~~LAW AND DEVELOPMENT:~~ THE LAW OF BEQUESTS IN THE CONTEXT OF *Land* REFORM ~~OF PROPERTY LAW~~ IN TUNISIA

by

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A B S T R A C T

According to our present interpretation of Islamic legal history, the total body of the traditional Sharīʿa reflects an evolution of social circumstances and moralities of past days. Now that social circumstances of the twentieth century are different from the previous centuries of Islam, one would expect that the Sharīʿa, when enforced today as a law of personal status, is still evolving, this time according to twentieth century circumstances and values. True to expectations there have been changes in the Sharīʿa as now applied in statutes. A question still remains, however: How deep and within what limits are these changes? The original limits on the growth of the Sharīʿa were only the Qurʾān and the Sunna of the Prophet and of Followers. As the centuries progressed, the limits on the Sharīʿa became more numerous. The law became what the jurists dictated. The "door of ijtihād" closed. H.A.R. Gibb succinctly describes the import of the closing of the door: "The principles on which jurists built the system were regarded as immutable and in time the system built on these principles was itself considered an inseparable part of the principles and hence immutable too." (Mohammedanism, Oxford, 1962, page 95) In this century

two Muslim countries are considered to have diverged radically from the "immutable" system. They are Turkey and Tunisia.

Turkey totally rejected the Sharī'a as a source of law to be enforced by the State, even though her leaders and citizens profess the Muslim faith. One may follow the Sharī'a in private life, but never expect the State to enforce claims on the basis of the Sharī'a. The logic behind the rejection is compelling: The Qur'ān can be viewed in its history as a manual that people expected to be enforced in a day when one's religious status was to a large extent one's legal status. Today one's religious status is a personal matter, not affecting one's legal capacities. Therefore, people cannot expect the Qur'ān to be enforced as a law of the State. Islam will still prosper, but only as a religion.

Tunisia, on the other hand, has retained legal enforcement of some provisions of the Sharī'a and dispensed with others. Tunisia has not explicitly rejected the Qur'ān as a basic source of law, neither has she explicitly named it as a basic source of law. In contrast, Moroccan law provides that where the Code of Personal Status has gaps, the traditional Sharī'a shall apply (article 82 of the Code du Statut Personnel

et des Successions, Dahir No. 1-57-343 of Rebia II 1377 (22 November 1957) for Parts I and II). Tunisia came closest to denying that the Islamic ethic is the source of the law when one of its enactments provided that no one's religious creed has enough authority to deny the authority of the Tunisian law (Law 57-40 of 27 September 1957 (2 Rabia I 1377) on the suppression of the Rabbinical courts; Beylical decrees of 25 September and 25 October 1956 on suppression of the courts of the Sharī'a -- By these three laws all Tunisians became subject to the Code of Personal Status promulgated by Beylical decree of 13 August 1956, effective 1 January 1957). On the other hand there are many indications that the law of personal status grew and continues to grow out of the Islamic ethic. The annotated version of the Code of Personal Status (M.T. Es Snoussi, 1970), government memos, the Constitution of June 1959 (Preamble: "The will of the people is to remain bound to the teachings of Islam" -- J.O.R.T. No. 30 of 1 June 1959) all imply that judges shall refer to the Sharī'a to answer points not covered in the Code of Personal Stauts. Furthermore, when the Tunisian judges and the President himself speak of the historical evolution of the Sharī'a according to social circumstances, the meaning of evolu-

tion covers only the reasoned interpretations which old jurists have placed on the Qur'ān and the ʾaḥādīth. The concept of evolution does not apply to the Qur'ān and the ʾaḥādīth. These basic religious sources remain for all time; it is the deductions from these sources that change. Tunisians recognise that, in the past, deductions from the Qur'ān were coloured with opinions of what was possible and what was not within given century. Today people have a different sense of what is possible and what is not.

It is the Tunisian, rather than the Turkish, alternative to legal reform that motivates this dissertation. Tunisians have, in terms of Gibb, kept the principles of Islam immutable; but the system built on them is no longer regarded as immutable. Tunisia accepts the "moral imperative" of Islam (Gibb, page 191), that is, the obligation to give legal force to the Qur'ān as a practical expression of obedience to Allāh. Why Tunisia has chosen to accept the imperative; how far she practises obedience; what she has substituted for old interpretations of the Qur'ān and ʾaḥādīth and the traditional methodology for arriving at a new practical expression of Islam are questions to which this dissertation addresses itself.

In answer to these questions the dissertation begins

with an analysis of the legal system of Tunisia -- the hierarchy of courts, the codes applicable. The time setting is from the Ottoman era to the present. The primary source material -- not used heretofore in studies of Tunisian Islamic law -- for this topic comes from the official historical archives, which contain official correspondence, memos from government bureaux commenting on proposals for law reform, government officials' analyses of the legal scene before the French Protectorate, during the Protectorate, and now after the abolition of the Protectorate.

The study of the legal system serves as background for an ensuing study in depth of the application of points of substantive law. The substantive laws chosen for the study are the law of wills and the law of property. The Code of Property Rights (majallat al ḥuqūq al ʿaīnīyat) and the Code of Personal Status (majallat al ʾaḥwāl as shakhsīya) contain the relevant provisions for acquisition of property by succession. While the two codes provide for the same subject, they have different juridical roots. The provisions on wills in the Code of Personal Status are derived from the Sharīʿa. The Code of Property Rights was promulgated with an eye to the economic needs of the twentieth century. Given two laws having different historical roots yet impinging on the same subject, the dissertation pays at-

tention to how these two codes both dovetail and contradict each other.

Wills and property rights, however, cannot be studied in isolation. They will be put in the context of other laws. Wills are seen as part of the laws of gifts, and written contract. The Code of Property Rights is seen as part of a land reform programme that began with the abolishment of the law of waqf, and moved onto cooperatives and eventually less co-ownership.

The primary source materials for the case study are enacted codes, preparatory drafts of the codes, court cases -- mostly decided since 1957, the year the Code of Personal Status commenced. Most of the cases have never been published. In their judgments judges use two sources when applying the codes: the Islamic fiqh and the broad provisions of the Code of Obligations and Contracts (majallat al ʾittizāmāt waʾl ʿuqūd), which is a synthesis of the best of French legal thinking and Islamic legal thinking.

It is not difficult to show that Tunisia has in fact acknowledged the need to keep Tunisian law of personal status islamicised; it is part of the evolutionary and gradualist politics of Bourguiba. The problem lies in her methodology. With all due respect to the dif-

ficulty which reformers encounter in the intricacy of the Sharī'a, one sees that Tunisia has not settled on a methodology to redefine islamicising of the law consistently. She has not been ruthless in scrutinizing every provision of the Sharī'a in the light of past and present rationalisation. She has been bold in re-examining the law of polygamy and talāq, but not the law of succession. She has allowed economic pressures to affect the laws of property, but not the laws of succession. She has reopened the "door of ijtihād", but has not tackled the traditional acceptance of ahādīth for interpreting the Qur'ān. In the law of wills, traditions are especially important, having been used as conclusive proof of the fact that the sūwar of inheritance abrogated the sūwar on bequests in the Qur'ān. This need not be so, for the Qur'ān enjoins the faithful to provide for the needy. Surely when heirs refuse to validate an ultra vires bequest, the courts should determine whether their refusal works great hardship on the needy legatee. In summary, Tunisia has not tackled firmly enough the issue at stake, namely, what does it mean to islamicise in the twentieth century. The old jurists had to islamicise old situations such as agnatic dominance. New jurists have to

islamicise new social values such as equality of the sexes.

The first challenge to the Sharī'a came with the arrival of the Europeans. Reforms were only illusory because they rested on a desire for immediate political gain. When the Protectorate was established, Tunisians became accustomed to, though they resented, a dual system of law. Tunisians had a choice between going to French courts and going to the courts of the Sharī'a, depending on whether they had adopted French nationality or had their land registered. The relative efficiency of the French system impressed Tunisians, who recognised that efficiency can work to the advantage of Islam. When Independence was won, Tunisians organised a system which took the best from two worlds. Since reverence for Islam is an acceptable working base, the law of personal status brought new hopes for proving that Islam can meet the twentieth century with renewed strength. The next burst of reform came about the mid-sixties, when economic ambitions predominated. Some reforms have remained; others have not. Again the reason for the unappealing reforms that did not remain is that they had only a secular base, not an Islamic one.

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CHAPTER I

HISTORY OF THE OTTOMANS AND THE BEGINNING OF FRENCH RULE IN TUNISIA

When the Muslim Arabs attempted to move against the Byzantine Empire by attacking the Turkish route to Europe, they met resistance. Instead of discouraging them, resistance forced them to channel their energy into another part of the Byzantine Empire, namely, North Africa. Only twenty-five years after the flight of Muhammad from Mecca to Medina, the Muslim governor of Egypt invaded the southern desert of Tunisia where he found the Byzantine governor had become independent of the Byzantine emperor already. By 698 A.D. all of Tunisia had fallen from the hands of the Berbers and Byzantines to the Muslim Arabs.

Consolidated rule began in the eighth century A.D. with the Aghlabids, who accepted the policy of the ʿAbbāsīds to support the collection of ʾaḥādīth for developing more systematic judicial thought. The school of Mālik owes a debt to Asad b. al-Furāt, pupil of Ibn al-Kasim of Egypt, and to Furāt's pupil Saḥnun for making Mālikī thought dominant in Tunisia. Saḥnun had been particularly active as qāḍī of Kairouan, the centre of Islamic learning and the capital of the Muslim military invaders, it being far more important, until the

twelfth century, than Tūnis.

Tunisia did not escape the invasion of the Fātimids (909-1171). Tūnis remained orthodox while Kairouan fell to the Shī'a.

When the caliph al-Mansur took over Tunisia and made a province of it for his governor Abd al-Wahīd b. Abī b. Hafs (1206-1221), who ruled in the name of the caliph of Marrākesh, the Hafsid dynasty made its debut. On and off the throne for three and a half centuries, the Hafsids restored Mālikī doctrine to North Africa, but never completely pacified the Berber-Arab tribes who dominated the interior. By the end of the first century of Hafsid rule, the legalists were benefiting from the Muslim refugees fleeing Christians in Spain. The chief qādī, Ibn al-Ghammāz, had come from Valencia. Despite political troubles from intrigues over the throne and Crusader invasions, the next century, the fourteenth, was described by the traveler Khalid al-Balawī (1335-1340) as the golden age of North African jurists. This was the time of the chief qudāh Ibn 'Abd al-Rafī', Ibn 'Abd al-Salām, 'Īsa al-Ghabrīnī, Qādī Ibn Rāshid al-Gafsī, and muftī Ibn Hārūn.

By the middle of the third century of Hafsid rule Tūnis had gained in importance, being a port which attracted European merchants, especially Italians. Also by the same time tribal rebellions in the interior had weakened the dynasty even more. Maraboutism, or popular

veneration of pious Muslims had taken hold. In time the groups who dedicated themselves to the upkeep of the memory of a shrine for a deceased pious Muslim brother became consolidated into large followings.[1] In 1535 the Spaniards, in venegeful pursuit of Turkish corsairs, made Tūnis a vassal state. The Spanish did not stay long, suffering severely from attacks from the interior. Kairouan produced the rebel Sīdī ʿArafa, and central Tunisia held out under the marabout confederation of the Shābbīya.

The Turks struck the final blow to the Hafsids and the Spaniards. In the east of the Islamic Empire, the Turks had been challenging the ʿAbbāsīds in Baghdad ever since the 1000's, and the Ottoman branch of the Turks had established the Ottoman dynasty by the 1300's. While the Byzantine rule had ended quite early in North Africa, the Muslims did not destroy Byzantine rule in Turkey until 1453. Once the Turks then defeated the Mamluk dynasty (themselves of Turkish and Circassian origins) in Egypt in 1517, the way was open to North Africa, as part of consolidating the Empire against the Europeans. Perched in Algiers, the Ottomans under ʿAli Pasha invaded Tūnis in 1569 when the son of the Tunisian vassal of Spain dethroned his

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[1] Jean Ganiage, Les Origines du Protectorat Français en Tunisie, 1861-1881 (Maison Tunisienne de l'Edition, December 1968), p. 145.

father and fought the Spanish. After a setback from Don John of Austria, the Turks did not win Tūnis until 1574, when Sinān Pasha led troops directly from Constantinople into Tūnis.

Tunisia became a province of the Ottoman Empire. At first the Turks appointed a pasha to rule Tunisia from Algiers. From 1587, the Sublime Porte (Constantinople) took direct responsibility for Tunisia. The descendants of the Ottoman rulers were to stay for the next three hundred eighty-three years. In religious and legal institutions, the Ḥanafī school was to be placed on a par with Mālikī thought. In terms of population, the Mālikī school held the greater sway among Tunisians and the Ḥanafī advocates were largely confined to the ruling Ottoman elite.

Ottoman rule in Tūnis did not begin peaceably. The Ottomans first had to settle struggles for power among themselves. In 1591 there was a bloody revolt against the dīwān, the tyrannical governing body of higher military officers. The deys (dayy, a military title, commander of every one hundred men in a unit of four thousand under an aghā) then took full power. The pashāwāt, representatives of the Ottoman Sulṭān at the Porte, had no longer any substantial power behind their official position.

It was not long before one of the deys (dayy) (1594-1610) laid the rudiments of systematic rule.

He issued a code of laws called mīzān to clarify duties and organised officers with the title of bāy into armed units to collect taxes twice a year. Shortly in time the deys (daʾy) became subordinate to the officers with the title bāy. However, before the decline of the deys (daʾy), France, later to become the dominant power in Tunisia, established diplomatic ties with Tūnis. She had already paved the way with diplomatic capitulations from the Porte.

The first Bāy (1612-1631) was originally a Corsican called Pāsha. His son succeeded in extending Ottoman military control outside Tūnis over the main towns in the northern half of Tunisia, where the better agricultural lands are situated. Yet civil uprisings from Tunisian tribes and attacks from Algerian border tribes continued. In 1686 and 1694, Algerians were strong enough to invade and occupy Tūnis.

Military and administrative centralism in the Tunisian province did not begin until the early eighteenth century when the military commander combined in one person, himself, all the titles of bāy, dey, pāsha, and aghā. In July 1705, Husain b. ʿAlī Turkī, was proclaimed Bāy. He was founder of the Husseinite dynasty which ruled Tunisia until July of 1957. He wanted to establish a dynasty based on a regular order of succession of his direct descendants. However, ambitions of agnatic collaterals, supported by Algerian invaders,

thwarted his dreams. Husain's nephew ruled next, to be dethroned by his own son who was followed by the son of Husain (Muhammad, 1756-59). The throne passed to the second son of Husain, then to a grandson. Between 1759 and 1814 under the reigns of these last two, Tunisia came into being as a semi-autonomous province of the Ottoman Empire. The Bāy began signing consular treaties with Europe as if he were a sovereign monarch. Fighting with the Algerians and with the rebellious Turkish infantry continued. Events in Europe began to influence North African politics more often than not, and in more subtle ways than the Crusaders. After the Congress of Vienna in 1815 the European powers forced the Tunisia Bāy to suppress the pirates. In 1830, France established herself militarily in Algeria, at the protest of the Ottomans in Constantinople.

Then for eighteen years Tunisia experienced a surge of military and fiscal assertions by the Bāy ʾAhmad (1837-1855). In the Ottoman tradition of preserving rule through efficient military power, ʾAhmad Bāy built up the Tunisian military on European lines, with the advice of French instructors. Jean-Baptiste Campenon, a French general, was dispatched to head one of the first non-religious educational centres in the Islamic province, the military school of Bardo (location of the palace of

the Bāy). He kept in close touch with the French Minister of War.[2]

Buying arms, uniforms, and paying men for the new army were not without expense. As was happening in other semi-autonomous Ottoman provinces, such as Egypt under Muḥammad ʿAlī , the military was draining the state coffers. This was setting a trend in government expenditures which at the end of the nineteenth century made many a ruler totally in debt to his own people and to European bankers. ʾAḥmad Bāy met his new expenses in the conventional manner at first: levying new taxes. He introduced the qānūn and the maḥṣūlāt. The qānūn was a fixed tax on olive and date groves. The maḥṣūlāt was a tax on sales and gifts.[3]

The most well-known legislation of ʾAḥmad Bāy is the decree facilitating emancipation of slaves (only in 1890 after the Protectorate was established was slavery fully forbidden). The decree is a good example of the sovereign's interference in the Sharīʿa--justified by new pressures from the presence of Europeans--in a matter over which his jurists disputed for lack of a definite text on the

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[2]Ganiage, p. 576, in "Biographies" (Campenon). Letter published from Lt.Col. Campenon to Maréchal Randon, Minister of War, 1862, pp.76-78.

[3]Jean Poncet, La Colonisation et l'agriculture européene en Tunisie depuis 1881 (Mouton, 1962), p.83.

question:[4]

> Decree prescribing the emancipation of slaves, 23 January 1846.
> We are completely certain that most of the inhabitants in the Kingdom abuse the right of property which they have over the blacks and that they mistreat these inoffensive creatures. You are not unaware that our learned jurisconsultants are not in agreement on the question of knowing if slavery, in which the black races have fallen, is supported by a formal text; thatthe light of the religion has penetrated into their country for a long time; that we are very far from the era when the masters conformed, in the enjoyment of their rights, to the prescriptions issued by the most eminent of the Messengers (Muhammad) before his death; that our most sacred law emancipates by right the slave mistreated by his master; and that the legislation (laws so far created) has a marked tendency towards the extension of liberty.
> As a consequence we have decided, in the present interest of the slaves and the future interest of the masters, as well as in the aim of preventing the former (the slaves) from demanding protection from the foreign authorities, that notaries will be established at Sīdī-Mahrez, at Sīdī-Mansour, and at Zaouia Bekria, for delivering to any slave who will demand of them, letters of emancipation which will be presented to us to be stamped with our seal.
> On their part, the judges of the Sharī'a must send to us all the matters on slavery on which they are petitioned, and all the slaves who address themselves to them to demandtheir liberty. They must not allow their masters to take them back, their court being a place of inviolable refuge for the persons who flee slavery, whose legality is doubtful, and who argue with their detainers over rights which are impossible to admit in our Kingdom; for if slavery is licit, the consequences whihh they entail are contrary to religion, and it follows, to avoid them, all the more when a considerable public interest is involved in this act.

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[4] Translated from the French of Jean A. Marty and Roger Maarek, Recueil général and practique de Législation Tunisienne (Patronage : Autorités de la Métropole et de la Régence), Vol.2 of the Encyclopedia of Islam, 1918-1930, "Tunisia", states that this decree of 1846 abolished slavery I have interpreted it as facilitating emancipation when slaves chose so. The Marty/Maarek collection of laws cites both the 1846 decree of emancipation and the decree of 28 May 1890

After the reign of ʾAhmad Bāy the European consuls were no longer blamed, as implied in the Emancipation decree of 1846, for legislation which was designed to protect the authority of the Bāy against foreign encroachments. The Europeans under ʾAhmad's cousin, Muhammad (1855-1859), won credit for encouraging legislation which forced the Bāy to define his political position in legal terms. Muhammad began with the ʿAhd al-ʾAmān (Fundamental Pact) of September 9, 1857, which used the authority of the Bāy to guarantee basic civil rights of life and property for non-Muslims. The ʿAhd al-ʾAmān did not set a precedent in the Islamic world. Constantinople, more sensitive to non-Muslim pressures, as the centre of the Empire, had promulgated in 1839 the Khatt-ī sherif of Gulkhane which ʾAhmad Bāy had refused to apply when the Sultān issued it, and the Hatt-i humayoun in February 1856.[5] Nonetheless, the dramatic circumstances which directly led up to the ʿAhd al-ʾAmān are important to note. They serve as a background to the policy of triple jurisdiction (Muslim, Rabbinical, French) which the Protectorate later supported. Author Jean Ganiage recounts the circumstances from letters exchanged between the French consul and the

prohibiting slavery.

[5]Ganiage, p.68.

Paris Foreign Office (page 65 et sq.):

In June 1857 Samuel Sfez, a Hebrew cart-driver, ran over a Muslim child in a street in Tūnis. He was drunk, and when assailed by a crowd, shouted blasphemies, cursing the Bāy and the Islamic religion. Taken immediately to the court of the Sharī'a, he was condemned to death. Despite efforts of the French and British consuls to obtain a suspension, Sfez was decapitated in twenty-four hours. In Tūnis emotion continued to rise over the execution and provoked an explosion of popular fanaticism. Bands armed with sticks terrorized the Hebrew quarters. The general European community barricaded itself against possible invasion and appealed to their consulates to take action. The consuls strictly speaking could not condemn the summary execution. Sfez was a Tunisian subject, a Tunisian Hebrew. He had been brought before the court of the Sharī'a, under the presidency of the Ḥanafī grand muftī and Sheikh-ul-Islām, Muḥammad Beyram, the brother-in-law of the Bāy Muḥammad. It could hear cases not only on personal status or <u>ḥubus</u> (<u>waqf</u>), but also any affair involving public cursing. In strict law, the penalty for blasphemy was death. Yet no one had known in recent years, according to the French consul, the penalty to have been enforced. The speedy execution of Sfez was interpreted as a sign of fanaticism among the <u>muftūn</u> against foreigners and non-Muslims. The affair provided enough alarm in European capitals to justify

demands to the Bāy for legal changes which would benefit the Europeans living in Tunisia. France and Great Britain had won concessions from the Ottomans in Constantinople to introduce mixed courts where strict Sharī'a yielded to European notions when Europeans were involved. Now France and Great Britain wanted to use the occasion to persuade the Bāy of Tūnis to grant the same.[6]

About ten days before the 'Ahd al-'Amān was proclaimed, a French gunboat paid a call "of courtesy". When Muhammad Bāy proclaimed three months after the Sfez affair the 'Ahd al-'Amān before a group of high Tunisian officials and foreign consuls, he essentially made a promise to write a code which would satisfy everyone. To lend weight to his word, he had already appointed a committee to draft the code. On the committee were representatives of the political cabinet of the Bāy and representatives of the Sharī'a: the Prime Minister, chairman, the Minister of War, the Minister of the Navy, the Keeper of the Seal, a general, a caïd (qā'id, provincial administrative official), the two Mālikī muftī, and the two Ḥanafī muftī, who apparently were decidedly disinterested in the meetings.[7]

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[6] Ganiage does not consider the possibility that the muftūn may have applied the penalty for a non-Muslim killing a Muslim, not the penalty for blasphemy.

[7] Ganiage, page 67.

The ʿAhd al-ʾAmān provided the basic guidelines for elaboration of the code.[8] The text follows:

Fundamental Pact of 10 September 1857
(20 Moharrem 1274)

1 In the name of God the merciful and the compassionate. Praise to God who opened the way to justice, who gave equity to guarantee the conservation of order in this world, who has ruled the gift of knowledge of law according to his interests, who has promised reward to the just and punishment to the oppressor. Nothing is truer than the word of God.

2 Blessed be our Lord Muhammad, whom God, in His Book honoured with titles of humane and compassionate, and to whom He sent the practice of the right way, and who has taught and explained to us, as God ordered him, the bases of the law which wants approval of the just and protection from the unjust, in such a way that the word of God has not been the object of vicissitude nor false interpretation. May health and blessings be on his family (Prophet's) and his companions who knew how to teach the truth to whomever desired to know it, and who have convinced others by their learning and their proofs, and who knew the law by text and by interpretation, and who left us as striking proof of their exemplary conduct, their justice and equity.

3 I ask You, Oh God, to grant me your powerful support to arrive at acts which please You, so that You help fulfill my princely task which is the heaviest burden any man could carry. I put all my confidence and all my hope in You. What greater support than that of the Highest!

4 The mission which God has given us, in charging us (the Bay) with governing His creatures in this part of the world imposes on us commanding duties and religious obligations which we can fulfill only with the help of His aid alone. Without this aid, who could satisfy his duties towards God and towards men?

5 Convinced that it is necessary to follow the prescriptions of God in everything relating to His creatures, I have decided no longer to let weigh upon those (creatures) who are confided to my care injustice nor contempt: I will neglect

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8. Marty and Maarek, vol.1, Annex No.1.

nothing in putting them in full possession of their rights.

6 Can one slack, whether in his acts, or in his intentions, in such duties, when one knows that God does not commit the slightest injustice and that He reproves those who oppress His creatures?

7 God said to His beloved Prophet: "O David! I made you my caliph over the earth; judge men according to justice, do not let yourself be guided by passion, for it will remove you from the way of God, and those who remove themselves from the ways of the Lord are destined to the most frightful torments, for they have forgetten the day of recompense."

8 God is witness that I accept His high prescriptions to prove that I prefer the happiness of my Realms to my personal advantage. I have dedicated my personal advantage to assure the happiness of my Realms. I have dedicated, to assure this happiness of my Realms, my time, my strength, and my reason. I have already begun, as is known, to alleviate the taxes which weigh on my subjects. God has permitted that this reform be a source of good, and these happy results have made our people hope for new improvements.

9 The hand(s) of the infidel agents found themselves from then on paralysed.

10 To arrive at improvements it is necessary first to establish the general bases for them. To want to attain them in one blow, without supporting them with bases, would be to create insurmountable difficulties.

11 We are convinced that most of the inhabitants of our Realms do not have a complete confidence in what we have done with the best intentions. It is a law of nature that man can arrive at prosperity only as long as his liberty is completely guaranteed to him, as long as he is certain to find refuge against oppression behind the ramparts of justice, and he sees his rights respected until the day when unimpeachable proofs show his guilt, only as long as he will be sure that this guilt will not result against him from insulated witnesses.

12 The guilty man who finds himself judged by many does not hesitate, in order to preserve their light of reason, to recognise his crime, and must say to himself: "Whoever surpasses the limits fixed by the Lord condemns his very self."

13 We have seen the Sheikh ul-Islam and those great powers who by their wise policy have placed

themselves at the head of nations, in giving the most complete guarantees of liberty; they have understood that that is one of their first duties, dictated by reason and by nature itself. If these advantages that have been conceded are real, the Sharī'a must consecrate them, for the Sharī'a was instituted by God to defend man against bad passions. Whoever submits to justice and swears by her approaches piety.

14 The heart of man which has faith in liberty reassures itself and strengthens itself.

15 We have lately informed the great 'ulama' of our religion and some of our high officials of our intention to establish courts composed of eminent men for dealing with crimes and misdemeanors as well as the disputes arising from commerce, the source of prosperity of our realms. We have established, for the organisation of these courts, principles consecrated by our law.

16 The sentences issued by the court of the Sharī'a will continue to have full effect. May God perpetuate until the Day of the Last Judgment the respect which this court inspires.

17 The administrative and judiciary code demands time for being edited, and adapted to the exigencies of our country. We hope that God, who reads our hearts, will confer the grace for establishing these reforms in the interest of our government, and may not at all throw out the principles which the glories of Islam have bequeathed to us. And we, the humble and poor servant of the Very High, hasten to conform to His will to reassure men. Nothing, in this code -- all can be convinced of it -- will be contrary to His prescriptions. Here are the bases:

I

A complete security guaranteed formally to our subjects, to all the inhabitants of our Realms, regardless of religion, nationality, and race. This security will extend to their respected persons, to their sacred possessions, and to their honoured reputation.

This security will be subject to exception only in legal cases when the matter will devolve upon the courts; then the matter will be submitted to us and it will be for us to order the execution of the sentence, either to commute the penalty or to prescribe a new one.

II

All our subjects are subjected to the tax existing today-- or to that which may be establish-

ed later -- proportionately and whatever be the position of the fortune of individuals, in such a way that the great will not at all be exempt from the qānūn because of their elevated position and the small will not at all be exempt any longer because of their weakness. The development of this article will take place in a clear and precise manner.

III

Muslims and other inhabitants of the country will be equal before the law, for this right belongs naturally to man, whatever his condition.

Justice on earth is a scales which serves to guarantee right against injustice, the weak against the strong.

IV

Our Hebrew subjects will not submit to any constraint to change their religion, and will not at all be prevented in the exercise of their religion; their synagogues will be respected and protected from any insult, considering that the state of protection in which they find themselves must assure them our advantages, it must also impose on us their protection.

V

Considering that the army is the guarantee of security for all, and that the advantage which results from that is to the benefit of the public in general; considering, on the other hand, that man needs to dedicate a part of his time to his existence and to the needs of his family, we declare that we will conscript soldiers only according to rules and according to conscription by lot. The soldier will not at all remain in the service beyond a limited time, and that will be determined in a military code.

VI

When the criminal court will pronounce a penalty incurred by a Hebrew subject, there will be attached to the said court Hebrew assessors. Religious law renders them, furthermore, the object of benevolent recommendations.

VII

We will establish a court of commerce, com-

posed of a president, a chief clerk, and several members chosen from among Muslims and the subjects of the friendly powers. This court, which will judge commercial matters, will function after we have reached an agreement with the great foreign powers, our friends, on the procedure to follow so that their subjects are within the jurisdiction of this court. The rules for this institution will be developed in a precise manner, in order to prevent any conflict or misunderstanding.

VIII

All our subjects, Muslims or others, will be equally subjected to rules and usages in effect in the country; none of them will enjoy any privileges over the other.

IX

Freedom of commerce for all and without any privilege for any one. The government prohibits itself any kind of commerce and will prevent no one from doing so.

Commerce, in general, will be the object of a protective character, and any one who would cause obstacles to it will be thrown out.

X

Foreigners who will want to establish themselves in our Realms can exercise all industries and all trades on condition that they will submit to the established rules and to those which will be established later, on an equal footing with all the inhabitants of the country. No one will enjoy in this regard any privilege over the other.

XI

Foreigners belonging to various governments, which want to establish themselves in our Realms, can buy all kinds of properties, such as houses, gardens, lands, on an equal footing with the inhabitants of the country, on condition that they will submit to the existing rules or to rules which will be established, without shirking them.

There will not be the least difference in regard to them in the rules of the country. We will make known the method of inhabitation, in such a way that the owner will have perfect knowledge of it and will be held to observe it.

We swear, by God and by the sacred pact, that we will execute the grand principles which we have exposed, according to the method indicated, and which we will follow up with the necessary explanations.

We will undertake matters, not only in our name, but in the name of our successors; none of them will be able to reign except after having sworn to observe these liberal institutions, resulting from our care and our efforts; we take as witness before God, this illustrious assembly composed of the representatives of the great friendly powers and the high officials of government.

God knows the aim, that I want known, and that I have just explained it to those who surround me; (it) has been placed in the bottom of my heart. God knows that my most ardent desire is to execute immediately the principles and consequences of these new institutions. One can demand of man only what is possible.

The one who has sworn by God must accomplish his oath.

Justice is the most solid good.

The life to come is the only to endure.

We receive the oath of the great persons and of the high officials of our government by which they undertake to join their intentions and their actions to ours in the execution of the reforms which we have just decreed. We say to them: Keep yourselves from transgressing the oath which you have just made before God, for God knows your most secret intentions and acts.

O God! Sustain those who have helped to contribute to the happiness of Your creatures; feed them with the nectar of Your grace.

O God! Grant us Your help, Your assistance, and Your compassion; make this work produce its fruits. We ask You Your support in this task, and render thanks to You for the mission which You have confided in us. Happy is the one whom You have chosen to lead on the path of truth. Good is in what you decree.

After having taken the different opinions, we, poor servant of God, have promulgated this act, in which we have seen the utility for

> the prosperity of the country with the blessing of the Qur'ān and the mysteries of the Fatha.
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> Salutations from the servant of his God, the mouchir Muḥammad Pacha Bāy, possessor of the Kingdom of Tūnis, 12 Moharrem 1274.

Thus the Bāy aimed to satisfy Hebrew, Muslim, European, and Tunisian alike. The Hebrew was to have assessors attached to criminal courts (Article VI); who would preside over the criminal courts -- Muslims only, or Muslims and Europeans -- remained unclear in the Pact. The Europeans, however, clearly won a mixed commercial court composed of Muslims and Europeans (Article VII). The Bāy even conceded the right to own property by purchase to the Europeans (Article XI). Before the Pact Tunisian law forbade foreigners to own immoveable property in the realm. Europeans had tried to evade the law by controlling the land through fictitious deeds of hypothecation (mortgage). The result was that a systematic control over transactions was lacking. At the same time, the Bāy assured Muslims that while commercial disputes would be subject in part to European authority, property disputes would be entirely subject to **local law** applied in Tunisian courts, regardless of the religion and nationality of the disputants (Articles VIII, X, XI). Tunisians, after the Bāy promulgated the Pact, did not seem to take the concessions to the

Europeans seriously. No commercial court was established; the government simply appeased by allowing Europeans to compete in areas where the government previously held monopolies. Buying property, however, was not so simple in an Islamic country where some of the best land was in hubus (waqf), which could not really be alienated except through ways the Europeans had already discovered. The European consuls still had to make specific treaties recognising rights to acquire and possess immoveables for their nationals (the English in 1863, the Austrians in 1866, the Italians in 1868, and the French in 1871).[9] In whatever large commercial ventures the Europeans undertook involving possession of land, the Bāy usually dictated conditions that aimed to assure that he too benefited from the new rights of the Europeans. Yet in the mid-nineteenth century, conflicts over rights with Europeans remained largely on the level of argument. It was not to be until the latter half of the century that Europeans engaged in important expensive business affairs and wanted to have guarantees stronger than words.

The reign of Muhammad ended only two years after the Pact was decreed. But before his death he bound his successor, his brother Muhammad Es Sādiq (1859-1882),

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[9] Ganiage, pages 47-48.

to elaborate the ʿAhd al-ʾAmān (Article XI) and to execute his dreams of a constitution which he announced at the same time as the Pact.

Faithfully Muḥammad Es Ṣādiq set out to fulfill the plans of his brother. During the early years of his reign, he promulgated (in 1860) a law on conscription, as provided for in Article V of the Fundamental Pact.[10] In addition he approved decrees on subjects very generally mentioned in the ʿAhd al-ʾAmān. These decrees covered administrative organisations, such as defining ranks and duties of civil officers. Yet these no doubt laid a detailed basis for the general administrative, political and legal structures of the constitution which was being prepared at the same time. The star piece of the early reign of Muḥammad Es Ṣādiq was the constitution, promulgated in January 1861, taking effect 26 April 1861.

The constitution was an example of legal reform made not out of a new jurisprudential mentality, but out of political impetuses. It represented innovations in forms for executing power, but the substance of the power represented a de facto situation.

To understand the politics of the constitution, one

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[10] Article V: ...we declare that we will conscript soldiers only according to rules and according to conscription by lot. The soldier will not at all remain in the service beyond a limited time, and that will be determined in a military code.

can begin with the occasion when Muhammad Es Sādiq met the Emperor Napoleon III in the French domains of Algeria. The Bāy had already prepared by September 1860 a copy of the constitution to present to the Emperor at that time. In the politics of this occasion was represented both a change from and a continuation of what Tunisians had known since the days of ʾAhmad Bāy. ʾAhmad had set a definite tone. He wanted as much independence from the Ottoman Sultān as possible. Correspondence was frequent between the Sultān and the Bāy, but the word of the Sultān seemed to have remained on paper.[11] ʾAhmad Bāy had refused to apply the Khatt-i Sherif from Constantinople, granting capitulations to Europeans.

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[11] Robert Mantran, Inventaire de Documents Turcs d'Archives de Tunis du Dār al Bāy, University of Tunis Publications of the Faculté des Lettres, 5th Series. Sources de l'histoire tunisienne, Vol.I (Paris: Presses Universitaires de France, 1961).

Page 42: Fin Djoumada II 1258(5 August 1842), Firmān du Sultān Abdul Mejid au mouchir de Tunis Ahmad Pacha, au sujet d'une femme nommée Fatimé revendiquant la succession de ses parents (No.203, Dossier 340, carton 220).

2 Safer 1273 (2 October 1856), Lettre de es Seyyid Mehmed ʿAli, au bāy de Tunis. Requête de la nommée Fatimé Hatoun concernant heritage en Tunisie (No.18308, Dossier 343, carton 220).

Page 48: 17 Rabiʿ I 1278 (22 September 1861), lettre de Mehmed Emir ʿAli Pacha, grand vizir, au Bāy de Tunis. Requête d'un nommé Chaʿban de Tripoli au sujet d'un heritage en Tunisie (No. 272, Dossier 343, carton 220).

Page 89: 9 Chaʿban 1259 (4 September 1843), copie d'une lettre du Bāy de Tunis Ahmad Pacha au governeur de Smyrne. Demande qu'on envoie l'argent resultant de la vente des biens laissés en héritage d'Ali Aghazade Indje Mehmed (No. 593, Dossier 379, carton 222).

27 Djoumada I 1271 (17 March 1855), lettre d'Ali Pacha, gouverneur de Damas au Bāy de Tunis. Demande de protéger al Seyyid ʿAbderrahman, qui vient recuellir héritage en Tunisie (No. 19216, Dossier 379, carton 222).

He also left unexecuted the firmān which the Sultān sent in 1856 on the equality of all subjects.[12] The Bāy turned to France for encouragement in this policy of independence. ʾAhmad selected the French as military advisors and visited Paris in 1846. France was a more likely partner than Great Britain, for many reasons. The French, after the victories of Napoleon in Egypt shattered the faith of Muslims in their own prowess. Great Britain, however, had chosen a policy that supported the integrity of the power of the Sultān. She had not hesitated in 1840, only three years after ʾAhmad had ascended the throne, to squelch the armies coming out of Egypt under Muhammad ʿAlī, whose expansionist aims threatened the Turkish centre of the Ottoman Empire. Great Britain could not tolerate any provincial military upstarts. France had another advantage over Great Britain in regard to Tunisia. She held Algeria since the 1830's against the wishes of the Sultān in Constantinople. The Tunisians, well familiar with the troubles which the Algerian tribes inflicted throughout the centuries, wanted a peaceful Algeria, and France wanted a peaceful ally against the

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Page 90: 3 Djoumada II 1273 (29 January 1857), lettre de Mahmoud Nedim, gouverneur de Smyrne, au Bāy de Tunis. Testament d'Ismail Efendi b. Davoud (Davondzade) (No. 19218, Dossier 379, carton 222).

[12]Mantran, page 61. Lettre du 21 Djoumada II 1272 (28 February 1856) d'Ahmad Kechaf au Bāy de Tunis. Annonce l'envoi d'une copie d'un firmān relatif à l'égalité des sujets de l'empire ottoman.

dominance of the Sultān.

The successors to the title of Bāy who ascended the throne in the second half of the nineteenth century continued to remain independent of the control of the Sultān. Even when Muhammad finally submitted to confirming in the ʿAhd al-ʾAmān the same principle of equality as in the Khatt-i Sherif of the Sultān of 1836 and the firmān of 1856, he neglected any reference to the faramīn of the Sultān. Muhammad Es Sādiq continued the tradition of autonomy in the constitution. It confirmed, without reference to the sanction of the Sultān, the right of the Tunisian rulers to determine their own order of succession (Article one).[12] Every Bāy after ʾAhmad also continued to rely on France for encouragement, rather than Great Britain. It was the French consul whom the Bāy invited to review the French edition of the constitution, although the British consul had suggested in 1859 the creation of a council of state or a Senate to assist the Bāy in governing. The French Emperor seemed perfectly satisfied that the actions of the Bāy neither violated the faramīn of the Sultān, nor did they acknowledge any other sovereignty

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13. Article 1: "The succession to power is hereditary among the princes of the Husseinite family by order of age, according to the customary rules in the kingdom." Translated from the French of Marty and Maarek, Vol.I, Annex (Constitution of 1861).

except that of the Bāy. The British would have had both a constitution and a firmān from the Sultān confirming the Husseinite succession and internal autonomy.

What had changed since the reign of ʾAḥmad Bāy was the nature of the influence the Bāy accepted from the Europeans. ʾAḥmad had rejected Western methods of governing, that is, by constitutional reins on the Sovereign. He had taken from Europe only what he thought might strengthen one of the traditional Ottoman pillars of power, namely, an efficient military. The main lever of French influence was thus in military advisors attached to the first secular school in Tūnis, the military school of Bardo (suburb where the palace of the Bāy was located). However, from the time of ʾAḥmad's successor, Muḥammad, and onwards, the Bāy chose to communicate with Europeans through political and legal documents, pacts, and constitutions.

The reasons for the change were two: the greater strength of the European influence, and the greater strength of a bureaucracy composed of the Mamluk ministers and tax collectors of the Bāy. As we shall see, the strength which the bureaucracy of the Bāy attained was in part due to a defensive reaction against encroaching Europeans. Both Europeans and Tunisian ministers had subtle mentalities. Both preferred to

rely more on edicts and authority of hierarchical organisation than on the military to achieve their ends.

Why had the European influence grown since the reign of ʾAḥmad Bāy? The Europeans of the nineteenth century had begun dealing with the Ottoman Empire according to a strictly legal order of authority. First they worked with the Sulṭān. Great Britain had naturally been drawn to the eastern part of the Ottoman Empire because of its proximity to her own eastern empire. All other powers naturally gravitated towards the same area to counterinfluence one another. In time, the Europeans influenced and won from the Sulṭān commercial rights and mixed courts. As they expanded into other parts of the Ottoman Empire, they expected the same from the provinces. But finding that rights gained in Constantinople did not guarantee the same rights elsewhere, the Europeans dealt with the Ottoman provinces on an individual basis, making the same demands for guarantees on legal paper as they had from the Sulṭān. In regard to the Tunisian province, the French, quarrelling with Constantinople ever since the 1830's when France took over Algeria, especially encouraged Tunisia to imitate the policy of the Porte of capitulations without the dominance of the Porte. The constitution that Emperor Napoleon III re-

ceived from the Bāy served two purposes: one, to define internal governing structures and the extent of the rights of foreigners, and two, to reaffirm the autonomy of the Bāy and his rights to deal with foreigners without the interference of the Sultān.

As for the greater strength of the ministers of Muhammad Es Ṣādiq, most of them disliked any competitors, European or otherwise, for the favour of the Bāy and rights to own his lands. These ministeres were "mamluks", the main groups through whom the Tunisian rulers, like all other Ottoman provincial princes governed. The upbringing of the Mamlūks was designed to insure a political corps loyal to the ruler. Originally Christian renegades of Greek or Circassian origin, the Mamluks were bought by Muslim princes when children as slaves in the markets of Constantinople. They were brought up in Islam then freed, but retained as loyal employees of the emancipator. The Bāy chose among them his favourites, made them a part of his family by marrying them to his sisters or daughters, and gave them whatever positions of power he chose. Having no blood family, no roots in the country and no influence except through the Bāy, the only stake they had in life was in power and politics. They had been bought by the Bāy as political pawns, and the game was dangerous. What fortunes and properties they built up

during their periods of favouritism more often than not aroused the suspicions of the Bāy. Quick summary justice which ended in loss of property or of life was the sole most effective weapon against their rapacity.

