandoned, as it would deal a fatal and irreversible blow to the independence of the judiciary, the separation of powers and the rule of law.

On February 13, 2022, Presidential Decree no. 11 issued by President SAÏED set up a provisional Higher Council of the Judiciary. The Council was to establish its own rules of procedure within one month of its first meeting. Chaired by the First President of the Court of Cassation, assisted by two vice-presidents, the First President of the Administrative Court and the President of the Court of Auditors<sup>49</sup>, the body is made up of: Provisional Council of Judicial Justice, Provisional Council for Financial Justice and Provisional Council for Administrative Justice<sup>50</sup>. Each of the 3 provisional councils is composed of 7 members<sup>51</sup>. Four of the magistrates' members are chosen based on the criteria of quality given their current positions as heads of major jurisdiction<sup>52</sup> or seniority based on how long they have been holding a specific position<sup>53</sup>.

Regarding the remaining 3 magistrates who are referred to as retired magistrates, the new legislation, namely Article 6, grants the president the authority to personally select individuals from a list of qualified candidates. The President of the Republic is empowered

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<sup>48</sup> FALL Mor, "En Tunisie: Le Conseil Supérieur De La Magistrature Victime d'un Coup De Force." *Rewmi.com* [Online], 8 Feb. 2022, Available at: < <https://rewmi.com/en-tunisie-le-conseil-superieur-de-la-magistrature-victime-dun-coup-de-force/> >, (Accessed on 1 December 2023).

<sup>49</sup> Decree-law no. 2022-11 of February 12, 2022, on the creation of the Provisional Higher Council of the Judiciary, article 7.

<sup>50</sup> "Tunisie: Voici La Composition Du Conseil Provisoire De La Magistrature." *Espace Manager* [Online], Available at: < [www.espacemanager.com/tunisie-voici-la-composition-du-conseil-provisoire-de-la-magistrature.html](http://www.espacemanager.com/tunisie-voici-la-composition-du-conseil-provisoire-de-la-magistrature.html) >, (Accessed on 1 December 2023).

<sup>51</sup> Decree-law no. 2022-11 of February 12, 2022, on the creation of the Provisional Higher Council of the Judiciary, *op.cit.* (Note 49), articles 3, 4 and 5.

<sup>52</sup> This criterion is used to choose four members of the Provisional Council of Judicial Justice, one member of the Provisional Council of Administrative Justice, and three members of the Provisional Council of Financial Justice.

<sup>53</sup> In the Provisional Council for Administrative Justice, this criterion applies to the President of the Cassation Division (the longest-serving vice-president), the President of the Appeals Chamber (the longest-serving member), and the State delegate (the longest-serving rapporteur). In contrast, the Provisional Council for Financial Justice applies this criterion solely to the President of the Appeals Chamber (the longest-serving member). To note, no judges are appointed to the Provisional Council of Judicial Justice based on this criterion.



to appoint them from the list or, if necessary, individuals from outside the list<sup>54</sup>. This is done through a presidential decree, appointing three retired judicial judges, three retired administrative judges, and three retired judges from the financial judiciary. These appointees must have no other employment or profession and should be distinguished for their competence and integrity.

To this end, Professor Rafâa BEN ACHOUR stated that the provisional Higher Council of the Judiciary (CSPM)'s sole task is to oversee the affairs of the judicial, administrative and financial justice system<sup>55</sup>, "*and it no longer remains an independent judiciary, guaranteeing the establishment of justice, the supremacy of the Constitution, the sovereignty of the law and the protection of rights and freedoms*"<sup>56</sup>.

Furthermore, wording of the abovementioned decree forbids judges from engaging in any associative activity unless it is humanitarian in character and restricts their ability to protest or express anger, with the general rule stating that they are not allowed to interfere with the tribunals' work<sup>57</sup>. Now, the president of the republic has the authority to appoint judges<sup>58</sup>, assess their professional backgrounds, conduct internal movements within the judiciary, determine when to remove them<sup>59</sup>, and do so based only on the recommendation of the head of government or minister of justice.

Through decree-law no 2022-35, the president strengthens his authority to sanction magistrates, allowing for their urgent and security-related revocation<sup>60</sup>. This decree immunizes revocation decrees against administrative appeals and stipulates that magistrates must face criminal proceedings and obtain an irrevocable judgment before challenging their removal.

On June 1, 2022, Kaïs SAÏED had dismissed 57 magistrates by presidential decree<sup>61</sup>, accusing them of corruption and obstructing several investigations. In August, the administrative court suspended this decision for 49 of them and announced that they could

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<sup>54</sup> Decree-law no. 2022-11 of February 12, 2022, on the creation of the Provisional Higher Council of the Judiciary, *op.cit.* (Note 49), art. 6.

<sup>55</sup> BEN ACHOUR Rafaâ, « Tunisie : le retour au pouvoir autocratique », *Revue française de droit constitutionnel*, 2022/4 (N° 132), p. 1001-1018.

<sup>56</sup> *Ibid.*

<sup>57</sup> "Pas De Droit À La Grève Pour Les Magistrats Et La Justice Passe De Pouvoir À Fonction." *Businessnews* [Online], 30 June 2022, Available at : < [www.businessnews.com.tn/pas-de-droit-a-la- greve-pour-les-magistrats-et-la-justice-passe-de-pouvoir-a-fonction,520,120563,3](http://www.businessnews.com.tn/pas-de-droit-a-la- greve-pour-les-magistrats-et-la-justice-passe-de-pouvoir-a-fonction,520,120563,3)>, (Accessed on 1 December 2023).

<sup>58</sup> Decree-law no. 2022-11 of February 12, 2022, on the creation of the Provisional Higher Council of the Judiciary, *op.cit.* (Note 49), art. 19.

<sup>59</sup> *Ibid.* art. 20.

<sup>60</sup> Decree-law no. 2022-35 of June 1, 2022, supplementing decree-law no. 2022-11 of February 12, 2022, relating to the creation of the Provisional Superior Council of the Magistracy.

<sup>61</sup> Presidential Decree no. 2022-516 of June 1, 2022, on the dismissal of magistrates.

return to work<sup>62</sup>. But they have not been able to return to their posts, their salaries have not been paid and they have been deprived of social security cover<sup>63</sup>.

One of the revoked judges, Hamadi RAHMANI, claimed that the head of State is trying to intimidate magistrates through statements that reflect his stance on political and legal issues<sup>64</sup>. Some judges fear dismissal if they resist orders. He alleges punishment for refusing to issue arrest warrants for political figures, highlighting government interference in the judiciary and attempts to intimidate judges<sup>65</sup>.

The Association of Tunisian Magistrates (AMT) released a press release on March 4, 2023, claiming that the government had placed significant pressure on the judicial system in Tunisia as a result of the arrests of journalists, trade unionists, magistrates, and political activists<sup>66</sup>.

The recent legal provisions conferring the authority upon the President to appoint three judges out of the seven members of the Provisional Council of Judicial Justice, Provisional Council for Financial Justice and Provisional Council for Administrative Justice in Tunisia have stirred discussions on their potential impact on judicial independence and accountability. While these changes aim to streamline the appointment process, there are concerns within the legal community<sup>67</sup> about the potential influence this may exert on the judiciary. Some argue that the direct appointment power may introduce an element of executive influence, potentially compromising the autonomy of the judiciary. On the other hand, proponents of the change assert that it ensures a more efficient and responsive judiciary, with the President playing a role in selecting members who align with the administration's vision for the judiciary. Striking a balance between efficiency and safeguarding judicial independence remains a critical aspect of ongoing discussions surrounding these alterations to the appointment mechanism within the High Council of Magistrates.

These above mentioned considerations lead us to adopt Professor's Jamel AJROUD perception of justice in Tunisia stating that “*as the Constitution currently stands, the*

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<sup>62</sup> In spite of this, the administrative court issued a stay of execution for 49 of the decrees out of 57, by orders dated August 9, 2022.

<sup>63</sup> The decision sparks widespread outrage and judicial strikes, met with Minister of Justice's implicit refusal to execute court orders. A convoluted statement on August 14, 2022, suggests that, due to a decree from June 1, 2022, the dismissed judges are subject to criminal proceedings, rendering their legal challenges ineffective. Simultaneously, the minister issues a circular instructing officials to inventory the offices of dismissed magistrates and restrict access.

<sup>64</sup> Afp & Jeune Afrique, “En Tunisie, La « Mainmise » De Kaïs Saïed Sur La Justice Contestée Dans La Rue.” *JeuneAfrique.com* [Online], 1 June 2023, Available at: < [www.jeuneafrique.com/1450004/politique/en-tunisie-la-mainmise-de-kais-saied-sur-la-justice-contestee-dans-la-rue](http://www.jeuneafrique.com/1450004/politique/en-tunisie-la-mainmise-de-kais-saied-sur-la-justice-contestee-dans-la-rue) >. (Accessed on 1 December 2023).

<sup>65</sup> *Ibid.*

<sup>66</sup> Kapitalis, Webmaster, “Tunisie: L’AMT Dénonce Les Pressions Du Pouvoir Exécutif Sur Les Magistrats.” *Kapitalis* [Online], 5 Mar. 2023, Available at: < <https://kapitalis.com/tunisie/2023/03/05/tunisie-lamt-denonce-les-pressions-du-pouvoir-executif-sur-les-magistrats/> >. (Accessed on 1 December 2023).

<sup>67</sup> *Ibid.*

*judiciary does not constitute a power<sup>68</sup>, but merely a counter-power exercised by an authority with special status within the executive branch<sup>69</sup>”. Tunisian legal doctrine considers the judiciary as “a public service of the State<sup>70</sup>”, or even as “an administration that judges with, admittedly, special procedures and results, but nothing more<sup>71</sup>”. That said, he proceeds with affirming that “justice can properly carry out its mission in a State governed by the rule of law, without necessarily being recognized as a public power. But then the function of justice must be detached from the political function. Such detachment is not easy”.*

### **1.3) Contrasting Trajectories: Stability of Judicial Council in France and Turmoil in Tunisia**

The stability of the High Council of Judiciary in France stands in stark contrast to the tumultuous situation facing the equivalent institution in Tunisia. In France, the High Council of Judiciary has maintained a consistent and stable presence, serving as a key pillar of the judicial system. Established as a constitutional organ, it has undergone minimal disruptions and continues to play a vital role in safeguarding the independence and integrity of the judiciary. This stability is reflected in its routine functioning, adherence to established procedures, and the absence of frequent controversies. On the flip side, despite promising initiatives, the High Council of Judiciary in Tunisia has faced substantial challenges, characterized by conflicts with political authorities, attempted dissolution, and concerns surrounding nominations and appointments. This disparity in stability underscores the contrasting trajectories of these institutions, with France's High Council of Judiciary providing a model of continuity and resilience, while Tunisia grapples with disruptions and uncertainties.

The preceding overview provides a compelling exploration into judicial councils and their specificities in each system. Now, our focus shifts to the individuals entrusted with administering justice – the judges. We will delve into the selection process, criteria, and prerequisites that aspiring judges must meet.

It is important to remember that the selection of judicial judges will be our main concern. It is important to note that administrative or constitutional court judges go through a different selection procedure; we will not go into great detail about it, but we will acknowledge its distinctive features. We will focus on revealing the process of selecting

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<sup>68</sup> “Tunisie/ Constitution 2022 : Les Fonctions Remplacent Les Pouvoirs, Régime Bicaméral, Le Gouvernement Responsable Devant Le Président De La République - Gnet News.” *Gnet News* [Online], 4 July 2022, Available at: < <https://news.gnet.tn/tunisie-constitution-2022-les-fonctions-remplacent-les-pouvoirs-regime-bicameral-le-gouvernement-responsable-devant-le-president-de-la-republique/> >, (Accessed on 1 December 2023).

<sup>69</sup> AJROUD Jamel, « L'indépendance de la justice en Tunisie », *Revue française de droit constitutionnel*, 2011/2 (n° 86), p. 427-438.

<sup>70</sup> BEN AÏSSA Mohamed Salah, « La compétence exclusive du Conseil supérieur de la magistrature en matière disciplinaire : quand le Conseil constitutionnel brise la jurisprudence du tribunal administratif », *Mélanges en hommage à Dali Jazi*, Tunis, CPU, 2010, p. 169.

<sup>71</sup> BEN ACHOUR Yadh, *Pouvoir gouvernemental et pouvoir administratif*, RTD, 2/1977, p. 48.



judicial judges, investigating the standards, and comprehending the requirements that prospective judges must fulfill in both France and Tunisia.

## 2) Judicial Excellence: Unpacking Qualifications and Criteria for Appointments

It goes without saying that magistrates, who really dispense justice, are essential to the functioning of the legal system. However, in the absence of judicial independence. It is impossible to speak of the court intervening autonomously in political matters. To assess the degree of independence enjoyed by judges, both their training and recruitment, as well as the safeguards in place to protect their independence, must be considered<sup>72</sup>.

The recruitment process for judges has an impact on the bench's social and professional makeup as well as the connections the judiciary makes with other political players<sup>73</sup>. The analysis in this part focuses on the institutional position of institution in charge of selecting judges and investigates the extent to which other political institutions might influence judge recruitment and, thus, alter judicial independence guarantees<sup>74</sup>. There is also discussion over whether the selectors are drawn from the legal system. As a result, we will first examine the recruiting process followed by France and Tunisia, as both employ almost equivalent hiring processes via the "(concours étudiant<sup>75</sup>)" with virtually identical protocols. However, the changes will appear to be significant when it comes to the operation of the mechanism put in place to ensure the proper operation of the legal system.

### 2.1) Insights into Judicial Standards in France

The selection procedures for judges in France and Tunisia exhibit almost identical recruitment features for professional judges. In France, aspiring judges require a master's degree in law and must pass a competitive examination held by the National School for the Judiciary<sup>76</sup> (École nationale de la magistrature in Bordeaux, ENM). Successful candidates attend a two-year training program at the National School for the Judiciary<sup>77</sup>, covering theory and practice. School graduates become auditors of justice and progress to judgeships based on career aspirations<sup>78</sup>. To note, the structure of the pertinent texts about hiring

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<sup>72</sup> GUARNIERI Carlo, PEDERZOLI Patrizia, *the Power of Judges. A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002), pp. 18-45.

<sup>73</sup> *Ibid.*

<sup>74</sup> VAN RUYMBEKE Renaud, « La liberté du juge », *Les Cahiers de la Justice*, 2022/1 (N° 1), p. 99-103.

<sup>75</sup> GUARNIERI Carlo, "Do Judicial Councils further Judicial Independence? Some Lessons from Europe", In D. Clark (ed.), *Comparative Law and Society, Elgar Series: Research Handbooks in Comparative Law*, 2011, May 27th 2011, pp. 20-23.

<sup>76</sup> BADÓ Attila, « 'Fair' Selection of Judges in a Modern Democracy », In: Attila Badó (Ed.): *Fair Trial and Judicial Independence, Hungarian Perspective. Ius Gentium: Comparative Perspectives on Law and Justice*, Volume 27, Springer International Publishing Switzerland, 2014, p. 27-58.

<sup>77</sup> The "École nationale de la magistrature" (ENM) stands as the exclusive institution in France dedicated to the education of aspiring judges, prosecutors, practicing judges, and foreign judges. The historical evolution of this institution is marked by the establishment of a professional test in 1908, which persisted until the transformative changes brought by the Fifth Republic in 1958. In line with these reforms, the National Center of Judicial Studies emerged through Ordinance 59-77 on January 7, 1959, ultimately adopting the name ENM in 1970.

<sup>78</sup> BADÓ Attila, « 'Fair' Selection of Judges in a Modern Democracy », *op.cit.* (Note 76).

aspiring judges is both extremely thorough and intricate<sup>79</sup>. In order to meet the needs of the judiciary, it enables recruitment at various hierarchical levels while taking potential experience and age into consideration<sup>80</sup>. It is important to note, however, that the only things that justify the existence of these recruitment processes and contests are the needs of judges.

In the judicial courts, the recruitment procedures are delineated by two significant laws. The first is Ordinance no. 58-1270 of December 22, 1958<sup>81</sup>, which serves as an organic law governing the status of magistrates. This ordinance has been subsequently amended by Law no. 2016-1090 of August 8, 2016, focusing on statutory guarantees, ethical obligations, and the recruitment of magistrates, with oversight from the Supreme Council of the Judiciary (Conseil supérieur de la magistrature). The second pivotal law is Organic law no. 2023-1058 of November 20, 2023, addressing the opening up, modernization, and accountability of the judiciary. This legislation is not a mere modification at the periphery but rather constitutes a radical reform of the renowned Order no. 58-1270 of December 22, 1958, governing the status of magistrates.

In France, the recruitment of judges encompasses various pathways, one of which is the role of Auditors of Justice<sup>82</sup> (Auditeurs de justice). According to Article 17 of the Ordinance of December 22, 1958, three distinct competitions exist. The first competition is tailored for students holding a diploma certifying completion of at least four years of post-baccalaureate training, or a qualification recognized as at least equivalent under conditions set by decree by the council of State aged no more than 31 years old when applying<sup>83</sup>. The second competition caters to State officials, military personnel, and others with four years of relevant service<sup>84</sup>. The third competition is open to individuals with eight years of diverse professional activities or non-professional judicial functions<sup>85</sup>.

Another avenue for judges' recruitment in France is through professional competitions for second and first-grade positions<sup>86</sup>, as outlined in Articles 22, 23 and 24 of Organic law no. 2023-1058 of November 20, 2023. The new law was to open up the judiciary to profiles

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<sup>79</sup> MARCHAND Jean-Michel, « Le recrutement des juges en France », *Revue générale de droit*, 2006/36(4), 675–688.

<sup>80</sup> *Ibid.* p. 683-684.