By the time the constitution was promulgated in 1861, the Mamluks, making up the majority of dignitaries at the court, were the most powerful officials next to the Bāy. The Prime Minister who headed the commission that drafted both the ʿAhd al-ʾAmān and the constitution was a Mamluk, called Mustapha Khaznadar. Born in the Aegean Islands, he had become brother-in-law of ʾAhmad Bāy and his treasurer (khaznadar). Under Muhammad Bāy he became Prime Minister. Kept by Muhammad Es Sādiq, he rose to great power. Whatever opposition he faced on his commission from the Minister of War and the four muftūn representing the traditional legal corps was in the minority. The Mamluks were in the majority. Even though there appeared to be solidarity then among the Mamluks, there sat on the commission another Mamluk who was to replace Mustapha in the latter nineteenth century as the result of a typical Mamluk intrigue. He was Khair ad Dīn Pacha (generally spelled Kheredine), a Circassian Mamluk and son-in-law of Mustapha, and Minister of the Navy at the time.

In competing with the Europeans for power over the

Bāy, the Mamluk ministers fought on the terms of the Europeans, namely, words with words. The first document, the ʿAhd al-ʾAmān, Mustapha edited when first made Prime Minister, under Muhammad Bāy; it reflected in actuality the concessions to the desires of the Europeans for an equal chance to compete in the Tunisian economy. The concessions appeared in the guise of the broad principle of equality of all inhabitants in the Tunisian relams. The second document which Mustapha edited, the constitution, reflected more the realities of Mamluk power and the dreams of the Mamluks to perpetuate by law that power.

Referring to themselves in the abstract as ministers and high government officials, the Mamluks achieved in the constitution two safeguards for their power. One was to interpose themselves between the Bāy and all other subjects -- Tunisian or foreign, no matter. The second was protection of all subjects -- high officials, low officials, ordinary subjects, even members of the Royal Family -- from arbitrary judgments when disputes arose.

The role as intermediator between the Bāy and other subjects was written into articles regulating appointment and dismissal. Without a constitution, the Bāy had a choice as to when he wanted to rule his subjects directly without interference of Mamluks and when he

wanted Mamluks to intervene for him. The constitution ended such choice. From the vagueness of the constitution about the appointment of ministers (provision being made for appointment of all other officials) one can surmise that the choice to appoint ministers or not was left to the Bāy. But once he decided to appoint ministers, he had, by law, to rule through them, unless he could think of a clever way to override the Mamluks.

Beginning as soon as Article two of the constitution, the Ministers had a hand in the Royal Family.[14] The Prime Minister (Mustapha Khaznadar at the time) and the President of the Supreme Council (Khair ad Dīn in 1861) were responsible for inscribing the civil list of the Royal Family, and as members of the Privy Council and ministers, they could be eligible to be appointed by the Bāy to ad hoc commissions which would investigate facts in disputes involving the Royal Family (Articles six, seven, eight).[15] As for appointments

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[14] Article 2: "There will be two registers signed by the Prime Minister and the President of the Supreme Council where the civil status of the royal family will be inscribed. One of these registers will be deposited in the archives of the Supreme Council." Translated from the French of Marty and Maarek, Vol.I, Annex.

[15] Article 6: If as a result of a contravention against the present dispositions or for any other cause, a dispute arises among the members of the reigning family for personal reasons, this dispute willbe arbitrated by a commission which the head of the family will institute ad hoc, under his presidency or under the chairmanship of the principal members of the reigning family whom he

and dismissals, the power of the Bāy to choose and name his subjects in high offices and to dismiss them when he thought suitable (Article fourteen)[16] was hedged by many other articles defining composition and attributes of officials. As mentioned before, there

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will designate to that effect. This commission will be composed of a member of the reigning family, the ministers, and the members of the Privy Council. The commission will be charged with making a report on the affair and if it establishes the existence of a violation, it will write on the report: "It is stated that the prince...is at fault", and it will present the report to the Head of State to whom belongs alone the right to punish the members of his family in penalising them in any way he thinks suitable.

Article 7: Any misdemeanor committed by a member of the reigning family against a particular person will be judged by a commission which the Head of State will name on an ad hoc basis, under his chairmanship or that of a member of the family whom he will designate. This commission will be composed of ministers in active service and of the members of the Privy Council; it will be charged with writing a report on the complaint and on the evidence produced in support of the complaint, and the commission will present it to the Head of State, who alone will pronounce the penalty to inflict, if guilt is established.

Article 8: The crimes which will be committed by the members of the reigning family whether against the State, whether against a particular individual, will not at all be judged by ordinary courts. A commission composed of the ministers in active service, of the members of the Privy Council and of the President of the Supreme Council, under the chairmanship of the Head of State himself or of the principal member of the reigning family after him, whom he will designate to this effect, will be charged with conducting the matter and with pronouncing the penalty which the guilty will merit according to the Penal Code. This commission will present sentence, signed by the President and by all the members, to the Head of State, who will order execution or will grant a commutation of the penalty.

[16] Article 14: The Head of State chooses and names his subjects in the high offices of the kingdom and has the right to dismiss them from their functions when he thinks it suitable. In the case of misdemeanors or

was no article specifically on the appointment of ministers. Instead, the duties of ministers were designed to over-lap non-ministerial functions. One of such functions was participation in the Supreme Council, a body of not more than sixty members (Article forty-four).[17] Second to the corps of ministers in the political hierarchy, the Council could act as a judicial body (a criminal court of highest arbitration, or cour de cassation[18], Article sixty), a semi-legislator (drafter of new law projects, Article sixty-two),[19] a general deliberative body on all major matters, including explanation of texts of codes (Article sixty-three),[20] and a budget manager (Article sixty-four).[21] By Article forty-five[22] the Bāy could choose the members of the Supreme Council only with the consent of the ministers. Even if he bypassed their consent, Article forty-four[23] ensured that at least one-third of the members of the Supreme Council were ministers and government officials. The very list of other notables, from whom the remaining two-thirds of the members of the Council were nominated by the Council, was prepared by the Council (Article forty-seven),[24] although the Bāy could refuse to sign the list.

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crimes, the officials will be dismissed only in the manner prescribed in Article 63 of the present code.

(Other footnotes 17 to 24 continued next pages)

[17]Article 44: The number of members of the Supreme Council cannot exceed sixty.

A third of this number will be taken from among the Ministers and the officials of the government of the civil and military order.

The other two-thirds will be taken from among the notables of the country.

This Council will have secretaries in sufficient number.
(Marty and Maarek)

[18]Article sixty: The Supreme Council is the guardian of the Fundamental Pact and of the laws, and the defender of the rights of the inhabitants. It opposes the promulgation of laws which will be contrary to or which will attack the principles of the laws, the equality of inhabitants before the laws, and the principles of the tenure of the magistracy, except in the case of dismissal for a crime committed and established before the court. (Marty and Maarek)

[19]Article 62: The Supreme Council can prepare projects of law in the large interest of the country or for the government. If the proposition is adopted by the Head of State in his Council of Ministers, it will be promulgated and become part of the laws of the kingdom.
(Marty and Maarek)

[20]Article 63: The matters which can be decided only after having been proposed to the Supreme Council; discussed in its midst; examined to see whether they conform to the laws, are advantages for the country and inhabitants, and are approved by the majority of its members, are: the promulgation of a new law, the augmentation or diminution of taxes; the abrogation of a law by another one more useful; the increase of the armed land and sea forces, and military material; the introduction of a new industry and anything new; the dismissal of an official of the State who will have merited this penalty for a crime committed and judged; the solution of disputes which could arise among the employees for reason of service; and questions not provided for in the code; the explanation of the text of codes; the application of their dispositions in case of dispute; and the sending of troops for an expedition in the kingdom.
(Marty and Maarek)

21. Article 64: The Supreme Council will have the right of control over the expense accounts made in the past year, presented by each minister. It will study the demands for funds made for the following years, compare them with the revenues of the State during these same years, and will fix the sum allocated to each ministry so that each department can no longer spend more than the sum allocated to it, nor spend on objects outside the ones indicated for it. The details of these services must be discussed in the midst of the Supreme Council and approved by the majority of its members. (Marty and Maarek)

22. Article 45: At the time of the installation of this Council, the Head of State will choose its members with the consent of his ministers. Article 44 refers to numbers in the Supreme Council. (Marty and Maarek)

23. Article 44: The number of members of the Supreme Council cannot exceed sixty.

A third of this number will be taken from among the Ministers and the officials of the government of the civil and military order.

The other two-thirds will be taken from among the notables of the country.

This Council will have secretaries in sufficient number. (Marty and Maarek)

24. Article 47: The Supreme Council will establish with the consent of the Head of State, who will sign it, a list of forty notables from whom will be taken by lot the replacements of the departed members. (Marty and Maarek)

Article fifty[25] guaranteed the members of the Council (ones who were not ministers) at least a five year tenure, unless they committed a crime or misdemeanor. No mention was made again of the right of the Bāy to dismiss (Article fourteen).[26] As for the lower officials in the ministerial departments, the Bāy appointed them, but again at the proposal of the Minister. Dismissal of any such employee was to be initiated by the Minister and only sanctioned by the Bāy (Article thirty-six).[27] Article eighty-one defined even more the conditions under which officials were to be dismissed: "No official, whatever his rank, can be dismissed except for an act or a speech contrary to the loyalty demanded of the position he occupies.

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[25]. Article 50: The members of this Council will be in office for the entire time specified in article 46 (five years), unless they commit a crime or misdemeanor proved before the Council.
(Marty and Maarek)

[26]. Article 14: The Head of State chooses and names his subjects in the high offices of the kingdom and has the right to dismiss them from their functions when he thinks it suitable. In the case of misdemeanors or crimes, the officials will be dismissed only in the manner prescribed in article 63 of the present code.
(Marty and Maarek)

[27]. Article 36: All the officials of the various departments are named by the Head of State, on the proposal of the competent Minister. If the Minister considers the dismissal of one of his employees of any of his departments, he will propose it to the Head of State who will sanction his demand.
(Marty and Maarek)

His misdemeanor must be stated before the Supreme Council. If it is proved, on the contrary before the Supreme Council, that the official was accused wrongly, he will continue to occupy his position, and the accuser will be condemned to the penalty in Article 270 of the penal code." Dismissal on any level was made even more difficult by the realities of appointment. Nothing in the constitution prevented one person from holding more than one position simultaneously. In the nineteenth century ministers usually in fact held several positions simultaneously.[28]

Once the ministers had advised the Bāy on appointment and dismissal and the Bāy sanctioned the advice, the Minister assumed the most direct control over the subordinates in his department, especially in matters of complaints against his subordinates (Article forty).[29] The Minister then was responsible for taking the matter to the Bāy or the Supreme Council

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28. Ganiage, pages 76-78.

29. Article 40: Complaints addressed to the Minister against whichever officials are under his department will be examined by him without delay, in a manner he will judge suitable for arriving at the truth of the matter. In this case the Minister, judging solely the conduct of his subordinate, will not be obliged to follow the procedure in use before the ordinary courts for the interrogations. When the truth of the facts willhave been stated, he will give the right of claim to the plaintiff if there be one, within a period that does not exceed one month. If after this delay he has not done justice to the reclamation of the plaintiff, the latter can address his complaint in writing to the Supreme Council. (Marty and Maarek)

if necessary (Articles forty-one and forty-two).[30]

Nonetheless, power of appointment or dismissal meant little if one did not have funds to operate. The purse strings were put in the hands of the highest ranking Mamluk, the Prime Minister. Although certain fixed sums were set aside for the expenses of the Royal Family in Articles twenty-nine and thirty[31] (including the princesses to whom a Mamluk might have been married, such as Mustapha), the accounting for the budget of the government was left to the Prime

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30. Article 41: In the case where a recourse is open to the Head of State on the matter of a complaint addressed to the ministerial department, the Minister cannot pronounce his decision before knowing that of the Head of State.

Article 42: Complaints of the governors against the governed, and vice versa, when it is a question of matters of service, will be carried, with evidence to support, before the competent Minister, to be examined and then carried to the recognition of the Head of State in his Council.
(Marty and Maarek)

31. Article 29: Out of the revenues of the government will be raised a sum of 1,200,000 piasters every year for the Head of State.

Article 30: There will be equally taken out an annual sum of 66,000 piasters for each of the married princes; 6000 piasters for each of the unmarried princes, who are still under paternal authority; 12,000 piasters for each of the unmarried princes whose father is dead up until the time of his marriage; and 20,000 piasters for the married or widowed princesses; 3000 piasters for the unmarried princesses whose father is still living; 8000 piasters for the unmarried princesses, after the death of their father and until the time of their marriage; 12,000 piasters for each widow of the Head of State; 8000 piasters for each widow of the deceased prince.

Furthermore there will be allocated the sum of 15,000 piasters to each prince and 50,000 piasters to each of the princesses at the time of their

Minister (Article seventy-five).[32] Each minister had to submit past expenses and estimates of future expenses to the Prime Minister who in turn presented accounts to the Supreme Council (Article seventy-six).[33] The Supreme council then allocated sums to the various departments. The Bāy was not involved (Article sixty-four).[34] The bureaucracy consolidated its control over the collection of the revenues too in Article one hundred three: Persons outside the government were to lose the power to buy out rights to collect taxes

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marriages for the costs of the weddings. (Marty and Maarek)

32. Article 75: Each Minister must submit to the Prime Minister an account of the expenses spent on the credit and indicate the amount of the expenses to come. Thus, the first of moharrem 1277, each Minister must present an account of the year 1276 and indicate the necessary crèdits for expenses of the year 1277. (Marty and Maarek)

33. Article 76: The Prime Minister will present to the Supreme Council the accounts and the supporting evidence which will have been presented to him by the other Ministers, along with the necessary explanations. (Marty and Maarek)

34. Article 64: The Supreme Council will have the right of control over the expense accounts made in the past year, presented by each Minister. It will study the demands for funds made for the following year, compare them with the revenues of the State during this same year, and will fix the sum allocated to each ministry so that each department can no longer spend more than the sum allocated to it, nor spend on objects outside the ones indicated for it. The details of these services must be discussed in the midst of the Supreme Council and approved by the majority of its members. (Marty and Maarek)

and debts.[35] Mustapha Khaznadar apparently succeeded in using all his powers as Prime Minister and budget manager to the fullest. For historians credit him for manipulating Tunisia into financial bankruptcy.

The second achievement of the Mamluks -- that is, the protection from arbitrary decisions in disputes -- took the form of various articles on rights of various organisations to undertake legal inquiry into the facts. A member of the Supreme Council appeared before his own peers, that is, the Council, if he committed a crime or misdemeanor (Article fifty).[36] All other government workers, ministers, and government agents below ministerial level were examined before the Council only if the complaint against them related to their functions or violations of the law and regulations, and if the penalty merited was no more than dismissal, suspension, or payment of a fine (Articles seventy and seventy-one).[37]

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35. Article 103: All the rights and debts will no longer be farmed out, but will be collected by the employees of the government whose administration will be regulated by a special law which will be ultimately elaborated and made a part of this code.
(Marty and Maarek)

36. Article 50: The members of this Council (Supreme) cannot be removed for the entire time specified in article 46 (five years) unless they commit a crime or misdemeanor proved before the Council.
(Marty and Maarek)

37. Article 70: The complaints against the Ministers, for facts relating to their functions or for violation of

Affairs that merited heavier penalties such as exile, detention, forced labour, capital punishment, were sent before the criminal court (Articles seventy and seventy-one),[38] which in the 1860's was in fact headed by a Mamluk (see page 68 post). The only difference between the ministers and subordinate agents of the government was that the ministers went directly to the Supreme Council, whereas the agents went first before the relevant Minister, who in turn was responsible for recourse to the Supreme Council (Articles seventy and seventy-one).

Yet for criminal complaints involving injury to private persons by a Minister or member of the Supreme Council or subordinate government agent, the criminal court handled investigation and sentencing once the

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the laws, will be carried before the Supreme Council, with proof to support, for examination before it. If the deeds committed result in dismissal, suspension or payment of a fine fixed by the code, the penalty will be pronounced by the Council. If, on the other hand, the guilty merits a more serious penalty, the affair will be sent before the criminal court.

Article 71: The complaints against the agents of the government other than the Ministers for deeds relating to their functions will be carried before the Minister to whom they are subordinate, and from there to the Supreme Council, to be judged according to the dispositions of the code.
(Marty and Maarek)

[38]. Article 71, above, footnote 37.

Supreme Council gave authority to do so (Article seventy-two).[39]

All civil disputes or debts against a Minister or other government agent went to the civil court without interference from the Supreme Council.

The most significant omission in these articles on the bureaucracy was the office of the Bāy. His judicial powers were limited only to passing sentence on members of the Royal Family; even inquiry was removed most times from his hands (Articles six, seven, eight).[40]

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[39] Article 72: The knowledge of the crimes or misdemeanors against private persons, committed by the Ministers, by the members of the Supreme Council, or any other official of the government will devolve upon the criminal court, on condition, however, that it will not pursue the guilty without the authorisation of the Supreme Council. Nonetheless, in the case of flagrant abuse, the court can have the guilty arrested and demand authorisation from the Council to pursue the case.
(Marty and Maarek)

[40] Article 6: If as a result of a contravention against the present dispositions or for any other cause a dispute arises among the members of the reigning family for personal reasons, this dispute will be arbitrated by a commission which the head of the family will institute ad hoc, under his presidency or under the chairmanship of the principal members of the reigning family whom he will designate to that effect. This commission will be composed of a member of the reigning family, the ministers, and the members of the Privy Council. The commission will be charged with making a report on the affair...and it will present the report to the Head of State to whom alone belongs the right to punish the members of his family in penalising them in any way he thinks suitable.

Article 7: Any misdemeanor committed by a member of the reigning family against a particular person will be judged by a commission which the Head of State will name on an ad hoc basis, under his chairmanship or that of a member of the family whom he will designate. This commission will be composed of the ministers in active

Although Article sixty-six was never called into operation, it represented a bold move by the Mamluks: The Head of State could be called before a select subcommittee of the Supreme Council if he violated the laws. The committee was responsible for taking the matter to the full Council. The Council had the right to discuss the violation, but the article lacked provision for passing sentence.[41]

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service and of the members of the Privy Council; it will be charged with writing a report on the complaint and on the evidence produced in support of the complaint, and the commission will present it to the Head of State, who, alone, will pronounce the penalty to inflict, if guilt is established.

Article 8: The crimes which will be committed by the members of the reigning family whether against the State, whether against a particular individual, will not at all be judged by the ordinary courts. A commission composed of the ministers in active service, of the members of the Privy Council and of the President of the Supreme Council, under the chairmanship of the Head of State himself or of the principal member of the reigning family after him, whom he will designate to this effect, will be charged with conducting the matter and pronouncing the penalty which the guilty will merit according to the penal code. (Marty and Maarek)

41. Article 66: The complaints about violations of the laws, committed by the Head of State, or by any other individual, will be addressed to the Committee charged with ordinary service. The said Committee must convene for three days the Supreme Council, in time of vacation, and will make it aware of the said complaint. If the Council is in service, the complaint will be immediately brought to its attention for discussion.
(Marty and Maarek)

Thus, by sheer number of articles, the Europeans lost out in the constitution. The drafting commission under Mustapha spent more time on articles defining legal rights of ministers and officials, who were Mamluks, than on the rights of Europeans. So far as Europeans were concerned, Article one hundred seven[42] simply reiterated the ʿAhd al-ʾAmān (Article III on equality and security before the Tunisian law). Yet equality as translated in the subsequent articles of the constitution meant no concession to the demand of the Europeans for special courts when disputes involved Europeans. The mixed commerical court, promised in Article VII of the ʿAhd al-ʾAmān, was only briefly mentioned in the constitution; and who was to compose it was a question left unsettled: "There will be a court of commerce for dealing with commercial affairs." (Article twenty-five). Article one hundred fourteen more explicitly confirmed Tunisian jurisdiction over foreigners: Europeans could not have special courts because special courts meant special rights, and every one living in Tunisia was supposed to be equal before the law. The Tunisians would try

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42. Article 107: They [foreign subjects] will enjoy the same personal security guaranteed to the Tunisian subjects by Chapter (Article) II of the Explanation of the Fundamental Pact.
(Marty and Maarek)

to give the Europeans the advantages the Europeans were accustomed to at home, advantages which Muhammad Bāy had recognised in the ʿAhd al-ʾAmān ("We have seen... those great powers who by their wise policy have placed themselves at the head of nations in giving the most complete guarantees of liberty." -- Introduction, paragraph thirteen). The Tunisians would achieve the same by appointing good judges and having precise codes on which the judges were to base arguments. Yet no European could sit as a judge. The role of Europeans was either to appear as an accused or as a consul accompanying his charge to court and being present at the trial.[43]

The most surprising affront to the Europeans, however, appeared in Article one hundred thirteen. It qualified the concession that had been made four years before in Article XI of the ʿAhd al-ʾAmān: "Article XI

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43. Article 114: The creatures of God being equal before the law, without distinction, whether for cause of their origin or their religion, or their rank, the foreign subjects established in our Realms, who are called to enjoy the same rights and advantages as our own subjects, must be subjected, like the latter, to the jurisdiction of the various courts which we have instituted to this effect.

The greatest advantages are given to all, whether by choice of the judges, whether by the precision of the codes according to which the magistrates must judge, whether by the various degrees of jurisdiction; and yet, in order to give a greater security we have established in the civil and criminal codes that the consuls or their delegates will be present before all our courts in the causes or trials of the persons within their jurisdiction.
(Marty and Maarek)

of the Fundamental Pact accorded to the foreign subjects the capacity to possess immoveable properties on conditions to be established, but be what it may that all results from the said Fundamental Pact are obligatory, it has been recognised, considering the state of the interior of the country, that it is impossible to authorise the foreign subjects to possess there (in the interior), for fear of the consequences. Also a special law will designate the localities of the capital and its surrounding areas, and of the cities of the coast and their surrounding areas where the foreigners will be able to reside.

It is well intended that the foreign subjects who will possess immoveables in the localities designated will be subject to the laws established and to be established on an equal footing with the Tunisian subjects." In this article, to possess meant the same as in Article ninety-six: "All those of our subjects who possess an immoveable, whether as a share-cropper colonialist (colon partiaire), by perpetual rent (enzel, inzāl), or by right of enjoyment, can cede their rights of property by sale, gift, or any other manner, only to those who have the right to possess in the Kingdom..."

Europeans could not quarrel or contest over the new legal enlightenment in an area of the world known

for its "oriental despotism". The grand principles of justice and equality before the law, instead of arbitrariness, were adopted in Tūnis. Whom they were to serve, the Europeans discovered to their consternation, was another matter.

As to be expected from a constitution that reflected political interests, the victory of the Mamluks on one political front caused another front to erupt. The battle took the form of a popular revolt in 1864, only three years after the promulgation of the constitution. For the cumulative causes of the uprising in the Tunisian interior, historians have turned to the power which the Mamluks had accumulated and used to complicate the number of channels to the ear of the Bāy. Both Europeans and Tunisians railed against the insulation which the Bāy seemed perfectly content to allow, once he appointed the Supreme Council. As early as 1862 the French director of the military school of Bardo wrote: "Articles one, six, and seven (of the constitution) conferred upon the different courts the exercise of justice. From then on the Bāy ceases to have a rapport with the country. Encased in Bardo (Palace), kept in sight day and night by the Prime Minister, who never lets him alone for one instant, even with the consuls of the foreign powers, he has become nearly invisible to his subjects. Never

before has the constitutional formula -- the King reigns and does not govern -- been applied in a more absolute manner...

"While the different articles of the constitution eroded successively the attributions of the power of the Bāy, the Mamluks neglected nothing in collecting their due. Controlling the principal civil or military offices, one of them presided over the criminal court of Tūnis; another presided over the Supreme Council. In this Supreme Council are gathered at the same time the attributions of the legislative body, the Senate, the Council of State, the highest appellate court, and the Court of Accounting. The guarantees that all the governed people of constitutional states find in the division of powers no longer exist here, and one can hardly explain how the European consuls, who...took part in the editing of the Tunisian constitution, could be accomplices in the monstrous creation of this Supreme Council, where all the powers are confused and which is only a revival of the old Turkish Dīwān.[44] It is true that the life of the Bāy is no longer threatened each day [as in the day of the Dīwān], but only on the condition that their power will be nothing, their intervention in all affairs

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44. The tyranny of the Dīwān, which had all power, resulted in a revolt among the military ranks in the sixteenth century. See page 26 above.

nothing. Near the Head of State, who is reduced to the role of an idle king, watches each day a permanent committee composed of about ten members of the Supreme Council. This committee, called the "committee of ordinary service", receives the complaints for infractions of laws committed by the Bāy or by any other individual. It is composed of the most influential Mamluks.[45]

"...The Tunisian constitution ended in the formation of a Council of ten, a kind of Commission of Surveillance, analogous to the one which the French Assembly of 1849 invented..."[46]

Among the Tunisians, the isolation from the Bāy meant a siphoning off of power from local administrators to the centralised unit of Mamluks in Tūnis, who were the clearing house for both the Bāy and the people. The Mamluk higher officials began dominating local of-

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45. Article 54: There will be detached from this (Supreme) Council a committee charged with ordinary service, such as giving advice to the Head of State or to the other princes when they demand it, on affairs which do not necessitate the approval of the Supreme Council: such as to prepare matters which must be submitted for deliberation of the Supreme Council, to designate the days of the meetings of the Council, etc. ...
(Marty and Maarek)

46. Ganiage, pages 76-78. Quotes from letter of Lt. Col. Campenon to Maréchal Randon, Minister of War, 31 May 1862. Letter published by P.Grandchamp in Documents relatifs à la révolution de 1864 en Tunisie.

ficials by virtue of three innovations in the constitution of 1861: power of appointment, government control over tax collectors, and secular courts.

Before the constitution, the chief local administrators were appointed by the Bāy. Upon the promulgation of the constitution, the Bāy could make no appointment without the consent of the Mamluk ministers. In fact, Mamluks not only influenced appointment of indigenous Tunisians to posts of caïd (qāʾid); they appointed themselves to the post of caïd (qāʾid).[47] For example, the Minister of the Navy was also the caïd (qāʾid) of the port of Tūnis.

Even when the Mamluks refrained from replacing an indigenous caïd (qāʾid) with a Mamluk, they were given under the constitution the power to interfere with the revenue collecting functions of the caïd (qāʾid). Prior to the constitution, the caïd (qāʾid) regarded his office as a non-salaried benefice; they used whatever forces they had at their disposal to collect taxes, then deducted from their collection what they needed to maintain their households. Article one hundred three of the constitution threatened to regulate tax collection so that the caïd (qāʾid) would be an administrative official whose salary would be separate from the taxes(See footnote 35, page 60 above).

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47. Ganiage, page 221.

Soon to be deprived of his control over his personal income, the caïd (qā'id) had already lost by virtue of the constitution his most important powers in repressive justice. The caïd (qā'id) previously could remove a matter from a local qādī on the pretext that it involved public order. Articles twenty-two and twenty-three of the constitution set up police and criminal courts which took over much of the jurisdiction of the caïd (qā'id) and centralised administration of justice in towns. The criminal court of Tūnis had jurisdiction over the entire country, although courts of first instance had been established in other main towns. Whichever court one chose to go to, and if one wanted appeal, one would have to go to Tūnis, the only city with appellate courts. Given the chance to plead in the capital city, even for first instance matters, most plaintiffs went to Tūnis, seat of the Bāy. This caused overcrowding in the courts of Tūnis and delayed hearings and the execution of judgments.

Defeated in competition with the Mamluks for higher posts, shorn of influence with the Bāy for appointments, shorn of the right to determine their salaries from collected revenues, and shorn of most judicial duties, the qāda sought channels of revenge. Their chances came when the general populace grew dissatisfied with the inconvenience of more centralised

justice -- longer trips, longer procedures. The qāda capitalised on such popular dissatisfaction by tolerating disorder in their provinces to prove the ineffectiveness of the new system.[48] Even the Bedouins grew dissatisfied. They disliked the new formation of the new courts and could hardly understand reasoning based on codified principles. The French military advisor to the Bāy was well aware of the growing discontent and summarised the situation: "...(T)he Arab depended in former times administratively on the caïd (qāʾid), and judicially on the qādī, with final recourse to the Bāy. He was, according to his pittoresque expression, eaten by two men, but by two men only. Today since most of the attributions of the caïd (qāʾid) and qādī have devolved on the courts, he is eaten by all members of the court. Formerly he yielded to the decision of local justice because it was prompt, and only in serious cases would he go to appeal to the sovereign. Today the inhabitant of Gabès, eighty leagues from Tūnis, who wants to appeal a judgment rendered against him by the court of his locality, must go to Tūnis. After this so burdensome dislodging, he no longer has the privilege to expose himself his griefs to the Bāy; it is to a committee derived from the Supreme Council, composed of a certain number of

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48. Ganiage, page 119.

these detested Mamluks, who, transformed into members of the highest appellate court (cour de cassation), annul or validate the first judgment.

"Everything thus has been suddenly changed in the habits of these so unchangeable Arab people; also the germs of discontent have not been slow in forthcoming. Some months ago (in 1862) 1200 inhabitants of Tūnis went to Bardo (the Palace of the Bāy) carrying banners of the most venerated marabouts. They went to demand of the Bāy to deliver them from the innovations and to prevent the export of grains. The Bāy held firm and had the principal leaders imprisoned. Undoubtedly, if he had conceded, serious disorders would have taken place in the European quarter of Tūnis.

"In their cunning politics, the Mamluks have not failed to say to the people: 'The reforms against which you protest are not our work, but that of the Christians (memories of whose Crusader exploits were hard to forget). Their consuls have imposed them on us by force. Incline yourselves to what it takes to rouse the 'Betters'.' "[49]

The populace continued to blame the Mamluks for finding so much advantage for themselves in surrendering to the demands of the Europeans. The event which

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[49]. Ganiage, pages 188-189. Quotes from Lt.Col. Campenon, 1862.

precipitated revolt in many parts of the country was an increase in the tax of medjba (majban). The medjba (majban) was a head tax which was introduced during the reign of Muhammad Bāy (1855-1859). A small tax of a fixed monetary value (thirty-five piasters),[50] it hardly affected urban areas. Muslim people of Tūnis Kairouan, Sūsa, Monastir, and Sfax, government employees, soldiers, students, the ʿulamāʾ, and the Hebrews of Tūnis were exempted.[51] In September of 1863 the government extended the medjba (majban) to all Tunisians, without any consideration of class or religion. Only three months later the tax was doubled. The people of the southern desert refused to pay and the nomadic tribes moved into Tripoli to escape count. The French consul advised the khaznadar (treasurer) to revoke the increase, and thereby won the undying hostility of the Prime Minister of the Bāy.[52] When the government agents began collecting the tax in earnest, the revolt broke out. The revolt proved that the Mamluks who had denied in the constitution to the Europeans the right to possess land in the interior, had no capability themselves for con-

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50. One piaster equalled half a franc. See Article 3 of the Convention of La Marsa, page 103 post, footnote 83.

51. Ganiage, page 192. Also Encyclopedia of Islam, "Tunisia", First edition, 1918-1934.

52. Ganiage, page 192.

trolling the interior (see page 66 above). Tribal leaders led an armed revolt. The most powerful was a qādī's son who had studied at the Great Mosque Zaitūna in Tūnis. In the tradition of violent upheavals in the day of the founder of the Husseinite dynasty, the tribal leader proclaimed himself Bāy only ninety-five miles south-west of Tūnis. At Kairouan, the city of orthodoxy, he tried but failed to organise a conference of tribal heads. All the villages in the Sahel, the eastern coastal region between the towns of Sūsa and Sfax, revolted. Yet the cities and most tribes staged a more passive revolt. They merely refused to pay the medjba (majban) or any other debts to Europeans or Hebrew creditors.[53] Tūnis remained untouched. The rallying cry of the rebels was: "Plus de capitation, plus de Mamluks, plus de constitution" (No more head tax, no more Mamluks, no more constitution).[54]

In an effort to quell the revolt by appeasement, the Bāy announced in April of 1864 that he renounced the doubling of the medjba (majban) and the judicial reforms, and he suspended the constitution temporarily.[55]

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53. Ganiage, pages 194-195.

54. Ganiage, page 188.

55. Ganiage, page 221.

Shortly afterwards the khaznadar negotiated with the Arab chiefs in the Kairouan area. He had the Bāy announce measures dictated by the insurgents: unconditional amnesty, reduction of the medjba (majban) to about one-third of its original level under Muhammad Bāy, reduction by half of the achour (ᶜushūr, the tax in kind on grains, kept by the constitution, which otherwise abolished taxes in kind, Article one hundred four),[56] nomination of indigenous qāda instead of Mamluks for the provinces, abolition of the constitution, and suppression of the new courts installed in 1861. In July of 1864 four hundred cheikhs (shuyūkh, assistants to qāda) and notables surrendered after having won their demands. Nearly one hundred years were to pass before Tunisia received another constitution.

The remaining eighteen years of the reign of Muhammad Es Ṣādiq after the revolt of 1864 were generally demoralising for the Tunisian government. Internal bankruptcy was to reduce the leverage of the government with the Europeans, who were still demanding economic influence, as well as with their own

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56. Article 104: The government will no longer levy tax by kind, with the exception of tithe (dîme) on grains and olives.
(Marty and Maarek)

Tunisian subjects, who were recuperating from the feverish reformist era of the late 1850's and early 1860's.

The revolt of 1864 revealed not only resistance of the interior to centralised administration, but also the troubled financial state of Tunisia. Even a decade before the revolt Muḥammad Bāy (1855-1859) had recognised that his Treasury received no more than one-fifth of all the sums actually collected in the country by qāda and shuyūkh.[57] The fixed medjba (majban), head tax, which Muḥammad introduced would have given a more stable income since taxes based on the value of crops would fluctuate with the poor and good seasons. By the time the number of acres under production was falling in the reign of Muḥammad Es Ṣādiq by one-third[58] since the reign of Muḥammad the government of Muḥammad Es Ṣādiq abolished all tax in kind (except the achour, ʿushūr, tax on grains) and doubled the medjba (majban). The government had to make up for the terribly incomplete registers of the Treasury. When the revolt actually broke out, the Treasury hard-

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57. Ganiage, page 116. From information confided by the Bāy in the French consul at the time, Léon Roches.

58. Ganiage, page 192. From quotations of the French consul De Beauval after Roches left.

ly had money to wage war against the rebels. The Ottoman Sultān sent three squadrons and a commission of inquiry. The British consul encouraged a détente between the Sultān and the Bāy. He suggested that Constantinople grant Tunisia one hundred thousand pounds in return for the costs which the Bāy had borne in sending troops to the Crimean War. In August of 1864 the Sultān granted a gift of fifty thousand sovereigns to help the Bāy.[59]

Meeting the demands of the insurgents to reduce the medjba (majban) and the achour (ʿushūr) drastically, the government still had nothing to pay off the debts which the Prime Minister Mustapha Khaznadar had made. Famine struck for two years (1867-1869).[60] It is small wonder that five years after the revolt, Tunisia had no strength to resist the Europeans who imposed the International Financial Commission upon her. A Mamluk, Khair ad Dīn Pācha, was made its president. Although he had held a ministerial post and the presidency of the Supreme Council for a year and a half in the constitutional era, he afterwards had held himself aloof from the government until the Commission was appointed. The Commission grew increasingly dissatisfied with the

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59. Ganiage, pages 208-210.

60. Poncet, page 44.

floundering administration of Mustapha, the architect of a constitution and treasury which were both in shambles. He became a victim of a typical Mamluk intrigue, the sort of which he had hoped to end through his constitution of 1861. He was dismissed in 1873. His son-in-law, Khair ad Dīn, was appointed Prime Minister. For the president of the International Financial Commission, it was appropriate that he have also the executive power necessary to bring order to the financial administration of Tunisia.

Taxes concerned Khair ad Dīn foremost, as they had Mustapha. Having faith in reorganising structures and reappointing new personnel, Khair ad Dīn concentrated on small sound improvements and detailed written instructions. To reduce pilfering of taxes, he fixed the salary of the qā'id at one tenth of the sums each collected, but required a detailed report of accounting and delivery of taxes so that he could judge whether local agents were following his own detailed instructions on ways to collect taxes. To reduce government expenses he replaced burdensome camps with light expeditions to bring in tax collections to the capital.

Since taxes would be difficult to raise unless people themselves had sources of income, Khair ad Dīn encouraged agricultural production. He gained control over whatever vacant or uncultivated lands he could.

For example, for lands around one of the main towns in the south-west, he refused to renew the one hundred year old grant which the Bāy had made to a tribal family. Instead, he kept the lands in the public domain and sold them by means of long-term rent to small farmers interested in the olive industry, a source of exports and the tax of qānūn.[61] If he had renewed the grant as his predecessors had done, the revenues collected from these lands -- if any -- would have gone to the tribal family. This had been according to a special arrangement that had begun in the eighteenth century when the Bay made settlements by which various tribes were to recognise him as principal defender of peace and order.[62] To stabilise farming, Khair ad Dīn codified very precisely the rights and obligations of the owner and tenant signing a contract of khammās, a kind of share-cropping contract under which most of the important cereals, source of the tax of achour (ʿushūr), were farmed.[63] The tenants were responsible for good agricultural methods of growing and storing grain; the landowners were responsible for paying taxes and

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61. Jules Saurin, La Constitution de la propriété et les contrats de culture indigènes en Tunisie (Paris: Berger-Levrault et Cie, 1897), page 37.

62. Poncet, page 59. From documents from Affaires Indigènes from the Ministry of the Interior.

63. Saurin, page 34.

for maintenance of farm tools. To avoid confusing holdings of the government officials with holdings of the government, he introduced in 1874 a special office having authority over government lands. Its duty was to keep an exact account of the extent of these lands.

In commerce Khair ad Dīn fared less well. Regulating productions and tax collection in agriculture was easier than encouraging commerce. Commerce needed capital, and whatever money the government of Khair ad Dīn gathered went to paying off debts.

During the first five years of his government, Khair ad Dīn succeeded in reducing the budget to a level where it could support the foreign public debt, which absorbed one-half of the state revenues. Good crops over the two years after the famine of 1867 to 1869 allowed the State to meet all its debts. By 1875 the revenues could be used to discharge bonds and coupons. Despite such progress the government would not have been in any position to survive a bad agricultural year if it had occurred. That is why the efforts of Khair ad Dīn to keep account of public lands and dispose of them to persons who were willing to farm them were crucial.

In dealing with the perennial question of the status of non-Muslims, Khair ad Dīn carried on the same policy of systematising existing practises without provoking resistance. Europeans retained the right to

own immoveable property in Tunisia, as the Bāy had granted in the ʿAhd al-ʾAmān. In return the Europeans agreed to submit to the jurisdiction of Tunisian courts only in property disputes. For civil, commerical, and criminal disputes, they refused to submit to the Tunisian courts. All such litigation went to the consulate. Just before Khair ad Dīn had become Prime Minister, Khaznadar, the very Mamluk who had so confidently resisted the demands of the Europeans for a mixed court in the constitution, submitted, after a decade of financial and political exhaustion, a proposal for a mixed civil court to the Europeans. By the first year of the ministry of Khair ad Dīn, the Italian consul had drafted a proposal. The mixed courts, according to his plan, would be composed of a majority of Europeans, under the presidency of a Tunisian; they would judge cases according to a code that would be similar to codes elsewhere in the Ottoman Empire. Tunisia accepted the proposal. The consuls hesitated when the European merchants objected. Khair ad Dīn set up a temporary commission to carry out the functions of a mixed court until the court could be installed. Nonetheless, Italy and France, who were later to vie for control over Tunisia, stopped negotiations.[64] The commission con-

64. Ganiage, pages 374-375.

tinued to hear minor disputes.

The status of the Tunisian Hebrew remained within limits similar to those for the Europeans. Khair ad Dīn retained under his regime the decree of 1872 on the judicial competence of the rabbis when the rabbis in Tūnis, Sūsa, and other cities began to hear civil and commercial cases among their co-religionists. The Tunisian government forbade rabbinical courts to hear disputes other than ones on personal status and succession.[65] However, the Hebrew community had won in the ʿAhd al-ʾAmān the right to have assessors in Tunisian criminal courts, but no criminal, civil, or commercial courts of their own. Problems came under

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65. Beylical Decree of 3 September 1872: We have learned that the Rabbis of Tūnis, Sūsa, and other cities of the Regency are made aware of civil and commercial affairs among their co-religionists. This manner of action being contrary to the rules of judiciary competence, it is forbidden to the said Rabbis to know these affairs and to judge litigations other than those relating to personal status of the Hebrew.

Footnote: "If, in Tunisia, the Rabbis had a certain power of exterior jurisdiction over their Tunisian co-religionists, this jurisdiction applies only to contentions among the Hebrews and to the difficulties touching on their personal status and their successions. They had not jurisdiction in penal matters and cannot inflict, for whatever infraction there be, of religious or civil order, corporeal punishments or penalties of imprisonment (Sūsa, 17 April 1893, Journal des Tribunaux de la Tunisie, 93.205 -- 1893, page 205 -- a case under the Protectorate).

Above translated from the French of Paul Zeys, Code Annoté de la Tunisie: Recueil de tous les documents composant la législation écrite de ce pays, au 1er Janvier 1901 (Nancy: Imprimerie Berger-Levrault et Cie, 1901), Vol. I.

the ministry of Khair ad Dīn as more Tunisian Hebrews claimed foreign citizenship to qualify for consulate protection. Khair ad Dīn met reluctance on the part of consuls to help him. By the time he won a temporary convention from the consuls, he was dismissed.

Khair ad Dīn did not stop at raising Tunisia out of political and financial flabbiness. His concern for education reflected a concern for disciplining as well the mental and moral lives of the Mamluks and Tunisians. His most imaginative effort was Sadiki College, founded by decree in January of 1875. It was the second attempt in Tunisia at secular, that is, non-Koranic, education. The first had been the military school of ʾAḥmad Bāy staffed by French advisors. Sadiki, however, was founded for different purposes because of the different disposition of its founder. The founder of Sadiki College had combined civil and military posts in his earlier career (caïd, qāʾid, Minister of the Navy, President of the Supreme Council). Yet his most influential years just before entering the Prime Ministry were spent with the International Financial Commission, whose European members had civil professional training. The time of ʾAḥmad Bāy had been dominated by Islamic military defeats at the hands of the Europeans. The period of the heyday of the Mamluks in the 1850's and 1860's was dominated by con-

suls who had political aims to achieve through legal means. By the time of the day of Khair ad Dīn administrators who realised that loyalty to government rested on an intelligent sense of details of efficiency were in demand. Financed by revenues from a hubus (waqf) consisting of former lands of Mustapha Khaznadar, Sadiki College was to provide a steady source of administrators.[66] The curriculum was designed to reflect variegated needs. Mathematics and science were to provide elementals for accounting and engineering. Instruction in French or Italian was to open students to a new world of literature and increase competency to deal with Europeans. Since only Muslims were admitted to the school Islamic teachings held an important position in the curriculum too. Next door to the school stood the Grand Mosque Zaitūna of Tūnis from where the teachers of the Qur'ān came. It would have been inconceivable to have neglected Islam at a time when many were probably wondering whether the decade of bankruptcy and revolt might have been due in part to a neglect of religious duties. Sadiki College was intended to make contributions to the character of the Tunisian administrator by nurturing a desire to pursue higher education in Europe,

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66. Ganiage, page 373.

since the best students were to go on to Europe; by creating a wider more popular source of administrators, since urban bourgeois sons attended along with Mamluks; finally, by giving administrators a sense of an independent bureacracy with its own identity, since the school was located away from the royal harem where Mamluk administrators had been brought up as political pawns, and built nearer to the military fortifications.[67]

Khair ad Dīn also tackled the bastion of Koranic education. The bastion was the Grand Mosque of Zaitūna of Tūnis. It was originally Mālikī, but the Ḥanafī Ottomans assured equal representation of both schools. Since the edict of 1842 of ʾAḥmad Bāy, the government had the right to appoint the teachers on the advice of the Mālikī and Ḥanafī Sheikh ul-Islām, while each sheikh and each qādī, one from each rite, had the right to audit the accounts of the Bait al-Māl out of which the salaries of the teachers were paid (see page 281 post of Chapter II). If funds of the Bait al-Māl were in great surplus, they could award financially the most diligent students. Thirty-five years later Khair ad Dīn, with his characteristic desire for de-

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67. Ganiage, page 373. Today the College still stands on a hill near the Kasbah, the area where the government offices are located. The military offices are near-by.

tails of substance rather than for form and structure, issued a decree in December of 1875 on the curriculum and student and teacher behaviour. Good behaviour was strongly recommended. Doubting principles traditionally admitted by the ʿulamāʾ was prohibited.[68] The curriculum heavily emphasised techniques of writing and speaking, in addition to study of the sources of law (ʾusūl al-fikh). The only science offered was astronomy. Arithmetic (hisāb) was useful in the study of inheritance; mensuration and survey were useful in land disputes; and Euclid geometry was an exercise in logic. Sadiki College, by comparison, aimed to achieve a greater balance among the literary(foreign and Arabic), scientific, and mathematical fields of knowledge. For future administrators had to be prepared to deal with both their own people and the Europeans.

The efficiency and streamlining with which Khair ad Dīn approached existing institutions directly led to his downfall. When he proposed to economise the spending of the Royal Family, another Mamluk harem intrigue resulted in his dismissal in July of 1877.[69] A year later the Ottoman Sultān called him to Turkey to be

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68. Article 19, as stated in Encyclopedia of Islam, First edition, 1918-1934, "Tunisia".

69. Ganiage, page 387. Source of material on Khair ad Dīn is Chapter IX of Ganiage.

first the Minister of Justice, then Grand Vizir. Khair ad Dīn stayed in this latter position for only a year, then retired. Eleven years later he died in Constantinople, the place where his political career had begun when he was sold as a Circassian slave.

During the next four years the instability of Tunisian politics was a far cry from the days of Mustapha Khaznadar, who held the Prime Ministry for over fifteen years. After Khair ad Dīn, the son-in-law of Mustapha Khaznadar, the office was jockeyed back and forth between the Mamluks Muhammad Khaznadar, the brother-in-law of Mustapha Khaznadar, and Mustapha ben Ismail, a schemining favourite of the Bāy Muhammad Es Sādiq. Muhammad Khaznadar became Prime Minister in 1877. Under the administration of Khair ad Dīn he had held the post of Minister of the Interior, a post created to alleviate the task of the Prime Minister in supervision of domestic administration. He held this post during the greater part of the administration of Khair ad Dīn. A year after Muhammad Khaznadar became Prime Minister Mustapha ben Ismail became Prime Minister. The International Financial Commission detested his fickle disposition and total lack of a sense of political administration.[70]

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[70]. Ganiage, pages 361-362.

Muḥammad Khaznadar was returned to office in 1881. The eve of the French Protectorate had come.

Tunisians had neither the means nor the unity to fight back the encroaching protectorate. Up to then Tunisia had been able to keep the Europeans at bay by fighting fire with fire. In the 1840's under ʾAḥmad Bāy foreign relations with France in particular had been cordial. ʾAḥmad needed an efficient army to support his policy of autonomy from the Sulṭān. The French gladly gave military advice, hoping that such ties would make her neighbour to the east a good obstacle to an Ottoman intervention from Turkey into Algeria. Cordiality increased over the next decade. France and the other European powers represented in Tūnis influenced the Bāy to issue the ʿAhd al-ʾAmān, which the Europeans regarded as a major step towards the same kind of capitulations which the Sulṭān had made some years earlier for Europeans in Constantinople. By the time the constitutional elaborations of the ʿAhd al-ʾAmān were put into effect, the Europeans realised that the Bāy and his Mamluk ministers were determined not to grant as many capitulations as the Sulṭān; and what substitutes they had granted, such as civil and criminal courts, which were to hear Tunisians and Europeans alike, but were manned by Mamluks,

had been turned into the advantage of the Mamluk ministers. They proved quite good at playing the legal game. The French in particular grew resentful. During the revolt of 1864 the French military advisor and the consul openly berated the Mamluks for causing the Bāy to approve a devastating tax increase and imposing a constitution that served neither Europeans nor indigenous Tunisian local officials. The consul interferred in domestic politics to the extent that he corresponded with the tribal leader of the revolt, the one who had proclaimed himself Bāy.[71] The Tunisians fell out with the French and felt better disposed towards the overtures from the British and the Turks. The Turks granted the Bāy money to help quell the revolt, and the British used the occasion to encourage a Tunisian mission under Khair ad Dīn, who had always preferred settling relations with the Sultān before turning to the Europeans for support, to go to the Turks. In the proposed convention between the Turks and the Tunisians the Bāy would have kept authority over internal affairs on the sole condition that he rule by way of civil and military officers whom he appointed and by written regulations and constitutional rules. The only important submission to

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71. Ganiage, pages 212-213.

the Sultān would have involved treaties and military contributions. The Bāy would have been able to sign any commerical or maritime treaty he wished, but the Sultān had to approve treaties affecting general security of the empire, such as treaties of alliance, cession of territory, and demarcation of borders. Constantinople would have been confirmed as military protector of Tunisia, since Tunisia would have had to make a yearly contribution to the Imperial Arsenal of the Sultān. Yet there would have been no explicit provision for forcing Tunisia to submit to the treaties which the Sultān had made with the Europeans for mixed courts. Only a letter from the Vizir confirming the proposed convention was issued.[72] The question of

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[72]. Ganiage, page 232. Text of the proposed convention. (page 233):

ARTICLE 1 - The hereditary right of succession by right of seniority is forever confirmed in the Husseinite family.

ARTICLE 2 - The Bāy will have the right to exercise his authority in the internal affairs of the Regency which he governs according to constitutional and administrative laws.

ARTICLE 3 - Consequently, he will have the right to appoint civil, military, and naval officers, up to the rank of Férrick.

ARTICLE 4 - The Bāy will have the power to maintain external relations.

ARTICLE 5 - The Bāy will have the right, as in the past, to make general treaties and conventions of commerce and navigation, but no treaty, convention, or other pact which will affect the general security of the Empire, such as treaties of offensive and defensive alliance, cession of territory, demarcation of the frontier, can be valid and executable without ratification by the Sultān.

the Sultān issuing a firmān consisting of the proposed convention was suspended for seven years. In the meantime Mustapha Khaznadar, the Prime Minister then, hated by the French by now, sought another way to guarantee Tunisian autonomy and the right to determine her own policy of capitulation. He sought what the French called an internationalised protectorate which would usurp the position of France as de facto protector of Tunisia. Mustapha went so far as to consult Italy and Austria about a Tunisian Resident Minister in their capitals along with guarantees of Tunisian neutrality in time of European wars. Instead,

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ARTICLE 6 - Upon the ascension of the Bāy, he will demand and receive, as in the past, his investiture from the Sultān.

ARTICLE 7 - The Bāy will have the choice to go to Constantinople, but every time he goes there, he will be received with all the honours due to the rank of a hereditary prince.

ARTICLE 8 - The present customs on such occassion are forever abolished and will be replaced by an annual contribution to the Imperial Arsenal under the title of aid for the general defence of the Empire.

ARTICLE 9 - The Porte will recognise as in the past the distinctive flag of the Regency of Tūnis.

ARTICLE 10 - His Majesty the Sultān will delegate to the Bāy the right to give civil and military decorations.

ARTICLE 11 - The coinage will be struck in the name of the Sultān.

ARTICLE 12 - The Khutbah or public prayers will be recited in the name of the Sultān.

because of deteriorating finances, Mustapha received an International Financial Commission.

Khair ad Dīn, made president of the Commission, abandoned the aim of Mustapha for an international protectorate, and pursued the détente which he had sought seven years before with the Sultān. In 1871 he finally obtained a firmān from the Sultān regulating relations between the Bāy and the Sultān. In the same year, France suffered a humiliating defeat in the Franco-Prussian War of 1870-1871. By the middle of the ministry of Khair ad Dīn, the firmān hardly meant anything since Constantinople was on the verge of bankruptcy, and in Europe events were moving in the direction of balancing European interests at the expense of the entire Ottoman Empire. Just when the Prime Ministry of Tunisia was entering its most unstable era of short appointments, and Khair ad Dīn had returned to Constantinople to be Grand Vizir, the Europeans and the representatives of the Sultān met at the Congress of Berlin in 1878. There the European settlement of the Balkan question began the serious disintegration of the Ottoman Empire. From then on France won as an appeasement for her humiliation in 1871 a free hand in regard to North Africa. At the same time Great Britain ceased to resist France, as

she had done in 1864 in the name of the integrity of the Ottoman Empire, and in 1878 concentrated on preserving the Egyptian route to India. To cut short any ambitions which the Italians hoped for in Tunisia since the friendly overtures from Mustapha Khaznadar, the French proposed that Great Britain win from the Sultān the cession of Tripoli for Italy.[73] Great Britain was hardly responsive, and France turned to consolidating her relations with Tunisia in Real-politik terms, not by way of mere capitulations and constitutional guarantees which every other European power had sought in previous decades when the desin-tegration of the Ottoman Empire was not discussed.

Pursuing a new approach towards Tunisia, France at first did not think of exerting her influence by military invasion as she had done in Algeria. The French Assembly, rent between the pacificists and the militants ever since the defeat of 1871, might not have supported such military invasion. It was hoped that a written treaty would convince the Bāy to keep amicable relations despite the cooling down of relations since the revolt of 1864. Still the friendly treaty would have been a military treaty to deter any thoughts which Tūnis or Italy had for other

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73. Ganiage, page 429. From account of conversation between the French and British Foreign Secretaries, 4 September 1878, in Paris.

plans. Very soon after the Berlin Congress the French Foreign Secretary, the Algerian Governor-General, and the French consul in Tūnis proposed French occupation of key military points along the Tunisian coast. The French could argue particularly for one port which became a source of grievance when a French ship docked there had been pillaged with impunity (in 1878). In domestic affairs France proposed to limit herself to the reform of the police and constabulary and to guaranteeing pensions and a civil list to the Bāy, a subject that had been a point of contention under the administration of Khair ad Dīn, who had suggested a cut in the expenses of the Royal Family (see page 87 above). Finally in 1879 the French consul in Tūnis presented the Bāy a convention of five articles. Articles one and three provided for a strictly defensive alliance (preserving the policy of neutrality which Mustapha Khaznadar had sought earlier) by denying Tunisia the right to cede territory to a foreign power. France in turn would protect the Bāy, his family, and his territory from any danger, no distinction being made between external and internal danger. It was an agreement similar to the one that Khair ad Dīn had settled with Constantinople, the difference being that the duty of the Sultān to pro-

tect Tunisia was not as heavily emphasised. Article four of the proposed convention provided for an Algerian-Tunisian customs union. There was no express stipulation that France would take charge of the foreign affairs of Tunisia, although article five provided for a French Resident Minister who would have been charged with supervising all French interests in all administrative affairs common to France and Tunisia, but article five made no mention of a Tunisian counterpart in France; and article four gave French consulates around the world the right to take care of the interests of Tunisian nationals abroad.[74]

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74. Ganiage, page 444, footnote 15. Text of convention:

ARTICLE 1 - H.H. the Bāy of Tūnis undertakes in regard to France not to cede and not to permit any foreign power to occupy a part of territory or a port belonging to the Regency...The government of the Republic undertakes on its side to swear its support to His Highness against any danger that could threaten H.H. Muhammad Es Sadok or his dynasty, or that could compromise the security of the Regency.

ARTICLE 2 - To facilitate the accomplishment of the obligations which the French Republic assumes by the preceding article, His Highness agrees that in the case where the security of the Regency or the presently reigning dynasty would be threatened by a danger, internal or external, the President of the French Republic would cause to be occupied one or several points which he thinks necessary, such as, notably, the Islands of Galite, and of Tabaraka, the bay of Bizerte, Cap Bon, the Island of Djerba.

ARTICLE 3 - H.H. the Bāy undertakes not to conclude any act having an international character without having

No Bāy had ever signed such a treaty with any non-Muslim power. Muḥammad Es Ṣādiq had no more intention of setting a precedent than he had of ceasing to insist that Europeans be subject to Tunisian jurisdiction in legal matters. The efforts of Khair ad Dīn to reach an agreement with the French over mixed courts had stopped at an interim measure, and none of his successors had gone beyond. As the French consul expected, Muḥammad Es Ṣādiq Bāy refused to sign the treaty. The response of the consul to the refusal showed that France knew what would probably be the final trump card she would have to play: "It is always the same fanaticism, the same ignorance, and he will never be convinced. He will yield only by force of events or bayonets."[75]

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notified the government of the French Republic and without having previously reached an understanding with her.

ARTICLE 4 - The diplomatic and consular agencies of France in foreign countries will be charged with the protection of the interests of the Tunisian nationals. The French government and the Tunisian government will ultimately reach an understanding for the conclusion of a customs union between the Regency and Algeria.

ARTICLE 5 - The government of the Republic will be represented before the Bāy by a resident minister who will supervise the execution of the present act and who will be the intermediary for the relations of the French government with the Tunisian authorities for all administrative affairs that are common to the two countries.

75. Ganiage, page 445. French consul Roustan à Desprez, Tūnis, 15 July 1879.

For the next two years France waited for a pretext to play her trump card, and filled in the time with launching an economic offensive at Tunisia. French entrepreneurs vied for concessions of lands and contracts for constructing public utilities, such as railways.[76] Creditors and bankers followed close on the heels of the entrepreneurs. Despite the revenue which the public treasury could have gained from sharing in the profits of the foreign companies, the economic adventurers were hardly welcomed by the Mamluk ministers, no more than they had been in the 1850's and 1860's when the Mamluks disliked having rivals for the lands of the Bāy. Out of such manifest hostility came squabbles which were the background to some of the land reforms which the French later introduced when they occupied Tunisia. Even the Bāy had his reservations. He conceded a domain to a certain French adventurer on two conditions: that the Bay could revoke the grant in case the Frenchman failed in real-

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76. Affair No. 26 of 28 December 1887 in the Chambre Mixte of the Tribunal Immobilier, Tunis. Case notes state that in May 1876 the Tunisian government (under Khair ad Dīn) promised a concession to the Compagnie de Chemin de Fer Bône-Guelma. It was not until April of 1879 that Muṣṭapha, Minister of Foreign Affairs (under administration of Muṣṭapha ben Ismail), gave a letter to the Compagnie to approve the route of the railway. The Tunisian state also gave free to the Compagnie all lands necessary for building the track and the stations.
(Found in the archives of the mahkama al ʿaqārīya, also known as the Tribunal Immobilief, Tūnis)

ising a profitable venture, and that the Bāy could share in the profits if the Frenchman succeeded. The Frenchman failed and the property was transferred to the Société Marseillaise, which had convinced the French consul to persuade the Bāy that the Société in partnership with the French adventurer could salvage the project. When Khair ad Dīn in Constantinople sold in December of 1880 to the same Société the huge estate (one hundred thousand hectares) which he had acquired in earlier times as a gift from the Bāy, the Mamluk Prime Minister, Muhammad ben Ismail, who had been instrumental in the downfall of Khair ad Dīn, grew rigid in refusing to make new concessions, even refusing offers to exploit the minerals in the west. He tried to renege an offer to the French company building the railway, and argued over the route of the railway as a delaying tactic.[77] Nor did the Tunisian government sympathise with French real estate credit companies, and hence did nothing to solve the difficulties which such companies would encounter in a country that had no cadastre or systematic registering of private lands. Relations with France cooled considerably, and the Prime Minister of Tunisia swallowed his hatred of the Italians

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77. Ganiage, pages 480 - 481.

and turned to them for reconciliation. The French imagined the Italians to be exulting.[78] The Société Marseillaise ran into opposition too. Their dispute with Tunisia was said later to have influenced in part the decision of France to invade Tunisia. The Tunisian notaries refused to register the sale of the estate of Khair ad Dīn without authorisation from the qudāh (qādī), and the qudāh made known their hostility to the act. The final insult to the Tunisian government and courts came when the Société Marseillaise went to the Sheikh ul-Islām of Constantinople, where Khair ad Dīn was living at the time, and obtained an advisory opinion in their favour.

The affair of the Enfida estate of Khair ad Dīn was still unsettled when an unsettling rumour began to circulate in January of 1881. The rumour was that the Sultān, fed up with the longstanding policy of autonomy of Tunisia, was preparing to depose the Bāy and name Khair ad Dīn as pasha over the Tunisian realms.[79] Europeans considered the rumour not to be

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78. Ganiage, page 482. French consul Roustan in Tūnis à Courcel, Director of Political Affairs in the French Cabinet, 28 December 1881.

79. Ganiage, page 502. French Secretary of Foreign Affairs in a meeting with the council of ministers on 29 January 1881, where he supported intervention into Tunisia with force.

very well-founded; but the French nonetheless sent the most powerful gunboat in their Mediterranean fleet to cruise off the Tunisian coast. Anger over the Enfida affair also motivated the French military intimidation. The affair involved much money; it was also the most clear-cut case for the longstanding contention of France that Tunisian courts were too prejudiced against Europeans to be fair judges. The traditional courts had resented European interference in the Sfez affair, for under European influence, the Bāy broke the traditional rule that no foreigner could possess property in the realms.[80] The civil courts created after the Sfez affair were headed by Mamluks who were known to dislike any outside competition for the lands of the Bāy. For the next following months complaint after complaint was made to the French government. The Khroumirs, Tunisian border tribes, invaded Algeria on a personal avenge. The French railway company complained of difficulties due to poor police protection. The final sign of deterioration was an overture from the second presumptive heir to the Tunisian throne. He offered to go to Algeria under French protection then return to Tūnis with French troops to dethrone his brother and usurp the rights of the first heir to the throne.

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80. See pages 40 and 41 above.

The traditional agnatic struggle that had plagued the throne up to the reign of ʾAḥmad Bāy again reared its ugly head.[81]

The Khroumirs again caused trouble, and the French proved to be no better neighbours than the Algerians who had invaded Tūnis in the seventeenth century. The French defeated the Khroumirs and marched onto Tūnis where the Bāy was again offered a military treaty. Having been informed of the pretentions of a usurper, Muḥammad Es Ṣādiq Bāy felt that he had no choice this time, and signed. He got a worse bargain this time, for although the treaty of Kassar Saïd of 12 May 1881 was similar to the one offered earlier under peaceful conditions, the treaty of Kassar Saïd was designed more to seal military victory with unconditional humiliation. In the treaty of 1881 the interference of France into the foreign affairs of Tunisia was made more explicit than before: "The government of the French Republic offers to guarantee the execution of treaties presently existing between the government of the Regency and the various European powers" (article four).[82]

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[81]. Ganiage, page 538. Telegram from French consul in Tūnis to Paris.
Also see page 27 above.

[82]. Text of Treaty of 1881: (Continued on next pages)

The Government of the French Republic and that of H.H. the Bāy of Tūnis, wanting to prevent forever the reoccurring of the disorders which recently took place on the frontiers of the two States and on the coast-line of Tunisia, and being desirous of binding more closely their old relations of friendliness and good neighbourliness, have resolved to conclude a convention to that end, in the interests of the two contracting parties.

Consequently, the President of the French Republic has named as his plenipotentiary Monsieur Général Bréart, who has come into agreement with H.H. the Bāy of Tūnis on the following stipulations:

ARTICLE 1 - The treaties of peace, friendship and commerce and all other conventions existing today between the Republic of France and H.H. the Bāy of Tūnis are expressly confirmed and renewed (e.g. the convention of 1871 that the French nationals could possess land in Tunisia; see page 41 above).

ARTICLE 2 - In view of making it easier for the French Republic to accomplish the measures which are necessary for attaining the aim which the eminent parties propose to each other, H.H. the Bāy of Tūnis agrees that the French military authority may occupy whatever points it thinks necessary for the reestablishment of order and security of the frontier and the coast-line. This authority will cease when the French and Tunisian military authorities recognise, in a common agreement, that the local administration is in a position to guarantee the maintenance of order.

ARTICLE 3 - The government of the French Republic undertakes to swear a constant support to H.H. the Bāy of Tūnis against all danger which would threaten the person or dynasty of His Highness or which would compromise the tranquility of the realms.

ARTICLE 4 - The government of the French Republic offers itself as guarantor of the execution of the treaties presently existing between the government of the Regency and the various European powers.

ARTICLE 5 - The government of the French Republic will be represented before H.H. the Bāy of Tūnis by a Resident Minister who will supervise the execution of the present act and who will be the intermediary of the relations of the French Government with the Tunisian authorities for all the affairs common to the two countries.

ARTICLE 6 - The diplomatic and consular agents of France in foreign countries will be charged with the protection of the Tunisian interests and of the nationals of the Regency. In return, H.H. the Bāy undertakes not to conclude any act having an international character without having notified the government of the French Republic and without having previously consulted with it.

ARTICLE 7 - The government of the French Republic and the government of H.H. the Bāy of Tūnis reserve to themselves the right to fix, by common agreement, the bases of a financial organisation of the Regency, which are of a nature that assures the servicing of the public debt and guarantees the rights of the creditors of Tunisia.

ARTICLE 8 - A war tax will be imposed on the unsubdued tribes of the frontier and of the coast-line. An agreement in the future will determine the amount of it and the method of collection, for which the government of H.H. the Bāy undertakes to be responsible.

ARTICLE 9 - To protect the Algerian possession of the French Republic from the smuggling of arms and war munitions, the government of H.H. the Bāy of Tūnis undertakes to prohibit all introduction of arms or war munitions on the island of Djerba, the port of Gabès, or the other ports of the south of Tunisia.

ARTICLE 10 - The present treaty will be submitted to ratification by the government of the French Republic and the ratified document will be sent to H.H. the Bāy of Tūnis in the briefest possible time.

Muhammad Es Sādiq (Sadok)
General Bréart
12 May 1881
Kassar-Saïd

(Translated from the French of Marty and Maarek, Vol. I, Annex)

Relations between France and Tunisia stayed on a military level, but not without influence on other matters. A year after the treaty the Société Marseillaise won from the civil court of Tūnis a favourable judgment on the Enfida estate. The widow of the chief contender against the Société no longer claimed the lands. Despite such a happy ending France used her position as military protector to interfere in civil affairs and provide laws which would deter any similar Enfida affairs from arising. Two years after the treaty of 1881 a tribal revolt broke out again in the interior. France used this occasion to sign a new convention with the new Bāy, ʿAlī, who would not have had his throne if the French had sided with the potential usurper under Muhammad Es Sādiq. Article one of the convention gave the French government the right to proceed towards the administrative, judicial, and financial reforms which the French government would judge useful.[83]

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83. Text of the Convention of La Marsa of 8 June 1883:

Convention undertaken at La Marsa between France and Tunisia, for regulating the respective relations of the two countries in the Regency and carrying a guarantee of the Tunisian debt by the French government.

H.H. the Bāy of Tūnis, taking into consideration the necessity for improving the internal situation of Tunisia, on the conditions anticipated in the treaty of 12 May 1881, and the government of the Republic , having

at heart to respond to this desire and to consolidate also the relations of friendship fortunately existing between the two countries, have agreed to conclude a special convention to this effect. Consequently the President of the French Republic has appointed as his plenipotentiary Monsieur Pierre-Paul Cambon, his Resident Minister at Tūnis, Officer of the Legion of Honour, decorated with the Haed, and the Grand Cross of the Nichan Iftikhar,etc...who, after having communicated his full powers in good and due form, has drawn up with H.H. the Bāy of Tūnis the following dispositions:

ARTICLE 1- To make it easy for the French government to accomplish its protectorate, H.H. the Bāy of Tūnis undertakes to proceed towards the administrative, judicial, and financial reforms which the French government will judge useful.

ARTICLE 2 - The French government will guarantee in time and under the conditions which to it seem best, a loan to be issued by H.H. the Bāy for the conversion or the reimbursement of the consolidated debt (perpetual debt whose realisation is postponed indefinitely and only the interest is paid; but it can be converted into a debt with a due date), rising to the sum of 125 million francs, and of the floating debt (for example, Treasury bonds, debts over a short time) up to an amount of 17,550,000 francs.

H.H. the Bāy prohibits himself from contracting in the future any loan on the account of the Regency, without the authorisation of the French government.

ARTICLE 3 - Out of the revenues of the Regency, H.H. the Bāy will raise: 1. sums necessary to assure the servicing of the loan guaranteed by France; 2. sum of 2,000,000 piasters (1,200,000 francs), the amount of his civil list, the surplus of the revenues before being used for the expenses of administration of the Regency and for the reimbursement of the charges of the Protectorate.

ARTICLE 4 - The present arrangement confirms and completes, in as much as needed, the treaty of 12 May 1881. It will not modify the dispositions previously provided for the regulation of war.

ARTICLE 5 - The present convention will be submitted for ratification by the French Republic and the document of the said ratification will be sent to H.H. the Bāy of Tūnis in the briefest possible

time. In such good faith, Ali Pacha and Paul Cambon have drawn up the present act and have stamped it with their seals.

Journal Officiel de Tunisie, 1884, page 313

(Translated from the French of Marty and Maarek, Vol.I, Annex)

In April of 1884 the French Senate sealed French control over Tunisia by issuing a decree delegating a French Resident Representative to approve in the name of the French Republic the promulgation and execution of all the decrees signed by the Bāy. France thus achieved even more control over the internal affairs of Tunisia than the Ottoman Sultān ever had. Their victory spelled out the limited resources of the Tunisians. In the days when France tried to persuade by the language of constitutions and rights of property, the Tunisians could speak the same tongue and negotiate for their own interests. But when France spoke with guns, and possible deposition of the Bāy, the Tunisians could not even begin to whisper.[84]

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84. Text of the decree of 1884 from the French Senate:

9 April 1884, Senate and Chamber of Deputies
Adopted 8 June 1883 Convention
Presidential decree of 10 November 1884

Seen the Acts of 9 April 1884 and of 8 June 1883.

ARTICLE 1. The Resident Representative of the French Republic at Tunis is delegated to the effect to approve in the name of the French Government the promulgation and the execution in the Regency of Tunis all the decrees made by H.H. the Bay.

ARTICLE 2. The President of the Council, Minister of Foreign Affairs, and the Guardian of the Seals, Ministry of Justice, are charged with execution.

Journal Officiel de la Tunisie, 1884, page 453.

(Translated from the French of Marty and Maarek, Vol.I, Annex)

The administration which the French introduced remained basically the same for over half a century. The overseer of French and Tunisian administration was the French Resident Minister. He was the Minister of Foreign Affairs for the Bāy. The Bāy could not correspond directly to Paris. The Resident Minister also replaced a Mamluk as head of the Council of Ministers of the Bāy but with more power than a Mamluk president ever had: The Resident Minister countersigned all the decrees of the Bāy before they could be valid. The constitution of 1864 had simply pronounced that the Bāy would guide the political affairs of the Kingdom with the consent of the Ministers and the Supreme Council (Article twelve)[85] without stating how the consent of the Ministers would be exercised. The Resident Minister had thereby a far more centralised role than any article in the constitution of 1861 had provided. Ministers under the constitution countersigned the edicts of the Bāy only when they related to the particular ministerial department (Article thirty-eight).[86] The

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85. Article 12: The Head of State will guide the political affairs of the Kingdom with the consent of the Ministers and the Supreme Council.
(Marty and Maarek)

86. Article 38: The Minister will countersign the edicts issued by the Head of State which relate to his department.
(Marty and Maarek)

Supreme Council had power only to oppose decrees that were contrary to the principles of the laws, equality of all inhabitants before the law, and the principles of tenure of the magistracy (Article sixty).[87] The only power of positive sanction concerned the decrees of the Bāy regulating functions of ministers (Article thirty-two).[88] The only article that came closest to resembling the powers of the French Administrator had been Article sixty-two:[89] The Supreme Council prepared projects of law, but only the Head of State in his Council of Ministers could adopt them, whereupon they were promulgated.

In addition to his ministerial functions, the

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87. Article 60: The Supreme Council is the guardian of the Fundamental Pact and of the laws, and the defender of the rights of the inhabitants. It opposes the promulgation of laws which will be contrary to or which will attack the principles of the laws, the equality of inhabitants before the laws, and the principles of tenure of the magistracy, except in the case of dismissal for a crime, committed and established before the court.
(Marty and Maarek)

88. Article 32: The laws sanctioned by the Head of State and by the Supreme Council will regulate the nature of the functions of each minister, his rights and his duties, the nature of his relations with the various agents of the Tunisian government or of the foreign governments, and the internal organisation of each Ministry.
(Marty and Maarek)

89. Article 62: The Supreme Council can prepare projects of law in the large interest of the country or for the government. If the proposition is adopted by the Head of State in his Council of Ministers, it will be promulgated and become part of the laws of the Kingdom. (Marty and Maarek)

Resident Minister also commanded the administrative services and armed forces, in which French and Tunisian armies were combined.

Below the Resident Minister was created a dual, or counterpart, administration. For every Tunisian high official there was a French equivalent. In the Council of Ministers sat Tunisian ministers as well as French "Directeurs", that is, French heads of departments. Each "Directeur" could issue by-laws. For local administration, the caïd (qā'id) was retained, but placed under the control of a French "contrôleur civil".

While all legislation pertaining to Tunisian officials originated and was promulgated only in Tunisia, though approved by the French Resident Minister, laws relating to French administrators in Tunisia were issued by the President of the French Republic.

Before the nineteenth century was over, the French ended in one swoop the judicial question which had plagued every Bāy since the days of 'Ahmad Bāy, that is, were Europeans to be subject to the jurisdiction of Tunisian courts or to special mixed courts? In 1884, even a few months before the Convention of La Marsa giving the French the right to effect administrative and judicial reforms, the French legislature created French courts for Tūnis. A month later

the Bāy issued a decree that made all foreigners subject to French courts. The only mixed courts established, two years later, had nothing to do with any of the promises in the ʿAhd al-ʾAmān.[90] It was a function of economic interests of French real estate companies. The mixed court was one of the chambers of the Tribunal Mixte (later called the Tribunal Immobilier), a court for deciding what was sufficient evidence a person could give to merit registration of land in his name. In itself the mixed court did not violate pre-Protectorate agreements which Europeans made to submit to local courts for land disputes. It, combined with the French civil courts, could be used in practice to avoid the pre-Protectorate agreements. For procedural laws allowed for any dispute involving land registered by the Tribunal Immobilier to go before the French civil courts.[91] The two parts of

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90. Article VII of the ʿAhd al-ʾAmān: We will establish a court of commerce, composed of a president, a chief clerk, and several members chosem from among Muslims and the subjects of the friendly powers. This court, which will judge commercial matters, will function after we have reached an agreement with the great foreign powers, our friends, on the procedure to follow so that their subjects are within the jurisdiction of this court. The rules for this institution will be developed in a precise manner in order to prevent any conflict or misunderstanding.

91. Zeys, page 900, footnote (a) for Article 2 of the Code Foncier of 1st July 1885, as modified by Decree of 16 May 1886.

the dual or counterpart judiciary of the French Protectorate in theory were not supposed to be in contact or cause confusion of jurisdiction. How practise over time came to differ will be discussed in the subsequent chapters.

Annotated Bibliography

Ganiage, Jean. Les Origines du Protectorat Français en Tunisie (1861-1881). Tunis: Maison Tunisienne de l'Edition, 1968.

Written by a Professor at the Sorbonne under the initiative of Chedly Klibi, the Tunisian Secretary of State (Secrétaire d'Etat) for Cultural Affairs and Information, this history book is a good detailed account of how European consuls in Tūnis interacted with Tunisian politics, and how the Tunisian political élite in turn reacted to the consuls. The author relies on archival material (diplomatic dispatches, official documents), newspaper accounts, and memoires. Whatever secondary works he uses are also based on primary source material. The domestic politics of France and Tunisia are discussed only in so far as they bear on events leading to the French invasion of Tunisia in 1881. The author does not propound a particular historical theory to prove why the Protectorate happened. He succeeds in showing how large foreign policy trends in both countries combined with the weaknesses and fears of men of the moment (consuls, merchants, rulers) to produce the Protectorate.

The biographical sketches of the important

personalities at the end of the book are most useful.

I have supplemented the commentary of Ganiage about the constitutional reforms of the 1850's and 1860's with the text of the articles of the constitution of 1861 from the collection of Marty and Maarek. A case found in the archives of the Court of Land Matters in Tūnis complements the analysis of Ganiage on the economic invasion of the French in the late nineteenth century (see page 98, footnote 76 above).

Mantran, Robert. Inventaire des Documents d'Archives Turcs de Tunis au Dār al-Bāy. Tunis: Université de Tunis, Publications de la Faculté des Lettres, 5e series, Sources de l'Histoire Tunisienne, Tome I, Paris, Presses Universitaires de France, 1961.

R.Mantran chose to examine mostly the documents of the Ottoman period of Tunisian history found in the general government archives called the Dār al-Bāy, as opposed to the individual archives in each ministry. His introduction gives a good guide to the main divisions of the Dār al-Bāy: the Turkish documents (Archives général) and the documents of the Protectorate (Archives d'Etat).

Archival work can be tedious when one has to rely on indices that give only general categories. R. Mantran not only arranges the documents he examined under general categories such as Foreign Affairs of the Ottoman Empire, but also gives a précis of the contents of each piece of correspondence. Outside of working myself in the archives of the Dār al-Bāy, I have neither heard of nor read any similar publication on the documents in the Dār al-Bāy for the era of the Protectorate.

Marty, Jean A. and Roger and Eugène Maarek. Recueil Général et Pratique de Législation Tunisienne. Patronage: Autorités de la Métropole et de la Regence.

Four persons with practical legal experience in Tūnis contributed to this practical collection of Tunisian legislation. Dr. Jean Marty carries the title of Commissioner of the Government for the Tunisian Courts; Roger Maarek, diplômé d'Etudes Supérieures de Droit Privé, Lawyer at the Court of Appeal (Avocat, Cour d'Appel); Eugène Maarek, also lawyer at the Court of Appeal; and Robert Tristani, Special Supervisor at the Ministry of Justice (Contrôleur Spécial). The French and Tunisian governments sponsored the work. The Maareks are responsible for distribution. The five volumes, found in several offices in Tūnis, have been since 1949 (date of preface, Volume one) a handy reference for many judges, lawyers and Ministry of Justice officials. The selection of legislation goes as far back as 1846. The bulk of texts come from the era of the Protectorate. The reader is kept informed of abrogations too. All is not bone dry reproductions of important legislative texts. Volume one contains essays on the historical development of Tunisian law and French legal policy in the Protectorate.

Poncet, Jean. La Colonisation et l'agriculture européene en Tunisie depuis 1881. Paris: Mouton, 1962.

This is a detailed well-documented description of agricultural geography, land use, and the agricultural and economic policies in the Protectorate. Although most of the book is devoted to the years after 1881 (year of the Treaty of Kassar Saïd), the sizable first part gives a historical background to land use and land laws (espeically habous (hubus), or waqf) in Tunisia under the Ottoman Bāy before 1881. For the historical part the author relies on documents he found in the archives of the French Embassy in Tūnis, and the archives of the Tunisian Ministry of the Interior.

Saurin, Jules. La Constitution de la propriété et les contrats de culture indigènes en Tunisie. Paris: Berger-Levrault et C^ie, 1897.

Written by a member of a French agricultural society that encouraged the French to settle as farmers in Tunisia, this small paperback is a précis of the types of land use and tenant-owner relations that the French would find in Tunisia at the end of the nineteenth century. The author has a practical bias. For example, he urges the French to settle only in sparsely populated, but good, lands of Tunisia, so that the French in Tunisia could avoid the difficulties which they had in settling into Algeria (page28). The author also frankly admits how far the French expected to interfere in and change the indigenous economy. He recommends that the government discourage certain kinds of existant share-cropping contracts, such as the khammès (khammās), which was a way of paying off debts, not necessarily to encourage profitable production, as the lease of livestock did. The French were to be more interested in introducing the inducements which they knew in France for greater security of holdings and higher production, such as loan funds and reserves during unemployment so that during hard times one would not have to leave one's own land to be hired out to feed one's family. The reader can

infer that such suggestions were to affect deeply the indigenous land laws. Before the Protectorate the French agreed to be subject to Tunisian courts in land disputes. After the Protectorate was established, the French clearly sought not only their own courts to take disputes, but also to make the Islamic courts obsolete by abolishing the very practises over which they had been given jurisdiction.

Unfortunately, the statistics used by the author to support his case that there were vacant lands in Tunisia waiting to be cleared mislead the reader into optimism. For the author does not give the source of the statistics, nor their reliability in a day when cadastre and registration were in a very embryonic stage. For the Tribunal Immobilier had opened only eleven years before the date of publication of the pamphlet, and during the first three years of its existence the Court heard less than a hundred applicants for registration (so the records of the Court in Tūnis reveal for those years).

I extend thanks to the library of IBLA (Institut des Belles Lettres Arabes) of the Pères Blancs in Tūnis for use of this volume.

Zeys, Paul. Code Annoté de la Tunisie: Recueil de tous les documents composant la législation écrite de ce pays au 1er Janvier 1901. Tome I. Nancy: Berger-Levrault et Cie, 1901.

This is one of the earliest and still most useful standard collections of the Ottoman decrees which the French retained in the Protectorate (the constitution of 1861, not being among them). This is the reference used by Marty and Maarek for their citations of early legislation. As to be expected, the legislation of the early Protectorate years is also included. The footnotes to many laws and decrees are most exhaustive and helpful. As a substitute judge for the Court of Tūnis (Tribunal de Tunis) and a judge of the Mixed Tribunal Immobilier (whose functioning began in 1886), Paul Zeys was very conscientious about citing in his footnotes Tunisian cases and problems of interpretation.

The author also published later supplements for legislation passed after 1901 (to 1912).

CHAPTER II

HISTORY OF LEGAL INSTITUTIONS AND REFORMS

Introduction

As seen in the last chapter, the judiciary was at the centre of a controversy between Tunisians and Europeans over capitulations. The Tunisians were prepared to yield to Europeans only by creating a system of justice based on written codes, similar to what the Europeans were accustomed to in their lands. It was a system not based on the Sharī'a. The Tunisian Turkish or Mamluk élite was predisposed to the change because it would give them a chance to attain more independence from the Bāy. The Europeans did not quarrel with the proposal of a secular system nor codes. They quarrelled over personnel. They wanted Europeans and Tunisians as judges, not just Tunisian judges advised by European consuls on points of European law when an European was involved in a case with a Tunisian. By the time the Europeans executed their wishes when the French occupied Tunisia and made a Protectorate in the treaties of La Marsa of 1883 and Kassar Sâid of 1881, the Islamic rulers of Tūnis had already devised a judicial system which the French had little difficulty in remoulding to French interests.

The judicial system of 1883 was the product of a bureaucratic evolution in the Islamic empire since earliest times. The first empire rulers, the Benu ʾUmawiya, were known for organising a fiscal structure which would support the military, on whom expansion of the empire depended. At the same time executive control over the judiciary seems not to have extended much beyond the appointing of judges by the caliph. (See Chapter Five on the Ummayyad in Joseph Schacht's An Introduction to Islamic Law, Clarendon Press, Oxford, 1964; and page 201 of his The Origins of Muhammadan Jurisprudence, Clarendon Press, Oxford, 1950). More than nine hundred years later when the Ottomans, the last of the Islamic Empire rulers, were firmly established in Tunisia, a large bureaucracy began to flourish. Religion still had a prominent place as Islam was the raison d'être of the Empire; nonetheless, religious matters became part of an over-all administration geared to maintaining temporal sovereigns, namely the Sultān and his provincial princes. Not only did the Bāy of Tūnis appoint the qudāh; he also legislated some of the laws which the qudāh applied and gave himself and his executive officials the power to judge also. Under the Protectorate, the French, ruling through the Ottoman princes, essentially

kept the Ottomans' basic administrative concept, namely, political control over the procedures, if not always the substantive law applied, in the judicial bureaucracy. The long-revered manuals of substantive and procedural law composed by private jurists had great moral and social sway and were the cornerstone of the independence of the judiciary, but unlike qānūn, were not declared as codes of law by a political ruler. The more sensitive each Islamic province within the Empire became to its existence as an integral political entity, the more the judicial sphere became subject to political and administrative pressures. The history of the administration of justice in Tunisia as seen by various Tunisian senior judges and advocates of the 1940's bears this out (see footnotes 3, 4, and 20 post).