<sup>81</sup> *Ibid.*

<sup>82</sup> SOUSSI Rachida, “« La Magistrature Regroupe Des Dizaines De Métiers Très Différents ! ».” *Studyrama.com* [Online], Available at: < [www.studyrama.com/formations/specialites/droit-justice-sciences-politiques/la-magistrature-regroupe-des-dizaines-de-metiers-tres-109188](http://www.studyrama.com/formations/specialites/droit-justice-sciences-politiques/la-magistrature-regroupe-des-dizaines-de-metiers-tres-109188) >, (Accessed on 18 November 2023).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> “Devenez Magistrat Sans Passer Le Concours”, *Ministère De La Justice* [Online], Available at: < <https://lajusticerecrute.fr/actualites/devenez-magistrat-sans-passer-le-concours> >, (Accessed on 18 November 2023).

that did not always fit easily into the various existing competitive examinations<sup>87</sup>. In this sense, the professional competitive examination, provided for in article 23 of the 1958 ordinance, is very clearly designed to better serve this objective of openness.

- 1) This approach requires a significant amount of *professional experience*<sup>88</sup>, which can vary from 7 to 15 years based on the judicial hierarchy's grade, in addition to meeting age requirements (35 years for the 2<sup>nd</sup> grade and 50 years for the 1<sup>st</sup> grade).
- 2) To be considered for a first-grade post in the judicial hierarchy, *legal assistants and new legal attachés* must have three years of relevant experience; for a second-grade position, *temporary magistrates*<sup>89</sup> must have five years of experience.
- 3) *Court registries' directors* must have five years of relevant experience for first-grade posts, or they must fulfill the grade and employment criteria specified in the decree of the Council of State and have the necessary abilities and experience to be eligible for second-grade judicial responsibilities.
- 4) *Lawyers* require five years of relevant experience, whereas second-graders require 10 years.
- 5) *Doctors of law* with supplementary degrees beyond the aforementioned degree must have five years of first-grade teaching experience or twelve years for second-grade positions.

Furthermore, the recent modification intends as well to modernize the legal profession by implementing new hiring, evaluating, advancement, representation, and measures. In particular, a third grade, subject to a quota, has been introduced, as well as priority assignment for magistrates who have worked for a certain length of time in positions that are less attractive<sup>90</sup>.

Added to that, The French judicial system includes provisions for the recruitment of temporary magistrates (Article 41-10 and following). This approach seeks to fill vacant positions temporarily by engaging individuals, potentially retirees, possessing the requisite experience for first-instance jurisdictional functions. The temporary judge is appointed for a five-year term, renewable once, and may not hold office beyond the age of 75<sup>91</sup>.

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<sup>87</sup> “Loi Organique N° 2023-1058 Sur L’ouverture, La Modernisation Et La Responsabilité Du Corps Judiciaire.” Civil | *Dalloz Actualité* [Online], 28 Nov. 2023, Available at : < [www.dalloz-actualite.fr/flash/loi-organique-n-2023-1058-sur-l-ouverture-modernisation-et-responsabilite-du-corps-judiciaire](http://www.dalloz-actualite.fr/flash/loi-organique-n-2023-1058-sur-l-ouverture-modernisation-et-responsabilite-du-corps-judiciaire) >, (Accessed on 2 December 2023).

<sup>88</sup> The professional experience is required in the legal, administrative, economic or social fields, making them particularly qualified to perform judicial functions.

<sup>89</sup> The temporary magistrate (MTT) is a person from civil society who temporarily performs judicial functions, in particular as a judge for protection cases or as an assessor on the panels of judicial courts. These functions may be exercised at the same time as a compatible professional activity.

<sup>90</sup> « Loi organique du 20 novembre 2023 relative à l’ouverture, à la modernisation et à la responsabilité du corps judiciaire », *Vie-Publique.fr* [Online], Available at : < <https://www.vie-publique.fr/loi/289260-statut-de-la-magistrature-loi-organique-du-20-novembre-2023> >, (Accessed on 28 November 2023).

<sup>91</sup> “Magistrat Exerçant À Titre Temporaire.” *Ministère De La Justice* [Online], Available at : < <https://lajusticerecrute.fr/recrutement/magistrat-exerçant-titre-temporaire> >, (Accessed on 18 November 2023).

Lastly, the concept of honorary magistrate exercising jurisdictional functions<sup>92</sup>, detailed in Articles 41-25 and the subsequent sections of the Ordinance, An honorary magistrate exercising jurisdictional functions is a magistrate of the judicial order who has retired and wishes to continue his or her activity by making his or her experience and know-how available to the service of justice for a renewable period of 2 years. The selection process is based on portfolio and involves interviews.

With that being said, article 13 of the Organic Law provides for a special "experimental" competition dedicated to the famous "Talent Prépas" (Prépas Talents) that have sprung up all over France. According to the ENM website, these classes are designed to "promote diversity" and support deserving students. The creation of a competitive examination specifically dedicated to them is to be tested until 2026 to determine whether it is appropriate to maintain this specific recruitment route<sup>93</sup>.

The new law has also enabled greater use to be made of temporary magistrates and honorary magistrates, in order to recruit a greater number of judges from civil society<sup>94</sup>. The Judicial Organization Code (Code de l'organisation judiciaire) had to be revised, with additional articles LO. 121-6 and L. O. 121-4 et seq. inserted.

The law further allows the recruitment of magistrates “*on extraordinary service*”, a noteworthy designation formerly linked to the Court of Cassation, for up to three years, renewable once, who may then integrate into the judiciary under conditions outlined by decree of the Council of State. Moreover, it streamlines the recruitment process for temporary and honorary magistrates.

The access route reform must go into effect by the latest possible date of 2024<sup>95</sup>. The third-grade provisions will take effect as late as the end of 2025<sup>96</sup>.

Evaluations, promotions, and ethical clearances are standard procedures overseen by the High Council of Judiciary “*Conseil Supérieur de la Magistrature*”. Furthermore, the position, functions, prestige, and salary of individual judges hinge significantly on their career advancements<sup>97</sup>, wherein merit holds greater importance than seniority. Every two years, judges undergo meticulous performance evaluations, often resulting in promotions that may entail transfers with prior consent. The promotion process, intricately linked to the judicial hierarchy, involves assessments by higher-ranking magistrates, documented in

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<sup>92</sup> “Devenir Magistrat Honoraire Exerçant Des Fonctions Juridictionnelles.” *Cour D’appel De LYON* [Online], Available at: < [www.cours-appel.justice.fr/lyon/devenir-magistrat-honoraire-exercant-des-fonctions-juridictionnelles#:~:text=Le%20magistrat%20honoraire%20exer%C3%A7ant%20des,exp%C3%A9rience%20et%20son%20savoir%2Dfaire](http://www.cours-appel.justice.fr/lyon/devenir-magistrat-honoraire-exercant-des-fonctions-juridictionnelles#:~:text=Le%20magistrat%20honoraire%20exer%C3%A7ant%20des,exp%C3%A9rience%20et%20son%20savoir%2Dfaire) >. (Accessed on 18 November 2023).

<sup>93</sup> “Publication De La Loi Organique Relative À L’ouverture, À La Modernisation Et À La Responsabilité Du Corps Judiciaire.” *Gazette Du Palais, op.cit.* (Note 33).

<sup>94</sup> *Ibid.*

<sup>95</sup> “Loi Organique N° 2023-1058 Sur L’ouverture, La Modernisation Et La Responsabilité Du Corps Judiciaire.” *Civil | Dalloz Actualité, op.cit.* (Note 87).

<sup>96</sup> *Ibid.*

<sup>97</sup> BADÓ Attila, « 'Fair' Selection of Judges in a Modern Democracy », *op.cit.* (Note 76).

accessible personnel reports. The Commission for Advancements<sup>98</sup> (la commission d'avancement) annually compiles a list of eligible magistrates, wielding substantial influence as all promotions must originate from this roster. Consequently, the executive's proposals are subject to the dual constraints of the Commission and the Higher Council.

France also has specialized magistracy schools for judges in administrative and financial sectors<sup>99</sup>.

## 2.2) Assessing Judicial Criteria in Tunisian Context

In Tunisia, candidates must hold a Masters' law degree<sup>100</sup> and undergo a rigorous written and oral examination conducted by the Ministry of Justice. Successful candidates enroll in a two-year training program at the National School of Magistracy<sup>101</sup>, which includes theoretical courses, practical training, and court internships. The Supreme Council of the Judiciary makes final appointments, ensuring a merit-based selection process. Security clearance and ethical evaluations are mandatory, and judges engage in continuous professional development. In the judicial courts, recruitment procedures are governed by the new Governmental Order No. 28 of 2020 of 10 January 2020 related to the Supreme

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<sup>98</sup> The commission, established under Article 10-1-1 of the Organic Law No. 2023-1058 of November 20, 2023, which addresses the opening up, modernization, and accountability of the judiciary, amending Order No. 58-1270 of December 22, 1958, governing the status of magistrates, is composed of six representatives of judges and prosecutors elected through proportional list voting by magistrates of the first, second, and third grades. Additionally, it includes one first president and one attorney general from a court of appeal, both elected by their respective assemblies. Furthermore, one president of a judicial tribunal and one public prosecutor are elected by the assemblies of their counterparts in the respective tribunals. The assembly of magistrates of the third-grade bench of the Court of Cassation elects one magistrate, excluding auditors and referendary judges, along with one prosecutor from the third-grade public prosecutor's office, excluding referendary advocates. Notably, the first president and attorney general of the Court of Cassation are ineligible to vote or be elected. The director of judicial services or their equivalent, in the absence of the director, participates unless the commission operates in an advisory capacity. Each full member is accompanied by an alternate member, elected in the same manner. The term of office for members of the promotion committee is four years, non-renewable.