History of the Court System Before the Protectorate

The basic unit of the court system was the single qāḍī, the one who judges disputes and pronounces what is valid. The first Muslim with such duty was the Prophet himself. The revelations of Allāh assume the existence of a judiciary and exhort it to mind high principles.[1] Yet the Prophet while alive was unique in powers. Not only did he pronounce judgment; he also was responsible for the execution of the judgment. ʾAbū Bakr, his immediate successor, followed the same example. Being political head did not deter him from being qāḍī too. After ʾAbū Bakr, the judiciary became more highly differentiated.[2] ʿUmar was the first to delegate his judicial powers to three qudāh, in Madīna (ʾAba ad-Durdāʿ shared duties with ʿUmar), Basra (Sharīḥan), and Kūfa (ʾAbā Mūsa al-Ash'arī).[3] During the era of the ʾUmawī, qudāh were sent to the

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1. Sūra IV (an-Nisāʾ): 58,59; and Sūra V(al-Māʾida):49

2. Tahar Kheredine, Minister of Justice, "Reform of the Courts of the Sharīʿa," March 1924. Tahar Kheredine was the son of the former Prime Minister Khair ad Dīn of the nineteenth century.

3. Jalīl Sīdī As-Sādiq al-Jazīrī, Deputy Public Prosecutor for the Chamber of Taʿqīb (appeal) of the Ouzara (Wazāra), "Al-Maḥākim at-Tūnisīya" (Tunisian Courts), Al Qadāʾ at-Tūnisī, 1947, page 31.

far ends of the Islamic Empire. The well-known ones in Africa were ʿAbd ar-Rahman Ibn Rāfiʿ at-Tanūkhī, the oldest qādī who believed in using the hadīth to guide his judgments, Sheikh ʿAbd ar-Rahman ben Ziyād, and ʿAbed ar-Rahman ben Ziyād ben Anʿum.[4] At first the qudāh in Ifrīqiyā (historical name for Tunisia) were sent outside the towns to dispense justice among the feuding Berbers. When qudāh proved powerless before the growing sedition of the Berbers the political ruler felt no qualms about intervening. He, ʿAbed ar-Rahmān, in the tradition of the Prophet and ʿUmar, passed judgment himself and created a more highly centralised control over the qudāh.

When Caliph Harūn ar-Rashīd sent in 800 A.D. his commandant Ibrahim ibn al-Aghlab to subdue the Berbers, the Aghlab dynasty ensued for a century and the qudāh witnessed a rather free atmosphere for juristic learning. The qudāh were aware of the madhab of the Hanafī and Mālikī while the madhab of Shāfiʿī and Ibn Hānbal were still in formation. The basic qualifications for a qādī under the Aghlabites were knowledge (ʿilm) and piety (tuqan). Since the concept of madhab had not

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4. ʿUmar as-Satārī, Deputy State Representative (Wakīl) at the Ouzara(Wazāra), "Mauqiʿnā al-jugrāfiyā wa ta'thīruhu ʿalā al-qadā'" (Geographical Events and Their Influence on Administration of Justice) in Al Qadā' at-Tūnisī, 1949, page 85.

fully crystallised, the qudāh naturally exercised ʾijtihād, that is, they had no formal guidelines nor fixed answers for the details which particular cases presented; and when there were guidelines, the qudāh felt free to choose the appropriate guideline according to their own discretion. One example cited by Sheikh ʾAbū al Qasim ben Shabalunī during the time of ʾAbu Muhraz[5] concerns the witnesses who gave false testimony. According to the Mālikī madhab the falsity would not entail a criminal charge, but the testimony certainly would not be accepted. The Zinduq madhab ("freethinkers") in Iraq was known to demand repentance. However, Ibn Muhraz chose to follow the Hanafī madhab, the madhab of the majority, he is said to have noted. In the same century there were other currents flowing in the direction of keeping a qādī within the particular madhab in which he had been instructed. Sahnūn, the qādī in the Aghlabite capital of Kairouan, was known to propagate the Mālikī doctrine actively throughout Tunisia. Once, however, he sent to the northern rich agricultural region Sulaiman Ibn ʿUmarān as qādī.[6] The people in that area com-

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5. Satārī, page 86. Muhraz wrote a commentary on the Mudawwana called At-Tabassur. He authored Al Qasad and Al-Ijāz. He died 450 A.H.

6. Satārī, page 87.

plained when, contrary to their desires, Sulaimān ruled according to the Ḥanafī madhab. Faced with the complaint, Saḥnūn is said to have answered diplomatically that he preferred that the people be judged according to what they believed in, but at the same time, he believed that a qādī should not venture to apply the principles of a madhab in which he had not been instructed.

The fluidity of the times, nonetheless, gave rise to the status of muftī, the most learned of the jurists, the one considered the most cognisant of various opinions on legal problems, and specialist in interpreting unclear texts. As private individuals attached to the mosque, the muftūn were at first only informal checks on the qudāh when the qudāh chose to seek the advice of the muftūn. The qudāh were not obligated to take their advice since at this time they still held strongly to the concept of the qādī as a single judge who alone was responsible for his judgment.[7]

When the Fāṭimīds invaded the Aghlabite state, and took Kairouan, the qudāh changed political colours and madhab. The first Shī'ī qādī under the Fāṭimīds was a member of a family of Kairouan. One of the outstanding Mālikī qudāh (Ibn Khalkān)[8] changed to the

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7. Jazīrī, page 31.

8. Satārī, pag 87.

leading madhab of the day and compiled a book on procedure and principles of fiqh. During the chaos ensuing the fall of the Fāṭimīds local North African rulers reimposed the Sunnī madhab on the qudāh and specifically allowed only the Mālikī opinions to hold sway.

Under the most stable dynasty of the medieval era (thirteenth to fifteenth century), the Hafsīds, the basic outlines of Tunisian administration of justice crystallised. The Mālikī madhab was in favour. The one-man qāḍī sessions were supplemented by a medjless (majlis), or a sitting of several judges. The political sovereign in the capital appointed four qudāh each with a different specialisation: the qāḍī of the community, the equivalent of the head of the administration of justice; the qāḍī of transactions; the qāḍī of marriage and marital relations; and the qāḍī who affirmed the appearance of the crescent moon. Later there appeared the qāḍī of religion (farīḍat).

In the fifteenth century (ninth century A.H.) the unofficial checks on the qāḍī became incorporated in the judicial structure. The political sovereign still reserved to himself the right to intervene; but between him and the qāḍī came to stand the muftī who was officially incorporated into the bureaucracy. The opinions issued by the muftī still were not legally

binding on the qādī, but it is not difficult to imagine that the muftī as part of the government structure would be subject to opinions of the sovereign and hence would hold sway over the qādī.

Alongside administrative changes, legal literature also was flourishing. The distinguished qudāh of the era authored treatises which were still well-known and used by judges far into the twentieth century.[9] Imām Muhammad Ibn as-Salām, who died in 759 A.H., composed a collection of the principles of Ibn al-Hājib. It was an important source for the opinions of Khalīl, the mainstay of North African Mālikī legal rules. ᶜAbed as-Salām Ibn ar-Rafīaᶜ and Al Barzalī composed a collection of fatāwin which is considered the best expression of Tunisian administration of justice. Al Jalmāsī is known for his description of procedures. He justified the changes in the organisation of Tunisian justice on the ground of contemporary needs. Proceedings and custom changed according to the benefit which the changes would bring for warding off corruption, he argued.

Hence, by the time the Ottomans established dominion over Tunisia, the earlier Tunisian rulers had simplified and stabilised the administration and control

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9. Satārī, page 58.

of the qudāh by channelling them into a definite madhab. The Ottomans being Ḥanafī brought a new complication onto the scene. However, the capacity of the Ottomans for organisation allowed them to make adjustments that kept the judicial organisation stable as it became more complex. The Ottomans had to reconcile two madhabān in case persons not of the same madhab disputed and had to reconcile urban and rural judicial authority, the urban judges being controlled by the Ottomans and the rural by the indigenous Tunisians. One of the first deeds of Sinān Pasha, the Ottoman conqueror of Tunisia, was to delegate a Ḥanafī Turkish qāḍī over the entire judiciary. Trained in one madhab only, the Ḥanafī delegate encountered many difficulties in settling disputes among the Mālikī. By a sensible decision the Ottoman government started the practise of having Mālikī assessors sit with the Ḥanafī qāḍī. The assessors came from the office of the Mālikī muftī and from among the ordinary qudāh. The division of the judicial system between a madhab of the ruling officials and a madhab of the populace made Tunisia unique in the Islamic Empire.

The Husseinites, the last dynasty in Tunisia, were responsible for the final organisation of the adminis-

tration of justice. From the results one can infer that their organisation was guided by two interdependent considerations: desire for political survival of a non-indigenous élite, and an equitable rule that granted concessions to the indigenous élite and populace, even at the expense of running contrary to the practises of Constantinople. For a start, in 1157 A.H. (eighteenth century A.D.) ʿAlī Pasha, the founder of the Husseinite dynasty, obtained the right to recruit in Tūnis itself the Ḥanafī qāḍī, who had previously been sent from Constantinople. Then in fairness to Constantinople he continued to look upon the Ḥanafī qāḍī in Tūnis as the overseer of the entire judicial machinery. In the next century under the dynamic ʾAḥmad Bāy, the Ḥanafī qāḍī in Tūnis received from Constantinople the title Sheikh ul Islām. In practise, however, the Husseinite Bāy could not afford to have the Sheikh ul Islām exercise all the functions which such a title conferred. The Bāy gave the Ḥanafī qāḍī priority only in rank in the official retinue when appearing in public. The Tunisian Sheikh ul Islām had not the powers of his Constantinople counterpart to censor Muslim works, send missions of judicial officials abroad, or be a part of the cabinet of ministers as chief of religious af-

fairs.[10] Instead, the Mālikī and Ḥanafī qudāh were placed o n levels of more or less equal authority, depending on the political realities of the urban or rural location. In Tūnis, the centre of the political sovereigns as well as the centre of the Beylical representative of the Ḥanafī Sulṭān, ʾAḥmad Bāy created alongside the Ḥanafī Sheikh ul Islām a comparable post, the Bach Muftī, the chief consultant for Mālikī affairs. Each head was given power to judge and to supervise their respective court sessions in Tūnis and departments (consisting of lesser muftūn, a qāḍī and supplementary qudāh). Outside Tūnis, only Mālikī qudāh were appointed since the number of Ḥanafī adherents outside Tūnis was very small and all the local minor officials responsible for enforcing the judgments were Mālikī.[11] The seeds for a systematic allowance of appeals lay in this difference between rural and urban constituencies. In their effort to balance religious feelings in their principality, the Husseinite rulers allowed Ḥanafī adherents to appear before the local Mālikī qudāh, who in turn sent the issue to the Ḥanafī qāḍī in the capital. The Ḥanafī qāḍī formulated the rules applicable to the case and sent them to the Mālikī qāḍī, who then passed judgment

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10. Tahar Kheredine, "Report".

11. Satārī, page 90.

as representative of the Hanafī qādī. Later in the century the Europeans arguing for separate courts and judges for the Europeans pointed to the balance between the Hanafī and Mālikī as an example of how they wanted to be accomodated as a third "madhab".[12]

Thus because of more systematic bureaucracy based on hierarchy and supervision, the post of muftī attained its height of influence in the last half of the nineteenth century. This meant that the substance of the Sharī'a applied in civil matters was controlled by the mosque since muftūn were recruited largely from the first class teachers of the Grand Mosque of Zaitūna as were also the urban qudāh subordinate to them. Not trained in the law (as later political ruler after the colonial era was to be), not interested in the law unless it affected political stability, and having more contact with the urban muftūn, the supporters of orthodoxy, than with the qudāh, the Bāy limited his legislative decrees largely to organisational concerns. Yet the style and the extent to which the decrees limited the control of the Bay over judicial affairs changed with each Bāy. There was a tendency in the decrees of each successive Bāy in the nineteenth century towards a formal style and towards the

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[12]. Satārī, page 90.

creation of more layers of jurisdiction between the Bāy and the qādī of first instance. ʾAhmad Bāy's decree on the emancipation of slaves (in 1846) appeared at the beginning of this trend. In Chapter I we cited the decree of ʾAhmad Bāy as an example of the pressures which the Europeans were putting on Tunisia's public interest. As a legal document, the decree is an example of the interest of the Bāy in the law when it affected political stability. While the qudāh in the formative years of Islamic law had used their discretion to choose among various opinions argued by various jurists, ʾAhmad Bāy in the nineteenth century felt that there was still room for maneuvering and exercising his own opinion in an area where he saw that jurists still arguing.[13] ʾAhmad Bāy's view of himself as being on a par with any jurisconsultant in his realm is manifested in the fact that he did not limit

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13. Beylical Decree of 23 January 1846 on emancipation of slaves (Marty and Maarek's Recueil de Législation, Zeys, 384): "...You are not ignorant that our learned jurists are not in agreement on the question of knowing whether slavery, in which the Negro races have fallen, is supported by a formal text; that the light of religion has penetrated in their countries for a long time; that we are far from the era when masters conformed, in the enjoyment of their rights, to the prescriptions dictated by the most eminent of Messengers before his death; that our Sacred Law emancipates by law the slave who is mistreated by his master; and that the legislation has a marked tendency towards extension of liberty."

See page 30 of Chapter I above.

the justification of his interference to public interest. He gave his decree the stamp of jurisprudential validity: no rights to those who abuse them even though they were established in the time of the Prophet and used correctly at that time; no blind following of rules where the jurists disagree about the textual support of the right in question, that is, slavery of Blacks; emphasis on what the Sharīʿa commends, namely emancipation rather than slavery; emphasis on laws that expand rather than restrict what the Sharīʿa commends. The provisions for the execution of the decree further showed that the Bāy was reluctant to entrust reforms to men accustomed to old ways. He relied on new officers and himself. Notaries were to be created at certain centres to issue certifying papers without intervention of the qudāh as was the case in certifying marriage contracts, or deeds of waqf. When the qādī was petitioned with a case of emancipation he was to relinquish jurisdiction to the Bāy himself. This was the extent of ʾAḥmad Bāy's official intervention in the court system of the Sharīʿa. In this way he differed from some of the princes of the eastern states of the Ottoman Empire who had been undertaking large-scale reforms in organisation (tanzīmat). The reorganisations were largely of a legal nature that affected the courts of the Sharīʿa by confining them to

family matters and removing them from certain commercial and criminal jurisdictions.

The two successors of ʾAḥmad Bāy came closest to adopting the concepts of tanzīmat. One year after the death of ʾAḥmad Bāy, Muḥammad Bāy began with a decree (of 14 November 1856) concerning organisation of the courts of the Sharīʿa of the capital. In terms of jurisdiction the decree seemed only to confirm what had been before: "[courts of the Sharīʿa are] for pronouncing and having executed the judgments of the law as well as for regulating religious affairs."[14] There was no definition of which "law", and the example of religious affairs concerned verification of the crescent moon for Ramaḍān. The remainder of the decree was devoted to details of location, numbers of judges and standards of conduct expected of the judges. The details all point to an effort on the part of the political sovereign to remove the influence of the mosque on the judges and to make them appear more as secular officials even though the substance of their duties derived from the religious. A building, the Dār as Sharīʿa, away from the respective Mālikī and Ḥanafī mosques, was designated for the qudāh as the

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14. Beylical Decree of 14 November 1856 (16 rabia al aoual 1273) on the organisation of the Sharīʿa of Tūnis, paragraph one (in Marty and Maarek, and Zeys, 523).

place to pass judgments. The only other place where they were expected to appear officially was at the Palace of the Bāy, once a week. Only later in the century was the Dār as Sharīʿa made exclusively the place for qudāh to pass judgments, this fact implying that in 1856 the qudāh might have sought to keep a measure of freedom in performing business in their respective mosques. Within the Dār as Sharīʿa the arrangements made for sitting were similar to those the judges had been accustomed to when in the mosque. The west side of the Dār as Sharīʿa was for the qudāh, Hanafī and Mālikī. The east side was for the Hanafī and Mālikī muftūn giving fatāwin when requested and assisting the qudāh at the request of the parties and substituting for the qudāh in case of absence of the latter. The qudāh and muftūn were treated like government bureaucratic officials when the decree specified the number of hours the courts of the Sharīʿa were expected to function and prohibited judgments after hours. Undoubtedly knowledge and piety were assumed to be the two basic qualifications for judges; but the Decree of 1856 added a bureaucratic morality, namely, judges were not expected to leave work early on days when the number of cases was small. They still had paper work and certifications to perform. Nor was any judge to

leave a meeting of all the judges before its official adjournment.

The main innovation in the Decree of 1856 was the council of judges exclusively composed of the judges located in the capital -- the Sheikh ul Islām, the muftūn, the qudāh, the dey (daʾy) -- one council for each madhab . Multiple jurisdiction was a departure from the traditional one-man, one judgment concept. The individual qādī continued to sit alone, but he was supplemented now by muftī and council. The jurisdiction of the council was left vague, outside its duty to verify the appearance of the crescent moon for Ramadān. In general the council would assemble in cases of a serious event, a condition which supposedly could be determined by the Sheikh ul Islām or the Mālikī Bach Muftī, each of whom presided over their respective council, or by the Bāy who could have them assemble at his Palace. Although the councils were the basis of an appellate organ, so designated properly later, one can only infer a certain appellate jurisdiction from paragraph seven of the Decree of 14 November 1856: Individual judges in Tūnis were to issue sentences to the provincial judges in the form of mrasla (murāsala). Presumably the judges could do the same when meeting as a council. Cause for issuing a mrasla (murāsala) arose when a provincial Mālikī qadi

asked for instructions from the Hanafī qādī in Tūnis should the parties be Hanafī, or when the litigants in the provinces were dissatisfied with the local qādī and chose to seek judgment from the capital's judges who supposedly were the most learned and in touch with the latest teachings and discussions held in the mosque schools. However, jurisdiction of the judges in the capital over the provincial cases was not strictly appe llate in the sense that a second instance judge has the legal right to force a first instance judge to withdraw the first judgment when that judgment is deemed contrary to law and evidence.

One year after the Decree of 14 November 1856, the ʿAhd al-ʾAmān was decreed and it brought Tunisia closest to the Tanzīmat reforms. The Fundamental Pact of 10 September 1857 was the start of a short-lived trend, before the establishment of the Protectorate, towards reducing the arbitrary intervention of the political sovereign into judicial affairs and towards a division of powers among the Bāy, his most immediate assistants, the Mamluks, and the Europeans. On the surface, the ʿAhd al-ʾAmān was a resp nnse to an increase in litigation, for it organised the judicial system according to categories of action rather than according to categories of persons bringing ac-

tions. Article III read: "Muslims and other inhabitants of the country will be equal before the law, for this right belongs naturally to man, whatever his condition. Justice on earth is a scales which serves to guarantee right against injustice, the weak against the strong" (see page 37 of Chapter I above). Article VIII added: "All our subjects, Muslims or others, will be equally subjected to rules and usages in effect in the country; none of them will enjoy any privilege over the other." The ʿAhd al-ʾAmān divided jurisdictions into commercial (Article VIII), criminal (Introduction and Article VI), real estate (Article XI), and the Sharīʿa (Introduction), the Sharīʿa being in effect limited to religious affairs and family matters. In fact, however, the division of jurisdictions reflected a highly politicised atmosphere. Jurisdiction for each class of actions was not to lie in the hands of a well-coordinated judiciary, but in the hands of those political blocs most interested in a particular class of actions. Thus the criminal courts were to be subject to the Bāy for final sentencing (Article I). Commerical matters were to be handled by Europeans and Tunisians jointly (Article VII). The actual extent of the jurisdiction of the qudāh outside of religious affairs

was left vague, as was also the question of who was to judge in real estate matters (Article XI). Given that even after the establishment of the Protectorate the qādī had certain jurisdiction in land matters, the silence in the ʿAhd al-ʾAmān on real estate matters no doubt meant a tacit sanction of the continuation of the courts of the qādī in land matters. What the ʿAhd al-ʾAmān did not tacitly sanction was the muftūn as chief coordinators of the new system of jurisdictions. The judges of the Sharīʿa had throughout the history of Islam been accustomed to the political sovereign usurping their criminal jurisdiction, since the emīr desired control over all sources of physical power -- police and prison keepers, not just the military. Originally the administrative medjless (majlis), called the Dīwān, was composed of the military officers. They did not confine themselves to judging disputes among soldiers; they also tried civilians for certain felonies deemed to affect the interest of the state.[15] Yet the emīr had appointed judges separate from the qudāh for crimes that had not been prescribed like the hudūd. The qudāh had retained jurisdiction in the hudūd.[16] In the mid-nineteenth century the criminal

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[15]. Satārī, page 89.

[16]. Jaziri, page 45.
Ministry of Justice, "Report on Matters of Competence in Penal Matters," (in French) 29 October 1941.

code which Muhammad Bāy promulgated in accordance with the ʿAhd al-ʾAmān was extracted from the Islamic fiqh with one important omission.[17] The hudūd for misdemeanors like theft were replaced by penalties of imprisonment and taʿzīr. The qudāh were taken out totally of criminal jurisdiction. Only the Bāy and the criminal courts remained, the courts investigating and judging the case, the Bāy executing the sentence with leave to lighten or increase the sentence (article one).

A more serious blow was given to the authority of the officials of the Sharīʿa as overseers of the general principles guiding the entire judiciary. The Bāy seemed to have relegated that function to himself. He formulated the principles and made his royal successors responsible forever for the execution of the ʿAhd al-ʾAmān. He had consulted the Sheikh ul Islām and the great ʿulamāʾ, but admitted that most of the inhabitants in his kingdom did not have complete confidence in his intentions.[18] Certainly the Sheikh ul Islām,

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17. Satārī, page 90.

Article 2 of the Beylical Decree of 9 July 1913 promulgating the Tunisian Criminal Code (T.Snoussi's 1957 edition): "The Code of 1913 abrogated the Code of Muhammad Bāy." (in Arabic).

18. Introduction of the ʿAhd al-ʾAmān: "We are convinced that most of the inhabitants of our Realms do not have a complete confidence in what we have done with the best intentions..." (see page 35 of Chapter I above). (Marty and Maarek)

having opposed the Europeans in the Sfez affair (see page 32 of Chapter I above), opposed the principles of the ʿAhd al-ʾAmān which was the Bāy's response in part to the demands of the Europeans in the Sfez affair. The justifications for the ʿAhd al-ʾAmān were purely public policy, lacking the more precise jurisprudential references which ʾAhmad Bāy had given in his decree of 1846 on slavery. One can account for the difference by the fact that Muhammad Bāy aimed at reconciling opposing political factions in Tunisia; doctrinaire jurisprudence would have hardened attitudes. Muhammad Bāy worked on the principle that justice is the basic right of man, not just of Muslims: "It is a law of nature that man can arrive at prosperity only as long as his liberty is completely guaranteed to him, as long as he is certain to find refuge against oppression behind the ramparts of justice and he sees his rights respected until the day when unimpeachable proofs show his guilt, only as long as he (is) sure that this guilt will not result against him from insulated witnesses... We have seen the Sheikh ul Islām and those great powers who by their wise policy have placed themselves at the head of the nations, by giving the most complete guarantees of liberty; they have understood that that is one of their duties, dictated by reason and by nature itself. If these advantages

that have been conceded are real, the Sharīʿa must consecrate them, for the Sharīʿa was instituted by God to defend man against bad passions. Whoever submits to justice and swears by her approaches piety" (Introduction of ʿAhd al-ʾAmān). The criminal code itself affirmed the principle that a person is punished only in accordance with a written legal provision, but affirmed the principle as a right of man, rather than a right of God like the hudūd.

The ʿAhd al-ʾAmān exposed a constitutional conflict in authority, namely, did the upholder and protector of the Islamic faith and laws have just as much right as a scholarly jurist to interpret the meaning of the Sharīʿa? The Bāy in 1857 was saying in effect that he was not going to limit himself to upholding a Sharīʿa that was exclusively defined by the ʿulamāʾ. He had his own broad interpretation of the dictates of God and was going to see that the Sharīʿa incorporated those dictates. As the upholding of the Sharīʿa was incumbent upon the political sovereign, so the Bāy swore to bind himself and his successors to uphold the principles he himself had incorporated into the Sharīʿa.[19] It was

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[19] Conclusion of the ʿAhd al-ʾAmān: "We will undertake matters not only in our name, but in the name of our successors: none of them will be able to reign except after having sworn to serve these liberal institutions, resulting from our care and efforts; we take as witness before God, this illustrious assembly of the representatives of the great friendly powers and the high officials of our Government."

ironical that the Bay who had traditionally been regarded as arbitrary in criminal law outside the hudūd was determined not to be arbitrary when he no longer included the hudūd in his criminal code.[20]

Apart from the political pressures of the moment and its affront to the details of the law of the Sharīʿa as interpreted by the muftūn and the qudāh, the ʿAhd al-ʾAmān can be viewed as part of an evolution in Islamic law in general in Tunisia. As a written document, the ʿAhd al-ʾAmān was a culmination of a long evolution in Islam towards putting into writing legal rules that would apply to a given community. First the oral revelations were collected into a written Qurʾān. Then the sunna of the Prophet and his Companions were recorded after an intense study of the

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20. Speech of the first president of the mahkama al-taʿqīb (highest appellate court), Sīdī Mūsa al-Kazam, Al Qadāʾ at-Tūnisī, 1957, page 134:

> "For the princes and rulers challenged the authority of the qudāh and the rulers created limits for the Sharīʿa. Then they invented the siyāsa jurisdiction, a domain that had no limit and there was added to that the inabilities of the administration of justice to seize the chains of national dominion within their own house over foreigners seeking protection in the consular concessions since the tenth century hegira.
>
> "The Tunisian country underwent suffering from the lengthiness of the malise, its terribleness and its wickedness. So the administration of justice in Tunisia became weak in expression, precarious in existence, limited in power by the courts of the bāyāt (Bāy), the qawād (caïd) and the dāyāt (dey), who took over settlement of disputes within the scope of what God revealed about authority. So the exceptions and the special rights were

oral traditions and published as collections of ʾaḥādīth. In the meantime jurists were composing their legal opinions in manuals that established sufficiently coherent principles to form a madhab. Political rulers, qudāh, and muftūn then simplified administration of justice by forcing qudāh of a particular region to confine their legal consultation to one madhab. Under the Ottomans the Islamic principalities saw administrative organisation and control grow in the form of decrees and ordinances from the political sovereign. In the late sixteenth century in Tūnis the early Ottoman dey (daʾy) (officers elected by the Ottoman infantry called the Janissaries) issued the mīzān (justice, a code of laws for maintaining order and collecting taxes in the country.[21] Throughout the nineteenth century the Sultān had his firmān and the Bāy his ʾamr to make known the rules by which they specifically wanted to govern their subjects. From this mass of literate wealth one can see that a certain confusion resulted over how the sources of law related to one another. All the writings grew out of an effort to balance the positivistic reality of temporal government and the religious

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generalised and the original administration of justice was divested of its executory power, a power which is the soul of the judiciary character..."

21. Encyclopedia of Islam, "Tunisia", 1934 edition.

raison d'être of the Islamic Empire. Sources like the Qurʾān and ʾaḥādīth connected with the religious raison d'être derived from authors other than the ephermeral "people" or ruler. The reverent respect for Allāh and the Prophet made it impossible to change their words without their consent. The Qurʾān could abrogate itself but no one else could. Hence, subsequent writings of jurists and decrees of political rulers could only supplement and interpret the Qurʾān and ʾaḥādīth, not abrogate them. In reality the effect of abrogating could be achieved by rulers ignoring or rendering impossible the operation of provisions of the Qurʾān (like the Tanzīmat reforms in criminal law.) Still it was not direct abrogation and there was a limit on the extent to which one could answer definitely the following question: To what sources of law did the courts appointed by the political sovereign turn to seek principles to apply to particular cases?

The ʿAhd al-ʾAmān can be seen as an effort to make order out of the mass of written sources of law. The instruction to all judges, qādī or otherwise, was that the word of the Bāy was the most immediate source of law applicable in the courts. It was his right to decide what were the legal sources supporting his word.

He endowned his right with the same eternal binding force which the jurists had proclaimed for the Qurʾān and ʾaḥādīth. In this case Muḥammad Bāy chose to affirm the principle of uniform justice for all mankind living in his realms. The principle was to be expressed through the judgments of the courts of the Sharīʿa, through the criminal code not applied by the judges of the courts of the Sharīʿa, and a commercial code borrowing from European and Muslim usages. Although Muḥammad Bāy in fact only changed the criminal law of the Sharīʿa, his Fundamental Pact had the makings of a bold systematisation of legal authority in the Islamic state.

The next major legislation was the constitution of 1861 during the reign of Muḥammad Es Ṣādiq. Its realisation, however, was a continuation more of the political tone of the ʿAhd al-ʾAmān rather than an exposition of jurisprudential principles. The Mamluk ministers who drafted the constitution needed laws which protected them from the arbitrary power of the Bāy to dismiss his appointees rather than laws which upheld the traditional Sharīʿa. For the Sharīʿa was long on private rights, but short on administrative rights such as tenure or pension. The constitution of 1861 proclaimed essentially administrative rules for the government of the Bāy.

In judicial concerns the constitution had three ends: allocating responsibility for upholding the ʿAhd al-ʾAmān; a general outline of judiciary structure for judgments not based on the Sharīʿa; and protection of the rights of employment of administrative officials. Articles nine and eleven covered protection of the ʿAhd al-ʾAmān, which came to be considered the only indication of the legitimacy of a ruler since every ruler had to swear to uphold its provisions. Physical might or religious piety no longer were to suffice in themselves. The only public crime specified was the failure of the Bāy to uphold the principles of the ʿAhd al-ʾAmān (Article nine).[22] Even though it was incumbent upon both the medjless (majlis) of the Sharīʿa (the council instituted in Muhammad Bāy's decree of 1856) and the legislative-administrative body called the Supreme Council to hear each as-

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22. Article 9: Any prince upon his ascension to the throne must swear in the name of God to do nothing contrary to the principles of the Fundamental Pact and the laws deriving therefrom, and to defend the integrity of the Tunisian territory. This oath must be solemnly made and in a high voice, in the presence of the members of the Supreme Council and the members of the Sharīʿa medjless (majlis). It is only after having fulfilled this formality that the Prince will receive homage from his subjects and that his orders must be executed.

The Chief of State who voluntarily violates the political laws of the Kingdom will be shorn of his rights.
(Constitution of 1861, Marty and Maarek)

cending Bāy swear allegiance to the ʿAhd al-ʾAmān, it was only to the Council (headed by a Mamluk) that the Bāy was held responsible for violating the laws (Article eleven).[23] The Sharīʿa had no part. Chapter III on the Organisation of the Supreme Council and the Courts created new courts without reference to the courts of the Sharīʿa, thus implying that a new system for criminal, civil, commercial, and military matters would be set up alongside the traditional system for personal and land matters.[24] The main structural dif-

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[23]. Article 11: The Head of State is responsible for all his acts before the Supreme Council if he contravenes the laws.

[24]. Article 22: There will be a police correctional court for judging simple police infractions.

Article 23: There will be a civil and criminal court for dealing with affairs other than those which depend on military councils and courts of commerce.

Article 25: There will be a court of commerce for dealing with commercial affairs.

Article 26: There will be a council of war for dealing with military affairs.

Article 60: The Supreme Council is the guardian of the Fundamental Pact and of the laws, and the defender of the rights of inhabitants. It opposes the promulgation of laws which will be contrary to or which will attack the principles of the right of tenure of the magistrates, except in the case of dismissal for a crime committed and established before the court.

It will deal with recourses against the judgments rendered by the court of review in criminal matters, and will examine whether the law was well applied. When the law is pronounced, there will be no other recourse.
(Marty and Maarek)

ference between the new system and the system of the Sharīʿa was to lie in the provision of Article twenty-four for an appellate court: "There will be a court of review for dealing with appeal on facts from the judgments rendered by the civil and criminal court and court of commerce." The new system even differed from the system of the Sharīʿa in its most immediate legal sources of authority. The civil, criminal, and commercial courts were to judge according to legal codes drafted by the Supreme Council with the Bāy's approval.[25] No one had ever promulgated the legal manuals from which the qudāh drew their principles of law.

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[25]. Article 27: The judgments rendered by the courts instituted by the present law must act according to the articles of the codes edited for their use.

Article 62: The Supreme Council can prepare drafts of law in the large interest of the country or for the government. If the proposition is adopted by the Head of State in his Council of Ministers, it will be promulgated and become part of the laws of the Kingdom.

Article 90: The crimes, misdemeanors, and violations which our subjects commit whatever their religion will be judged only by the constituted courts, as it is prescribed in the present code, and the sentence will be pronounced only according to the dispositions of the code. (Marty and Maarek)

Hādī Madinī of the staff of the publication of Al Qadāʾ waʾl tashrīʿa of the Ministry of Justice, Tūnis discusses the draft of the Commercial Code, completed in January of 1864, in numbers 6 and 7 of Al Qadāʾ waʾl tashrīʿa of June 1971 and July 1971 respectively, from pages 57 and 41 respectively.

Presumably the codes for the new courts would have specified in detail the jurisdiction over matter and persons. The constitution only stated certain jurisdictions which had to appear in the codes. The general jurisdiction of the civil and criminal and commercial courts was to cover all Tunisian subjects (Article eighty-seven)[26] regardless of religion and all foreigners residing in Tunisia (Article one hundred fourteen).[27] As for subject matter these courts were to hear all crimes (Article ninety).[28] Criminal jurisdiction over foreigners was not per se specified. It appears to have been merely included in the general subjection of foreigners to Tunisian courts (Article one hundred fourteen):

> The creatures of God, being equal before

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[26]. Article 87: All our subjects without exception have the right to see to the maintenance of the Fundamental Pact, and to the execution of the laws, codes, and rules promulgated by the Head of State in conformity with the Fundamental Pact. Towards this end, they can all be aware of the laws, codes, and rules above mentioned, and denounce before the Supreme Council, by way of petition, all the infractions which they know of, even when these infractions do not impinge on a third party. (Marty and Maarek)

[27]. Article 114: The creatures of God, being equal before the law, without distinction, whether for cause of their origin or their religion, or their rank, the foreign subjects established in our Realms, who are called to enjoy the same rights and advantages as our own subjects, must be subjected, like the latter, to the jurisdiction of the various courts which we have instituted to this effect... (Marty and Maarek)

[28]. See footnote 26.

> the law,...the foreign subjects established in our Realms, who are called to enjoy the same rights and advantages as our own subjects, must be subjected, like the latter, to the jurisdiction of the various courts which we have instituted to this effect. ...(A)nd yet, in order to give a greater security we have established in the civil and criminal codes that the consuls or their delegates will be present before all our courts in cases or trials of the persons within their jurisdiction.

The qādī was excluded definitely from any criminal jurisdiction by Article ninety:

> The crimes, misdemeanors, and violations which our subjects commit whatever their religion, will be judged only by the constituted courts, as it is prescribed in the present code and the sentence will be pronounced only according to the dispositions of the code.

In commercial and land matters, the constitution was more ambiguous, not expressing exclusive jurisdiction of the commercial or civil courts in such matters. Actions brought by Tunisians and foreigners in these areas were merely subject to the rules already established and rules to be established. Rules already established referred no doubt to the Sharī'a and previous Beylical decrees. Provisions for commercial competence read:

(Article ninety-seven)

> All our subjects who exercise any industry must submit to the rights already established or those to be established in future relating to rights of entry and departure on the products of the land or on manufactured ones.

(Article one hundred twelve)

> The foreign subjects established in the Tunisian realms will be able to undertake commerce of importing or exporting on the same footing as the Tunisian subjects and they must submit to the same charges and restrictions as those to which the said Tunisians submit.

Likewise in property matters, the constitution did not specify how far the civil courts would compete with the courts of the Sharīʿa. In regard to the Tunisian subjects, the reference to them is only in terms of rights not jurisdiction of courts:

(Article ninety-six)

> All those of our subjects who possess immoveable (property), whatever it be, whether it be like a share-cropping tenant, whether by perpetual rent, whether by right of enjoyment, can cede their rights of property by sale, gift, or any other manner, only to those who have the right of possession in the kingdom. The concession to any other is invalid.

Ones who did not have rights of possession probably referred to foreigners not established in the Tunisian realms.

Since the land rights of Tunisian subjects were intricately bound up with the rules of the Sharīʿa on succession, partition, and co-ownership, one could presume that matters of land rights still fell under the jurisdiction of the courts of the Sharīʿa. Foreigners, however, had disputed hotly being subject

to the Sharī'a in land matters. Hence, the constitution spoke about jurisdiction over foreigners in terms of "laws to be established":

(Article one hundred thirteen)

> ...It is well intended that the foreign subjects who will possess immoveables in the localities designated will be subject to the laws established and to be established on an equal footing as the Tunisian subjects.

As for civil matters, there is only one clue as to the scope of civil laws, that is, debts (Article seventy-three). Other "civil matters" later came to mean all contracts concerning moveables and immoveables (by the Code of Contracts and Obligations of 15 December 1906).

Aside from the provisions on the general jurisdiction of the new civil, criminal, and commercial courts, the constitution of 1861 also carried articles specifying the jurisdiction of the courts over administrative officials. From a strictly legal point of view, this equality before the law aimed at protecting the administrative officials from arbitrary dismissal at the whim of the Bāy. In principle the criminal sentences determined by the new criminal courts were removed from the Beylical controls. Serious criminal sentences automatically resulted in dismissal, without

any interference from the Bāy (Articles eighty-one, eighty-two).[29] Lighter sentences were not to affect the employment of the accused official (Article eighty-four). In practice the administrative officials assured their efforts to escape Beylical interference in legal matters by placing some of the administrative officials on the Supreme Council -- a body at the apex of the legislative, executive, judicial organisations -- and by conferring on the Council wide judicial powers. For despite the existence of a criminal code the Council had the right to discuss any sentence that automatically meant the dismissal of an official (Article sixty-three). The general judicial jurisdiction of the Council was to cover in effect anything affecting public policy. The Council was to uphold the general principles underlying all the laws:

(Article sixty)

> The Supreme Council is the guardian of the ʿAhd al-ʾAmān and of the laws, and the defender of the rights of the inhabitants. It

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[29] Article 81: No official, whatever his rank, can be dismissed, except for an act of a speech contrary to the loyalty demanded in the position he occupies. His misdemeanor must be stated before the Supreme Council. If it is proved, on the contrary, before the said Council that the official was accused wrongly, he will continue to occupy his position and the accuser will be condemned to the penalty of article 270 of the penal code.
(Marty and Maarek)

Article 82: The distressing and infamous penalties pronounced by the civil and criminal court carry with them dismissal (from office).
(Marty and Maarek)

> opposes the promulgation of laws which will be contrary to or which will attack the principles of the laws, the equality of inhabitants before the laws, and the tenure of the magistrature, except in the case of dismissal for a crime committed and established before the court...

The wording of Article sixty seems not broad enough to have allowed the Council much interference in the courts of the Sharī'a except by way of any decrees affecting these courts like the Decree of 1856 on organisation of the courts of the Sharī'a of Tūnis, or legislation that promulgated new codes for new civil and criminal courts. However, the more detailed references in subsequent articles to the judicial powers of the Council in criminal matters tended to restrict the Council to surveillance over only the new courts not applying the Sharī'a. This is not surprising when one considers the politics of the era. Finding political competition strongest in civil and criminal matters rather than in family matters, the Mamluks writing the constitution had more interest in controlling criminal matters that affected their political rank which in turn determined their wealth. Stirring up a hornet's nest by interfering with the Sharī'a would serve no political benefit. Article sixty-one made the Council serve as final arbitrator in criminal judgments that were

appealed from the ordinary criminal court:

> In case of recourse against a judgment rendered by the court of review [article twenty-four, providing for a court of review dealing with appeal on facts from the judgments rendered by the civil and criminal court and court of commerce] in criminal matters, the Supreme Council will choose from its midst a commission composed of twelve members at least to examine whether the law has been violated. When this commission states that procedure has been observed, that the law has been well applied, it will confirm the judgment under attack, and the party will no longer have means to validate his claim. If, on the contrary, the commission recognises that the judgment was not rendered in conformity with the law or procedure it will send the matter back to the court of review in pointing out the defects of the judgment.

Article sixty-three gave the Council first instance jurisdiction in disputes over interpretation of all the codes promulgated or to be promulgated. In this way the Council was to serve as a <u>muftī</u> but with a difference; the Council had substantial judicial power and was not limited to any advisory capacity. The article read:

> The matters which can be decided after having been proposed to the Supreme Council, discussed, examined to see whether they conform to the laws or are advantageous for the country and the inhabitants, and are approved by the majority of the members are: [among others] the abrogation of a law by another more useful;...questions not provided for in the code; the explanation of the text of codes; the application of their dispositions in case of dispute...

Article eighty-seven , besides declaring the general responsibility of all citizens to uphold the law, also aimed at keeping the Council abreast of all potential disputes in case the courts -- Sharī'a or constitutional -- were negligent about being informed of all infractions of the law:

> All our subjects, without exception, have the right to see to the maintenance of the 'Ahd al-'Amān and to the execution of the laws, codes, and rules promulgated by the Head of State in conformity with the Fundamental Pact. Towards this end, they can all be aware of the laws, codes and rules above mentioned, and denounce to the Supreme Council, by way of petition, all the infractions which they know of, even when these infractions do not impose on a third party.

The third and final jurisdiction of the Council included matters that one would today classify under administrative law. Articles forty-two and sixty-six gave the Council general powers to examine complaints against all officials:

(Article forty-two)

> Complaints of the governors against the governed, and vice versa, when it is a question of matters of service, will be carried, with evidence to support, before the competent Minister, to be examined, and then carried to the recognition of the Head of State in his Council.

(Article sixty-six)

> The complaints about violations of the laws, committed by the Head of State, or by any other individual, will be addressed

> to the Commission charged with ordinary service. The said Commission must convene for three days should the Council be on vacation, and will make it aware of the said complaint. If the Council is in service, the complaint will be immediately brought to its attention for discussion.

What legal action the Council could have taken against administrators was specified only for cases involving Ministers and non-ministerial agents:

(Article seventy)

> The complaints against the Ministers, for facts relating to their functions and for violation of the laws, will be carried before the Supreme Council, with proof to support, for examination before it. If the deeds committed result in the dismissal from office, suspension, or payment of a fine fixed by the code (criminal), the penalty will be pronounced by the Council. If on the other hand the guilty merits a more serious penalty, the affair will be sent before the criminal court.

(Article seventy-one)

> The complaints against the agents of the Government other than the Ministers, for deeds relating to their functions will be carried before the Minister to whom they are subordinate, and from there to the Supreme Council, to be judged according to the dispositions of the code.
>
> If the deeds imputed to the agent are those which carry a serious penalty, such as exile, detention, forced labour, or capital punishment, the affair will be sent before the criminal court.

Even when the criminal courts were allowed to try a minister or agent of the government for serious crimes,

whose penalties entailed dismissal from office, the Council had the right to review such decision to test its conformity to the laws, as provided in Article sixty-three:

> The matters which can be decided after having been proposed to the Supreme Council...are:...the dismissal of an official of State who will have merited this penalty for a crime committed and judged...

Unlike the criminal code which took away all criminal jurisdiction in hadd from the courts of the Sharīʿa, the constitutional provisions for the Council's powers to try administrative officials according to the criminal code were not very innovative. The Council was designed to carry on the purposes for which the traditional courts of maẓālim had been created. The courts of maẓālim were courts of complaints; in particular, complaints against the unlawful acts of the government officials, whether qāḍī, or tax collector.[30] The quḍāh applying the Sharīʿa had long been accustomed to the political sovereign using his power to control criminal and administrative affairs. The main difference between the Council's judiciary control

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30. ʾAbū al-Qāsim al-Qaruwī as-Shābī, Assistant Public Prosecutor for the Court of Appeal (Taʿqīb), Tūnis, "Qāḍī al-maẓālim," Al Qaḍāʾ at-Tūnisī, 1957, page 52. The study on the courts of the maẓālim was based on al-Māwardī's Al-Ahkām as-Sultānīya.

over officials and the jurisdiction of the courts of mazālim lay in their procedure. The Council had a code with determined rules to judge cases; the courts of mazālim had no clear determined method.[31]

The constitution of 1861 did not stay in effect long enough (only three years) for a case history to develop and to point out what actual legal conflicts the provisions engendered. The ʿAhd al-ʾAmān was to survive only as a pledge that the political sovereign would subject himself to laws and forego arbitrary intervention into the legal system. We have seen the political forces surrounding the two documents and examined the legal system they aimed to produce in the mid-nineteenth century. It remains for us to view the two in the light of how they forced Tunisian Muslims to become part of the evolution of Islamic law. The ʿAhd al-ʾAmān and the constitution of 1861 have become milestones in the evolution of the Islamic law over the last one hundred fifty years by the fact that they raised issues of reforms which never went away. The issues became latent during the Protectorate years, then flared up again as the time of Tunisian independence approached. These issues are what lie behind the crisis of conscience that plagues Muslims in facing changes in the law. The influence of

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31. Qaruwī, page 53.

the Europeans has been believed to be responsible for the reforms in the Sharīʿa for the last one hundred fifty years. Yet the ʿAhd al-ʾAmān and the constitution of 1861 were not entirely dictated by the Europeans; nor were they wholesale adaptations of European customs. The Europeans were certainly catalysts to reform, because their presence raised questions that the Muslim world found pressing and unprecedented. Muslims had been accustomed to a history of conquering and overtaking foreigners. The nineteenth century brought for the first time traffic in the opposite direction. The foreigners were flowing into the Muslim state. There had been conflicts to resolve when the Muslims overran foreign lands; and a law was forged for the circumstances and remained in essence the same for centuries. There arose conflicts likewise when the Europeans moved into lands where Muslims had long established sovereignty. Could the law once established for certain conditions be changed to meet opposite conditions or could one cause conditions to revert to the original status quo? This was the question before the Muslims. The ʿAhd al-ʾAmān and the constitution of 1861 favoured adapting the law to the demands of the conditions. The ʿAhd al-ʾAmān, a statement of principles, implied some guidelines for determining which classes of conditions

warranted changes in the law rather than spending time on reverting conditions to the status quo. Using the law to change the status quo was not at stake at that time, as was to be the case in the twentieth century. One guideline given by the ʿAhd al-ʾAmān was hardship. The conditions warranting change in interpretation of the law were those of adversity, brought about by persons outside the community, and those of moral laxity within the community itself. In 1857 adversity took the form of Europeans who were too powerful to ignore or to defeat militarily. Moral laxity came in the form of a charge that the ʿulamāʾ, the traditional interpreters of the Sharīʿa had failed to incorporate into the Sharīʿa the principles of equality of God's creatures; so the political sovereign had to remedy the situation.[32] Because these themes were to appear

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[32] Paragraph five of the Introduction of the ʿAhd al-ʾAmān: "Convinced that it is necessary to follow the prescriptions of God in everything relating to His creatures, I have decided no longer to let weigh upon those (creatures) who are confided to my care injustice nor contempt: I will neglect nothing in putting them in full possession of their rights."

Paragraph thirteen of the ʿAhd: "We have seen the Sheikh ul Islām and those great powers who by their wise policy have placed themselves at the head of nations, in giving the most complete guarantees of liberty; they have understood that that is one of their duties, dictated by reason and by nature itself. If these advantages that have been conceded are real, the Sharīʿa must consecrate them, for the Sharīʿa was instituted by God to defend men against bad passions. Whoever submits to justice and swears by her approaches piety."

Article III of the ʿAhd: "Muslims and other in-

throughout the history of legal reforms in Tunisia and help explain why certain reforms occurred and others did not, one should turn to the details of the crisis that produced the ʿAhd al-ʾAmān and the constitution of 1861.

The ʿAhd al-ʾAmān and the constitution were basically redefinitions of the law of the dhimmī. In the Sunnī madhāhib the law divided non-Muslims into two categories: dhimmī and mustaʾmīn. The dhimmī was a non-Muslim living as a subject in Muslim lands. Many were descended from communities that were conquered by Muslims. Some, like the Hebrews, had fled to Muslim lands to escape persecution elsewhere. Regardless of origin, they accepted Muslim political sovereignty in return for certain safeguards of their religion and legal rights. They could not be treated completely equal to Muslims, because religion determined rights, as citizens today of a particular country have more rights by virtue of having more duties than non-citizens residing in that country. The dhimmī was subject to

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habitants of the country will be equal before the law, for this right belongs naturally to man, whatever his condition.

Justice on earth is a scales which serves to guarantee right against injustice, the weak against the strong.

(See pages 34-37 of Chapter I above)

punishments of hadd except those which related to the Muslim religion like the hadd for drinking wine. Yet the Sfez affair of 1857 (see page 32 of Chapter I above) pointed out that the dhimmī was subject to the penalty for offences such as blasphemy and disrespect for the Islamic religious sentiment. In the law of procedure the dhimmī could not be witness for affairs of Muslims but could in affairs of another dhimmī. In the law of contracts and commerce the dhimmī had full rights except in a contract called mufāwada, a partnership with full liability and power of each partner. In land law the dhimmī could own land as long as he paid the kharāj (land tax). Muslims were subject only to taxes on crop production.

The non-Muslims who fell into the category of musta'mīn were originally from lands which the Muslims had not conquered, like France, England, Austria. Hence, there was always a potential for war with these unconquered lands. They were called the dār al-harbī. When any person from the dār al-harbī wanted to enter the Muslim lands, the Muslim political sovereign guaranteed by an agreement security of person and possession. The visitor from the dār al-harbī then became a musta'mīn, similar to the dhimmī in rights, but limited in his stay to a maximum of about a year.

Whereas a dhimmī showing disrespect for Islam could be penalised the mustaʾmīn was supposed to be deported.[33]

The non-Muslims who came from Europe to Tunisia in the nineteenth century were not dhimmī. They came from the dār al-harbī. The question before the Tunisian Bāy and his Mamluk ministers was whether to convert the status of the Europeans to that of dhimmī. The argument for accepting them as dhimmī would have rested on the fact that the Sharīʿa allowed mustaʾmīn who remained for some while in Islamic territory to become dhimmī. The argument against conversion would have rested on the Europeans' protest against full dhimmī status. The Europeans while establishing themselves in Islamic territory did not want all the duties attached to dhimmī status. They continued to regard themselves as subjects of a foreign power, thereby keeping ties with the dār al-harbī. They did not want to become subjects of the Bāy of Tūnis like the indigenous Christians and Hebrews who were subject to Tunisian law regardless of their religion. The ʿAhd al-ʾAmān was the response to the conflict between the Europeans' desires and the principles of the Sharīʿa.

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33. See Joseph Schacht, An Introduction to Islamic Law, Oxford: Clarendon Press, 1964, pages 130-133, and 156.

The solution was a half-way position for Europeans. The very title ʿAhd al-ʾAmān means a treaty for "safe conduct", ʾamān being reserved usually for non-Muslims from the dār al-ḥarbī. However, the text of the ʿAhd al-ʾAmān in reality converted the European mustaʾmīn into a dhimmī. The Europeans were to be dhimmī in the sense that they could undertake commerce and own property, subject to taxes (Articles X and XI).[34] Those who wanted to protest that the ʿAhd al-ʾAmān contravened the traditional prohibition against foreigners owning land could not argue that a right was conferred without corresponding duties; the only way they could have protested the conferrment of land rights on the Europeans was to ask whether the Europeans could in the first place be converted to dhimmī status, especially if they were not willing to be called subjects of the

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[34]. Article X: Foreigners who will want to establish themselves in our Realms can exercise all industries and all trades on condition that they will submit to the established rules and to those which will be established later, on an equal footing with all the inhabitants of the country. No one will enjoy in this regard any privilege over the other.

Article XI: Foreigners belonging to various governments, who want to establish themselves in our Realms, can buy all kinds of properties, such as houses, gardens, lands, on an equal footing with the inhabitants of the country, on condition that they will submit to the existing rules or to the rules which will be established, without shirking them.

There will not be the least difference in regard to them in the rules of the country. We will make known the method of habitation, in such a way that the owner will have perfect knowledge of it and will be held to observe it.

(See page 38 of Chapter I above)

Bāy. The answer would have been that whether a European called himself a subject of the Bāy or not had no relevance to the practical. As long as Europeans were in fact subject to each particular local rule corresponding to each particular right which they won, they were de facto if not de jure subjects of the Bāy. The legal mentality of the Europeans was not satisfied. If Europeans were in law still European subjects, then the factual situation should be a true reflection of the legal. Some Europeans came round to the Bāy's practical point of view on land rights within five years after the ʿAhd al-ʾAmān was promulgated. Others held out longer.[35] The Europeans did win from the Bāy a principle that paid in fact a certain deference to their legal status as foreign subjects. This principle was equality between the Europeans and the Tūnisian subjects. Equality was what distinguished the ʿAhd al-ʾAmān of 1857 from ʾamān in the traditional sense of the Sharīʿa. Equality extended the principle that duty determines rights beyond its traditional scope. The discrepancy between duties and therefore rights of Muslims and of those of the dhimmī took into account a certain respect for and tolerance of different religious and legal beliefs co-existing in one

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35. Ganiage, pages 47-48.

state. Equality meant the end of tolerance of differences. It could have meant that one side would have to bow completely to the beliefs of the other. Yet since in reality one could hardly expect one side to give in completely, equality entailed making up a new belief system that combined values from both sides but which was applicable equally to both sides.

Before the constitutional elaboration of the ʿAhd al-ʾAmān was promulgated in 1861 the Mamluk ministers were faced with several alternatives. The alternatives were three: to treat the Europeans as dhimmī without the full rights and duties of Muslims, especially in criminal matters; to allow Europeans to act as foreigners not controlled by Tunisian law, or to treat Europeans as Muslims with full rights under Tunisian control. The Europeans on the other side of the negotiating table were too strong to be made to accept the status of dhimmī. If Tunisians had insisted on full status of dhimmī they would have been tempting the European states to come forcibly to the protection of their people. As for allowing Europeans to set up their own courts as if they belonged to a third "madhab" in a country that allowed two to function, Tunisians would have been in effect inviting a foreign power to make the Bāy a puppet, taking orders for exe-

cution of judgments from another sovereign. The Europeans on the other hand had not enough power in the mid-nineteenth century to ignore the logic of the Tunisian point of view. For was there not a common system of law for all persons whether citizens or not living in any European country? Only diplomats were exempted and not all Europeans in Tūnis were diplomats. The third alternative -- treating Europeans as Muslims -- was a violation of the integrity of Islam. Full religious belief entailed full legal duties and rights; they were inseparable. It would have been hypocritical to treat a person as if he were Muslim without his confessing the creed. That was why the status of dhimmī had been created -- to allow for the differences in religion and hence the difference in rights and duties.

Since no one alternative in itself was satisfactory, the answer turned out to be a legal system controlled by the Tunisians but attempting to meet European standards of administration of justice. A system of common law would override the traditinnal practise of treating non-Muslim foreigners as dhimmī, but at least would avoid a worse violation, namely, the violation of the principle of Muslim sovereignty. What were the changes that the Mamluk ministers of the Bāy were willing to to concede in the confrontation between the European

legal ways and the Islamic? A discussion of the changes and their import for the traditional legal system follows:

The formal procedures which the Tunisians set up for the new system of common law constituted the widest break from the traditional practises. As in European systems, the Tunisian law was divided into categories and each category assigned to a separate court. The Sharī'a too had its categories of law, but assigned all to one court, that of the qādī. And even though, as we have seen, the political sovereign removed certain criminal jurisdiction from the control of the qādī, the qādī still had competence in offences of hadd, in addition to civil and commercial competence. The mode of expressing the law through codes promulgated by a political sovereign was another European adoption. The codes were not to be merely another set of qawānīn(qānūn) or decrees (ʾamr) that supplemented the interpretations of the Sharī'a already established in the madhāhib. The codes were to be equivalent to manuals of a madhab in being coherent expositions of the monopoly which the muftūn and the qudāh had had in establishing and interpreting many of the laws of the land. Because of the reforms of 1861 the executive power was to be responsible for establishing and interpreting codes that interfered drastically with the

former competence of the qudāh and muftūn. Tunisia was to wait until independence to reestablish a balance between the judicial responsibility of the judges (interpretation) and the judicial responsibility of the executive (promulgation).

As for their substance, the codes promised to retain rules of the Sharīʿa that were already established, while extending their application beyond Tunisian Muslims to non-Muslim Europeans. The criminal code was the only one actually promulgated in the mid-nineteenth century. It was an example of departure from the substance of the criminal law in the Sharīʿa. The hadd was abolished[36] and replaced by imprisonment and taʿzīr. Although abolishment of the hudūd was a break from the Sharīʿa, it was not a break from practise. The Sfez affair of 1857 (see page 32 of Chapter I above) illustrated practise. The case had produced such clamour because the Sheikh ul Islām apparently invoked the hadd for sacrilege because of blasphemy despite the fact that people had long been accustomed to seeing a less serious penalty, or taʿzīr, inflicted, even for blasphemies.

Hence, in light of the law the judges had been accustomed to applying, the reforms of 1861 appeared to

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36. Satārī, page 90.

be like pouring old wine into new bottles. There was, however, some advantage in the new bottles. Expressing the reforms in the form of codes introduced a new definitiveness that undermined the arbitrariness of past practises. Prior to the codes, suspension of the hudūd did not amount to abrogating the prescription of the hadd found in the jurists' manuals. Purist qudāh and muftūn or political sovereigns still could argue that they legally had the right to invoke the original provisions of the Sharī'a despite customary practise. A code, however, requires a legal forewarning before there can be a change in the application of the law and does away with the possibility of a strict qādī or muftī or political sovereign changing his mind overnight, as in the Sfez case. As late as 1941 a case similar to the Sfez case arose and revived the question of reversal of criminal practises.[37] The Bāy of Tūnis was considering removing jurisdiction over infractions of religious law (e.g., blasphemies, failure to observe fasting, drunkenness during Ramadān)[38] from secular courts (comparable to courts of common law created by the constitution of 1861) whose judges were trained in the College of Law, sponsored by the Ministry of Jus-

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37. Ministry of Justice, "Note on the matter of competence in penal matters," 29 October 1941 (in French).

38. Ibid.

tice,[39] to the Dīwān. This would have meant in effect that such cases would be judged by the Sharīʿa, not codes. Although the Tunisian Minister of Justice reacted against the Bāy out of a desire to keep criminal justice in secular courts, the Ministry could and did justify its opposition to the Bāy by the exigencies of codification. Abrogation of the existant laws and the drafting of new ones took more time than the traditional practise of the Bāy intervening in the law and expecting instaneous results.

Despite their legal advantages, the reforms had immediate political repercussions, as seen in Chapter I (pages 73-76 above). The revolt of 1864 resulted in the Bāy shelving the reforms. Shaken by disorder, Muhammad Es Ṣādiq Bāy reverted to old ways. He resumed hearing disputes himself and applying the Sharīʿa. The new criminal courts established in the provinces (one of the sources of irritation that sparked off the revolt) were abolished and jurisdiction over misdemeanors was given to administrative agents called ʿummāl. In Tūnis the criminal court was kept but its jurisdiction was considerably reduced. The qudāh recaptured

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[39] Jazīrī, page 52. The Ministry of Justice started training for magistrates in law of Tunisian codes, commercial law, and Islamic law of inheritance and gift. Qudāh and muftūn were trained in the mosques.

the authority to give sentences of physical punishment and imprisonment.[40] However, all the new jurisdictions created by the constitution of 1861 were not totally abolished. Instead of distributing the jurisdictions among various courts and the Supreme Council, the Mamluks simply concentrated the various jurisdictions in the office of the Prime Minister.[41] There were created in the Ministry branches for handling financial, civil, criminal, and commerical affairs, and any matter touching public policy. The civil and penal branches of the Ministry had registrars for recording pleadings, complaints, summonses of accused parties, and their interrogations. Officials called the ʿummāl were commissioned to investigate light commercial cases and small misdemeanors. The clerk then wrote a report on the case for the head of his department (civil or criminal division). The head then drafted a decision

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40. Ministry of Justice, "Report on the matter of competence in penal matters," 29 October 1941: "His Excellency the Minister of Justice was only able to confirm to His Highness the Bāy that the provisions of article 15 of the Decree of 25 May 1876 granting members of the Sharīʿa of Tūnis the power of physical punishment and penalties of imprisonment (taʿzīr) had been abrogated as a consequence of the organisation of the Tunisian penal code of 1913." (Translated from French)

41. Jazīrī, pages 37-39.

for the case and transmitted it to the Bāy. Should the Bāy stamp it with his seal while in Council (majlis), the decision became a royal marʿrūd.

The judicial system which followed the revolt of 1864 remained until the beginning of the Protectorate. Tunisia was to wait fifteen years before any more comprehensive judicial legislation was attempted. Under the Prime Ministry of Khair ad Dīn, Muḥammad Es Ṣādiq Bāy issued the Decree of 25 May 1876 on the functioning of the courts of the Sharīʿa of Tūnis and the courts of the interior. The decree was significant because it remained the basis for the organisation of the Tunisian courts applying the Sharīʿa until Tunisia won its independence. The decree of 1876 was typical of the desire of Khair ad Dīn to organise and work with what existed rather than to remake a system. We have seen how circumstances of adversity motivated the ministers of Muḥammad Es Ṣādiq preceding Khair ad Dīn to redefine the status of dhimmī in the ʿAhd al-ʾAmān and the constitution of 1861, as well as how the ʿAhd al-ʾAmān used moral laxity on the part of the ʿulamāʾ to justify incorporating equality of Muslims and non-Muslims into the Sharīʿa (see pages 163-166 above). The decree of 1876 was not rooted in adversity; it was rooted in a concern for moral laxity.

Yet the concern of Khair ad Dīn for moral laxity was not a device for incorporating something new into the Sharīʿa to meet an adverse situation. It arose out of a sense of guilt over the lack of respect of the government for the learned judges applying the Sharīʿa.

From a strictly legal point of view, the decree of 1876 was basically an attempt to clarify the competence of the qādī vís à vís the Ouzara (Wazāra), the judicial department of the Prime Minister. For ever since the decree of 1856, which provided only for a council of muftūn and qudāh to replace the single qādī for important decisions (see page 137 above), the courts of the qudāh had not been given any clear definition of their role in the judicial system which was changing its face rapidly during the mid-nineteenth century. By article fifteen[42] of the decree of 1876 the courts of the Sharīʿa of the capital regained their traditional civil and criminal jurisdiction. This meant that the jurisdiction of the court of the qādī and the court of the Ouzara (Wazāra) overlapped. Either the qādī or the government could decide to transfer a case from

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[42]. Article 15: "...The Sheikh Muftī will also have the right to order measures conforming to his competence, such as receiving proofs of acts of marriage, cheffa kemcha, for the greatest comfort of the public. He will give reproaches (admonishments) to the parties who merit them, will order arrests he judges necessary and will write msraslas (murāsala) to the qudāh of the districts..."
(Marty and Maarek)

the court of its original registration to another court, as long as final judgment had not been rendered. If the qādī decided to send the case before the government he was to do so only because of uncertainty over the law applicable. In Tūnis it was the Council of the Sharī'a in particular that was subject to direct government interference. Since the Hanafī and Mālikī Councils of the Sharī'a each consisted of all the magistrates appointed from each madhab and handled serious questions, there arose the possibility of diverging opinions. Where divergent opinions occurred, the government became the final arbitrator.[43] The individual qādī judging in Tūnis was subject to government interference only indirectly. If the muftī disagreed with the qādī, the matter could be submitted before the entire Council.[44] The provincial qādī was likewise subject

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43. Article 6: The examination of certain questions, provoking sometimes controversies on the matter of the application of the law, in the case where divergences (of opinion) occur among the opinions expressed by the members of the Sharī'a belonging to one or the other of the two rites, without the discussion leading them to a single and united opinion, the Bach Muftī of the court where the division (of opinion) occurred will draw up a report in which he will develop the arguments produced in support of each opinion; each judge will sign the opinion which he sustains and the report, thus drawn up and signed, will be addressed to the Government.
(Marty and Maarek)

44. Article 7: If there sits at the council only one of the muftī and the qādī or the muftī designated for serving in the absence of the qādī, and if the condemned party demands the sending of the affair before the sitting sheikhs, the sheikh who heard the affair

to government interference indirectly. He went to the Council of Tūnis when in doubt about a judgment.[45] When in doubt about the limits of his jurisdiction he was to notify the government by way of one of the qudāh[46] in the capital. If the muftī in the capital

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will defer it until the meeting of the council, so long as it does not appear that his demand for deferral is a dilatory measure; if not, the judgment will be executed. But if the three sheikhs are present at the council, the sheikh who heard the affair will have the judgment executed, unless the condemned party claims that the bach-muftī is of an opinion contrary to that expressed by the presiding judges, and in this case, the bach-muftī must explain himself on the opinion that one attributes to him, before the execution of the judgment.

But when the sheikh who heard the affair renders his judgment in the presence of the bach-muftī of his rite and agrees with him, the execution of this judgment will not be submitted to any formality.
(Marty and Maarek)

45. Article 36: If a qādī of the province is preoccupied with judging an affair, he will submit it to the Council or to the muftī if there exists in the city only one muftī.

If all the magistrates issue the same opinion, he will fall in line with their opinion; if they are of a different opinion, he will consult the qādī of Tūnis who will submit the affair to the Sharī'a of this city. This consultation must equally take place if the qādī does not share the opinion of the Muftī.
(Zeys, 528)

46. Article 37: If a provincial qādī finds himself perplexed over having an act executed, according to the rules of the Sharī'a, he will write about it to one of the qudāh of Tūnis who will advise him or he will write about it to the government if that is necessary. If he has some doubts about the limits of his province of jurisdiction, he will address himself to the government by way of one of the qudāh of Tūnis.
(Zeys, 529)

disagreed with the opinion of the qādī, the matter was to go before the Council, and if the Council could not reach a unanimous decision, the government gave the final decision.

While the government could demand to supervise certain cases brought before the courts of the Sharīʿa, the courts of the Sharīʿa did not seem to have such power in reverse when the courts of the Ouzara (Wazāra) were seized initially with an affair. The decree of 1876 reserved only to the government the right to have a case transferred from the Ouzara (Wazāra) to a qādī or the Councils of the Sharīʿa.[47] The only way the courts of the Sharīʿa could guarantee independence of the Ouzara (Wazāra) was by the Council of Tūnis reaching an unanimous decision.[48]

While the position of the qādī vís à vís the

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47. Article 23: The affairs which the Government will send to the Sharīʿa will be judged according to the rule that the defendant has the right to choose the rite by which he desires to be judged, if this is not when the Government has indicated in writing that the affair be judged by a particular rite (as modified by Decree of 15 December 1896, Article 1, section 1). (Zeys, 528)

48. Although article 6 provides that in case of divergence of opinions, the government would settle the issue, the footnote in Zeys to article 26 cites a letter from the Director of the Judiciary Services of 10 August 1896, saying that since the judgments of the Sharīʿa are of last resort, they cannot be repealed by the Ouzara (Wazāra).

the government depended on the importance of a litigation and the uncertainty of the qudāh or muftūn about the law applicable, the competence of the courts of the Sharī'a *vís à vís* one another throughout the Tunisian principality depended on the locality of the court. The courts of Tūnis, the capital, had the widest jurisdiction territorially and in subject matter.[49] In general both the courts of the Sharī'a in Tūnis and the provincial courts were competent to settle disputes and to notarise acts such as mar-

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[49] Article 15: ...The sheikh muftī will also have the right to order measures conforming to his competence, such as receiving proofs of acts of marriage, cheffa kemcha, for the greatest comfort of the public. He will give reproaches (admonishments) to the parties who merit them, will order arrests he judges necessary and will write msraslas (murāsala) to the qudāh of the districts, affixing them with his seal, without that, however, constituting a bar to the exercise of the power of the qādī within the limits of his jurisdiction. All that relates to what he can do outside the council...

The articles specifying the competence of the provincial judges were:

Article 27: Each qādī must limit his jurisdiction to the limits of his district; but if the two parties not belonging to his district present themselves before him, he will be able to judge their dispute.

Article 28: There will be installed in each city possessing a Council of the Sharī'a (majlis) a distinct place for the meeting of this Council... For the cities and localities where this council does not exist, a choice will be made of a convenient place where the qādī will sit to exercise his functions.
(Zeys, 527, 528)

riage contracts and death certificates.[50] The qudāh were to pay special attention to cases of guardianship and declaration of age of majority. In criminal jurisdiction, the hadd was not provided for; only ta'zīr ("giving reproaches to parties who merit them," from article fifteen).[51] It was in criminal matters that the competence of the courts in the capital and the provinces differed. Article fifty-four removed the right to make criminal judgment from the provincial qādī and centralised the matters in the hands of the muftūn in Tūnis.[52] The provincial qādī had

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50. Article 15, see footnote 49 above.

Article 29: ...He [the qādī of the provinces] can equally order, at any time and in any place, an arrest demanded by the circumstances, prescribe an inquiry, draw msraslas (murāsala) (as modified by Decree of 15 December 1896, article 4 et sq.), appoint guardians and administrators of estates, authorise the statements of death, and in general, do any such similar act.

51. Ministry of Justice, "Report on the matter of competence in penal matters," 29 October 1941 (in French).

52. Article 54: In criminal matters the qādī [of the provinces] will be able only to prepare the investigation; the judgment of these affairs will take place in Tūnis. He will be able only to order the arrest of the accused into the hands of the ca'id (qā'id) of his khalīfa (officials assigned to the qa'id).
(Zeys, 528)

only powers of investigation. In land matters the decree of 1876 did not confine or limit the application of the Sharīʿa. It merely singled out certain areas of importance that needed to be better organised so as to facilitate the application of the Sharīʿa. Article eighteen prescribed that the qādī keep a register of all the administrators of ʾahbās (waqf) appointed by the courts of the Sharīʿa. This was part of Khair ad Dīn's campaign for centralising control over the properties held in hubus. Article eighteen was designed to work against corrupt administrators who would claim the properties held in hubus for themselves.[53] Cases of enzel (inzāl, perpetual rent on a hubus) or exchange of lands held as ʾahbās could be heard only in the courts of Tūnis, regardless of where the land in question was located. One could well assume that the provincial courts, however, retained power to judge on the validity of a constituted hubus or on distribution of revenue from the hubus as long as the hubus had remained solely in

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[53] Article 18: A register will be opened for inscribing the designation of each hubus to which an administrator will be named by decision of the Sharīʿa. This inscription will serve for the administrator rendering an exact account of the estate of hubus which he has been appointed to administer, and will prevent him from raising claims to the property of all of or one party of the hubus which he administers (modified by Decree of 15 December 1896, article 5). (Zeys, 528)

the hands of the original beneficiaries and not been exchanged.[54]

To what extent civil (contractual) and commercial affairs fell under the jurisdiction of the courts of the Sharīʿa was not specified in the decree of 1876. Three years later, a decree relating to the keeping of a book-journal by the qāʾid (caïd, district governors) indicated that quwwād (caïd) were considered to have first instance authority in contractual, debit, and commercial litigation in the provinces. The caïd (qāʾid), however, could be ordered to transfer the affair to the Ouzara (Wazāra) or to the courts of the Sharīʿa. Presumably transferal would have occurred because of a difficult point of law or irregularity in evidence, or the possibility of a heavy penalty being imposed. In the absence of provisions for precise channels by which the courts of the Sharīʿa and the Ouzara (Wazāra) could have been informed of affairs before the caïd (qāʾid), one would presume that transferals were a matter of informal communications.[55]

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54. Article 43: The qudāh of the districts will not be able to hear questions of enzel (inzāl) or to exchange hubus whether there exist in the locality a Council (majlis) of the Sharīʿa or not. The examination of these questions is reserved to one of the two qādī in Tūnis. (Zeys, 528)

55. Article 3: There will be registered in the register in question, the affair carried before the

qā'id, with the mention of the names of the plaintiff and of the defendant, of the purpose of the demand and of the document invoked by the plaintiff, of the response of the defendant, of the validity of or the nullity of the document invoked from the point of view of the regulation of the affair ... while designating equally if the defendant merited being imprisoned by his delay in payments ...; the same if it is necessary to stop in the court of inscription until the affair has been brought before the qā'id, or until he has received the order, and if after having submitted to the qā'id, it [the affair] is sent back to the Sharī'a or to the Ministry, that will be investigated...
(Zeys, Law 166, page 116)

Article 7: If the qā'id receives the order to defer an affair to the judgment of the Sharī'a, one will inscribe the contents of the order and its date; one will mention if the affair has been deferred on a simple injunction or if it has been with the sending of an agent of the public force.
(Zeys)

The above articles from the Decree of 1 May 1879 on the journal kept by the qā'id specify who shall go to the qā'id from the Sharī'a, but not who would go from the qā'id to the Sharī'a.

The importance of the capital in the indigenous judicial system is seen even more clearly in the provisions for supervision of the judgments of a qādī. The decree of 1856 organising the Councils of the Sharī'a had merely provided for muftūn to be present to offer their opinion should a litigant desire to hear the opinion of one other than the qādī hearing the case.[56] The decree of 1876 explained more fully the importance of the opinion of the muftī when a litigant chose to invoke a fatwā. If the muftī held an opinion contrary to that of the qādī, that was cause for summoning all the muftūn and qudāh of the rite involved to settle the matter.[57] In the provinces the

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56. Article 6: The eastern part is that where will sit the two Hanafī and Mālikī muftī, on a rotating basis for the muftūn of the Court, for giving fatāwin when it is required of them, for assisting the qudāh with their enlightenment when the parties demand it, and for assuring the distribution of justice in case of absence of one of the qudāh. (Decree of 14 November 1856, Marty and Maarek)

Confirmed by article 15 of Decree of 25 May 1876: The sheikh muftī shall give his opinion to the qādī when it is required of him and to the individual who consults him. He will exercise the role of substitute when the qādī is absent...

57. Article 7: If there sits at the council only one of the muftūn and the qādī or the muftī designated for serving in the absence of the qādī, and if the condemned party demands the sending of the affair before the sitting sheikhs, the sheikh who heard the affair will defer it until the meeting of the council, so long as it does not appear that his demand for deferral is a dilatory measure; if not, the judgment will be executed. But if the three sheikhs are present at the council, the sheikh who heard the affair will have the judgment executed, unless the condemned party claims that

muftī appointed in the towns other than Tūnis also had an advisory role.[58] An error committed by a provincial qādī was occasion for the muftī to notify the provincial Council of the Sharī'a or the Council of the Sharī'a in Tūnis. The qādī too had the duty to report to the Council of the Sharī'a in Tūnis if the provincial muftī committed an error.[59]

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the bach muftī is of an opinion contrary to that expressed by the presiding judges, and in this case, the bach muftī must explain himself on the opinion that one attributes to him, before the execution of the judgment.

But when the sheikh who heard the affair renders his judgment in the presence of the bach muftī of his rite and agrees with him, the execution of this judgment will not be submitted to any formality. (Decree of 25 May 1876). (Marty and Maarek)

58. Article 50: The sheikh muftī, in the interior of the Regency, must give his opinion to the qādī of his residence, when the latter demands it of him, just as he will be able to give his consultations, whether verbal or written, for affairs which are not on trial. He has the right to condemn all acts contrary to the law and to give to the notaries authorisation to draw up contracts of marriage.
(Zeys, 528)

59. Article 56: Every time a muftī finds an error committed by the qādī or by his deputy or by another muftī in what concerns the provisions in article 25 [enforcement of the provisions of the Decree of 25 May 1876], he must advise the qādī or muftī of it by a courteous letter by indicating to him the point of the error. If he recognises the fault, the incident will be closed; in the case to the contrary, the muftī will share his opinion and should the qādī persist in his opinion, the bach muftī of the place will address a report on the affair to the Mālikī council of Tūnis.

If in the locality there does not exist a Council, the muftī having raised the error will address a report on the affair to the Sharī'a of Tūnis and the qādī will not be able to pronounce the judgment before knowing its decision. Likewise, if the qādī perceives some irregularity in the conduct of the muftī, he will act in the same ways. (Zeys, 528)

Taken as a whole, the system of supervision of the courts of the Sharī'a as outlined in the decree of 1876 was not an appellate system in the sense that various layers of jurisdiction are evenly spread over a country. The decree of 1876 provided for two layers of jurisdiction: the provincial and the capital (Tūnis). The system of supervision for the qādī in the capital itself reflected the evolution of the qādī's role in the Islamic administration of law. Originally the single qādī had ruled supreme in the area of jurisdiction allocated to him by the political sovereign. Qādī in district A was equal to qādī in district B. As bureaucracy became more organised, a qādī of the qudāh was appointed usually in a capital to supervise several qudāh within the province. Later alongside the qudāh were appointed muftūn, jurists who were not to interfere in the administration but to advise on how to maintain the quality of judicial reasoning demanded by the Sharī'a. By the late nineteenth century the post of muftī had evolved into one similar to that of qādī of the qudāh. The muftī came to exercise the same powers of judgment as a qādī while at the same time retaining and strengthening his role as advisor to other qudāh. In cases of conflict between the muftī and the qādī the opinion of the muftī was cause for serious dis-

cussion. In Tunisia the influence of the muftī destroyed the equality of jurisdiction of all qudāh in the country. For the decree of 1876 accorded to those qudāh who were most accessible to the chief muftī greater jurisdiction than those farther removed from the muftī. Only the first instance court of the qādī in Tūnis could hear cases on exchange of hubus[60] or enzel (inzāl);[61] and only the muftī in Tūnis had power to try criminal cases.[62]

The union of two powers -- that of qādī and that of muftī -- in one person also obstructed in Tūnis the

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60. Article 18: The Sharīʿa of Tūnis was responsible for keeping a list of the administrators of ʾahbās appointed by the decision of the Sharīʿa and for making these administrators give account of the estate. (See footnote 53 above)

61. Article 43: The qudāh of the provinces will not be able to hear questions of enzel (inzāl) or to exchange properties of a hubus whether there exist in the locality a Council (majlis) of the Sharīʿa or not. Examination of these questions is reserved to one of the two qādī in Tūnis. (Zeys, 528)

62. Article 15: ...[The sheikh muftī] will give reproaches (admonishments) to the parties who merit them, will order arrests he judges necessary and will write msraslas (murāsala) to the qudāh of the provinces...

Article 54: In criminal matters, the qādī will be able only to prepare the investigation; the judgment of these affairs will take place in Tūnis. He will be able only to order the arrest of the accused into the hands of the qāʾid (caid) of his khalifa (official assigned to the qāʾid).

development of an appellate system in the sense that a judge superior in rank to the judge who originally hears the cases may disagree with the original judgment and replace it with his own opinion by reason of his superior rank. When serving as a muftī, the muftī knew that his opinion would be considered by the qādī hearing a case in question. When serving like a qādī, the muftī passed judgment that was no more superior than that of another qādī judging on the same subject matter. The opinion of the muftī held superior weight to that of the qādī only as an opinion that could provoke a summoning of all the magistrates in Tūnis (chief muftī, four or five ordinary muftūn, and one qādī for the madhab involved[63]) to examine the original judgment. It was the judgment of the Council that decided the issue. The procedures for initiating reexamination varied according to who was hearing the case; they were applicable in Tūnis only before the judgment was executed. Article nine of the decree of 1876 provided that when an ordinary qādī investigated a case either of the litigants could ask that the affair be submitted to the Council. The qādī in response could submit the case to the Bach (chief) Muftī if he were present. The case would be further submitted to the Conncil only if

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63. Tahar Kheredine, "Report".

the Bach Muftī disagreed with the opinion of the qādī. If the Bach Muftī had agreed with the opinion of the qādī the judgment would be executed. On the other hand, if the sheikh muftī were present when the litigant demanded submission of the case to the Council, the qādī was to present the case first to the sheikh muftī. If the sheikh muftī agreed with the opinion of the qādī and the litigant still disagreed, the affair was sent to the Bach Muftī, who, in case of agreement with the qādī and sheikh muftī, would have the judgment executed. In case of disagreement he was to submit the matter to Council.[64] If there were present at the Council only

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[64]. Article 9: The affairs of the Sharīʿa which will be submitted to one of the two qādī will be judged by the rite which the defendant will choose. Each of the parties can, when investigation of the trial has been done by the qādī alone, demand that the affair be submitted to the council of the Sharīʿa. If the sheikh Bach Muftī of the rite (involved) finds himself present, the qādī vested with the affair will submit it to him. If he shares the opinion of the qādī, the latter will pronounce and will have executed his judgment, and the yielding party will no longer have anything to protest.

In case of divergence (of opinion) the affair will be submitted to the council.

For affairs presented on a day other that on which is found present the sheikh Bach Muftī of the rite out of which the affair arises, the qādī who will be vested of it (the affair) will send the affair to the sheikh muftī present at the Sharīʿa; if the latter is of a contrary opinion, the affair will be sent to the council. If the muftī shares the opinion of the qādī vested with the affair and the party persists in demanding that the affair be submitted to the council, the judge vested with the affair will defer it to the Bach Muftī. If the latter shares the opinion expressed, the sentence will be executed without any objection; if he is contrary to the opinion of the qādī, the affair will be submitted to the council.

one of the muftūn and the qāḍī who heard the case, the affair could be submitted, on the demand of the condemned party, to a Council consisting of a muftī and two qāḍī. If the condemned party then alleged that the Bach Muftī was of an opinion different from that of the Council, the Bach Muftī would have had to come to the Council to explain.[65] If the Council of two muftī and two qāḍī still could not reach an unanimous decision, the Bach Muftī was to draw up a report on the varying opinions and address it to the government.[66]

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[65] Article 7: If there sits at the council only one of the muftūn and the qāḍī or the muftī designated for serving in the absence of the qāḍī, and if the condemned party demands the sending of the affair before the sitting sheikhs, the sheikh who heard the affair will defer it until the meeting of the council, so long as it does not appear that his demand for deferral is a dilatory measure; if not, the judgment will be executed. But if the three sheikhs are present at the council, the sheikh who heard the affair will have the judgment executed, unless the condemned party claims that the Bach Muftī is of an opinion contrary to that expressed by the presiding judges, and in this case, the Bach Muftī must explain himself on the opinion that one attributes to him, before the execution of the judgment...

[66] Article 6: The examination of certain questions, provoking sometimes controversies on the matter of the application of the law, in the case where divergences occur among the opinions expressed by the members of the Sharī'a belonging to one or the other of the two rites, without the discussion leading them to a single and united opinion, the Bach Muftī of the court where the division (of opinion) occurred will draw up a report in which he will develop the arguments produced in support of each opinion; each judge will sign the opinion which he sustains and the report, thus drawn up and signed, will be addressed to the Government.

When the Bach Muftī (Hanafī or Mālikī) had acted as a first instance judge, either ligitant could ask that the affair be reexamined directly by the Council.[67]

Thus, in providing alternatives to the judgment of the single qādī in Tūnis, the decree of 1876 nonetheless required that the body of magistrates act as if it were one person (like the qādī). If it could not reach anunanimous decision, then the government was to issue an opinion. The government's opinion was in the form of a maʿrūd, Beylical order, intended to fix a principle and avoid in the future divergences of opinion on the matter in question.[68]

A litigant was not the only person who could initiate reexamination of a judgment given by one of the magistrates in Tūnis. Since the system of reexamination was more like a system of search for anunanimous opinion than a system of appeal, the qādī or muftī originally hearing the case could also demand that the

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67. Article 8: The Sheikh ul Islām and the Sheikh Bach Muftī have both the right to judge at the Sharīʿa on the day when they are designated in turn. If one of the parties demands that his affair be submitted to the Council of the Sharīʿa, the sheikh vested with the affair will defer to this demand; he can even officially send back to the council the judgment of the affair.

68. Draft letter from the Wazīr al kabīr to M.Y., 10 March 1941, proposing a maʿrūd on the problem of credibility of titles of hubus versus the word of the mokaddem (muqaddam) in Hanafī law.

Council give judgment instead of himself.[69]

On the other hand, the provincial system of courts contained more elements resembling an appellate system in the sense that a judge superior in rank to the judge who originally heard the case may disagree with the original judgment and replace it with his own opinion by virtue of his superior rank. The Councils of the Sharīʿa instituted in the decree of 1856 provided the base for an appellate system in the decree of 1876. As in Tūnis the Councils of the Sharīʿa of the provinces were composed of muftūn and qudāh acting together, with power to issue a judgment. The provincial councils heard difficult questions and appeals from judgments of the provincial qudāh.[70] In turn the Council of the

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69. Article 8: ...If one of the parties demands that his affair be submitted to the Council of the Sharīʿa, the sheikh [Sheikh ul Islām or Bach Muftī] vested with the affair will defer to this demand; he [the sheikh] can even officially send back to the Council the judgment of the affair.

Article 10: Each of the two qādī [of Tūnis] will have the right to postpone the sentence in order to submit it to the council even when none of the parties demand it.

70. Article 42: In every locality where there is a Council of the Sharīʿa (majlis) or a muftī, a full audience will take place weekly...The muftūn will be present there to regulate the difficult questions which the qādī will submit to them and to rule on appeal. The Khalīfa or the Governor will equally take part in them to assure the execution of the judgment.