<sup>99</sup> « Qui sont les juges administratifs ? », *Vie-Publique.fr* [Online], 2023, Available at : < <https://www.vie-publique.fr/fiches/38135-qui-sont-les-juges-administratifs> >, (Accessed on 16 November 2023).

<sup>100</sup> Similarly, The Ministry of Justice has adjusted, through the adoption of Government Order No. 345 of 2017 related to the organization of the Supreme Institute of Judiciary and the control of the studies and exams system, the training requirements to match those in France, to ensure that aspiring judges are considered fit to learn the activities of a magistrate. This amendment has created a number of tensions between young law graduates and the government, making it difficult for them to access the judicial system in lesser years. This pressure led The Minister of Justice Ghazi Al-Juraibi to emphasize that the requirement to obtain a national certificate of master's degree in law or legal sciences, or an equivalent certificate as specified Government Order No. 345 of 2017, does not apply to students currently enrolled in law faculties or those who have previously graduated from law faculties with a bachelor's degree. Ghazi Al-Juraibi also stated that this requirement would be met beginning with the 2017–2018 academic year for new students who are selected for the first time in the first year of law. See; Admin. “Tunisie La révolte des étudiants en droit.” In : *LA TRIBUNE DES TRAVAILLEURS* [Online], 2017. Available at : < <https://latribunedestrayailleurs.fr/2017/04/20/tunisie-la-revolte-des-etudiants-en-droit/> >, (Accessed on 18 November 2023).

<sup>101</sup> Law No. 80 of 1985, issued August 11, 1985, created the National Institute of the Judiciary. Law No. 70 of 1992, dated July 27, 1992, revised and amended it. It was published in the Official journal of the Republic of Tunisia, 50, dated July 31, 1992.

Institute of Judicial, as well as the curriculum and training system., which stipulated the Master's degree in the assignment of the aspiring judicial judges and the Decree-Law no. 2011-70 of July 29, 2011, on the organization of military justice and the General Statute of Military Judges as amended by Organic law number 19 of 2023.

According to above mentioned laws, two distinct competitions exist. The first competition is tailored for students holding at least a national master's degree in law or legal sciences as defined by current legislation, or an equivalent diploma, or a post-graduate diploma in legal sciences or an equivalent diploma, aged no more than 40 years old when applying. The second competition caters to military judges with practically the same requirement needed for judicial judges. To note, the law states that the recruitment of judges is subject to presentation of a signed and authenticated written undertaking from judges to serve for at least ten years in the judiciary<sup>102</sup>. This condition applies for judicial judges.

Tunisia's judicial system stands in contrast to that of France, particularly in its absence of multiple categories of judges like professional, temporary, and honorary judges. Unlike the diversified recruitment approach in France, Tunisia's judiciary has a more straightforward structure. The Tunisian legal system does not incorporate these varied roles, limiting the flexibility to address specific needs or temporary shortages within the judiciary. The absence of such diverse categories in Tunisia reflects a more streamlined and traditional approach to judicial recruitment, which may impact the system's adaptability to specific challenges or changing circumstances.

Tunisia also has specialized magistracy schools for judges<sup>103</sup> in administrative and financial sectors<sup>104</sup>. To note, judges' salaries in Tunisia were raised several times during the Jasmine Revolution with the express intention of advancing judicial independence and shielding judges from any wrongdoing stemming from becoming demoralized, accepting bribes<sup>105</sup>, or being unduly influenced by possible future employers.

While both countries prioritize stringent selection processes, the mechanisms and training pathways differ significantly due to variations in legal systems and traditions.

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<sup>102</sup> Tunisia, *Governmental Order No. 28 of 2020 of 10-01-2020 related to the Supreme Institute of Judicial, as well as the curriculum and training system*, art. 10.

<sup>103</sup> The National School of Administration (ENA) is a public administrative institution under the authority of the Prime Minister, whose budget is attached to the State budget In accordance with decree n°1885-2007 of July 3, 2007, amended by decree n°2531-2012 of October 16, 2012 and by decree n°4568-2014 of December 31, 2014.

<sup>104</sup> The entrance to the school is regulated through various conditions prescribed in the ministerial decree dated 18 of May 2017 concerning the conditions for the external assignment of assistant consultants to the Administrative Court and Decree No. 90 of 2011 as amended by the Decree No. 6 of 1970 on the status of judges of the Court of Auditors.

<sup>105</sup> Decree no. 2022-798 of November 8, 2022, setting the program and amounts of the general salary increase for magistrates of the judiciary, magistrates of the Administrative Court and magistrates of the Court of Auditors, for the years 2023, 2024 and 2025, prescribed a monthly salary increase of 100 Tunisian dinars that will be granted to magistrates of all orders from October 1, 2022, 100 additional dinars from January 1, 2024 and 100 final additional dinars from January 1, 2025.

### 2.3) Exploring Meritocracy: Insights into Judicial Recruitment and Independence

We wanted also to shed light on the nature of career followed by prospective professional judges in the given two judicial systems. In fact, The French judiciary has traditionally resembled the bureaucratic model, compared to the Common law judiciary which has reflected for instance the professional model<sup>106</sup> the most closely.

Professor Otto KIRCHHEIMER outlined the following characteristics of a bureaucratic judiciary<sup>107</sup> as follows: in a technical-based selection process, judges are chosen through examinations early in their careers, emphasizing little previous professional experience<sup>108</sup>. Furthermore, usual training occurs within the judiciary, with a competitive hierarchy dictating roles and promotions based on formal criteria<sup>109</sup>. Without forgetting of course that the following judges follow a generalist approach and are expected to handle various roles and compete for higher positions<sup>110</sup>. This frequent job rotation poses challenges to independence, as hierarchical superiors wield influence over career moves<sup>111</sup>. Consequently, guarantees of internal independence among judges are weaker in this system.

Following this model and to give a close insight about the following approach to understand the bureaucratic judiciary functioning, we can admit that young judges who are positioned at the base of the judicial pyramid, lack substantial professional experience, and their organizational socialization is closely observed during a career centered on climbing a hierarchical ladder<sup>112</sup>. Moreover, because promotions<sup>113</sup>, transfers, and punishment are managed by the top echelons of the hierarchy, senior judges can affect the actions of lower-ranking judges<sup>114</sup>.

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<sup>106</sup> In a professional judiciary, judges are appointed based on acquired professional legal experience, often as legal advocates, with no formal provisions for advancement. In the United States, legal academics may also be appointed, especially to the Supreme Court. While higher-ranking judges, particularly in England, may influence the initial appointment and promotions, the recruitment is specific to particular positions. Unlike a civil-service model, promotions are less common, and internal controls over judges by higher-ranking colleagues are weaker. However, this model ensures stronger guarantees of both internal and external judicial independence.

<sup>107</sup> KIRCHHEIMER Otto, *Political justice: The Use of Legal Procedure for Political Ends*, Princeton University Press, 2015, p. 180.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.* p. 182.

<sup>110</sup> *Ibid.*

<sup>111</sup> Senior judges' evaluations decide the merit, which is awarded based on a competitive process and seniority.

<sup>112</sup> GUARNIERI Carlo., *the Power of Judges: A Comparative Study of Courts and Democracy*, *op.cit.* (Note 72), pp. 66-68.

<sup>113</sup> Promotions frequently depend on data from personal reports that supervisors have assembled, which emphasizes the extraordinarily sensitive and important function that the judicial elite is entrusted with.

<sup>114</sup> KIENER-MANU Katharina, "Crime Prevention & Criminal Justice Module 14 Key Issues: Topic 1 - The main factors aimed at securing judicial independence" [Online], Available at: <<https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html>>, (Accessed on 18 November 2023).



The meritocratic system is predicated on public competition, which is intended to be the most efficient means of guaranteeing the judiciary's independence and professional qualifications<sup>115</sup>. This aimed to enable a more impartial assessment of their work and guarantee that promotions would be made only on the basis of professional competence as opposed to interpersonal connections<sup>116</sup>. This will help screen out unfit judges and prevent them from serving by giving the ability to decide whether to promote someone based only on merit rather than links to the position.

With that being said, the instauration of such system would help in a way or in the other in enhancing the judicial independence and good administration of justice. Nevertheless, the involvement of judicial self-government bodies would undoubtedly bring about a fresh perspective in understanding and implementing effective control mechanisms within the judicial branch.

The preceding overview provides a brief comparison of the similarities and differences between the individuals entrusted with administering justice – the judges. Now, our focus shifts to highlight the convergences and divergences between the two judicial court systems.

### **3) Comparative Legal Systems and Central Administration of Justice: Institutional Structure and Functionality**

The existence of two distinct legal orders, the administrative and the judicial, with the Council of State and the Court of Cassation at their heads, is known as the duality of judicial orders<sup>117</sup> (*La dualité des ordres de juridiction*) in France, or “*dualisme juridictionnel*”. The historical result of the desire to keep the judiciary from becoming involved in administrative matters is the presence of these two separate judicial orders in France<sup>118</sup>.

Tunisia, having inherited its judicial system from the French model<sup>119</sup>, also adheres to the dual jurisdiction framework adopting slight differences.

#### **3.1) French Jurisdiction: Mapping the Jurisdictional Landscape within Central Administration**

The French judicial system is divided into three tiers. Trial courts, often referred to as “*tribunaux de première instance*” or “*tribunaux judiciaires*,” are the first level's adjudicators for both civil and criminal proceedings. The appellate courts, or “*cours d'appel*,” which examine trial courts' rulings, make up the second level. The Court of Cassation (“*Cour de*

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<sup>115</sup> OBERTO Giacomo, « *Recrutement et formation des magistrats en Europe, Étude comparative* », Éd. du Conseil de l'Europe, 2003, pp. 11-20.

<sup>116</sup> *Ibid.*

<sup>117</sup> GIUDICELLI-DELAGE Geneviève, *Institutions judiciaires et juridictionnelles*, [s.l.] : FeniXX, 1986, pp. 27-28.

<sup>118</sup> *Ibid.*

<sup>119</sup> Le Système Judiciaire Tunisien, « *Maghreb - Machrek* », 1966/5 N° 17, La Documentation française, pp. 26-30.



cassation"), which acts as France's highest court in both civil and criminal cases, is the last level.

In France, the adjudication of ordinary cases, encompassing both criminal and civil matters, follows a structured three-tier hierarchy. The Court of Cassation stands as the pinnacle of legal authority, casting its discerning eye over the decisions rendered by lower courts. As the highest judicial body, its paramount role is to ensure the adherence of these decisions to the dictates of the law<sup>120</sup>. What sets it apart is its unique focus eschewing a reexamination of facts or evidence, the Court of Cassation diligently scrutinizes legal intricacies and procedural correctness, safeguarding the sanctity of justice<sup>121</sup>. Bridging the realms of the initial judicial encounter and the apex of legal scrutiny are the Appellate Courts, strategically dispersed across various regions in France. Charged with the weighty responsibility of handling appeals from trial court decisions, these courts become the crucible where both questions of fact and law undergo a thorough reevaluation. The Appellate Courts<sup>122</sup>, with their jurisdictional reach, thus serve as vanguards of fairness, ensuring that justice remains an ever-evolving pursuit with each appellate review. At the heart of this judicial framework lie the Trial Courts, the foundational bedrock where the vast majority of civil and criminal cases find their inception. Furthermore, In France, a number of specialized courts operate within the first-instance judicial system. The Conseil des Prud'hommes is responsible for resolving disputes relating to employment relations, intervening mainly in conflicts between employers and employees. The Tribunal de Commerce (Commercial Court) handles commercial matters, dealing with disputes between companies. Added to that, the Tribunal Paritaire des Baux Ruraux (Rural Leases Joint Court) is involved in agricultural matters, dealing with issues relating to farmland rental contracts. Lastly, for minors under the age of 18, there is a separate legal system in France. The primary focus of this juvenile justice system<sup>123</sup>, known as "justice des

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<sup>120</sup> The appeal to the Court of Cassation is permissible under specific circumstances, including: 1) Violation of the Law: When judges apply an inapplicable or misinterpret a legal text concerning the presented facts. 2) Lack of Legal Basis: When judges fail to adequately justify their choice of applying a law to a given situation, lacking a clear link between the facts and the legal rule. 3) Procedural Irregularities: Violation of the principle of contradiction, where judges use undisclosed or unaddressed elements. Failure to address parties' arguments. 4) Alteration of the Subject of Dispute: When judges consider arguments not presented by the involved parties. 5) Lack of Reasoning: When the decision lacks any reasoning or is based on contradictory, hypothetical, or doubtful analysis, preventing a certain conclusion. 6) Distortion of a Written Document: When judges attribute a meaning to a clear and precise document that contradicts its content. However, if the writing is imprecise, judges have the authority to interpret it without critique before the Court of Cassation. See; « Le pourvoi en cassation », *Cour De Cassation* [Online], Available at: < <https://www.courdecassation.fr/la-cour/les-procedures-devant-la-cour-de-cassation/le-pourvoi-en-cassation> >, (Accessed on 10 November 2023).

<sup>121</sup> *Ibid.*

<sup>122</sup> « Comment fonctionne une cour d'appel ? », *Vie-Publique.fr* [Online], 2023, Available at: < [www.vie-publique.fr/fiches/268757-comment-fonctionne-une-cour-dappel](http://www.vie-publique.fr/fiches/268757-comment-fonctionne-une-cour-dappel) >, (Accessed on 16 November 2023).

<sup>123</sup> The juvenile court was created by Act of February 2, 1945, establishing fundamental concepts of juvenile justice. It will be repealed when the Juvenile Criminal Justice Code comes into force on September 30, 2021. France has chosen to prioritize education in criminal trials and has chosen to have judges and educators work together. Furthermore, family courts and other ordinary courts make decisions on a great number of other child-related issues.

mineurs”, is on children who are at risk and juvenile offenses. Each of these courts plays a crucial role in resolving disputes specific to its area of expertise, helping to ensure specialized and fair justice.

From family disputes to contract intricacies and criminal offenses that elude specialized jurisdictions, these courts serve as the initial crucible for legal contention. It is here that the first notes of justice are struck, echoing through the corridors of the French legal system, resonating with the promise of a fair and just resolution.

What is extremely interesting in the French model is its unique feature in embodying a distinctive merit of common law systems within the civil law framework, through the French Court of Assizes<sup>124</sup> which plays a pivotal role in the administration of justice. Established to adjudicate serious criminal cases, its unique characteristic lies in the inclusion of a jury<sup>125</sup> in the decision-making process, a practice traditionally associated with common law jurisdictions. The integration of common law and civil law principles facilitates an inclusive and collaborative approach to justice. Nevertheless, the court has witnessed multiple reforms<sup>126</sup> in order to reduce the highly technical assize trials characterized by their discontinuous features, extending over several weeks<sup>127</sup>. The jury, comprising citizens from diverse backgrounds, collaborates with professional judges in determining the verdict and, in some cases, the sentencing<sup>128</sup>. This integration of the jury system in the French legal landscape through the Court of Assizes not only fosters public participation in the justice system but also promotes transparency, credibility, and a broader societal understanding of complex legal matters<sup>129</sup>. This practice is a clear implementation of justice through the words of Alexis De Tocqueville who said describing the institution of jurors or citizens participation as follows: “*The jury serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is*

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<sup>124</sup> The court of Assize in France is composed mainly of: 1) Assize Court for Adults (Cour d'Assises des Adultes): This court handles serious criminal cases involving adults. The cases tried in this court include offenses such as murder and other serious crimes. 2) The Juvenile Assize Court (Cour d'Assises des Mineurs): This court is specifically designated for cases involving minors aged 16 to 18 who have committed serious crimes. Minors must be assisted by a lawyer. The juvenile assize court operates separately from the regular assize court and is designed to address the unique aspects of juvenile criminal cases. 3) The Special Assize Courts (Cour d'assises spéciale) is an assize court without a jury specialized for military, terrorism and treason offences etc.

<sup>125</sup> The court of assize is composed of six jurors (in first instance) or nine (on appeal) as amended by Law (No. 2011-939 of August 10, 2011) on the participation of citizens in the operation of criminal justice and the trial of minors, published in OJ No. 0185 of August 11, 2011.

<sup>126</sup> From September 2019, in certain French departments, crimes punishable by between fifteen and twenty years' imprisonment will be tried before a criminal court without a jury. See: COUET Isabelle, (n.d.). Réforme de la justice : le recours au jury populaire perd du terrain, *Les Echos* [Online]. Available at: < <https://www.lesechos.fr/economie-france/social/reforme-de-la-justice-le-recours-au-jury-populaire-perd-du-terrain-1892855> >, (Accessed on 10 November 2023).

<sup>127</sup> ZIENTARA-LOGEAY Sandrine, « Le devenir de la cour d'assises : perspectives comparées », *Les Cahiers de la Justice*, 2017/4 (N° 4), p. 635-638.

<sup>128</sup> SALAS Denis, *La Cour D'assises Actualité D'un Héritage Démocratique*, Doc' En Poche Regard D'expert 2270-6852. 2016, pp. 1-12.

<sup>129</sup> *Ibid.*

*the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right*<sup>130</sup>.” The Court of Assizes thus stands as a testament to the adaptability and innovative synergy<sup>131</sup> between legal traditions, enriching the French judicial system with elements enshrined in common law practices.