Sharīʿa of Tūnis could invalidate a decision taken unanimously by the provincial council.[71] All muftūn and qudāh in the provinces were to respect the judgment of the Council of the Sharīʿa in Tūnis as last resort.[72] The persons who could initiate re-examination before a provincial council were either of the litigants or the provincial muftī or qādī himself. If the muftī became aware of an error in law in the qādī's judgment, or the qādī noticed an error in the judgment of the muftī, the affair was to go before the nearest provincial council if the qādī and muftī could not settle the matter between themselves. If the council could not reach a reconciliation, the Council of Tūnis settled the matter.[73]

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71. Article 47: If the council is unanimous in the sentence rendered and should the party want to appeal to Tūnis, he will not be heard, and the qādī will have the sentence executed. If after that, the party demands a copy of the judgment in order to produce it before the Sharīʿa of Tūnis, it will be given to him and the Council of Tūnis will be able to invalidate the judgment if it were rendered contrary to the law.

72. Article 52: The muftūn and qudāh of the Regency must, according to custom, respect the decisions of the Sharīʿa of Tūnis, whose judgments are rendered as last resort.

73. Article 56: ...[T]he muftī will share his opinion [about an error committed by a qādī] with the Council of the Sharīʿa of his residence, if there exists one. If the muftūn share his opinion and should the qādī persist, in his opinion, the bach muftī of the place will address a report on the affair to the Mālikī council of Tūnis...

Apart from subjecting the twenty-year old provincial councils to the appellate jurisdiction of the Council in the capital, the decree of 1876 did not provide any clearly defined channels for appeal from the more traditional institution, namely, the provincial qādī, even though article forty-two gave the provincial councils the power to hear appeals from the qudāh.[74] The provincial qādī remained independent to the extent that he was not to be overruled automatically by another qādī or muftī. He was merely expected to reach some modus vivendi when a conflict of opinions arose. Article thirty-three of the decree of 1876 allowed litigants to agree to take the case out of the hands of the provincial qādī and take it to Tūnis.[75] Circumstances under which the litigants could agree to go were decided by customary practises in the district.[76] If only one of the litigants wanted to transfer the case to Tunis and the provincial qādī saw no good reason

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74. Article 42: ...The muftūn (of the provincial councils of the Sharīʿa) will be present...to regulate the difficult questions which the qādī will submit to them and to rule on an appeal...

75. Article 33: When the two parties agree to present themselves before the Sharīʿa of Tūnis, the qādī will take note of this agreement and send them before the said court, whatever the affair be, according to custom followed.

76. Ibid.

for it,[77] the qādī or muftī in Tūnis could decide to return the affair to the original qādī.[78] Whatever decision the judge in Tūnis took -- to return the case or to judge on it in Tūnis -- the provincial qādī was bound by it. Yet if the provincial qādī considered the decision wrong in law, he could suspend enforcement and notify the magistrates in Tūnis. How the judges in Tūnis and the provincial judges were then expected to settle the controversy was left unspecified in the decree. Superiority of rank did not automatically operate to invalidate the qādī's opinion.[79] Not even

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77. Article 34: If one of the parties demands to be sent before the Council of the Sharī'a at Tūnis, whatever the cause at hand before the qādī alone or before the Sharī'a of the locality having a council, the qādī will send him there, whether it be the petitioner or the defendant, unless the affair be so clear that it appears with evidence that the intention of the one who demands this sending away (to another court) is only to gain time and to make the adverse party lose money in provoking for him useful fatigue; in this case the qādī retains the affair.

If despite his decision, the affair is carried before the Sharī'a of Tūnis or before one of the two qādī of this city, it will be prosecuted in conformity to article 20 of Title I.

78. Article 20: The two qādī and the members of the Council of the Sharī'a have the power to defer judgments of affairs which are submitted to them by the inhabitants of the cities or of the interior of the Regency, to the qudāh of these same localities.

79. Article 35: If a muftī or qādī of the Sharī'a of Tūnis writes to the qādī of a judicial district to indicate to him the decision in a civil, penal or religious affair, the latter is held responsible for conforming to the order of the superior magistrate, unless he is of a contrary opinion, supported by a text of the law. In this case, he will suspend the judgment and will make known to the said magis-

the government was involved unless the magistrates of Tūnis had decided to take the matter to the Council of Tūnis. Discussion until the provincial qādī and the judges of Tūnis reached an agreement was probably the expected method for settlement, as was expected when several qudāh were involved in the same case. Several qudāh could become involved in the same case because of the freedom granted to any qādī to hear parties not living in his district.[80] Such freedom worked against authoritarianism when appeal to a muftī or council was difficult. At the same time it caused confusion for the qādī in the district where judgment was expected to be enforced. In the event of various provincial qudāh hearing the same case and sending it to different qudāh in Tūnis, the qādī who viewed the various communications from Tūnis for enforcement and who could not reconcile them was to address the most significant jurist of the country, the Chief Muftī in Tūnis (Mālikī or Hanafī, whichever madhab was involved). The Muftī was expected to resolve whatever dif-

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trate the motive which stops him...

[80]. Article 27: Each qādī limits his jurisdiction to the limits of his district; but if two parties not belonging to his district present themselves before him, he will be able to judge their dispute.

ferences there needed to be reconciled in points of law or in varying versions of facts.[81]

The absence of one important provision in the decree of 1876 helps one to place that decree in the context of the nineteenth century conflict that had led the Tunisians at one time to accomodate the non-Muslim Europeans by creating new courts which rivaled the courts of the qādī. These common law courts created by the constitution of 1861 had placed in doubt the status of the court of the qādī. Were the courts of the qudāh the basic unit of judicial administration or courts of exceptional jurisdiction?[82] The decree of 1876 avoided a precise def-

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81. Article 35: ...Likewise if (the provincial qādī receives several communications from the Sharī'a of Tunis, issued by magistrates of different rites or by several magistrates of the same rite, or by a single magistrate, he must, in the circumstances where it would be difficult to establish an agreement among them (the communications), or in the circumstance where the party who has obtained them would have distorted the facts, address on this subject a report to the Bach Hanafī muftī or to the Mālikī Bach muftī according to whether the orders which he received emanated from the Hanafī or Mālikī source.

If in a similar affair orders are sent to him by magistrates of the two rites, he will address his report to the Hanafī Bach Muftī.

But if these orders have been repeated to him by a single magistrate, he will answer to his magistrate only.

82. It was well after the establishment of the French Protectorate that the Tunisian Minister of Justice admitted early in the twentieth century that the qādī had evolved from a judge of common law...(to a) judge of exceptional jurisdiction confined to affairs of personal status, and certain real estate litigations. From Tahar Kheredine, "Report".

inition of the jurisdiction of the qādī's justice. It did not bring the courts of the qudāh within the same confines as those specified for the Rabbinical courts in the decree of 3 September 1872. Rabbinical courts could hear only cases of personal status and succession. They had no penal jurisdiction whether for religious affairs or not; they had no competence in commercial or civil (contractual)affairs.[83] The decree of 1876 for courts of the Sharī'a gave the impression that in law the courts of the Sharī'a remained the common law courts of Tunisia. In reality, other judicial bodies, not mentioned in the decree, had been created and served to limit the jurisdiction of the qudāh to Muslims.[84] Khair ad Dīn had created a mixed

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[83]. Decree of 3 September 1872 (Zeys, page 524):

> We have learned that the Rabbis of Tūnis, Sūsa, and other cities of the Regency hear civil and commercial affairs among their co-religionists.
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> This manner of action being contrary to the rules of judiciary competence, it is forbidden to the said Rabbis to know these affairs and to judge litigations other than those relating to personal status of the Hebrews.

[84]. Article 17 (Decree of 25 May 1876): An obligatory condition for the wakīl who pleads the causes carried before the Sharī'a is that he be subject as to his person to the jurisdiction of this court...

Note that this section of the article implies that some wukalā' were subject to non-Muslim jurisdictions.

committee of Tunisian and Europeans to settle commercial disputes among Muslims and non-Muslims (see page 82 of Chapter I above). The Ouzāra (Wazāra) handled serious crimes. The government could interfere in civil matters brought before the court of the Sharī'a of Tūnis from any part of the Regency. The interference of the Bay's administration into the judicial system did not only reflect the Ottoman penchant for centralisation. It was convenient also that the government be most easily available for interference in the same urban locality as most Europeans were found. In short, Khair ad Dīn could not have afforded to limit explicitly the courts of the Sharī'a to an exceptional status. The protest of 1864 was still clear in the minds of most. Nor could he have persuaded the Europeans to accept the traditional status of a non-Muslim (dhimmī) in a Muslim state. The result was the creation of a separate organisation which taken altogether encroached on the competence of the courts of the qudāh; yet no one specified the exact status of the Muslims or the Europeans. Only the government was left to fill the position of ultimate arbitrator.

While the decree of 1876 held in abeyance a clear-cut solution to the problems of the Europeans, the decree also held in abeyance a solution to a purely Islamic conflict. That conflict was between the qudāh and the jurists, or

muftūn, on one hand, and the political sovereign on the other. Each side had been struggling since the death of ʾAbū Bakr over the control of the establishment and interpretation of the law. The jurists won a monopoly early after the caliph ʿUmar set a precedent for delegating judicial matters to persons other than himself. Given the sheer volume of work how could any one expect him to be in three centres of the early empire, Baṣra, Kūfa, Madīna, simultaenously hearing cases. Nor could one expect all persons from the three cities to flock to Madīna to be judged by the caliph. He could be available but not the sole person responsible for judicial affairs. Besides practical considerations there were certain abstract concepts which made Muslims predisposed to accepting the jurists as heirs to the Prophet's judicial duties instead of the caliph. For one, the directness of the Prophet's approach was reflected in the principle of a single qāḍī hearing any type of case, and being responsible alone for the solution. Another was the religious respect for the unity of the law. This respect underlay the following simple scheme which was developed after the Prophet for the division of responsibilities for upholding the Sharīʿa: Allāh was the promulgator of the Islamic principles. The jurists and qudāh interpreted the principles and promulgated detailed rules that supplemented principles and rules in the Qurʾān. The caliph

upheld the Qur'ān as the raison d'être of the Islamic state and enforced the rulings of the qudāh. Caliphs realised that if religion was to have any social and political force, it had to be given a legal expression, legal in the sense that set logical rules were imposed to push or keep behaviour of the ruled within certain channels. Finding the appropriate legal expression was a task for more than one man, even one generation. The caliph could guide its formation, appoint men for undertaking it, encourage the formation, but not undertake it himself. Yet caliphs, like any other humans, developed their own political needs distinguishable from the grander reasons for which they as rulers existed. Hence, in time, the caliph and the provincial princes complicated the scheme of division of judicial powers by promulgating detailed rules, especially for criminal affairs, for chastisement of administrative appointees, and land distribution for military officers. These promulgations were accepted as part of his prerogative of siyāsa. Nonetheless, in theory the political ruler was limited in the exercise of siyāsa. His rules had to conform to the limits of the Sharī'a, limits defined by the qudāh and muftūn. 'Ahmad Bāy took pains to point out that his decree for the emancipation of abused slaves was within the limits of the Sharī'a. Muhammad Bāy, however, ex-

ceeded the limits of siyāsa in the ʿAhd al ʾAmān. He was curtailing the arbitrary use of political power, as the Sharīʿa aimed to do while simultaneously redefining the established limits of the Sharīʿa. If the qudāh and muftūn were not willing to redefine the established limits to meet new political exigencies, the government felt it still had the freedom to respond and seize the upper hand in the conflict between legalists and the political executive. The Bāy would force the Sharīʿa to incorporate in its principles the equality of Muslims and non-Muslims subject to a Muslim sovereign. The decree of 1876 prescribed a reconciliation. The courts of the Sharīʿa were allowed to settle questions which were well defined and soluble within the rules of the Sharīʿa. When they could not settle questions, the government intervened, just as ʾAhmad Bāy had done on the question of slavery, a matter on which the "learned jurists (were) not in agreement".[86] In other words, the decree left to both the political ruler and judicial officers the right to establish and interpret rules within their own spheres of jurisdiction. There was no clear awarding of the exclusive power of establishing and interpreting all

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86. Decree of 23 January 1846 on emancipation of slaves (Marty and Maarek, Recueil).

the rules to one set of officials over another set.

In the section which follows we shall see that the French established a clear-cut solution to the nineteenth century conflict over the judicial status of Europeans. The solution was a system of three jurisdictions: European, Muslim, Hebrew. How these three worked together is the story of the Tunisian judiciary under the Protectorate. As for the conflict between the Islamic political ruler and the qudāh and muftūn over the control of promulgation of and interpretation of laws, the French interfered little directly. However, by example of their own methods and because of the political obstacles which they posed for independence, the French tipped the balance in favour of administrative control, at least over the promulgation, if not always the interpretation, of principles guiding judicial decisions.

Administration of Justice Under the French Protectorate: French courts, Tunisian secular courts, mixed courts

As seen in Chapter I, the French made few compromises when establishing the Protectorate in 1883. During the reign of Muḥammad Bāy the French had demanded separate courts for Frenchmen and been refused. Having the upper hand in 1883, they resolved that Europeans were subject to French judicial authority. The system established in March 1883 remained the same up to the time of Tunisian independence in 1956. The law of 7 March 1883 (J.O.T. 53, 19 April 1883) created one court of first instance and a justice of the peace in Tūnis and justices of the peace in four other major towns (Bizerte, Sūsa, Sfax, Le Kef). Appellate jurisdiction at first lay with the Court of Appeal in Alger. In 1941 Tūnis was given its own Court of Appeal. As litigation expanded the French made Sūsa and Sfax seats of courts of first instance. The number of justices of peace increased to fourteen.[87] Commercial, administrative, and civil (personal status, contractual) jurisdiction belonged to the courts of first instance. The courts of first instance also held criminal and petty sessions. The justices of the peace held only exceptional jurisdiction in criminal matters. The French codes appli-

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87. Satārī, page 94.

cable to Europeans in Tunisia were the French penal code, the code of penal procedure, the code of commerce, the civil code, and the military code.

The French did not stop at organising courts for their own citizens. Administering a Protectorate also meant staying abreast of the Tunisians' activities so that the French could appraise how much Tunisians would support or hinder French preoccupation with lands and businesses. In order to let the Tunisians know their position vis á vis the French courts, the French, through the office of the Secretary General (a Frenchman who was under the jurisdiction of the Tunisian Prime Minister as well as liaison officer between the Tunisian and French governments) were responsible for reorganising the pre-Protectorate judicial system for Tunisians. The French kept the types of courts inherited from the Ottoman era -- the courts of the Ouzāra (Wazara), the qā'id, the qādī, the Rabbis -- but replaced the blurred, or customary, lines of jurisdiction with lines defined by decrees. The French divided the Tunisian system of courts into two distinct jurisdictions: religious and common (ʿadlīya). The Beylical decree of 31 July 1884 reserved to the religious courts (Rabbinical and Sharīʿa) the regulating of the disputes relating to the personal status or to the successions of the Hebrew or Muslim Tunisian subjects.[88]

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[88] Zeys, page 502. Footnote to Decree of 31 July 1884 on procedure: "This (personal status and succession of

The reorganisation of the ʿadlīya courts was more complex. The French made use of the organisational concepts which had been promulgated in the constitution of 1861. At the bottom of the hierarchy as created in the late nineteenth century were the cāîds (qada), provincial governors who heard small penal and civil cases. The pre-Protectorate decree of 1 May 1876 on the registers kept by the quwwād (term used also in Tunisia for cāîds) was confirmed by the French authorities by the circular of 3 May 1896 and the decree of 23 May 1900.[89] Above the quwwād were imposed regional courts (jihawī). In effect the original criminal and civil courts provided for in the constitution of 1861 were revived. They were situated in 1896 only in the towns: Tūnis (whose Regional court was known as the Driba, or darība), Sfax, Gabès, Qafas. Two years later the orthodox city of Kairouwan received one; also Sūsa and Le Kef. Beja and Nabeul were late in receiving Regional courts, 1930 and 1948 respectively.

Muslims and Hebrew Tunisians) is a source of incompetence ratione materiae."

89. Marty and Maarek, Recueil, Vol. I, "Critical Appreciation of the Tunisian Legislation" (Chapter IV): "The head of the French state in the presidential decree of 10 November 1884 delegated the Resident General to approve all beylical decrees. So the Resident General on 15 December 1884 published an order for approving en bloc a series of decrees rendered before 1884 and during the Protectorate by the Bāy." (page 4)

The Regional courts corresponded to the French first instance courts in civil and criminal jurisdiction. The difference was that their jurisdiction depended largely on the nationality of the litigants. Although most major towns had both a French court and a Tunisian Regional court, the absence of a Tunisian Regional court in Bizerte indicated the high concentration of Frenchmen at that former naval base; and the absence of a French court in a southern town like Gabès or a religious town like Kairouwan indicated a paucity of French inhabitants, for the Europeans lived more profitably in the northern agricultural districts. Regional courts had both civil and penal jurisdiction. Maximum penal jurisdiction was five years of imprisonment. Maximum value for any civil case was twenty thousand francs. This value was also applicable to land disputes. Allegations of injury in commercial transactions also were heard in Regional courts. Commerical transactions affecting family relationships fell under the competence of the courts of the Sharī'a. As for personnel, the Tunisians were appointed as magistrates and Frenchmen as commissaires.

With the revival of the civil and criminal Regional courts, the Ouzāra (Wazāra) might have become obsolete. For when the revolt of 1864 had forced the Bay to rescind the creation of the new courts the office of the Prime

Minister simply took over the jurisdictions that had once been delegated to that set of courts. Instead, the French authorities made the Ouzāra (Wazāra) an appellate organ. It remained in the office of the Prime Minister, but was removed from the direct control of the Prime Minister and placed under a Frenchman who had the title Director of Judiciary Services (Direction des Services Judiciaires). The French also confined the Ouzāra (Wazāra) strictly to affairs assigned to the courts called ʿadlīya.

On 10 August 1896 the Director of the Judiciary Services sent out a letter declaring that the Ouzāra (Wazāra) had no appellate jurisdiction over the judgments of the courts of the Sharīʿa.[90] Although it was pointed out earlier that the Ouzāra (Wazāra) never had appellate jurisdiction in the strict sense of the word, the letter from the Director in effect meant that the qudah and muftūn were not expected to apply to the government to settle disputes where the courts of the Sharīʿa were competent. This, however, did not prevent the government from intervening to decide whether the courts of the Sharīʿa or the ʿadlīya or French courts would have competence in a case that raised difficult questions.

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90. Footnote 2 of article 26 of the Decree of 25 May 1876 on the courts of the Sharīʿa (Zeys, 528).

See pages 177 & 179 above on the Wazāra.

Within the Ouzara (Wazāra) itself, the civil and criminal divisions were maintained. Each division was then broken down into clearer sub-departments. The civil division consisted of a department for receiving petitioners from the Regional courts (jihawī), a department for review of Regional judgments, and a department for repeal (cassation) from Regional judgments. The criminal division included a court for hearing appeals from petty sessions (misdemeanors, or junah) of Regional courts; a court of criminal accusation; and a court having jurisdiction in any criminal matter (mostly felonies, or jināyat, disturbing public order) in any part of Tunisia. Five magistrates without a jury sat for the criminal court. During the first quarter of the twentieth century a Tunisian magistrate was president of the Ouzāra (Wazāra) (also known as the mahkamat an-naqd wa-l-ibrām) for four years. Then from 1926 to 1947 a French magistrate replaced the Director of the Judiciary Services and became president of the ʿadlīya courts along the lines of a French system of lower and appellate courts, the French administrators allowed the Ouzāra (Wazāra) to continue to express its judgments in the form of the maʿrūd, or the decision taken by the Bāy on the basis of the report presented by the relevant department of the Ouzara (Wazāra). In reality the maʿrūd became merely a formal procedural matter after the Ouzāra (Wazāra) and Regional courts (jihawī) were made to draw up

their decisions according to the Tunisian Code of Criminal Procedures (1921), the Penal Code (1913), and the Tunisian Civil Code, known also as the Code of Obligations and Contracts (1907).

On the 26th of April 1921 the Tunisian Ministry of Justice was created. It was responsible for all Tunisian courts -- the quwwād (caïds), the Regional courts (jihawī), the Ouzāra (Wazāra), the Sharīʿa. A year later (14 July 1922) a decree abolished the maʿrūḍ for affairs before the courts of the Ouzāra (Wazāra). The Bāy was limited to receiving matters of qiṣās[91] and to the right to waiver or lighten criminal sentences. The Frenchman who had headed the Direction of the Judiciary Services controlling the Ouzāra (Wazāra) became the Public Prosecutor with Tunisian assistants. A Tunisian was appointed to head the Ministry of Justice, while, as we remarked earlier, a Frenchman came to preside as president of the Ouzāra (Wazāra). (See page 212 above)

Another traditional vestige of the interference of the office of the Prime Minister in judicial affairs was the post of ʿummāl (agent). The ʿummāl were agents commissioned by the Ouzāra (Wazāra) to investigate cases that interested the government. When the French administrators

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91. Jazīrī, page 49.

had presidents appointed to the first Regional courts (jihawī) on 23 May 1900 no ʿummāl were appointed. Later when the office of the Public Prosecutor was formed, the Public Prosecutor dispatched agents of investigation to the Regional courts.

The final reorganisation of the non-religious courts concerned the quwwād (caïds). Since the French had approved of the constitution of 1861 the revival of courts not applying the Sharīʿa was not setting a precedent. Yet the French were also aware that the provincial quwwād (caïds) had supported the revolt of 1864 against the constitutional reforms because the new civil and criminal courts usurped the jurisdictions of the qāʾid. (See pages 72-73 of Chapter I above) Hence, the French left room for the qāʾid in the system of ʿadlīya courts created in 1896 and simply attached French contrôleurs to supervise the quwwād (caïds). By the mid-1920's the French felt confident enough to replace the quwwād (caïds) in light penal and civil (personal and moveable) cases with a set of inferior courts called cantonal courts (nawāhī). The quwwād were allowed to have competence in civil affairs and only if no Regional or cantonal court were present nearby. The first cantonal court was established on the island of Djerba[92] in 1924. More than ten years later

[92]. Smuggling of arms on the island had given the French an excuse to assume military control over Tunisia (article 9 of the Treaty of Kassar-Saïd of 12 May 1881).

the decree of 23 July 1938 created more in Mekknine, Nabeul, Bizerte, Mahdia, a southern desert town, was the last to receive a cantonal court in 1948. The judges appointed were analogous to the French justices of the peace. They were professional judges trained to apply the Tunisian codes promulgated since the beginning of the century for the ʿadlīya courts.

For the first time since the abortive efforts of 1861 Tunisian sustained a complete judicial system of civil and criminal jurisdictions based on codes established by the political executive, not the judges themselves. Also for the first time Tunisian judges were subject to an hierarchy of rank based on the principle that the superior rank had the power to annul the judgment of the inferior by virtue of superiority of rank. The maintenance of the new principles of codification and appellate jurisdiction was further reenforced by education. Shortly after the Ministry of Justice was created, that Ministry sponsored a two year course for judges and administrative agents for the ʿadlīya courts. Since Sadīkī College founded by Khair ad Dīn for training government administrators, the course was the second secular educational institution to cut into the monopoly of the mosques over education. The emphasis in training was on magistrates rather than lawyers even though the decrees creating Regional courts (jihawī)

allowed for lawyers (muḥāmūn) to represent litigants before the ʿadlīya courts.[93] Lawyers trained in Algeria or France (Bourguiba among them).[94] Only in 1947 was the course of the Ministry expanded so that it became a College of Law awarding a licence similar to the French licence en droit. Besides study of the codes of civil and criminal procedure, Code of Obligations and Contracts, and the Penal Code, the program began to cover commerical law (French-based since there was no Tunisian Code of Commerce) and Islamic law of inheritance and gifts (necessary for the land cases falling within the competence of the ʿadlīya courts). Prior to 1947 the ʿadlīya judges had simply consulted the qudāh and muftūn when a point of Islamic law arose in a case falling under the competence of a code. The studies introduced in 1947 freed the ʿadlīya judges of consulting judges of the Sharīʿa and taught them a selective approach to the body of the law of the Sharīʿa.

The judicial systems so far discussed for the era of the Protectorate were not revolutionary. They had been precedented. The system of ʿadlīya courts had basically

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93. Jazīrī, page 42.

94. Marcel Morand, Avant Projet de Code, 1916, done at the University of Alger.
Conversations with established lawyers in Tūnis.

been preconceived in the ʿAhd al ʾAmān and the constitution of 1861. The French courts were only a more systematic application of the rules for consular courts. The third creation of the French administrators, however, was unique for Tunisia. This was the Mixed Land Court. A mixed commerical court had been promised in the ʿAhd al ʾAmān and the constitution of 1861. Yet land rights had been a delicate issue. The Bāy had been willing to break the old rule that persons under the sovereignty of the dār al harbī could not own land in exchange for Europeans submitting to the land laws established under Islamic law and Ottoman rule. The issue was so important that the French decided on a solution only two years after the signing of the Treaty of La Marsa of 1883. The solution in essence was to submit Europeans to those Tunisian rules which admitted alienation or transferral of use of land and to avoid those Tunisian conditions which impeded stability of possession of the land once rights over it were alienated or transferred. The structure created to achieve the last purpose was the Mixed Land Court. The law it applied was the Code Foncier of 1 July 1885. The magistrature reflected the character of the Tribunal Mixte, as it was known. For the first session of 7 October 1886 three chambers were established: French, Mulsim (or rather Tunisian), and mixed. The

French chamber consisted of one French President, two French judges, and one supplementary French judge who could substitute in case of absence of the one of the three regular judges. It heard cases involving only Europeans. The Muslim chamber consisted of three Tunisian sheikhs (shuyūkh). They heard cases involving only Tunisians. The mixed chamber was presided over by the French president, the two French judges, and two of the judges from the Muslim chamber. This mixed chamber heard cases where Europeans and Muslims were involved, as when a European might be claiming possession of certain land while Muslim Tunisians objected to the validity of his claim. The office of clerk was divided between a Frenchman and a Tunisian. The preponderance of the French in the mixed chamber reflected the political purpose of the Code Foncier of 1885. The purpose was to guarantee by law the land rights of French immigrants.

The jurisdiction of the Tribunal Mixte extended to all of Tunisia. Later auxiliary branches were established in the cities of Sūsa, Sfax, Bizerte, and Souk el Arba.

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95. In 1886 named to the French chanber were: Fermé, President; Berge, Watrin, judges; Prope, complementary judge. Named to the Muslim chamber: Sheikh Amor ben Sheikh, Sheikh Moktar Chuika, Sheikh Si-Mahmound ben Mahmoud. Named to the Mixed Chamber: Fermé, Berge, Watrin, Sheikh Mokhtar Chouika, Sheikh Si Mahmoud ben Mahmoud. Greffier: Lhomme and Si Snoussi. (From the Minutes du Tribunal Mixte, 7 October 1886 to 30 December 1889, in the present Tribunal Immobilier, Tūnis)

The court's judicial function was to accept or reject requests from any inhabitant in Tunisia for standardised registration of certain types of land rights. Acceptance or rejection was based on the adequacy or inadequacy of evidence presented by the petitioner in support of his claim and the evidence presented by the party opposing such claim.[96]

The kinds of land rights which the court was competent to recognise during the Protectorate were: right of ownership; holding by enzel (inzāl, perpetual rent paid for use of land constituted into hubus; the person paying the rent usually was not a beneficiary of the revenues of the hubus; enzel in effect was a sale by way of perpetual rent[97]); right of usufruct; usage (use of fruits of property for subsistence needs; a non-transferable right); right of habitation (use of a house, subject

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96. Article 12: There are instituted, in Tunisia, a Land Court and conservateurs of landed property.
The Land Court passes judgment on the admissibility of the demands for registration. It has a main seat in Tunis and auxiliary seats in cities which are designated by decrees. Its composition and organisation are established by decree.
The Conservateurs of Landed Property are charged with:
1) registration of immoveables
2) constitution of titles of property
3) preservation of the documents relating to the immoveables
4) inscription of the rights and obligations of these immoveables...
(Code Foncier, Annotated, t.I, edited Mohamed Tahar Es Snoussi, 1957).

97. Code Foncier, Annotated, t.I, paragraph 3 from bottom, page 64.

to the same rules as usage); long-term leasing of land (eighteen to ninety-nine years); right of construction on another's land; servitude; priority of creditor (privilège); rights accruing from the contract of antichrèse (antichresis: creditor may collect revenue from the land for payment of interest or principal of the loan); rights of creditor in a pledging of property for payment of an obligation (hypothèque).[98] The land in question had to be defined by cadastral survey. By 1896 the secular civil court (French) of Tūnis had established that the petition for registration of land rights had as a sole aim to fix the judicial status of the property and to have the property regulated by Tunisian land law (not necessarily the Sharī'a); it did not aim to change or transfer land rights from one person having such rights to another not having them. It merely determined and respected rights which it saw had been derived from evidence of extant possession.[99] This conservative aim

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98. Article 13: The real landed rights are: immoveable ownership, enzel (inzāl) and rent of enzel, usufruct of the immoveables, usage and habitation, emphytéose, rights of construction, servitude, antichresis, creditors' privileges, and hypothecation. (Code Foncier, Annotated, t.I)

99. Judgment from French civil court, Tunis, 14 December 1896, Journal Tunisien (J.T.) 97,36; from court at Sūsa, 27 October 1898, J.T. 99,496 (Code Foncier, Annotated, t.I, footnote IV,b$_2$, page 13).

Article 18: Registration has the sole aim of placing the immoveable submitted to registration under the regulation of the present law. (Code Foncier)

was later to give rise to the charge that the Code Foncier was most useful for those whose land situation was already sure.[100]

Apart from recognising rights the Tribunal Mixte was incompetent. It had no power, for example, to order the creation of a servitude on a passage leading from a property that was totally surrounded by other properties (Decision of the Tribunal Mixte, 3 July 1897).[101] Registration was a recognition of existing rights, not a creation of new ones.

The criteria which the Tribunal Mixte used to decide whether the petitioner for registration had lacked sufficient evidence for his claim were established by case law. The desire of the French to conform to local land laws as wanted by the Bāy in the ʿAhd al ʾAmān was most evident in this process of investigation of the evidence presented. Tunisia had recognised written land titles long before the French Protectorate. Even though holding land by written title was not standardised, many who

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100. J.M. Verdier, Professor, University of Tunis, "Les Principales tendances du droit foncier Tunisien de 1956 à 1961," Revue Tunisienne de Droit, 1962, page 133.

101. Journal Tunisien (J.T.) 97,447 (Code Foncier, Annotated, t.I, paragraph 3 from top, page 83).

came to the Tribunal Mixte for standardised registration presented ancient Arabic titles which the French tended to respect. The Court placed great credibility in the ancient titles in themselves and would accept notarised (written testimony of witnesses) declarations of land rights only as supporting evidence. Notarised declarations of recent date certainly did not prevail over regular ancient titles. Consequently the Court rejected any petition for registration based solely on simple declaration of rights when the party challenging the petition argued on the basis of an old title.[102] The Court, however, had to be wary of unauthentic titles. As early as 1888 the mixed chamber heard a petition for registration from an European and opposition from a number of Tunisian Muslims. At first the challenging parties presented only copies of the title of the hubus, showing the origin of the rights in the property. When the Court demanded the original titles, the petitioner had none and one of the opponents could offer only a title which the

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102. Judgment of the Tribunal Mixte, 4 November 1893, Journal Tunisien (J.T.) 97,523 (Code Foncier, Annotated, t. I, paragraph 1 from top, page 26).

At al mahkama al ʿaqariya I looked through some of the old Arabic titles dating from the early nineteenth century. They are made of dried animal skin and written over completely with Arabic. They give descriptions of the land, and dates of transactions concerning the land. Several different seals on one title were evidence that the land in question had passed through several hands.

Court considered suspect: "The paper appears stained to make it appear old (1818) but the paper is too crisp to have passed from hand to hand since 1818. The signatures of the notaries appear on a part that is not stained and so seem to have been detached from another piece. Even the ink differs from the rest of the title." The Court was not competent to decide any issue outside registration, much less to decide a case of alleged fraud. Nor did the Court think it proper to go against traditional procedure by throwing out an alleged ancient title. The Court decided to send the matter to the Public Prosecutor for the French courts. The Prosecutor decided that there was no case and returned the matter to the Tribunal Mixte. Thereupon the Court undertook its own investigation, submitting the title to chemical tests by experts. The report of the experts confirmed the suspicions of the Court. Then considering other circumstances which cast doubt on the authenticity of the title, such as a Hanafī court decision of 1876 which ruled in favour of the European in the absence of any title of hubus even being produced, the Tribunal Mixte ruled for registration in the name of the European petitioner.[103]

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[103] Case No. 33 of 20 June 1888, 4 March 1889, 14 May 1889, found in Minutes de jugements du Tribunal Mixte, 7 October 1886 à 30 December 1889.

Later the Tribunal Mixte, by the help of decisions from the regular courts, decided to discriminate among authentic Arabic titles. An ancient title presented by a petitioner or opponent which showed that there had not been any alienation or judicial dispute concerning the land for a long time and which was not supported by the fact of possession would not prevail over evidence of possession which fulfilled all the requirements of prescription (Civil court of Tunis, 14 June 1899).[104] One category of titles of which the Court was wary was the medmound (madmun). When only a fraction of a land was sold one drew up a new title especially for the alienated portion. This title was a medmoun (madmun), that is, a resumé of the original ancient title. It indicated the origin of ownership and the successive transmissions of the property, its original boundaries, and the contract of sale. This new title was given to the person who acquired the land while the ancient title remained in the hands of the seller. On the ancient title was supposed to be made a note of the concession of rights over part of the property and a reminder that the title then applied only to the part over which the seller

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104. Journal Tunisien (J.T.) 99, 522 (Code Foncier, Annotated, t. I, paragraph 4 from top, page 28).

retained his rights (Civil court of Tūnis, 29 April 1893).[105] The Tribunal Mixte, in conformity with its respect for originals of ancient titles, accepted the medmoun (madmun) as proof of rights only when the original ancient title could not be presented (Civil court of Tūnis, 6 May 1892).[106]

Besides ancient land titles the Tunisians also presented notarised documents in support of their claims. Notarised documents used in place of a title to land were called outika (wathīqa). The Civil court of Tūnis placed these on the same level as titles only if they were of an ancient date. An outika (wathīqa) of recent date had no weight in the face of persons whose factual possession had begun far before the date of the outika (wathīqa) (judgment, 23 March 1889).[107]

As for other notarised documents, such as ones witnessing a contract involving the land in question, the Tribunal Mixte demanded that certain standards be met before the Court would consider them authentic. The document which declared the existence of a certain right over the land had to be confirmed by actual possession. Its

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105. Journal Tunisien (J.T.) 96, 362 (Code Foncier, Annotated, t.I, paragraph 2 from top, page 25).

106. Journal Tunisien (J.T.) 94,186 (Code Foncier, Annotated, t.I, paragraph 2 from top, page 26).

107. Journal Tunisien (J.T.) 89, 133 (Code Foncier, Annotated, t. I, paragraph 2 from bottom, page 28).

date had to be prior to the date on notarised documents presented by parties challenging the claims. It had to be confirmed by other notarised documents and the witnesses for this corroborative evidence had to be well-known (Tribunal Mixte, 15 December 1888).[108] The courts of the Sharī'a of Tūnis (which rite was not specified) further ruled that anyone challenging the claims made in the notarised documents could also contest the competence of the witnesses whose signatures appeared on the documents. The challenge, however, had to be presented within a defined period (three days).[109] Corroborative evidence was especially important for establishing the origins of the property in question. For while a notarised contract of sale might have met all legal requirements for witnesses and sealing, the act in itself might be invalid if it involved land that was inalienable from the start (Tribunal Mixte, 6 February 1897).[110] If the

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108. Journal Tunisien (J.T.) 97,481 (Code Foncier, Annotated, t.I, paragraph2 from top, page 29).

109. Judgment from courts of the Sharī'a, 1 May 1895, Journal Tunisien, 97, 525 (Code Foncier, Annotated,t.I paragraph 5 from top, page 28).

110. Journal Tunisien (J.T.) 98,509 (Code Foncier, Annotated, t.I, pages 23-24).

notarised documents presented by the petitioner and opponent before the Tribunal Mixte appeared to be equally authentic the Court gave preference to the document which was supported by the possession of the longest time (Tribunal Mixte, 26 March 1898).[111]

When parties could not produce written documents in support of their claims, the Tribunal Mixte recognised acquisition of rights by prescription. Evidence of ownership could be derived from peaceful and long-recognised possession. The Court accepted the judgment of the courts of the Sharī'a on the basis of whether the lapse of time warranted prescription (fifteen years in Hanafī law, ten years in Mālikī law).[112] Yet even when possession had been for less than fifteen years, peaceful and well-recognised holding was sufficient to warrant admissibility of the petition for registration.[113] One modification

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111. Journal Tunisien (J.T.) 98,273 (Code Foncier, Annotated, t.I, paragraph 3 from top, page 29).

112. Code Foncier, Annotated, t.I, paragraph 6 "Prescription", page 10.

113. Judgment from Sūsa, Civil Court, 28 February 1889, Journal Tunisien (J.T.) 89,53 (Code Foncier, Annotated, t.I, paragraph 3, from top, page 26).

which the Tribunal Mixte brought to the Tunisian law of prescription derived from the Court's procedural requirements. Presenting a petition for registration of land rights risked raising opposition. Such had the effect of interrupting the continuity of possession claimed by the petitioner (Tribunal Mixte, 26 July 1899).[114] Should the claim of the petitioner be rejected and the petitioner try at a later date to register his rights on the basis of prescription, prescription would be calculated from the date of the filing of opposition to the first petition.

Whichever evidence -- written or unwritten -- parties presented before the Tribunal Mixte to support their claims, the Court had to undertake considerable investigation to verify the claims. When investigation revealed that the petitioner was only holding land by payment of enzel (inzāl) rather than as pure and simple owner, the Court did not throw out the case. It only granted registration of the right of enzel (Tribunal Mixte, 17 January 1893).[115]

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114. Journal Tunisien (J.T.) 900, 480 (Code Foncier, Annotated, t.I, paragraph 1 from top, page 28).

Article 52 of the present Code of Property Rights (promulgated in 1965) continues this policy with some qualifications: "Prescription can be interrupted only: 1) by a petition before the competent court; the interruption has no effect if the petition is rejected because of form or substance, if the petitioner withdraws his claim or a judgment is entered on the basis of statute of limitations;..."

115. Journal Tunisien (J.T.) 93,93 (Code Foncier, Anno-

Like any other litigant who wishes to assert his rights, the petitioner for registration of land carried the burden of proof. Yet unlike a litigant in a regular lawsuit, the petitioner for registration did not benefit from the absence of opposition. Registration was established on the basis of authenticity of documents, court investigations, and actual possession. The mere absence of opposition to the claim was not considered evidence that the petitioner had established his claim. The Tribunal Mixte felt bound to reject a claim if proof presented by the petitioner was inadequate.[116] Findings of the investigation of the Court could be used to establish a claim when no opposition to the petition appeared, even though the petitioner could not produce his title to the property because it was either lost or destroyed. Such findings had to demonstrate the legitimacy of the claim.[117]

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tated, t.I, pages 34-35).

116. Judgment from Tribunal Mixte, 17 February 1890, Journal Tunisien, 90,87(Code Foncier, Annotated, t.I, pages 36-37).

Judgment from Tribunal Mixte, 29 August 1896, Journal Tunisien (J.T.) 98,74 (Code Foncier, Annotated, t.I, paragraph 2 from bottom, page 22).

Both ruled: Petitioner cannot argue that absence of opposition automatically means that he must be recognised as legitimate owner of the land in question.

117. Judgment from Tribunal Mixte, 11 March 1896, Journal Tunisien (J.T.) 98, 199 (Code Foncier, Annotated, t.I, paragraph 2 from top, page 23).

Absence of opposition could be due to no intention on anyone's part to oppose or to failure of one intending to oppose to meet the deadline for filing opposition.[118]

If the petitioner could not establish a claim on the basis of mere absence of opposition, nor could the opposing party establish a claim on the basis of opposing evidence. Proof offered by a party challenging the claims of a petitioner for registration could be strong enough to convince the Tribunal Mixte that the petitioner's claim was unfounded and that the right in question belonged to the party challenging. However, unless the party challenging desired to file a request for registration after the rejection of the claim of the first petitioner, no Tunisian court recognised the rejection as a decision to attribute the land rights in question to the party originally challenging the claim.[119]

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118. Judgment from Tribunal Mixte, 13 February 1896, Journal Tunisien (J.T.) 96,164, and 28 November 1896, Journal Tunisien (J.T.) 96,599 (Code Foncier, Annotated, t.I, paragraph 3 from bottom, page 43).

119. Judgment from French civil court of Tunis, 26 November 1894, Journal Tunisien (J.T.) 95,23 (Code Foncier, Annotated, t.I, paragraph 3 from bottom, page 36).

Later the decree of 28 March 1948 made this rule (rights of opposition) a part of the Code Foncier. Article 37, section 3 of the Code read: "However it [the Tribunal Mixte] can order registration in toto or in part of the land in the name of the opposing party or parties when the latter makes a request for registration and their rights are established."

This ruling was later challenged by the Director of Juridical and Legislative Services. The Director proposed in the draft of the decree of 28 March 1942 (article thirty-seven of the Code Foncier)[120] that the Tribunal Mixte order registration in favour of the opposing parties whenever their rights appeared to be well-established without obliging them to file a new petition for registration. The motive of the Director was expediency. By eliminating the step of a new petition for registration after rejection of the original petition, the opposing parties could avoid double costs.[121] Nonetheless, the decree which took effect, as evidenced in article thirty- seven of the Code Foncier, upheld the case law on the subject. The government of the Protectorate was not ready to compromise the principle that registration was by request and by clear establishment of claim.

The French insistence on the rule that absence of opposition was no proof of ownership was contrary to

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120. See footnote 119 above on article 37.