Citizens' participation in the criminal justice system is not limited to the assize court. A presiding juvenile judge and two assessors from civil society comprise the juvenile court that hears cases involving minors in the first instance<sup>132</sup>. Nevertheless, these assessors, appointed at the discretion of the Minister of Justice from a list provided by the First President of the Court of Appeal, are required not only to exhibit a vested "interest in children's issues" and provide specific guarantees of competence but also to actively seek the position<sup>133</sup>.

Furthermore, the Ministry of Justice has merged throughout the adoption of the Law no. 2019-222 of March 23, 2019 on programming 2018-2022 and reform for justice (loi de programmation pour la justice) the “Court of First Instance” and « High courts » into a single jurisdiction called the judicial court – “Tribunal Judiciaire”. This law has also created the proximity court (le tribunal de proximité) which is a chamber of a judicial court located outside its seat. It will take over from “Court of First Instance” for municipalities that did not previously have a « High court ». This legal reform was intended to facilitate the administration of justice and avoid increasing the workload of the courts.

Conversely, disputes involving citizens and public agencies find resolution within a distinct set of administrative courts, established since 1987 and organized into three tiers: administrative tribunals, administrative courts of appeal, and the judicial division of the Council of State “Conseil d'Etat”. France's Court of Auditors is an independent institution responsible for auditing public finances and evaluating the management of public funds. Its structure comprises several specialized chambers dealing with areas such as the finances of the State, local authorities, social security and other public entities. It also has a plenary chamber. As for the administrative organization, it follows a hierarchy up to the appeal court. The administrative courts are the courts of first instance, followed by the administrative courts of appeal, which deal with appeals. These administrative courts of appeal are positioned at the second level of the administrative hierarchy. At the top is the

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<sup>130</sup> TOCQUEVILLE Alexis de, *Democracy in America, Chapter XVI: Causes Mitigating Tyranny in the United States – Part II*, New York, G. Dearborn & Co., 1838, p. 219.

<sup>131</sup> BRAFMAN Julie, “Jurés populaires : leur existence dans la balance.” *Libération* [Online]. 7 August 2019. Available at: < [https://www.liberation.fr/france/2019/08/07/jures-populaires-leur-existence-dans-la-balance\\_1744292/](https://www.liberation.fr/france/2019/08/07/jures-populaires-leur-existence-dans-la-balance_1744292/) >, (Accessed on 17 November 2023).

<sup>132</sup> CHEVALLIER Jacques, « La participation des citoyens au fonctionnement de la justice », dans : Michel Wieviorka éd., *Rendre (la) Justice*, Auxerre, Éditions Sciences Humaines, « Les entretiens d'Auxerre », 2013, p. 219-235.

<sup>133</sup> *Ibid.*

Conseil d'Etat, the highest administrative court, which performs both advisory and contentious functions<sup>134</sup>.

Notably, the Council of State enjoys a unique status, and the position and trajectory of administrative judges are overseen by the “Conseil supérieur des tribunaux administratifs et cours administratives d'appel”. This supervisory body comprises judges, some elected by their peers, and lay members appointed by the President of the Republic and the Presidents of both legislative chambers. The esteemed standing of the French “Conseil d'Etat” is, in part, attributed to its significant autonomy and its association with the “Institut national du service public (INSP)”, the institution responsible for the selection and training of numerous top administrative officials. The aim of this organization is to ensure the regularity of administrative acts and to guarantee respect for the law in administrative matters.

There are also numerous specialized jurisdictions within the administrative order that revolve around primarily social matters related courts, where disputes relating to the financing of social or medico-social establishments and services and hospitals are referred to an inter-regional health and social pricing tribunal and, on appeal, to the national health and social pricing court. Added to that, we have also the National Court of Asylum (Cour nationale du droit d'asile) and the Pay parking lawsuit commission (Commission du contentieux de stationnement payant) which are both administrative tribunals with specific competences.

In case of conflict of competences between judicial courts and administrative courts, legislators have implemented an institution specialized in resolving such matters. Established by the law of May 24th, 1872, to resolve jurisdictional issues arising from the coexistence of two separate judicial systems, the Conflicts Tribunal has undergone changes since then. Currently, it is known as the Tribunal of Conflicts (Tribunal de conflict). The Tribunal of Conflicts continues to play a crucial role in arbitrating disputes between administrative and judicial authorities. Members are selected for a three-year term that can be renewed twice<sup>135</sup>, the Tribunal of Conflicts comprises members from both the judiciary and the administrative branch<sup>136</sup>. The tribunal is considered to be “*paritaire*”<sup>137</sup>, meaning that the number of members includes a balanced representation from both sides. To note, it maintains a reduced caseload, with around forty cases submitted annually. While the jurisprudence developed by the court remains influential in shaping French public law, it

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<sup>134</sup> LEMASURIER Jeanne, *Le contentieux administratif en droit comparé*, Économica 2001, p. 3

<sup>135</sup> Article 2 of the 24 May 1872 statute pertaining to the tribunal of conflicts, as amended by Law No. 2015-177 of February 16, 2015, concerning the modernization and simplification of law and procedures in the areas of justice and internal affairs.

<sup>136</sup> *Ibid.*

<sup>137</sup> SEILLER Bertrand, « Chapitre III. Le règlement des difficultés de compétence », *Droit administratif. 1. Les sources et le juge*, sous la direction de SEILLER Bertrand. Paris, Flammarion, « Champs – Université », 2021, p. 283-292.

is essential to note that judgments from the Tribunal of Conflicts can be subject to administrative appeal procedures.

With that being said, nobody could deny the critical role of the French Constitutional Council, which consists of nine members, including previous presidents, in confirming the validity of legislation and regulations. Its main duty is to check that proposed legislation complies with the laws and ideals of the French Constitution before it is enacted. In addition, the council provides advisory views on constitutional concerns and has authority over election disputes. Its enforceable rulings have important legal ramifications, making unconstitutional laws unenforceable. The Constitutional Council, a crucial defender of the integrity of the constitution, protects citizens' rights by carefully examining proposed legislation and interpreting the fundamental tenets of the constitution.

### **3.2) Tunisian Legal Architecture: The Blueprint of Central Justice Administration**

As we previously mentioned herein above, Tunisia has followed in its administration of justice the French judicial system which is divided similarly into three tiers. Trial courts, often referred to as "tribunaux de première instance" or "tribunaux judiciaires," are the first level's adjudicators for both civil and criminal proceedings. The appellate courts, or "cours d'appel," which examine trial courts' rulings, make up the second level. The Court of Cassation ("Cour de cassation"), which acts as Tunisia's highest court in both civil and criminal cases, is the last level. To note, Tunisia features a French civil law system with some Islamic law elements<sup>138</sup>. When civil and Islamic law collide, courts frequently impose Islamic law over civil law in family and inheritance conflicts.

The Court of Cassation was established as a supreme institution by decree on August 3, 1956<sup>139</sup>. Originally a simple chamber of the Tribunal of "l'Ouzara"<sup>140</sup>, it has been known as the claims commission "Commission des Requêtes" since 1921 witnessing numerous developments historically<sup>141</sup>. In the civil domain, the right of recourse by cassation is only available against 7 types of cases, as specified by Article 175 of the Code of Civil and Commercial Procedures<sup>142</sup>. Regarding criminal matters, in accordance with article 258 of

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<sup>138</sup> HACHED Farah, «La laïcité : un principe à l'ordre du jour de la IIe République tunisienne ? », *Confluences Méditerranée*, 2011/2 (N° 77), p. 29-36.

<sup>139</sup> In 1956, at independence, the legislator devoted articles 103 to 105 of the Code of Civil and Commercial Procedure to cassation, but it was with the new Code of Civil and Commercial Procedure, promulgated by the law of October 5, 1959 and in force since January 1, 1960, that the Court of Cassation, in its current form, came into being.

<sup>140</sup> ABDELHAK Imen. (n.d.), Histoire De La Cour De Cassation De Tunisie | *AHJUCAF. Association des hautes juridictions de cassation des pays ayant en partage l'usage du français* [Online], 2023, available at : < <https://www.ahjucaf.org/histoire-de-la-cour-de-cassation-de-tunisie> >, (Accessed on 11 November 2023).

<sup>141</sup> *Ibid.*

<sup>142</sup> The recourse includes these 7 cases: "1) if the judgment contains a violation of the law or if it was rendered as a result of an error in the application or interpretation of the law; 2) if the court which rendered it was incompetent; 3) if there has been an excess of power; 4) if the formalities prescribed on pain of nullity or forfeiture, during the proceedings or in the judgment, have not been respected; 5) if there is a contradiction between judgments rendered at last instance between the same parties, on the same subject and for the same cause; 6) if a ruling has been given on matters not requested, or on more than requested, or if the appeal

the Criminal Procedures Code<sup>143</sup>, the Court has the authority to ascertain appeals against final decisions made for contempt, overreach, or erroneous application of the law, even if they have been carried out.