121. Letter from Direction de la Service Juridique et de Legislation, No. SJL 6380 of 16 March 1942 to Resident General Esteva. Signature illegible. Object of letter was modification of Code Foncier. Found in archives of Dar al Bay, Series E, carton 155, Dossier 1. I thank M. Abdeljelil Temini for his help in the Archives.

the Tunisian practise. In an early case of registration the Tribunal Mixte was told that a Tunisian notary had confirmed the allegation of a Tunisian on the location of certain land boundaries. The notary had based his statement on the fact of possession and absence of opposition. In the absence of opposition, he felt no need to investigate the titles.[122] Since the French had already twisted in their favour the principle of territorial jurisdiction in land matters as originally postulated in the ʿAhd al-Amān they were keen to see that the Tunisians have as much opportunity as possible in law to oppose petitions for registration. If they had registered the rights of the opposing parties in case of rejection of the petitioning parties, they would have closed off the opportunity for a new opposition to arise.

One other feature which distinguished the Tribunal Mixte from other courts was the absolute finality of its decisions. There was no appeal from them. Hence, the standard of proof which the Tribunal Mixte set for itself was absolute certainty that the rights in question were rightly attributed to the claimant.[123] Once

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[122]. Case No. 6 of 2 July 1887 and 1 February 1888, Minutes du Tribunal Mixte, Tunis.

[123]. Judgment from Tribunal Mixte, 22 April 1896, Journal Tunisien (J.T.) 97,411 (Code Foncier, Annotated t.I, paragraph 5, page 34).

Article 332 of the present Code of Property Rights of 1965 reads: "The decisions of the Court of Land Matters are not subject to any opposition, appeal, or any other recourse."

the Tribunal Mixte decided in favour of a petitioner for registration and the given right was registered with the office of the Conservateur Foncier no one could challenge those rights in any court.[124] If the Tribunal Mixte rejected the petition, the petitioner was, however, free to renew his claim if he brought forth new evidence and transferred his intentions to another piece of land.[125] From a practical point of view, the finality of their judgments is understandable. It took time to file a petition and for the Court to undertake investigations to assure certainty of claim. Cases could and did go on for years, as evidenced in the several preparatory judgments which preceded the final judgment by as much as three years.[126]

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124. Judgment from Tribunal Mixte, 8 April 1897, Journal Tunisien (J.T.) 97,310 (Code Foncier, Annotated, t. I, paragraph 3 from top, page 47).

125. Article 31: From the time of the deposit of the demand for registration and of the titles and documents attached to the application, the President of the Tribunal Mixte designates a judge of this court to proceed towards inquiries and to report according to the following conditions:

This judge, apart from the obligations which are imposed on him by article 41, has the task of watching, during the course of the procedure for registration, that no landed right of incapacitated persons or of persons not present in the Regency are abused; and to this effect he proceeds towards all verifications and necessary investigations. The powers which are conferred on him in this case are discretionary...

126. From investigations of records of the mahakama al ʿaqariya, Tunis.

Appeal would have caused the litigation to be prolonged and increased costs. In some cases the Tribunal Mixte had to delay final judgment until another court had settled a question of authenticity or determined a legal status, or the like of such matters, in which the Tribunal Mixte had no competence. If the litigants so chose, these cases went through the appellate channels for the regular courts, thus delaying even further the final judgment of the Tribunal Mixte. From a judicial point of view, absence of regular channels of appeal from a judgment by the Tribunal Mixte is not appalling. For the Sharī'a itself never provided for such institutional channels. Yet absence of any body to hear appeals in cases of flagrant abuse of rights is asking one to accept that human judgment is infallible.

Because of the absolute finality of its judgments, the Tribunal Mixte tried to develop certain safeguards to protect the rights of those who were challenging the petitioner's claim. The Court on its part undertook investigations of claims and evidence. Another purpose of such investigations appeared in article thirty-one, paragraph two of the Code Foncier: "This (investigating) judge (appointed by the President of the Tribunal Mixte) ... has as his mission to be careful that in the course of the procedure for registration no land right of any

person who has no legal capcity or who is not present in the Regency is abused; towards this end he must undertake all verifications and necessary inquiries. The powers conferred on him in this regard are discretionary. At the demand of the investigating judge, for the interests of the persons lacking legal capacity or persons who are not present, the President of the Tribunal Mixte can ... extend the delay (period of time within which opposition to the petition had to be presented) so that opposition to the registration can be formed in their name. Notification of this extension will be given to the officials who receive opposition (as modified by decree of 28 March 1942)." As for the persons who had legal capacity to act in their own name and who were not absent from the Regency, they had recourse against the final decision of the Tribunal Mixte if they proved abuse of right. The recourse was to a regular civil or criminal court but the award was only in terms of indemnity. There was no solution in equity whereby the party claiming abuse of rights could force the Tribunal Mixte to order removal of registration of rights from the register of the Conservateur Foncier. As early as 1896 the civil court of Tūnis ruled that it would award damages to the party who proved that the party who won registration had introduced the petition in bad

faith.[127] Two years later in a more elaborate ruling the civil court of Tūnis recognised that when the Tribunal Mixte rejected a claim for registration and pronounced registration for the party which had originally opposed the petitioner, the rejected party could not petition the civil courts to recognise the rights which he originally claimed. Neither could the civil courts admit a subsidiary petition applying for the original titles so that the party rejected could challenge the party awarded registration. The only way a party who was rejected by the Tribunal Mixte could win damages was to demonstrate that the party to whom registration was awarded had acted fraudulently.[128] Apart from fraudulence the civil courts awarded compensation to purchasers whose rights were abused. In 1897 the Tunisian civil court ruled that the decision of the Tribunal Mixte rejecting a petition for registration of land rights yet ordering registration in favour of a third party definitively settled for all courts the question of land rights. The original petitioner was definitely evicted

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127. Judgment from French civil court of Tūnis, 13 February 1896, Journal Tunisien (J.T.) 96,288 (Code Foncier, Annotated, t.I, paragraph 2 from bottom, page 40).

128. Judgment from French civil court of Tūnis, 13 July 1898, Journal Tunisien (J.T.), 98, 472 (Code Foncier, Annotated, t.I, pages 37-38).

from the land. If the petitioner had acquired the land by sale he still was evicted from the land. To recover his loss in the sale transaction he could apply to a civil court for compensation. Compensation, however, could be awarded only in the form of moveables.[129] There was only one exception to the rule that a petition claiming abuse of rights because of the final decision of the Tribunal Mixte could ask only for compensation, not nullification of the registration. A petition from the government on behalf of the public domain was the exception. In order for the government to claim a parcel of land that was part of land already registered in the name of a private person, the government had to discharge the burden of proof. For the legal presumption was in favour of the registered owner. Any evidence that caused the court to doubt the validity of the claim of the government was interpreted as against the government.[130]

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129. Judgment from French civil court of Tūnis, 12 February 1897, Journal Tunisien (J.T.) 97,125 (Code Foncier, Annotated, t.I, pages 41-42).

130. Code Foncier, Annotated, t.I, paragraph 3 from bottom, page 45:

> As an exception, one can admit the action for claim, exercised by the state in the name of the public domain, for a parcel included in a registered immoveable. But registration having been established, for the benefit of the person in the name of whom the immoveable was registered, a

Once the Tribunal Mixte admitted registration of a land right there was one more stage before the process was completed. All documents after judgment of acceptance of the petition went to the office of the Conservateur de la Propriété Foncière. That office recorded all rights admitted by the Tribunal Mixte at the time of final judgment. Any changes in the holder of these rights, or any alienations or any obliteration of these rights after the initial registration also had to be submitted to the Conservateur.[131] Article three hundred forty-three of the Code Foncier demanded that the following types of changes be brought to the notice of the Conservateur: inter vivos agreements of a gratuitous or onerous nature; any court judgment which constituted

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legal presumption of ownership over the entire immoveable and over all its accessories, the burden of proving that the parcel being claimed would be part of the public domain, falls on the state and doubt must be interpreted against the latter. (Civil court, Tunis, 26 July 1897, Journal Tunisien (J.T.) 97, 436).

131. In judgment number 7367 of 11 March 1971, the Supreme Court of Tunisia (Cassation, taʿaqīb) held that rights not inscribed on the title when first granted by judgment of the Court of Land Matters are deemed non-existent (applying the very words of article 308 of the present Code of Property Rights of 1965). Such a ruling prescribes anyone from challenging a registered title on the basis of rights that are alleged to have existed before the registration of the title, but which the Court of Land Matters did not have inscribed on the title. See Al Qadāʾ waʾl tashrīʿ, No. 10, December 1971, pages 48-49.

(such as statement of validity of the creation of a hubus), transmitted, or declared, or modified, or eliminated a right over the property in question; redistribution of rights after the division of land previously held in co-ownership; redistribution of rights after the opening of a succession;[132] notarised deeds or judgments ending shared ownership of a dividing wall; leases made for more than three years; notarised deeds or judgments declaring acquittal of more than a year's rent when the rent had not come to term yet; agreements or judgments declaring the acquittal of a year's worth of rent of enzel (inzāl); any transfers of creditors' priority rights to

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[132]. Article 364: In the case of the death of a holder of a real immoveable right that is not inscribed, inscription can, before liquidation or division (qasama), be taken in the name of the succession, on the single production of the certificate of death, and these inscriptions will be modified after division, in conformity with the certificate of division presented.

Article 366: In order to obtain landed property rights resulting from the opening of a succession, the petitioners can present a certificate of death, and if the deceased did not leave a will, they can present a certificate stating their civil status and their rights to the succession.

These certificates will be drawn up in Tunisia for the Tunisians by the presidents of the courts of first instance or their representatives or the cantonal judges in the place of domicile of the deceased. They will be drawn up for foreigners by the consuls and consular agents. The certificates drawn up outside Tunisia will be accepted in their authentic legal form (modified decree of 24-6-1957).

(Both articles from Code Foncier, al Qānūn al ʿAqārī, t.II)

other creditors; any change in the holders of hypothecation, or mortgage. Unlike the original land right inscribed on the registers of the Conservateur by virtue of a decision of the Tribunal Mixte, the validity of alienations and transfers which were later brought to the notice of the Conservateur could be challenged by third parties.[133]

When litigation arose involving registered land, the full impact of the Tribunal Mixte in Tunisia became quite clear. The Tribunal Mixte as we have seen had exceptional territorial jurisdiction. It had competence to register land rights of any one living in Tunisia, irrespective of the personal status of the registrant. This exceptional

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133. Article 343: The following must be rendered public by being inscribed on the title of property, in order to be opposed by third parties: 1) All transactions and agreements inter vivos of a gratuitous nature or incurring obligation, all judgments that have the effect of constituting, transmitting, declaring, modifying, or extinguishing a real landed right, of rendering it inalienable, of restraining free circulation, or modifying any other condition of its inscription;

2) Transactions and judgments on the ceding of use of common walls;

3) Leases of immoveables exceeding three years as well as the leases of less duration or their renewals when they bring about disposing of the enjoyment of the immoveable for a period of time whose term exceeds the expiration of the third year from the date on which they made agreement...

4) Transactions and judgments confirming the liberation or ceding of a sum superior to a year of rent...

5) Transactions and judgments confirming the liberation or ceding of a sum superior to a year of arrears of enzel (inzāl).

territorial jurisdiction gave rise to another exception in a legal system where jurisdiction was normally based on personal status of the litigants. The exception was that French courts had jurisdiction over any litigation involving land registered by the Tribunal Mixte.[134] The exception was justifiable on grounds of public order. French control meant public rule based on French jurisprudence, not Tunisian or Islamic. The legal provision expressing this policy and allowing jurisdiction of French courts over Tunisians involved in disputes of registered land was article two of the Code Foncier. Article two read:

> Those provisions of the French Code which are not contrary to the present law (Code Foncier of 1885) nor to the personal status or to the rules for succession of the holders of land rights will apply in Tunisia to the lands which are registered and to the rights over these lands (as modified 16 May 1886).[135]

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134. Example of French courts dealing with Tunisians is the case of Ali Rabah Es Sehali vs. Azaiz ben Ali, Minute No. 151 of the French civil court of Tunis, 6 March 1947 (second chamber), affair no. 314. The issue was that the defendant was claiming a part of a property that had been registered subject to co-ownership. He could not produce the document of sale by which he claimed that he bought one-half of the part belonging to his mother, nor had the transaction been inscribed on the land title. He sold the same parcel to his brother Rabah, who in turn could produce the the act of sale. Nor had he had it inscribed on the land title. The court rejected his petition.

135. Article 2 of the Code Foncier (Zeys, page 899): The provisions of the French civil code which are not contrary either to the present law, or to the personal status (a) or to the rules of successions (b) of the holders of real landed rights apply in Tunisia to the registered immoveables and to the real rights over these immoveables (thus

In 1891 the French supreme court (cassation) more clearly ruled that the Tunisian land law of 1885 applied the dispositions of French law only to those lands which were registered in conformity with the prescriptions of the French law.[136] It was easy to apply to Tunisians "those provisions of the French code which (were) not contrary to (the Code Foncier of 1885)", for the French Code Civil defined the same rights as the Code Foncier, excepting

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modified by decree of 16 May 1886).

Footnotes:(a) The Tribunal Mixte does not have the power to settle disputes relating to the personal rights connected to the registered immoveables (Tunis, 23 May 1894, Journal Tunisien (J.T.) 94,350).

(b) Successions are regulated in Tunisia by the national law of the deceased, even in regard to immoveable property. This rule is established by the customs which have the force of law (Tunis, 31 May 1899, Journal Tunisien (J.T.) 99,588).

(a) The Tunisian law of 1885 applies the provisions of the French law only to registered immoveables in conformity with its prescriptions (Supreme Court of Appeal, 20 April 1891, Dalloz, Jurisprudence Générale 91,I, 273), Zeys, page 900.

Article 2 was abrogated by the decree of 24.6.1957 and replaced by another article 2: The provisions of the Code of Obligations and Contracts which are not contrary to the present law, nor to the personal status or to the rules of succession of the holders of real landed rights apply to the registered immoveables and to the real rights over these immoveables. Subject to the provisions of the present law, any juridical situation created in Tunisia before 1st of July 1957, by virtue of the French law or of the Tunisian law normally applicable, continues to have effect.

136. See $(a)_2$, Zeys, page 900, footnote 135 above.

enzel (inzāl), which was a peculiarly Tunisian contract since it derived from hubus.[137] Article thirteen of the Code Foncier corresponded to article five hundred twenty-six of the French Civil Code:

(article thirteen) The real rights of immoveables are: immoveable property, enzel and the rent of enzel, usufruct of the immoveables, usage and inhabitation, long-term leasing of land, right of construction on land, servitude, rights accruing from antichresis (contract by which a debtor gives up to his creditor possession and usufruct of a real estate in order to assure the relief of a debt), priority of creditor, and rights of creditor in pledging of property for payment of and obligation (hypothèque).

(article five hundred twenty-six) The following are immoveables by virtue of the object to which they apply: usufruct of immoveable things
servitude or land services
actions which aim at claiming an immoveable.

Articles ninety to ninety-four in the Code Foncier provided for usufruct as did article five hundred seventy-eight of the French Civil Code (Code Civil):

(article ninety) Usufruct of land is the right to enjoy an immoveable the ownership of which belongs to another but on condition that he preserve the substance of ownership.

(article five hundred seventy-eight) Usufruct is the right to enjoy things the ownership of which belongs to another but on condition that he preserve the substance of ownership.

Article one hundred thirty-four of the Code Foncier pro-

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137. Footnote 1, Code Foncier, Annotated, t.I, page 17: Sheikh Snoussi finds that the rights defined by this article (13) are those provided for in article 526 of the Civil Code of France, except that enzel (inzāl) is known only in Tunisia and the legislator of 1885 admitted it in the law of 1885. It specifies that enzel derives from hubus.

vided for definition of rights of usage and habitation as did article six hundred twenty-five of the Civil Code:

(article one hundred thirty-four) The rights of usage and habitation are established and lost in the same manner as usufruct.

(article six hundred twenty-five) The rights of usage and habitation are established and lost in the same manner as usufruct.

Right of construction on another's land was covered by article one hundred fifty of the Code Foncier and article five hundred fifty-three of the Civil Code:

(article one hundred fifty) The right of construction on another's land is a real property right which consists in having building, enterprises or plantations on a land belonging to another.

(article five hundred fifty-three) All the constructions, plantations and enterprises on a land or in the interior, are presumed to have been done by the owner at his own costs and to belong to him, if the contrary is not proved; this is without any prejudice to the ownership which a third party might have acquired or might be able to acquire by prescription, whether it be the basement of the building or any other part of the building.

Servitude in article one hundred fifty-three of the Code Foncier corresponded to article six hundred thirty-seven of the Civil Code:

(article one hundred fifty-three) A servitude is an obligation imposed on an immoveable for usage and utility of the immoveable belonging to another owner.

(article six hundred thirty-seven) A servitude is an obligation imposed on a patrimony belonging to another owner.

Priority of creditor was found in article two hundred twenty-eight of the Code Foncier and article two thousand ninety-five of the Civil Code:

(article two hundred twenty-eight) Privilege is a real land right which the status of credit gives to a creditor as being preferred over other creditors even hypothecated creditors...

(article two thousand ninety-five) Privilege is a right which the status of credit gives to a creditor as being preferred over other creditors, even a hypothecated creditor.

Rights accruing from the contract of antichresis (contract for use of land to relieve a debt) were protected in articles two hundred seventeen to two hundred twenty-seven in the Code Foncier (abrogated by Law No. 1 of 28 January 1958, Journal Officiel No.9) and article two thousand eighty-five of the Civil Code.[138] Pledging of property by hypothecation (or mortgage) appeared in article two hundred thirty-one of the Code Foncier and article twenty-one thousand fourteen of the Civil Code:

(article two hundred thirty-one) Hypothecation is a real land right over the immoveables destined for acquittal of an obligation...

(article twenty-one thousand fourteen) Hypothecation is

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138. Article 2085 (Code Civil): Antichresis is established only by written document. By the contract the creditor acquires only the right to collect the fruits of the immoveable on condition of imputing them annually on the interest, if such is due, and then on the capital of his credit.

> a real right over the immoveables destined for acquittal of an obligation...

Regulation of long-term leasing of land (eighteen to ninety-nine years, called emphytéose) was covered by article one hundred forty-six of the Code Foncier and article seventeen hundred seventy-eight (sub articles 937-950) in the Civil Code. Although the contract of enzel (inzāl) did not exist in French law, the French courts in Tunisia assimilated enzel (inzāl) to perpetual rent in general and applied relevant sections of the Civil Code, such as article twenty-two hundred seventy-seven, which provided that arrears of lifetime and perpetual rents were no longer enforceable after five years.[139]

When one compares the provisions of the French Civil Code and the Tunisian Code Foncier with the rules of the Sharī'a that were applicable to all land matters previous to 1885, one can see that the imposition of French public order on registered land was born of necessity. The necessity was that French colonial settlers financed their land ventures in Tunisia through French financial concerns which were regulated by French law. The rules of the Sharī'a for land and commerce would have been inadequate if they had been left sovereign in land litigation. For example, the priority of some creditors over others in

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139. Judgment from the civil court of Sūsa, 7 December 1899, Journal Tunisien (J.T.) 900,380 (Code Foncier, Annotated, t.I, paragraph 4 from bottom, page 68).

regard to land was not the same in French law as in Islamic law.[140] In the law of joint ownership of property, the French Civil Code was more flexible than the Sharī'a. Article eight hundred fifteen of the Civil Code allows any co-owner to demand division of the property into units of individual ownership. The Tunisian Islamic law allowed a co-owner only recourse to selling his particular share in the property when he wanted to end his participation in co-ownership.[141] The sale would not terminate the co-ownership as a whole. The Tunisian system of notarisation had also been a source of friction. When the Bāy granted the French the right to own land in Tunisia (before the establishment of the Protectorate) the Sheikh ul Islām insisted that the Europeans' titles to holdings and documents of transactions be drawn up by the Tunisian notaries. This was to ensure that foreigners were conforming to the Tunisian land laws and customs since no notarised document contrary to the law of the

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140. Judgment from civil court of Sūsa, 19 November 1897, Journal Tunisien (J.T.) 98,304 and of the civil court of Tūnis, 12 February 1897, J.T. 97, 301 (Code Foncier, Annotated, t.I, paragraph 1 from bottom, page 6).

141. Judgment from civil court of Tūnis, 29 May 1896, Journal Tunisien (J.T.) 96,319 (Code Foncier, Annotated, t.I, paragraph 4 from bottom, page 6).

land was executory.[142] The French, however, were not pleased about such restrictions. If French business could not operate except by Muslim law, it would have had to forego such French practises as charging interest on loans. In Algeria the French had been able to establish alongside Muslim notaries French notaries who drew up contracts of interest. These documents were executed by the French courts. Some Frenchmen wanted to propose to the Bāy to institute French notaries in Tunisia. Both Tunisian Muslims and the French would avail themselves of the French notaries when the transaction in question could not be authorised by a Muslim notary.[143] If the Bāy had instituted French notaries who authorised the Tunisians and the French to perform transactions against the local law and custom, he would have incurred the great displeasure of the Sheikh ul Islām. The French, instead, passed the Code Foncier. This was more in conformity with the terms of the Franco-Tunisian agreement about for-

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142. Ahmed Ben Khoja, Sheikh ul Islām, "Report on Islamic Law," 22 Caada 1300, Archives of Dār al Bāy, Series E, carton 155, Dossier 6 (Sharī'a law of Property).

143. Letter of 28/bre 188(?) from Vice-Consulate of France in Sfax on report of Sheikh ul Islām on land law and notaries, Archives of Dār al Bāy, Series E, carton 155, Dossier 6.

eigners owning land than in conformity with local law. Through the Code Foncier the French simply had the local law changed and kept it applicable to Tunisians and French alike. Nor would instituting French notaries have solved the problem of French landowners being justiciable before courts of the Sharī'a. If a French business owning land in Tunisia had undertaken certain transactions before a French notary, then had to go before a court of the Sharī'a in case of litigation, his French notarised documents would probably have not been recognised by the qādī if they were contrary to Tunisian Islamic law. Yet the creation of a Tribunal Mixte gave the French business a chance to avoid the jurisdiction of the Sharī'a if it so chose to register its land under the Code Foncier.

No one, European or Tunisian, was forced to register his land and thereby have it regulated by French law. The Code Foncier of 1885 simply provided an alternative to the land law applied in the qādī's courts to unregistered lands. The only example of the owner of an unregistered plot having to submit to the rules of registered land came from the law of servitude. Article twenty of the Code Foncier provided that "in case of dispute over the borders or servitudes of contiguous lands, when one of the two (was) registered and the other not, the Code Foncier would be applied." The French civil court of

Tūnis conformed to the provision in ruling that only the Tunisian Code Foncier of 1885 was applicable in regard to servitudes when one of the two lands, whether serving or being served, was registered. This was applicable not only to properties which had been registered with a servitude at the time of litigation before the Tribunal Mixte but also to servitudes created after the initial registration.[144]

In the domain of personal rights and succession, however, the exceptional jurisdiction of the French courts over Tunisians holding registered land was eliminated. Any litigation involving personal rights or succession, whether to registered or unregistered lands, was regulated by the rules of personal status. This meant that only courts of the Sharī'a had jurisdiction over Muslim Tunisians and French courts over Europeans in succession. In 1894 the French civil court of Tūnis initiated the following important jurisprudence: "The Tribunal Mixte has not the power to settle disputes relative to personal rights accruing to the registered lands (23 May 1894)."[145]

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144. Judgment from Justice of the Peace, Tūnis, 26 July 1897, Journal Tunisien (J.T.) 97,441 (Code Foncier, Annotated, t.I, paragraph 1 from top, page 82).
Judgment from Justice of the Peace, Tūnis, 16 December 1896, Journal Tunisien (J.T.) 97,43 (Code Foncier, Annotated, t.I, paragraph 3 from bottom, page 82).

145. Footnote (a) to article 2 of the Code Foncier, Zeys, page 899 (see footnote 135 above).

And in 1899 it ruled: "Successions are regulated in Tunisia by the national law of the deceased, even in regard to immoveables. This rule is established by the customs which have force of law (31 May 1899)."[146] The fact that the land in a succession matter was registered only necessitated that any changes be inscribed on the title awarded previously by the Tribunal Mixte. Article three hundred sixty-six of the Code Foncier provided: "To obtain the inscription of names for rights of real property resulting from the opening of a succession the claimants shall produce, other than the statement of death, if it is a question of intestate succession, a certificate confirming their civil status and their exclusive rights to the estate (as modified by the decree of 16 May 1886). These certificates shall be established in Tunisia by the justices of the peace or the consular agents, for the nationals and protegés of the various European nations, and for the Tunisians by the justices of the peace or the qudāh..."[147]

In practice life was not so simple as the above court

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146. Footnote (b) to article 2 of the Code Foncier, Zeys, page 899 (see footnote 135 above).

147. Zeys, Loi Foncière, 1 July 1885. In essence, this article remained the same in the 1957 edition of the Code Foncier. Only the names of the courts changed.

decisions would have it seem. One set of litigants might have to go to several different jurisdictions to have solved all the issues raised. Nor were the judges free of doubt about which jurisdiction was applicable. Throughout the history of the French Protectorate there arose cases which demonstrate how the French allowed to the various jurisdictions in Tunisia much room for play, while at the same time insisting that French public policy underlie all jurisdictions. At the turn of this century the example in point was a case of shufʿa (right of preemption). The property in question was an unregistered parcel held in co-ownership. It was sold by one of its Muslim owners to a French protegé and some Italian subjects. The contract of sale was before the French bar, that is, it was intended to be regulated by French law and was registered in the cahier of obligations. The sister of the seller sought the right of preemption over three-eights of the parcel. The Ḥanafī muftī of Tūnis serving as qāḍī summoned the foreigners to court. Then he declined competence in the matter on grounds that a sale, regulated by French law, and all litigation born of that sale were justiciable only before French courts. The non-registered status of the property was not considered. The lawyer for the Muslim claiming the right of preemption requested the Secretary General (the liaison

officer between the Tunisian government and the French Resident General) to order the Hanafī qādī to hear the case. The Secretary General consulted and accepted the opinion of one of the French judges on the bench of the Tribunal Mixte. The opinion in essence was as follows: The fact that property was sold before the French court did not change its status as unregistered property. All real estate actions involving this property could be heard by the jurisdictions of the Sharīʿa as long as the property was unregistered. And even if Europeans were the litigants the courts of the Sharīʿa could decline competence only if the validity or regularity of the sale itself were contested. In such case only the French courts could pronounce judgment on the sale effected before the French court. In the particular case at hand only shufʿa was at stake and the court of the Sharīʿa would have to hear the matter. But if in the course of the suit on shufʿa an issue was raised touching upon the sale itself, the court of the Sharīʿa was to send the parties before the French courts.[148] Similarly in matters of succession one could well imagine that the unregistered estate of a deceased Tunisian Muslim could have been burdened with various

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148. Ministry of Justice, Note No. N.160-8 of May 1908 to the Secretary General. Answer of 28.2.1908. Also letter from the Hanafī qādī to the Secretary General of 27 Xbr 1907.

legal charges which had to be settled before the heirs could share in what remained. There appeared before the French appellate court in Tūnis a case involving Tunisian Muslims and succession. The case had already gone through several Tunisian courts. The facts were that the praepositus, a Tunisian Muslim and relative of the defendants, had leased an unregistered building from the plaintiffs. Since the lease was covered by provisions in the Tunisian Code of Obligations and Contracts (promulgated in 1906 to settle law of contract, especially contracts concerning unregistered land), the Regional court (jihawī) of Tūnis had taken the affair, then the Ouzāra (Wazāra)on appeal. Both courts had ordered expulsion of the heirs of the deceased from the premises. Later a French Muslim from Algeria was introduced as an intervening party who claimed rights as a sublessee of the deceased. The plaintiffs took a suit to the President for urgent provisional judgments in the French jurisdiction. Precedent supported French jurisdiction over protegés such as the Algerians and naturalised Frenchmen[149] despite their Muslim confession. The French court ordered expulsion of the intervening party from the premises . The defendant then obtained

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149. Letter from Director of Tunisian Justice to Resident General of 18 April 1933,No. j-766-I.

from the French civil court a decision forbidding the plaintiffs to continue further lawsuits purporting to expel the defendant from the premises of an estate in which the defendant claimed rights as heir to the deceased lessee. The French court accepted the defendant's plea that he had not been party to the decisions given by the Tunisian Regional court (jihawī) and the Ouzāra (Wazāra). The plaintiffs appealed from the last order against them. The French appellate court upheld the court of first instance since the plaintiffs had not proved whether the judgments of the Regional court (jihawī) and the Ouzāra (Wazāra) were aimed at one and the same person. The name given by the defendant claiming rights through the deceased lessee in the cases before the French jurisdiction was different from the name of the heir to the same deceased lessee in the judgments of the Tunisian jurisdictions. The defendant also presented a death certificate stating heirs whose names were different from the ones on the death certificate presented by the plaintiffs. The French court of appeal ruled that the plaintiffs would have to return to Tunisian courts to settle the question of identity and decide which of the two death certificates presented was valid. This author did not find any other records of further litigation by the plaintiffs. If they had undertaken a case before the Regional court (jihawī), the

the courts of the Sharīʿa would probably have had to be involved to give opinions on the validity of the death certificate and the rights of each heir.[150]

Likewise in a case of personal rights, specifically, maintenance (nafaqa) and custody (hadāna), the parties shuffled between French courts and courts of the Sharīʿa to settle various issues involved. In one such case a Tunisian Muslim woman had obtained from the court of the Sharīʿa of Tūnis a judgment condemning her former husband, also a Tunisian Muslim, to pay her maintenance for their daughter. The judgment was rendered in 1953. A year later the same woman obtained from the Hanafī qādī of Tūnis a decision naming her provisional guardian of the same daughter. The woman then turned to the French civil court of Tūnis with a petition for exequatur. The French court granted her a judgment by default, ordering the 1953 judgment of the Sharīʿa on maintenance to be executed out of the husband's registered property. The former husband appealed against the French court's decision to the French court of appeal in Tūnis. The plea of the husband raised several points on the procedure which the French court had to follow in order to sanction

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150. Consorts El Mahdaoui vs. Abdelmajid B. Dabbagh, French Cour d'Appel, Second Chamber, Tūnis, 21 January 1957, Minute No.55.

a judgment foreign to French jurisdiction. The French court had to verify the regularity of form, the finality of the decision, its conformity to the law which it purported to apply, and its harmony with the exigencies of French public order. The French court of appeal affirmed that the Ḥanafī judgment applied only for the first nine years of the child's age since ḥaḍāna in Ḥanafī law ceases for the daughter at the age of nine. The French court also affirmed that the Ḥanafī court rightly demanded that the person holding the right of ḥaḍāna seek the costs of the child's maintenance from the father, who has a natural obligation of providing such maintenance. The French court found the court of the Sharīʿa competent since the parties involved in the suit of personal rights were all Tunisians. The reading of the judgment of the Sharīʿa condemning the husband convinced the French court that the qāḍī had observed proper form in stating particulars and in allowing the husband a defence. The judgment of the Sharīʿa was declared definitive since there was no evidence that the husband had filed appeal to the superior court of the Sharīʿa within the prescribed delay after the decision of first instance. The French court was also satisfied that the matter did not offend French public order, even though the litigants were Tunisian Muslim. The French Civil Code (Code

Civil) like the Sharī'a, consecrated the principle of responsibility of parents to maintain their offspring.[151] In regard to the 1954 judgment of the Sharī'a appointing the mother guardian, the French court declared itself incompetent to appreciate its legitimacy. It concerned only a right of personal status and was not a prerequisite for awarding maintenance to a mother for her child. Maintenance would be due irrespective of who was holding the child. The court of appeal confirmed the order of exequatur so that maintenance could be paid out of the registered property.[152]

151.
Article 203 of the Code Civil: The spouses together undertake a contract, by virtue solely of their marriage, to fulfill the obligation to nourish, maintain, and raise their children.

Article 213 of the Code Civil: Together the spouses assure the moral and material direction of the family. They provide for the education of the children and prepare for their future.

Article 212 of the Code Civil: The spouses must owe each other fidelity, aid, assistance. (footnote 4: Independently of divorce or of separation...the spouse who invokes an injury that is foreign to that resulting from the rupture of the marriage tie is allowed to demand compensation from her spouse...).

All above articles taken from Code Civil, Dalloz, 1970-71.

152.
Tahar ben Lamouchi vs. Chadlia Bent Allala, Cour d'Appel, Second Chamber, Tunis, 7 January 1957, Minute No. 25.

French Public Order in Tunisia

We have seen how the decisions of the Tribunal Mixte for registration of land rights provided one avenue by which the French courts came to exercise jurisdiction over Tunisian Muslims. Such jurisdiction, however, came about largely by the choice of the Tunisians themselves. If a Tunisian Muslim wished to register his land, he knew what the consequences would be for future litigation involving his land. Apart from land law, however, there were certain types of actions where the French courts imposed their jurisdiction on Tunisian Muslims without any choice on the part of the Tunisians. These actions were any civil and criminal litigation involving both Europeans and Tunisians. In the absence of a regular mixed court for handling civil litigation for parties of mixed nationalities, the French courts intervened. There were various ways in which the French courts could intervene. When a European was called before a court of the Sharī'a having jurisdiction over him, as was the case when the European was party to a suit on unregistered land, the French allowed the court of the Sharī'a to make its judgment, then gave the French courts a kind of supervisory jurisdiction by way of exequatur. The judgment of the Sharī'a would

be executed only after review by the French courts.[153] An example involving unregistered land arose only two years after the promulgation of the Code Foncier. An Italian petitioned the Tribunal Mixte for registration of property. He presented evidence that the property in question had originally been a hubus, then alienated by way of enzel (inzāl) to two persons, each of whom had authority to substitute any person whom they wanted for paying the enzel (inzāl). In 1872 one of the original enzelists ceded his share in the hubus to another Tunisian Muslim whose widow and heirs upon his deceased ceded the duty of enzel (inzāl)to the Italian. This last cession took place in 1884. In 1885 the second of the original enzelists ceded his share to the same Italian with the consent of the Administration of ʾAhbās (organ created by Khair ad Dīn to put in order the administration of public hubus and supervise transactions involving private hubus). The Administration of ʾAhbās contested the boundaries of the lands held by the Italian. The Administration claimed that the boundaries of the Italian embraced parts of a domain belonging to the State. The dispute was taken before the court of the Sharīʿa, which ruled on 25 Feburary 1886 in favour of the State. Or-

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153. See pages 258-259 above on what constituted review by a French court of a decision of a court of the Sharīʿa.

dinarily the Tribunal Mixte was obliged to accept the settlement of a court of ordinary jurisdiction by virtue of articles thirty-five and thirty-seven of the Code Foncier as contributing to proof of a claim.[154] In this case, however, the Tribunal Mixte could not accept the judgment of the Sharī'a as evidence against the Italian as long as the judgment had not been declared executory by a French court. The Tunisian state petitioned the French court for exequatur. If the French court granted exequatur the Tribunal Mixte would have had to reject

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154. Article 35, section 1: The disputes presently pending will remain submitted to the courts vested with them and registration will be suspended until the decision of these courts.

Article 37: The decisions of the Tribunal Mixte will not be subject to any opposition, appeal or recourse.

The Court will pass judgment on substantive matters on all the disputes other than those provided for in the first section of Article 35... It will pronounce the admission or the rejection, in toto or in part, of the registration and order in case of registration inscription of the real rights whose existence the court recognises.

In case of rejection the parties will be sent to make use of the competent jurisdiction.

(Above taken from Maurice Bompard, Législation de la Tunisie, Paris: Ernest Leroux, 1888, at the library of the Court of Land Matters, Tunis)

The modification of article 35 by decree of 28.3.1942:

Any person before a jurisdiction of common law will be able, before defence in substantive law and by the completion of all formalities prescribed in articles 23 and 24 [details for filing petition and paying costs], to divest the court of the affair, on condition that he follow up the matter upon his petition for registration.

Modification of article 37 by decree of 28.3.1942 confirmed that judgments of the Tribunal Mixte were not sub-

the petition of the Italian for registration in regard to the parcel claimed by the State. If the French court annulled the decision of the court of the Sharī'a the State would have had to provide other evidence to support its opposition.[155]

In criminal litigation involving mixed nationalities, the French courts assumed direct control over the matter. The decree of 2 September 1885 made the French courts competent to hear all crimes alleged to have been committed by Tunisian subjects to the prejudice of Europeans. For example, the Tribunal Mixte suspected an Arabic title presented by Tunisian litigants to be a fraud and suspended decision until the French Public Prosecutor had settled the matter.[156]

In matters of personal status (other than land) the decree of 31 July 1884 had specified jurisdiction over persons and matters according to public order. Public order demanded that the courts of the Sharī'a have competence only when all parties were Muslim Tunisians. The

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ject to appeal.

155. Affair No. 9, 25 June 1887, Mixed Chamber, Tribunal Mixte, Minutes du Tribunal Mixte, Tūnis.

156. Affair No. 33, 20 June 1888 and 4 March 1889, Mixed Chamber, Tribunal Mixte, Minutes du Tribunal Mixte, Tūnis.

courts of the Sharīʿa were imcompetent ratione personae and ratione materiae for disputes relating to personal status of those non-Tunisians who were justiciable before the French courts. Such non-Tunisians included non-Muslims as well as converts to Islam (although nationality remained French or European). In matters of marriage even if only one of the spouses or both had converted to Islam, the French courts had competence to hear the case. When the spouses had retained their religious status (Muslim) but converted their nationality (especially in cases of Algerians naturalised as French), the French courts still had competence but were willing to apply the law which conformed to their personal status rather than their acquired nationality, that is, the French courts applied the Sharīʿa.[157] Nonetheless, the French courts were under the first obligation to French public order and applied only those rules of the Sharīʿa which were not contrary to French principles. For example, French courts would not allow repudiation, or divorce Muslim style.[158] If the spouses had married only

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157. Note for attention of Secretary General of the Tunisian Government on the draft of the Code of the Sharīʿa, 28 July 1950, No. 918TSJ4.

158. Roger Jambu-Merlin, Le Droit Privé en Tunisie (Paris: Librairie Général de droit et de jurisprudence, R. Pichon et R. Durand, 1960), pages 260-261. M. Jambu-Merlin was Ancien Directeur de la section d'Etudes juridiques de l'Institut des Hautes Etudes de Tunis, Professeur de droit à la Faculté de droit et des sciences politiques de Caen.

by Muslim religious ceremony without appearing before the French notary in the French consulate, the marrage was regarded as marriage without contract; hence, the French courts had to compare the relevant rules of the Sharīʿa with the French law of marriage without contract.[159] In internationally mixed marriages, such as between a Muslim Tunisian man and a non-Muslim European woman, the nationality of the wife gave the French courts competence. One would presume that in suits on marriage and divorce the courts applied the law of the nationality of the husband within the limits of French public order. When the Code of Procedure for the courts of the Sharīʿa was promulgated in 1948 the courts of the Sharīʿa were not allowed any jurisdiction in personal status or inheritance of non-Muslims. They had jurisdiction in cases between Muslim Tunisians or between Muslims who were not Tunisians or protegés (like Algerians) of a non-Muslim power (articles two and seventeen).[160] Matters of

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159. Ministry of Justice, Notes on ʿaqd an-nikāh, February 1935.

160. Article 2: Cases of personal status and inheritance in which the courts of the Sharīʿa are competent are those which are between Muslim Tunisian subjects or between Muslims who are not subjects and who are definitely not protegés of a non-Muslim state.

Article 17: Parties can raise the incompetence of the Mahkama if the reason is the nationality of one of the parties or is the failure to observe rules relating to the order of jurisdiction, and the court must even,

non-registered land were of course the exception.

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in these two cases, declare itself incompetent.

Reforms in the Courts of the Sharīʿa Under the French Protectorate

After the French had promulgated the decree of 15 December 1896, making minor changes in the system of the courts of the Sharīʿa, the next most significant legislation did not appear until 1937. The decree of 27 May 1937 provided for the courts of the Sharīʿa to give judgment by default (hukm ʿalā ġāʾib). For the law of contract and sale, judgment by default was not entirely new. In the nineteenth century the Mālikī Bach Muftī had written a report on the law of the Sharīʿa of sale in order to make Europeans aware of the rules by which they had to abide when the Bāy granted them the right to own property. The section on judgment by default applied to persons who were absent because of a journey. The report read: "The judgment by default can be rendered against any person who is justiciable in a given district, who is absent from the district, or whose residence is unknown. The rule to follow in this matter varies according to three cases: 1) If the person who is justiciable is absent at a distance of two or three days (and expects to return to the district of the court concerned), the magistrate (qādī) must warn him in writing of the petition and summon him to appear before the court within

a fixed delay. The defendant must appear or appoint a proxy. If he fails to do this he can be condemned to pay and his possession can be sold, without his having any other recourse since he has no appeal. 2) If the person who is justiciable is absent at a distance of ten days' walk he can be condemned in personal matters (such as debt) but not in a matter of property. He preserves his right to appeal against the one in whose favour judgment had been given. The court accepted his protest if he gave sufficient justification or new proof. 3) If the person who is justiciable is at a great distance, such as the distance between Mecca and Barbary or Madīna and Andalusia, the qādī will judge provisionally and the person absent is admitted to present his proofs upon his return."[161]

The decree of 27 May 1937 was aimed at persons who were residing in the district of the court issuing a summons but who failed to appear out of recalcitrance. For that reason article one of the decree of 1937 abrogated article fifty-nine of the decree of 25 May 1876 (basic decree organising the courts of the Sharīʿa under Khair ad Dīn). The former article fifty-nine read:

> The Governor (of the province) is held responsible for lending a strong hand to the Sharīʿa or

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161. Mālikī Bach Muftī, Report on contracts, Archives of the Dār al Bāy, Series E, carton 155, Dossier 6.

> to the qādī of his district to constrain recalcitrant persons to appear in court before him. He will assist him equally in the execution of the judgments every time that he required this of him in writing.

By article one of the decree of 1937 persons were no longer constrained. They were free to decide what was to their disadvantage. The decree of 1937 took account only of distances between the locality of the court and the place of residence, not the place to where the person summoned had traveled. The court had to allow for seven days between the date the summons reached its destination and the date required for appearance in court. One day more was added for every ten thousand metres (myriamètre) if the person summoned resided at some distance away from the court.

The summons had to be issued three times before judgment could be given by default (articles five and six). In conformity with both Mālikī and Hanafī law, article seven of the decree of 1937 required that the court not rule in default before it appointed a representative for the defendant.[162]

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162. Article 7: If, on the date fixed by the third summons, the defendant neither appears in person nor sends a representative, the qādī will designate a wakīl to represent him. This wakīl must remain vested with the affair until the solution of the dispute.