It also examines modification between courts and referral from one court to another<sup>144</sup>, and reviews its combined commissions while calling for unification of opinions between them as well as in manifest error. Furthermore, as an extraordinary remedy, the appeal in cassation does not suspend the execution of the contested decision in civil or even criminal matters pursuant to articles 194 of Code of Civil and Commercial Procedures and 265 of Criminal Procedures Code.

Below it, the Courts of Appeal, each court has several divisions: civil, commercial, correctional, criminal and indictment. The Court of Appeal always sits as a collegial body to hear appeals against first-instance judgments handed down by the Court of First Instance. In civil matters, the Court of Appeal exercises jurisdiction over appeals challenging judgments rendered in the first instance by local courts, including summary judgments and payment injunctions issued by the presidents of those local courts. In criminal cases, the Court of Appeal holds final authority on appeal for misdemeanors tried by local courts and felonies tried by those local courts situated within its jurisdiction<sup>145</sup>. In administrative matters, the Court of Appeal, acting as a second-instance court, hears appeals against decisions of professional bodies, including the Bar Association, and also adjudicates appeals related to constraints and specific tax issues, functioning as a first-instance court in these administrative cases.

Tunisia's courts of first instance, of which there are 27, are distributed among the districts of the courts of appeal and comprise several specialized chambers, dealing with civil, commercial, criminal, correctional cases. They have extensive jurisdiction in civil matters, acting as courts of first instance in a variety of actions, and also serve as appellate courts for judgments handed down by the cantonal judges in their districts. In criminal matters, the courts of first instance deal with all offences at first instance, except those falling within the jurisdiction of the cantonal judge, and on appeal with judgments of the cantonal courts within their jurisdiction.

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decision has neglected to rule on claims already decided by the first judge, or if the same judgment contains provisions to the contrary; 7) if an incompetent person has been condemned without having been duly represented, if he has been manifestly ill-defended and if this was the principal or sole cause of the judgment thus rendered."

<sup>143</sup> The Court of Cassation has jurisdiction to hear appeals" against decisions rendered on the merits and as a last resort, even if enforced, on grounds of lack of jurisdiction, excess of power, violation or misapplication of the law".

<sup>144</sup> Art. 292 and 294 of the Criminal procedures code.

<sup>145</sup> This jurisdictional scope is defined by articles 126 of the Code of Criminal Procedures and 103 of the Child Protection Code, as amended by Law No. 2000-43 of April 17, 2000, and May 22, 2000, respectively.

The Labour tribunals<sup>146</sup> “les conseils de prud'hommes”, found within the territorial jurisdiction of each court of first instance<sup>147</sup>, have jurisdiction over disputes between employers and employees. Composed of a professional magistrate and two elected judges<sup>148</sup>, their decisions are subject to appeal to the Court of Appeal.

Cantonal courts<sup>149</sup> in Tunisia have extensive jurisdiction in various fields, acting as the first instance for civil cases up to seven thousand dinars. In civil matters, the cantonal judge seeks to reconcile the parties and handles personal actions, payment cases, as well as matters relating to industrial accidents and occupational diseases. He also handles payment injunctions and orders on request. The cantonal judge deals in the first instance with claims for alimony, possessory actions, and intervenes in summary proceedings in specific cases<sup>150</sup>. The court has also a final jurisdiction over adoption cases and tax disputes. In criminal matters, the cantonal court has final jurisdiction over minor offences, and original jurisdiction over misdemeanors punishable by a prison sentence of up to one year or a fine of up to one thousand dinars.

The Real Estate Court<sup>151</sup>, originally known as the "Mixed Real Estate Court<sup>152</sup>", is competent for a variety of land-related matters, including updating of land titles, land registration, applications for review and rectification of judgments, it may sit with three magistrates or a single judge, depending on the circumstances, as in the case of compulsory registration.

Having stated that, we may talk about administrative and financial jurisdictions, which are largely located in the administrative court and the court of auditors, two important bodies.

In accordance with article 69 of the June 1, 1959, Constitution, the legislation pertaining to the Administrative Court was enacted under the sixth chapter, which deals with the Council of State. It states that the Council of State and its two bodies are constituted by the legislation, which also establishes the processes and norms of jurisdiction that apply before

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<sup>146</sup> Instated in 1939, the Labour tribunals were reorganized by the law of November 4, 1958, then by the Labor Code of April 30, 1966.

<sup>147</sup> Decree no. 2010-1536 of June 21, 2010 provides for the creation of an industrial tribunal within the territorial jurisdiction of each court of first instance, with the exception of the Tunis court of first instance, where three industrial tribunals have been created.

<sup>148</sup> Article 186 of the Tunisian Labor Code.

<sup>149</sup> The territorial jurisdiction of cantonal courts is defined by decree no. 2009-2287 of July 31, 2009.

<sup>150</sup> Article 39 of Code of Civil and commercial procedures as amended by law n° 94-59 of 23 may 1994) enumerates the various cases as follows: protective seizures, urgent statements of facts, difficulties in enforcing judgments, stays of execution of judgments, and the issue of a second gross-up of judgments.

<sup>151</sup> Decree of February 19, 1957, reorganizing the Tribunal “Mixte Immobilier de Tunisie” (Mixed Real Estate Tribunal of Tunisia) [Online], Available at: < [https://www.justice.gov.tn/fileadmin/medias/organisation\\_juridictionelle/tribunal\\_immobilier/D\\_1957\\_reorganisation\\_tribunal\\_imm\\_fr.pdf](https://www.justice.gov.tn/fileadmin/medias/organisation_juridictionelle/tribunal_immobilier/D_1957_reorganisation_tribunal_imm_fr.pdf) >, (Accessed on 13 November 2023).

<sup>152</sup> As stated by article 33 of the law of July 1, 1885 relating to land ownership [Online], Accessible at: < [https://www.justice.gov.tn/fileadmin/medias/organisation\\_juridictionelle/tribunal\\_immobilier/L\\_pro\\_fonc\\_1885.pdf](https://www.justice.gov.tn/fileadmin/medias/organisation_juridictionelle/tribunal_immobilier/L_pro_fonc_1885.pdf) >, (Accessed on 13 November 2023).



the aforementioned entities. The latter is composed of the Administrative Court<sup>153</sup> and the Court of Auditors<sup>154</sup>. Nonetheless, the 2014 Constitution abolished the Council of State and no legislation pertaining to it was passed. Furthermore, the new constitution of 2022 instituted 3 independent judicial bodies with each of them having its own structural organization and supreme council. In fact, Article 119 states that: “*The judiciary comprises the judicial, administrative and financial branches. Each of these is supervised by a superior council*”. Both of these constitutional institutions have operated independently of one another in all spheres of organization, authority, and procedure.

The aforementioned highlights the distinctions with the French model, when the council of State functions as the highest court of cassation for administrative matters, naturally assuming certain supervisory responsibilities. The council in Tunisia served only as an institutional requirement for lawmakers to handle administrative concerns; it is neither a court of cassation nor a body of last resort for administrative disputes. In reality, every court—administrative or audit—has separate internal commissions or regional chambers to render decisions for first, appeal, and final resort. What is unique and different in the latest reforms made by Tunisian legislators in order to boost decentralization is the establishment of 12 subordinate regional courts of first instance within the Administrative Tribunal in accordance with Government Decree No. 2017-620 of May 25, 2017. This might lower the number of cases pending first-instance rulings.

Tunisia has also implemented a council regulating prospective conflicts that may appear between administrative and judicial orders. A council of conflicts was established by the Organic Law N° 96-38 on June 3, 1996, to divide any disputes pertaining to competence that may arise between the administrative tribunal and the judiciary's jurisdictions. The council is an intercollegiate body that is presided over alternately for a mandate of 2 years by the first president of the administrative tribunal and the court of cassation. It is composed of six members who are equally chosen from among the active advisers and presidents of the relevant courts. The Council's decisions in matters of jurisdiction concerning the case referred to it have absolute “*res judicata*” effect.

The Constitutional Court holds a pivotal role within the Tunisian judiciary, tasked with ensuring the constitutionality of laws and regulations. Comprising nine members, including former presidents appointed by various authorities<sup>155</sup>, the council's primary function is to

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<sup>153</sup> The administrative tribunal is governed by law no. 72-40 of June 1, 1972, as amended on several occasions. The Administrative Court has jurisdiction to rule on disputes involving the administration and appeals on grounds of “*ultra vires*” for the annulment of the acts of central, regional and local administrative authorities, local public bodies and public administrative establishments. Its role is to advise the administration.

<sup>154</sup> The organization of the Court of Auditors is regulated through articles 10 to 23 of Act no. 68-8 of March 8, 1968 on the organization of the Court of Auditors, as amended and supplemented by subsequent legislation, in particular Organic Act no. 2008-3 of January 29, 2008. The Court comprises central and regional chambers.

<sup>155</sup> Article 125 of the Tunisian constitution of 2022 states that the Constitutional Court is an independent judicial body composed of nine members appointed by decree. The first third of the members is made up of the most senior presidents of the chambers of the Court of cassation, the second third is made up of the most



scrutinize proposed legislation before it becomes law. This meticulous examination ensures alignment with the principles and provisions outlined in the Tunisian Constitution, upholding consistency with fundamental rights and constitutional values. Furthermore, it provides advisory opinions on constitutional questions referred by government officials or deputies. The decisions rendered by the council are binding and carry significant legal consequences. If a law is deemed unconstitutional, it loses its enforceability, serving as a vital check on legislative power and a safeguard for individual rights guaranteed by the constitution. However, political unrest and tension, particularly following the 2014 constitution's promulgation, which granted the president, parliament, and high council of magistrates the authority to nominate, has made the actual implementation and enforcement of the constitutional court extremely challenging. In addition, even after the new constitution was adopted and the seniority criterion was implemented to avoid a similar problematic political tension that may occur, we are still awaiting the court's official establishment in the future.

Although there is no clear mentioning for military tribunals in the new constitution of 2022 but they are still functioning pursuant to national legislations. In fact, the military courts have jurisdiction over offences of a military nature, offences committed by military personnel for the purposes of the army or the armed forces<sup>156</sup>.

Several law provisions that permit military tribunals to hear certain matters involving civilians constitute the legal foundation for this practice<sup>157</sup>. According to Article 8 of the Military Justice code, civilians may be tried in military tribunals "*as perpetrators [...] or co-perpetrators of the offenses covered by the law*". Under Article 91 of the same code, these include public insults to "*the flag or the army, violating [their] dignity, [their] reputation, [their] morale, acts likely to weaken [...] military discipline, obedience and respect due to superiors, and criticism of the actions [...] of army officials which undermines their dignity*"<sup>158</sup>. For example, like many other provisions of the military justice code, Article 91 has not been changed since it was first introduced in 1957<sup>159</sup>. The articles pertaining to civilians<sup>160</sup> have never been changed in a way that would prohibit them from being prosecuted by military tribunals, notwithstanding minor modifications made since then.

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senior presidents of chambers or advisory chambers of the Administrative Court and the last third is made up of the longest-serving members of the Court of Auditors.

<sup>156</sup> CHEKIR Hafidha, « La justice politique en Tunisie », in *L'Année du Maghreb, III* | 2007, pp.141-162.

<sup>157</sup> The Code of Military Justice of January 10, 1957 also instituted permanent or provisional to try political crimes under a special law. Act n°2000-56 of June 13, 2000, extended the jurisdiction of military courts to try civilians guilty of undermining the internal and external security of the State.

<sup>158</sup> "How can military courts judge civilians?" *inkyfada.com* [Online], Available at: < <https://inkyfada.com/en/2021/09/28/how-can-military-courts-judge-civilians/> > (Accessed on 16 November 2023).

<sup>159</sup> *Ibid.*

<sup>160</sup> Afrique Jeune, "Tunisie : la justice militaire, pour qui et pourquoi ?" *JeuneAfrique.com* [Online], 29 June 2017. Available at : < <https://www.jeuneafrique.com/451990/politique/tunisie-justice-militaire-quoi/> > (Accessed on 16 November 2023).

### **3.3) Analyzing the Points of Divergence between French and Tunisian Institutional Structure of Justice**

Nobody could deny that significant distinctions exist between the legal systems of France and Tunisia despite the fact that both countries adhere to the same basic concepts, such as the separation of powers and a dedication to justice. The extensive history and various administrative branches of France's legal legacy stand in stark contrast to Tunisia's developing legal system, which has been shaped by its colonial past. It is essential to comprehend these differences in order to fully appreciate the subtleties that influence each nation's judicial system, from the function of the council of State in France which act as the supreme court of the administrative order to the special jurisdiction of the Administrative and Financial tribunal as independent tribunals in Tunisia.

In France, the Council of State operates as a distinct and influential administrative court with broad powers, including advising the government on legal matters and serving as the highest administrative court (Court of Cassation). Its jurisdiction encompasses administrative disputes and appeals against administrative decisions.

Tunisia has dissolved its Council of State pursuant to its national regulations and instituted a double judiciary administrative system based on independent financial and administrative tribunals. This divergence reflects the distinct paths each country has taken in shaping its administrative and legal structures, emphasizing the dynamic nature of legal institutions and their evolution over time.

This contrast underscores the unique adaptations and variations in the implementation of administrative justice in each country, reflecting historical, legal, and institutional differences.

Similarly, France, which has a civil law background, depends heavily on the inquisitorial system, in which judges actively look into cases, and codified legislation. Tunisia, on the other hand, has a more inquisitorial-adversarial hybrid legal system that combines aspects of both Islamic and civil law.

Another interesting point that we need to shed light on is the use of jury trials and the establishment of the Court of Assize. In criminal matters tried by the “Cour d'Assises”, France uses a jury system; in contrast, Tunisia uses a more inquisitorial approach that excludes the jury. This variation in trial practices demonstrates how legal customs shape the legal systems in every nation. The fact that Tunisia relies on professional judges while France emphasizes lay jury involvement highlights the different ways that legal traditions influence the way that justice is administered in these two countries.

In conclusion, the presence of military tribunals represents a significant difference between the legal systems in France and Tunisia. In order to incorporate military justice into the civilian legal system, France abolished its military tribunals whether nationally or abroad. Law 82-261 of July 21, 1982 on the investigation and trial of military and State security offences, and amending the codes of criminal procedure and military justice, abolished, in

peacetime, the permanent courts of the armed forces and the permanent High Court of the Armed Forces. However, it maintained military courts for wartime. Furthermore, in 1999, with the professionalization of the army, the Tribunal aux armées de Paris (TAP) was established to adjudicate military offenses occurring outside France<sup>161</sup>. However, this final peacetime military tribunal in France, known as the "tribunal aux armées de Paris (TAAP)," established in 2011, was subsequently dissolved in 2012. Following its dissolution, it was succeeded by the common-law correctional tribunal. This abolition was implemented on January 1, 2012, as a consequence of the 13 December 2011 statute<sup>162</sup>. By contrast, matters involving military members are decided by a distinct and functional system of military tribunals in Tunisia. This difference highlights the different ways that each nation has structured its military justice law systems.

The distinct historical, cultural, and constitutional settings of every nation are reflected in the diverse legal approaches, which in turn influence how justice is actually applied within each nation's legal systems.

### **Concluding the Journey: Charting the Path through Judicial Challenges**

To sum up, the comparative analysis of the legal systems in France and Tunisia illuminates the complex situations molded by historical trends, legal codes, and modern advancements.

In contrast to Tunisia, where the judiciary has faced several difficulties, such as disputes with political authorities and efforts at dissolution, The French High Council of Judiciary is steady and well-established, although it is always seeking for greater autonomy and freedom from the executive power<sup>163</sup>.

The evolution of the High Council of Judiciary in France, dating back to 1958, reflects a robust and enduring institutional framework that safeguards judicial independence. The presence of established procedures, such as the nomination of magistrates and disciplinary actions, contributes to a stable and predictable judiciary. Furthermore, the French court system's structure, with the Council of State and Court of Cassation, mirrors the commitment to a hierarchical yet interconnected approach.

On the other hand, Tunisia grapples with a more volatile judicial landscape marked by conflicts and attempted interventions by political figures. The recent dissolution attempt and issues surrounding nominations underscore the ongoing struggle to establish an independent and resilient judiciary. Despite these challenges, Tunisia has made

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<sup>161</sup> KREMPF Antoine, La justice militaire n'existe plus en France? *Franceinfo* [Online], Available at: <[https://www.francetvinfo.fr/replay-radio/le-vrai-du-faux/la-justice-militaire-nexiste-plus-en-france\\_1781121.html](https://www.francetvinfo.fr/replay-radio/le-vrai-du-faux/la-justice-militaire-nexiste-plus-en-france_1781121.html)> (Accessed on 16 November 2023).

<sup>162</sup> "Les métiers de la justice militaire, 40 ans après sa réforme." In: *Administratif | Dalloz Actualité* [Online], Available at : < <https://www.dalloz-actualite.fr/flash/metiers-de-justice-militaire-40-ans-apres-sa-reforme> > (Accessed on 16 November 2023).

<sup>163</sup> MANTELLI Mélanie, « *L'Indépendance de la justice en France et en Italie* », PHD Thesis In Public Law, Université de Bordeaux, 2022, pp. 182-193.

commendable attempts to reform its judiciary, reflecting aspirations for a fair and effective legal system.

While both countries face their unique set of challenges, the comparative analysis highlights the importance of a well-defined and stable judicial council in upholding the rule of law. The experiences of France and Tunisia offer valuable insights into the complexities of balancing judicial independence with external influences<sup>164</sup>, providing a rich field for further study and reflection. As these nations continue to navigate their legal landscapes, the shared commitment to recruiting and maintaining qualified magistrates serves as a common ground, fostering a continuous dialogue on the global stage of judicial reform and reinforcing the need for adaptable mechanisms in the face of evolving challenges.

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<sup>164</sup> ERRERA Roger, « The Recruitment, Training, Evaluation, Career and Accountability of Members of the Judiciary in France », in G. Di Federico (dir.), *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain*, Bologne, IRSIG & CNR, 2005, p. 43-68.

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