If the defendant appears after the appointment of the wakīl and demands that he follow the trial himself, he will not be granted his demand. However, he will be able to be in contact with the wakīl who was appointed officially and to furnish him with all informa-

tions and documents useful for the proceeding, or he can immediately constitute another wakīl.

In case of default or absence of the wakīl thus constituted, the qadī will appoint another...

Article 20: In all matters, if the defendant himself nor his residence have been discovered, the judge will publish three times in a daily newspaper in Tūnis an advertisement containing the name of the petitioner, that of the defendant, the object of the petition, and if the defendant fails to appear within 40 days of the last appearance of the advertisement, in person or by representative, a judgment by default will be rendered.

If at the end of the above delay the defendant does not appear in person or send a representative, the qadī will appoint a wakīl to represent him...

Article 2317 (Hanafī): If the defendant is absent after what the plaintiff proves against him or the wakīl is absent after the court accepts the evidence, but before the settlement, or the wakīl dies, then that evidence is abandoned and the court does not pass judgment. (Footnote 1 - Abū Yusūf says to pass judgment as a courtesy to the people...)

Article 2321 (Mālikī): Judgment is against the defaulting party only after the wakīl for him is instituted to argue for his right. (Footnote 1 - This is the opinion of Sahnūn who made it effective.) (Muhammad bin Sahnūn al ʿĀlim bin al ʿĀlim, 202-256 A.H., buried in Kairôuwan)

(Articles 2317 and 2321 taken from the draft of the Code of the Sharīʿa, Majallat al ʾAhkāma as Sharʿiya)

After judgment was given by default according to prescribed procedures, the defendant, as in the rules of the Sharīʿa, had a right to present a plea in opposition within a definite delay after notification of the decision (article twelve).[163]

Contrary to Mālikī law, the decree of 27 May 1937 abolished the distinction between personal matters and property matters, and applied judgment by default in all personal and property matters within the jurisdiction of the courts of the Sharīʿa:

> (article twenty, paragraph four) However, the judgments rendered in matters of family maintenance or guardianship remain in every case regulated by the second paragraph of article thirteen (on the provisional execution of judgments by default in maintenance and guardianship).
>
> (article twenty-one) The above provisions are equally applicable to the defendants who are under Tunisian jurisdictions in land matters...

As for Hanafī law, thirty years before the decree of 1937 the Hanafī *muftī* had been known to threaten to apply judg-

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163. Article 12: The judgment by default will be served by the head clerk to the defendant with mention that he has the right to put in opposition within 40 days from the date of receiving the notice.

This notification will be done in person or left at his residence...by an intermediary of the Sheikh al Madīna or of the *qāʾid* as far as our subjects are concerned.

If the defendant has not formed opposition within the 40 days, the judgment will become executory, excepting recourse before the Sharīʿa of Tūnis if the decision comes from a provincial *mahkama*.

ment by default in a matter of property. The muftī had notified French and Italian protegés to appear or to send their representatives to answer an action brought by a Muslim Tunisian on shufʿa. He warned that failure to appear would result in a judgment to the disadvantage of the foreigners.[164]

Harsh scrutiny of the courts of the Sharīʿa did not take effect until the late 1940's. To see how the changes came about one must look at events in an earlier period well before World War II. A few Tunisians had felt the need to reform the Sharīʿa. The first Minister of Justice, Tahar Kheredine, son of the Prime Minister Khair ad Dīn of the nineteenth century, was deeply affected by the changes made after World War I in Turkey, where he had lived when his father was exiled. Tahar Kheredine did not wish to change the substance of the Sharīʿa so much as to get the qudāh to learn a sense of efficient administration of justice. The courts of the Sharīʿa no longer held respect when compared with the Tunisian secular courts (Regional, jihawī, and cantonal, nawāhī). In 1924 Tahar Kheredine wrote a report on the reform of the courts of the Sharīʿa.[165] He pointed out three prob-

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164. Letter No. 899 from Si Ahmed Bayroui, Hanafī muftī, to the Prime Minister, 29 October 1907.

165. Tahar Kheredine, "Report".

lems and suggested solutions. The first problem was the religious control over the recruitment of the qudāh in Tūnis. The qudāh were selected from the teachers of first class at the Grand Mosque. Their religious training had two detrimental results: First, their thinking was more theoretical than practical for "functions as delicate as those members of a superior Court". Second, the magistrates of the Sharī'a continued their teaching duties at the Mosque, or their duties as heads of religious brotherhoods. Employment in two different ministries (education and justice) simultaneously produced administrative complications and detracted from the quality of work expected of a magistrate in his legal duties. Tahar Kheredine recommended separating what he considered two functions -- religion and law -- which were so foreign to each other. Like his father, who set up the first most important secular school for training administrators, Tahar Kheredine recommended creating a school devoted only to Muslim law. The educational program at the Mosque was too diluted with religion. However, the Minister of Justice recognised that tool which was later to be most persuasive in convincing the magistrates of the Sharī'a to change their ways. That tool was raising the salary to a level sufficient to keep magistrates from seeking additional employment.

The second problem which Tahar Kheredine cited was the confusion of jurisdictions. The court of the Sharī'a of Tūnis had first instance as well as review or supervisory jurisdiction over every provincial court of the Sharī'a in Tunisia. In turn, the court of the Sharī'a of Tūnis could transfer a case which came before it to a provincial court. The exchange of cases seemed based on no set criteria, no other reason than that a party or a magistrate thought it best. As a result of popular preference to take cases to Tūnis, the two qādī of Tūnis were "overwhelmed by a job which exceed(ed) human capacity". No court exercised a superior appellate jurisdiction. Vesting appellate jurisdiction in the Bāy, in whose name the ma'rūd was issued, was not attacked by Tahar Kheredine. What he disliked was the intervention of the executive in settling a divergence of views over the least details of procedure. Superior appellate jurisdiction should have been reserved for only the main arguments and facts on which a decision rested.

The third problem was the slow procedure that resulted in lengthy trials. This defect cost the courts of the Sharī'a popular respect. The complexity stemmed partly from the qādī being judge, chief secretary, chief editor, chief registrar, all at once, without time to su-

pervise his subordinate secretaries. Slow procedure was partly due also to the poorly qualified notaries. The notaries, Tahar Kheredine complained, often did such poor work in gathering clear statements of witnesses, or clear statements of the issues at stake, before the trial, that the qādī had to have the work done again. Attempts at verifying written documents like outikas (wathīqa) giving erroneous limits to properties were shoddy or non-existent. It was easy for persons of bad faith to take advantage of the qudāh. The vast number of and the complex writing style of the sources of law which the qudāh consulted meant that a qādī would have to spend much time searching among many opinions to find a solution to a complex or unusual issue. He had no systematic or practical collection of legal opinions at his disposal. The secular courts, ruling by codes, had a tremendous advantage over the courts of the Sharīʿa in this respect. Trials for land matters brought before the courts of the Sharīʿa were particularly cumbersome, since numerous parties with various claims and conflicting evidence of boundaries were usually involved. Enforcement of a judgment once passed was slow too. For the correspondence from the qādī to the agent of execution had first to go to the Ministry of Justice then to the agent. For solving these procedural problems, Tahar

Kheredine proposed a code of procedure for the courts of the Sharī'a. The code would have divided the legal system into distinct jurisdictions. Supplementary executive orders from the Ministry of Justice would have established a service of inspection for rendering an account of the state of the courts of the Sharī'a.

The proposals of Tahar Kheredine obviously met resistance, since Tunisia continued for the next two decades to tolerate the courts of the Sharī'a without change. The French officials of the Protectorate did not consider the political atmosphere sufficiently stable to interfere too far into the domains of the muftūn and qudāh. As late as 1930, after fifty-three years of control of Tunisia, French officials feared political repercussions in matters of Tunisian Muslims adopting French nationality by application to the government or by marriage. The French left the solution to such matters to the courts, but did not bar themselves from pressuring the qudāh who were prone to exclude a naturalised French Muslim from his legal rights under Islamic law. In 1933 one of the French contrôleurs in northern Tunisia demanded an answer from Tūnis about the rights of a naturalised Muslim Tunisian to revenues of a hubus. A Muslim Tunisian had applied for French naturalisation, then withdrew his demand when his co-religionists harassed him,

as was "frequent in such circumstances". The Muslim had wanted to be a French national because French law would have recognised him as being of majority age. This would have permitted him to enjoy the revenues of his properties in the hubus immediately. As long as he remained a Tunisian Muslim the Sharīʿa prevented him from sharing in the revenues yet for two years. The local qādī, however, destroyed his dreams by informing him that naturalisation would result in his losing all rights in his property in the hubus. The opinion which the Director of Tunisian Justice sent to the Resident General on the incident was contrary to that of the qādī. He argued that in French law the naturalised Muslim was submitted to French personal status and hence could not himself found a hubus since such act was illicit in French law (by reason of its inalienability). Yet French law did not prevent him from enjoying his rights as a beneficiary of the revenues of the hubus because such rights were a result of usufruct, a concept which was not contrary to French law. In French law rights deriving from one's religion were not denied unless they were contrary in essence to French law. The position of the qādī was deemed untenable, first, because the traditional Sharīʿa had never considered consequences of changes in nationality, and secondly, because the Mālikī and Ḥanafī courts of

Tūnis had issued fatāwin stating that a Muslim naturalised Frenchman was not excluded from the Muslim community. The provincial qādī was to be warned of his error.[166]

By the 1940's there had matured a Tunisian élite of magistrates who worked in the secular Tunisian Regional courts (jihawī) and the Ouzāra (Wazāra). By 1947 they all formed an Association which published a journal (Al Qadā' at-Tūnisī) expressing their wishes for appointment of only Tunisians to supervise the secular courts (for example, the Public Prosecutor for Tunisian courts was a Frenchman) just as only Frenchmen supervised French justice. The French at least had a reformist atmosphere on their side when they advocated implementing the 1924 proposals of Tahar Kheredine. What immediately precipitated the Code of Procedure for the courts of the Sharī'a was an action of review that was contrary to usual procedures. A decision of a qādī in Tūnis was reversed in favour of a decision by a provincial qādī.[167] The matter

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166. Letter No. J-766-1 of 18 April 1933 from Director of Tunisian Justice to Resident General. Letter of 21 Feburary 1933 from Vice-Consul to Contrôleur Civil. Letter No. 428 of 17 March 1933 from Contrôleur Civil to Resident General.

167. Sheikh Sīdī Muhammad al-'Azīz Ja'īt, Former Minister of Justice and Mālikī Bach Muftī, At-Tarīqa al murdīya fī'l 'ijrā'āti as-shar'īyati 'alā madhab al mālikīyati (The Gratifying Way of the Rules of the Sharī'a According to the Mālikī madhab) (Tūnis: Maṭba'a al 'irāda, Second Edition, n.d.), page 287, footnote 1.

was upsetting since the qudāh of the capital regarded the provincial qudāh as "judiciary deputies".[168] A reversal of a decision of the courts in Tūnis was also an affront to their country-wide jurisdiction. The decree of 25 May 1876 had provided for interference in the decisions of the courts in Tūnis only if the muftūn and qudāh could not reach an unanimous judgment (article six).[169]

The interest of the French in settling matters of judicial competence through a code of procedure grew particularly keen when the Bāy in 1941 ordered the Ministry of Justice to prepare a draft of a decree whose aim was to be to restore to the courts of the Sharīʿa penal competence in matters of infractions of the religious law (such as blasphemy, failure to observe fasting). The Bāy had been upset when he learned that the Regional court

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168. Tahar Kheredine, "Report".

169. Article 6: The examination of certain questions, provoking sometimes controversies on the matter of the application of the law, in the case where divergences occur among the opinions expressed by the members of the Sharīʿa belonging to one or the other of the two rites, without the discussion leading them to a single and united opinion, the bach-muftī of the court where the division occurred will draw up a report in which he will develop the arguments produced in support of each opinion; each judge will sign the opinion which he supports and the report thus drawn up and signed will be addressed to the Government. (Decree of 25 May 1876)

of Tūnis (Driba, or Darība) ruled on an affair of a Muslim being drunk during Ramaḍān after the Ḥanafī qāḍī had previously passed judgment on the same affair. The Ḥanafī court had condemned the accused to one month of imprisonment on the basis of article fifteen of the decree of 25 May 1876.[170] While in prison he was summoned before the secular Regional court of Tūnis and condemned to five days of imprisonment and a fine of twenty francs. The Ministry of Justice explained to the Bāy that article fifteen of the decree of 1876 had been abrogated by the Tunisian penal code of 9 July 1913. Article seventeen prescribed that no one could be punished except by virtue of a written disposition of law. The penalty prescribed by the Ḥanafī qāḍī had been of the category of taʿzīr, which unlike the ḥudūd, were not provided for in written law but were according to the discretion of the judge.[171]

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170. Article 15: ... [The Sheikh Muftī] will give reproaches (admonishments) to the parties who merit them, will order arrests he judges necessary and will write msraslas (murāsala) to the qudāh of the districts...

171. Ministry of Justice, Note on the matter of competence in penal matters, 29 October 1941.

The law for the jurisdictions of the courts of the Sharīʿa needed clarifying. Just as the Sfez affair preceded the ʿAhd al ʾAmān, so the two above matters of jurisdictions in the 1940's preceded the Code of Procedure for the courts of the Sharīʿa.

The exposition of the motives for the Code of Procedure reveal the political methods which had to be used to persuade the traditional qudāh and muftūn to accept a code which affirmed certain previous practises as well as introduced practises contrary to traditional views on appellate jurisdiction. The morale of the qudāh and muftūn in Tūnis had been deteriorating since the late 1920's. The Administration of ʾAhbās began to find in the 1920's that it no longer could afford to increase its financial obligations. This meant that the qudāh suffered for lack of money for replacing or repairing buildings and furnishings. The government of the Protectorate decided to put the expenses of the courts of the Sharīʿa on the credit of the State budget (tax revenues not revenues from ʾahbās) as were the expenses for the secular Tunisian courts.[172] Then only four years after Tahar Kheredine lamented the paucity of salary which drove many muftūn and qudāh to seek additional employment, the muftūn

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172. Ministry of Justice, Report on the salaries of the Sharīʿa, circa 1926 (see page 86 of Chapter I above).

won the support of the Bāy in a campaign to make the salaries of muftūn at least equal to, if not superior to, the salaries of qudāh by reason of rank. Under the system before the Protectorate, the qudāh had received higher salary because they had more work. In 1930 the muftūn and qudāh of Tūnis were demanding that their salaries be equal to those of the presidents of the Chamber of the Ouzāra (Wazāra) for civil and criminal appeals.[173] In 1945 the Resident General received a proposal for elevating the muftūn beyond the pay of the President of the Ouzāra (Wazāra) up to that of a minister.[174] Aware of the financial dissatisfaction of the judges of the Sharīʿa, the Bāy and the French government agreed to "assure to the religious magistrates salaries in relation to the importance and dignity of their functions...,"[175] provided that the judges of the Sharīʿa would accept reforms in their organisation to simplify procedure. They had the following in mind: "The most im-

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173. Ministry of Justice, Petition to the Bāy, 30 April 1930.

174. Letter from Roger Gromand to the Resident General, No. 5614 of 24 November 1945.

175. Letter from His Highness the Bāy to the Sheikh ul Islām and to the Mālikī Bach Muftī, n.d.

portant of these reforms will consist in the codification of the rules of procedure. It is essential that the total of these rules be presented in one form and with a method which, while suppressing as much as possible the controversies, facilitates the task of judges and avoids, for the persons who are justiciable, any uncertainty about the ways and means to be employed for making the most use of their rights. It is equally indispensable that these rules be to all extent possible simplified and put in harmony with the modern conditions of existence."[176]

A consultative commission was appointed to give opinions on the code. The members were the two chief muftī of the two rites in Tunisia, a subordinate muftī and two qādī from each rite, and a judge from the Tribunal Mixte. The main principles which they were to consider were appellate jurisdiction and the means and conditions for appeal for reversal of judgment. Later the Minister of Justice, who was simultaneously the Mālikī Sheikh ul Islām (Bach Muftī), issued a ministerial order appointing twenty persons to examine the Code of Procedure for the Sharīʿa. Most were muftūn and qudāh from each of the two rites; members of the deliberative quasi-legislative body called the Grand Council; members of the highest

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176. Ibid.

appellate secular court, the Ouzāra (Wazāra); teachers of law from the Grand Mosque; Tunisian lawyers; and oukils (wakīl), or advocates, from the secular Tunisian courts. The committee was weighted heavily in favour of the magistrates of the capital, Tūnis.

Finally on 5 August and 2 September 1948 there appeared respectively a decree and a code prescribing procedure for the courts of the Sharīʿa. Despite the political tools used to persuade the judges of the Sharīʿa to accept codification, the Code of 2 September 1948 was still in some ways a compromise. It was a compromise between advocates of an uniform system and those high magistrates of the Sharīʿa in Tūnis who did not wish to lose their ancient prerogatives. As we noted earlier, the committee for drafting the Code was weighted in favour of the magistrates of the capital. In matters of jurisdiction by subject matter, the chief muftūn and qudāh judging alone in Tūnis won concessions. Generally, all courts of the Sharīʿa -- in Tūnis or in the provinces -- had jurisdiction only in matters of personal status of Tunisian Muslims and any foreign Muslims who were not protegés of the French Republic. The listing of the categories of affairs of personal status in articles one and two of the Code was sufficiently clear to avoid confusion over whether the courts of the Sharīʿa had competence to rule on penal punishment in actions offensive to the public religious

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conscience (see pages 279-281 above). Article seven of the Code reinstated a traditional division of functions among the qudāh. In former ages, qudāh had special areas of jurisdictions, such as a qādī for marriage affairs, a qādī for guardianship. Article seven accepted also the customary distinction in Tunisia between qudāh judging alone and qudāh judging in a body (medjless, or majlis), then assigned personal status matters (marriage, repudiation, etc.) to qudāh judging alone and property matters (hubus, shufʿa, etc.) to qudāh judging in a medjless (majlis).[178] The provision was

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[177] Article 2: Cases of personal status and inheritance in which the courts of the Sharīʿa are competent are those which are between Muslim Tunisian subjects or between Muslims who are not subjects and who are definitely not protegés of a non-Muslim state.

As for cases of claim (ʾistihqāq) the courts have competence in them equally between subjects or between subjects and non-subjects.

If the cases be between subjects of a non-Muslim state they have no jurisdiction.

Article 1: The courts of the Sharīʿa are competent in cases of personal status and in inheritance and in the validity or invalidity of contracts relating to personal status or the consequences of status for claim (ʾistihqāq), and in the break-down of ties between spouses or actions of betrothal, and on the partition of property and its sale by auction.
(Articles 2 and 1 from the Code of Procedure for courts of the Sharīʿa)

[178] Article 7: The limits of the competence of the courts of the Sharīʿa are as follows: The provincial qādī (nāhiya) in the places where there are not majālis of Sharīʿa and the qādī in the towns which have a majlis will

largely a matter of putting into law the already existing tendency of Tunisians to take their land disputes to the medjless (majlis) rather than to a single qādī since the issues in land matters were usually complex. In matters of hubus particularly, opinions were many and varied. For example, it often happened that the magistrates composing the Hanafī courts disagreed over the amount of credibility to be given to written documents and titles of hubus. Certain magistrates in determining the beneficiaries to the revenues of land in a hubus depended on the list established by the mokaddem (muqaddam), or administrator of the hubus. Other magistrates preferred to depend on an authentic title in case the list of the muqaddam and the persons named in the title differed.[179]

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rule, in last resort subject to appeal (taʿqīb), on personal status such as those pertaining to legal competence (hajr), age of majority, guardianship, marriage and its effects, and inheritance.

And the two Sheikhs ul Islām and the two qādī sheikhs will rule on a rotation basis, in last resort and subject to appeal, in the capital in the capacity of single judge in cases of personal status and suits for claims (ʾistihqāq).

The majālis of Sharīʿa in the provinces will rule in last resort subject to appeal on property cases, those concerning revenues from ʾahbās, and those which are transferred by the qādī who judges alone...

179. Draft No. 115, 10.3.41, from Wazīr al Kabīr. Ministry of Justice, "Report on credibility of titles of hubus," 4 June 1941.

While Tunisians took land disputes in general to the majālis, article 43 of the decree of 25 May 1876 on courts of the Sharīʿa restricted hubus and inzāl to the qādī and majlis of Tūnis. All other land matters could have been heard by provincial courts.

Since several litigants were usually involved in complex land matters and there was bound to be at least one of them who disagreed with the decision of a qāḍī judging alone, the litigants saved time when they took their case before several quḍāh of a majlis from the start. The chief muftūn and quḍāh in Tūnis did not want the same division of powers to apply to them. The two chief muftī and the qāḍī, therefore, were allowed to hear both cases of land and personal status, whether judging alone or in majlis. Two motives probably impelled them to demand exception. First, they were particularly conscious of their status as the most learned of the quḍāh in the country. Secondly, they were aware of the many domains of law from which they had been progressively excluded (from criminal, from registered land, from French Muslims). The exclusion was contrary to Islamic law. Islamic law allowed the individual quḍāh to be confined to particular kinds of cases (e.g., marriage), but the quḍāh as a whole were responsible for all domains of law.

On the issue of jurisdiction by rank, that is, the appellate system, there were compromises too. Advocates of uniformity won the creation of two new organs. They were the supreme appellate courts of the Sharīʿa (cassation, or taʿqīb), one for each rite, endowned with jurisdiction over the entire country. They essentially

replaced the two Councils of the decree of 14 November 1856 organising the courts of the Sharīʿa. The supreme appellate courts differed in composition from the Councils. Only the Sheikh ul Islām of the Ḥanafī and Mālikī rites and two subordinate muftī sat on the supreme courts. No qāḍī participated. The qudāh in 1948 were confined to first instance affairs. The decisions of all provincial majālis (muftūn and qudāh judging in a group) and of any provincial qāḍī judging alone were subject to reversal on appeal by any of the litigants to the supreme courts in Tūnis. The decree of 27 May 1937 instituting judgment by default in the courts of the Sharīʿa had already established the expectation that recourse from provincial courts was to the capital when a defendant did not present opposition within the required time of delay (article twelve).[180] In Tūnis the decisions of only the qāḍī and subordinate muftī judging alone were subject to the jurisdiction of the supreme courts. Since each supreme court in Tūnis was made up of chief and subordinate muftūn who could also serve as qudāh judging alone in first instance, the decree

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180. Article 12: ...If the defendant has not formed opposition within the delay of forty days...the judgment will become executory, under reserve of recourse before the Sharīʿa of Tūnis if the decision was issued by a mahkama of the provinces.

accompanying the Code of 1948 clarified a point that was obscure in the decree of 25 May 1876 organising the courts of the Sharīʿa. The Code of 1948 made it clear that any muftī who had participated in a given affair in the first instance debates or had given directives to the provincial qādī whose decision was appealed in Tūnis could not sit on the supreme court for that case (article five).[181] Such a safeguard against a prejudiced appellate judge had been lacking in the decree of 1876, since the Council hearing the cases deferred to it by the qudāh in Tūnis was presided over by the same qudāh of Tūnis who had heard the case in first instance (article fifteen).[182] The stumbling block to uniformity in the appellate system was the majlis of Tūnis. There

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181.
Article 5: The muftūn who have, in their capacity as representatives of the qādī, had to know an affair in first instance or to give to the qudāh of the interior provinces directives on which the qudāh have based their judgments, cannot sit on the supreme court of appeal (taʿqīb) to pass sentence on these same judgments. (Decree of 2 September 1948, attached to Code of 1948, J.O.T. 14 September 1948)

182.
Article 15: The sheikh muftī shall give his opinion to the qādī when it is required of him and to the individual who consults him. He will exercise the role of substitute when the qādī will be prevented from appearing... As for the council, all sheikhs form a united body, and the qudāh preside over the debates, each one in their rite.

was one for each rite. Consisting of the muftūn and qudāh, the majālis used to be the two Councils provided for in the decree of 1876 with country-wide jurisdiction. When the two supreme courts replaced the two Councils, the majālis in Tūnis became equivalent to any provincial majlis, the difference being that the majālis in Tūnis were for the district of Tūnis, no other. The majālis in Tūnis demanded that some special prerogative remain with the majālis, so that they could continue to be distinguished from the provincial majālis. The prerogative granted was that certain of the decisions of the majālis in Tūnis were not subject to the country-wide jurisdiction of the supreme courts. These decisions were subject, instead, to reversal only if so granted by the Bāy in a maʿrūd (executive decision), the Bāy being the qādī of the qudāh.

Although the majālis of Tūnis per se had no more competence to take cases from the provincial qudāh or majālis in any part of Tunisia, the members of the majālis of Tūnis in practise retained country-wide jurisdiction. For the members of the majālis of Tūnis and the supreme appellate courts were the same. The Sheikh ul Islām presided over both the Hanafī majlis of Tūnis and the Hanafī supreme appellate court. The Bach Muftī presided

over both the Mālikī majlis of Tūnis and the Mālikī supreme court.[183] Subordinate muftūn in Tūnis also served on both courts. As a result, the changes in the jurisdiction of the courts of Tūnis over all provincial courts simply amounted to two different posts being assigned to the same persons. Once that was accomplished for preserving the wide scope of the jurisdiction of the Sheikh ul Islām and the Bach Muftī, there was no choice other than to exempt the majālis of Tūnis from the general rule of appeals to a higher court. The judges of the supreme appellate courts could not hear the appeals of their own judgments in the majālis of Tūnis. Nor were the chief muftūn apparently willing to give up the salary for the members of the majālis of Tūnis. Thus, only the Bāy was left to arbitrate on appeals from the majālis of Tūnis. There was no one in the legal profession possessing higher

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183. Article 50: The minimum number of those meeting in every majlis of the Sharīʿa is three of the sheikhs.

The majlis in the capital is presided over by the head (the Sheikh ul Islām or Bach Muftī) if he is present, or by the most senior member in authority if he is not present. The provincial majlis is presided over by the chief muftī, and, where there is no chief muftī, by the qādī. (Code of Procedure, 1948)

Article 2: Each of these chambers (Hanafī and Mālikī chambers of taʿqīb) is composed of the Sheikh ul Islām of the rite in question, in capacity of president, and of the two muftī of the same rite in capacity of members.

In case of absence of the president, the latter is represented by the most senior muftī of the rite. (Decree of 2 September 1948)

learning than the Sheikh ul Islām and the Bach Muftī. And only someone of superior learning or superior political authority could have reversed their judgments.

The most significant changes brought by the Code of 1948 lay in the very concept of the functions of appellate jurisdiction. The Code brought the Tunisian legal organisation closer to a Western model. Such appellate system is characterised by distinct layers of jurisdiction, distinct reasons for appeals, preservation of control over all decision-making within the judiciary, and efficiency in the administration of the law. As we discuss the changes brought by the Code we shall also note how compromise forced the changes to co-exist with some old practises. In regard to the first characteristic, the Code of 1948 clearly divided the courts of the Sharī'a into two layers: first instance and final appellate. Yet it preserved the traditional practise of the qādī consulting the muftī if one of the litigants demanded (article five).[184] In regard to reasons for appeals, the Code was not expansive. It specified grounds for appeal only when the majālis of Tūnis applied for a ma'rūd from the Bāy.

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184. Article 5: The muftūn who have, in their capacity as representatives of the qādī, had to know an affair in first instance or to give to the qudāh of the interior provinces directives on which the qudāh have based their judgments cannot sit on the supreme court of appeal to pass sentences on these same judgments. (Decree of 2 Septemebr 1948)

The one ground was "taadjize" (taʿajīz), that is, the decision of the majlis had been based on inability of the defendant to produce evidence sufficient to answer the claims and proofs of the plaintiff (article seventy-four).[185] Although the law of appeal applied to both the Hanafī and Mālikī chambers of the majālis of Tūnis, the law of taʿajīz was Mālikī law, but reversal of that kind of judgment was Hanafī law. A Mālikī judge in traditional law could grant delay to the plaintiff or defendant to procure enough evidence to challenge the evidence already presented. When the time period for the delay expired, the judge ruled on whether the party for whom the delay had been granted had or had not established his plea.[186] In traditional Hanafī law the judge either accepted or rejected a plea without grants of delay. For example, if a party filed a petition

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185. Article 74: Appeal (taʿqīb) will be accepted for cases judged by a single judge or by a provincial majlis of Sharīʿa. As for the judgments of the sessions of the majlis of the capital, appeal is accepted only after a beylical maʿrūd is issued at the request of the the court when it is a question of judgments based on the incapacity of the defendant to produce means of proof (taʿajīz). As for judgments not based on taʿajīz, their appeal is not subject to a beylical authorisation. Such will be the case of judgments invoked by the party for being confirmed by another judgment emanating from another court of the Sharīʿa.

186. Jaʿīt, page 77 et sq.

against a person who had use of a certain house and argued that the house was inherited by the petitioner from his father and established his claim, the judgment was for the petitioner. Later if the ex-defendant brought to court a document showing that the father of the ex-plaintiff sold the house in question to the parent of the ex-defendant, the court reversed (naqd) the first judgment after the ex-defendant established his proofs and refuted the plea of the ex-plaintiff.[187] It would have been in the second instance when the ex-defendant brought new evidence that the majālis of Tūnis would have applied for a maʿrūḍ to reverse the first decision in favour of the ex-plaintiff. However, judgment based on taʿajīz was applicable only to those rights which once established could be abrogated by the person holding them (as in contracts of sale, debts). In regard to judgments of the majālis dealing with ḥubus, talāq, affiliation, inheritance, that is, domains where rights once established, could not be abrogated, the Code of 1948 made them susceptible to appeal to the supreme appellate courts without any intervention on the part of the Bāy. Appeal was at the initiation of the parties, not the majālis. The original draft of the

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187. The example is a translation of article 2252 (Hanafī) from Majallat al ʾAḥkām As Sharʿīya (draft of the Code of the Sharīʿa).

Code of 1948 had made all judgments -- whether based on taʿajīz or otherwise -- of the majālis of Tūnis susceptible to reversal only by maʿrūḍ. The final draft of the Code, as article seventy-four shows, considerably encroached on the prerogative of the majālis in Tūnis. The discrepancy between the original draft and the final draft of the Code shows that compromise was reached at the expense of simplicity in procedure. More important, the discrepancy shows that reform-minded Frenchmen and Tunisians were strong enough to force traditionally-minded muftūn to subject important matters of family law (ṭalāq, affiliation, inheritance) to a new system of procedure.

In the absence of any extensive definition of the grounds of appeal from the qāḍī judging alone or from the provincial majālis, one would presume that the magistrates of the two supreme appellate courts heard appeals according to their discretion. In traditional Mālikī law a judgment was reversed only if grave injustice or a blatant mistake had been committed. The worst a qāḍī could do was to contradict unmistakably the Qurʾān, or the sunna, or an ʾijmāʿ, or clear qiyās. Determining what was the ʾijmāʿ, however, raised the most controversy. For example, there were varying opinions on whether to accept a judgment based on the wit-

nessing of a dhimmī to a will of a Muslim who was on journey, or a judgment leaving inheritance to the maternal relatives.[188] A judgment based on the testimony of slaves, non-believers, or youths, or persons who did not measure up to the standards of righteousness (fasīq) could be held in doubt.[189] Whatever was grossly unfair in the judgment of a qādī known to be tyrannical was ground for reversal, even though the judgment had the appearance of right judicial reasoning.[190] The level of learning of the qādī also could give rise to scrutiny of judgments.[191] Litigants could dispute judgments of a muqallid qādī who had failed to consult men more learned than he -- like the muftūn of the capital -- and had based his judgment on his discretion (ʾistihsān).[192] However, the decision of a muqallid

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188. Jaʿīt, page 281. Based on Ibn Yūnus, Al-Māzarī, Ibn al-Majashūn.

189. Jaʿīt, page 283. Based on Mālik, Ibn al-Qāsim, Sahnūn, Ibn ʿArafa.

190. Jaʿīt, page 285. Based on Ibn al-Qāsim, Ibn Muhraz, Ibn al-Majashūn, Mālik.

191. Jaʿīt, page 285. Based on Ibn Marzūq; Sheikh Halūlu, author of Mukhtasar; and sunna of Tūnis.

192. See pages 276-278 above on a qādī who had told a Muslim Tunisian applying for French nationality in the 1930's that his naturalisation would deprive him of his rights in the revenues of the hubus. The French asked that the qādī be referred to the fatwā of the muftūn of Tūnis declaring that naturalisation did not result in denial of certain rights in the Sharīʿa.

qādī could not be reversed if the matter in question was controversial and not even the most learned muftūn had come to an unanimous agreement.[193] In the Ḥanafī madhab a matter of establishing beneficiaries to revenues of a ḥubus by a title of ḥubus or by the word of the muqaddam would be an example of such controversy (see page 286 above). Nor was a qādī allowed to pass judgment on someone known to be his enemy.[194]

In regard to the third characteristic of an appellate system -- preservation of control over decision-making within the judiciary -- one may regard the right of the majālis in the capital to appeal to the Bāy instead of to the supreme appellate courts as more than an exception in an uniform appellate system. It represented, in addition, a great limitation on the Bāy's traditional interference in the majority of decisions of the courts of the Sharīʿa. First of all, the Bāy was limited to issuing a maʿrūḍ reversing a decision of the majlis in Tūnis only when the judgment was based on taʿajīz (see page 293 above). The appellate juris-

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193. Jaʿīṭ, page 286.

194. Jaʿīṭ, page 280.

diction of the Bāy was further limited in that he could not bring pressure to bear on the litigants to appeal for a reversal of a decision of taʿajīz which might displease him; for only the members of the majālis themselves could initiate appeal for reversal of their decisions (article seventy-four).[195] In the second place the Code of 1948 removed all government interference in the decisions of the provincial courts. All provincial decisions were to be reviewed on appeal by the supreme appellate courts of Tūnis. The decisions of the supreme courts were final, whether they were by majority or unanimous vote (article four).[196] The Code ended the system of communication promulgated in the decree of 25 May 1876. According to the decree of 1876, communications between the provincial courts (of the qudāh or the majālis) were such that any case which the magistrates of Tūnis removed from the provinces could eventually be presented to the government for final decision, especially when the magistrates in Tūnis could

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195. Article 74: ...As for judgments rendered by the majlis of the capital, appeal is accepted only after a beylical maʿrūd is issued at the request of the court when it is a question of judgments based on ...(taʿajīz)...

196. Article 4: ...The judgment of the chamber of appeal (taʿqīb) is pronounced by the president of each of the two courts, Hanafī or Mālikī, on the majority of opinions. (Decree of 2 September 1948)

not reach an unanimous decision (article six, decree of 1876).[197]

While the Code of 1948 imposed greater limits on the Bāy's interference in the judiciary, the Code left certain key magistrates in Tūnis an uncommon control over their own decisions. We noted that advocates of a systematic uniform appellate procedure persuaded the traditional muftūn of Tūnis to limit their prerogative to taʿajīz and to submit all other cases to the supreme appellate courts without application for a maʿrūḍ (see page 295 above). The original version of article seventy-four on the extent of the prerogative (that is, cases of the majālis of Tūnis bypassed the supreme court and were subject only to the maʿrūḍ) was changed without a change being made in the composition of the supreme appellate courts and the majālis of Tūnis. Both were presided over by the chief muftī of the appropriate rite (article fifty in the Code, article two in the decree).[198]

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[197] Article 6: The examination of certain questions, provoking sometimes controversies on the matter of the application of the law, in the case where divergences occur among the opinions expressed by the members of the Sharīʿa belonging to one or the other of the two rites, without the discussion leading them to a single and united opinion, the chief muftī of the court where the division occurred will draw up a report in which he will develop the arguments produced in support of each opinion; each judge will sign the opinion which he supports and the report...will be addressed to the Government.

[198] Article 50: The minimum number of those meeting

The Sheikh ul Islām and the Bach Muftī also each had the right to hear first instance cases as a qādī sitalone (article seven).[199] Although article five of the decree of 2 September 1948 stipulated that any muftī who had participated in a first instance case could not sit on the supreme appellate court, in practise an awkward situation undoubtedly developed. For the two chief muftī of the Mālikī and Ḥanafī rites were regarded as the most learned of the qudāh in the realm. They were available for passing judgment as well as for consultation by subordinate muftūn and qudāh. If the Sheikh ul Islām or the Bach Muftī had made a first instance decision or presided over a majlis in Tūnis, then was excluded from presiding over the supreme appellate

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in every Sharīʿa majlis is three of the sheikhs.
The majlis in the capital is presided over by its head (Sheikh ul Islām or Bach Muftī) if he is present...

Article 2 (Decree of 1876): Each of these chambers (Hanafī and Mālikī chambers of taʿqīb) is composed of the Sheikh ul Islām of the rite in question, in capacity of president, and of the two muftī of the same rite in capacity of members...

[199] Article 7 (Code of 1948): ...The two Sheikhs ul Islām (Hanafī and Mālikī) of the two rites and the two qādī of Tūnis will hear equally in last resort subject to appeal (taʿqīb), on the days when they sit respectively, as single judge, affairs of personal status and land actions...

court when the first instance decision was appealed, the subordinate muftūn sitting on the supreme appellate court would hardly feel comfortable about reversing the opinion of the most respected magistrate, especially when no obvious wrong appeared in the reasoning of the first instance decision.

As for greater efficiency in the administration of justice, the division of the courts into distinct layers of jurisdiction reduced congestion. Jurisdiction in land matters was more evenly distributed through-out all the courts of the Sharīʿa. The Code of 1948 relieved the courts in Tūnis of the burden of hearing all cases in inzāl and ḥubus and had the provincial majālis to share in such jurisdiction.[200] The appellate system of 1948 was more appropriate for a society in which

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200.

Article 43 (Decree of 1876): The qudāh of the provinces will not be able to hear questions of inzāl or exchange of properties of ʾaḥbās whether there exist in the locality a council of the Sharīʿa (majlis) or not. The examination of these questions is reserved to one of the two qādī of Tūnis.

Article 7 (Code of 1948); ...The majālis of the Sharīʿa of the provinces will judge in last resort, within the limits of their competence, subject to appeal (taʿqīb), on land matters, those concerning the revenues of ḥubus and those, which being of the competence of the single judge, are communicated to them by the qudāh.

litigation was increasing faster than the number of judges being recruited. In an appellate system an inferior judge could be done with caseA, for example, and while a superior judge was hearing the appeal from case A, the inferior judge was handling case B. The system of review promulgated in the decree of 1876, however, had been more appropriate for a society where litigation was light. Under the traditional system of the Sharī'a an inferior judge could be spending so much time on case A that he either delayed hearing case B or handled them simultaneously. The complex procedure under the system of 1876 illustrates this point: The qādī was responsible for the first instance hearing of a case as well as for the review hearings. If he or the litigants took a case to Tūnis (article thirty-four),[201] the magistrates of Tūnis were to defer the case back to the inferior qādī with an opinion or deci-

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201. Article 34 (Decree of 1876): If one of the parties demands to be sent before the council of the Sharī'a of Tūnis, whatever be the cause at hand before the qādī sitting alone or before the Sharī'a of the locality having a council, the qādī will send him there, whether it be the petitioner or the defendant, unless the affair is so clear that it appears with evidence that the intention of the one who demands this sending away to another court is only to gain time and to make the adverse party lose money; in this case the qādī retains the affair.

If despite his decision, the affair is carried before the Sharī'a of Tūnis or before one of the two qādī of this city, it will be prosecuted in conformity to article 20 of Title I.

sion (articles twenty and thirty-five).[202] If the inferior qādī disagreed, he could suspend the judgment until the chief muftī in Tūnis settled matters (articles thirty-five and thirty-six).[203] Tossing of the ball back and forth between the capital and the provinces

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[202]. Article 20 (Decree of 1876): The two qādī and the members of the council of the Sharī'a have the power to defer the judgments of affairs which are submitted to them by the inhabitants of the cities or of the interior of the Regency, to the qudāh of these same localities.

Article 35 (Decree of 1876): If a muftī or qādī of the Sharī'a of Tūnis writes to the qadī of a judicial district to indicate to him the decision in a civil, penal, or religious affair, the latter is held responsible for conforming to the order of the superior magistrate, unless he is of a contrary opinion, supported by a text of the law. In this case, he will suspend the judgment and will make known to the said magistrate the motive which stops him.

Likewise, if he receives several communications from the Sharī'a of Tūnis, issued by magistrates of different rites or by several magistrates of the same rite, or by a single magistrate, he must, in the circumstances where it would be difficult to establish agreement among them, or in the case where the party who has obtained them would have distorted the facts, address on this subject a report to the Bach Muftī (or Sheikh ul Islām) according to whether the orders he received emanated from the Hanafī or Mālikī source.

If in a similar affair orders are sent to him by magistrates of the two rites, he will address his report to the Hanafī Bach Muftī.

But if these orders have been repeated to him by a single magistrate, he will answer to this magistrate only.

[203]. See article 35 above.

Article 36 (Decree of 1876): If a qādī of the

ended in 1948. The litigants appealed from an inferior judge. The superior appellate judge was to notify the inferior judge of the appellate decision. Whether it was a reversal, affirmation, or a retrial, the inferior judge was to accept it. If the decision were an order for a retrial, the case was not sent back to the same first instance qāḍī. Another inferior qāḍī or majlis was to be designated to rehear the case (article eighty).[204] In practise, however, the provincial qudāh could have easily undermined the efficiency of the appellate system by continuing lengthy consultations with the muftūn in Tūnis before judgment was given and the wheels of appeal could go into operation. Article five of the decree of 2 September 1948 permitted such consultative communications between the capital and

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provinces is preoccupied with an affair he will submit it to the council (majlis) or to the muftī, if there exists in the city only one muftī.

If all the magistrates issue the same opinion, he will fall in line with their opinion; if they are of different opinions, he will consult the qāḍī of Tūnis who will submit the affair to the Sharī'a of this city. This consultation must equally take place when the qāḍī does not share the opinion of the muftī.

204. In case of admission of appeal, the affair is sent back, for a new examination, to the initial jurisdiction, on condition that it be entirely composed of other members, or to another competent jurisdiction of the Sharī'a...

and provincial judges.[205]

The Code of Procedure for the courts of the Sharīʿa gave rise to a spate of other reforms in substantive law. Article sixteen of the Code promised a code of substantive law of the Sharīʿa to be applied by the courts of the Sharīʿa in matters of family law and land law. Article sixteen read: "The right of choice (about which rite would apply) for the defendant will subsist until the promulgation of the code of the Sharīʿa which will unify the rules to be followed and will suppress the right of option for the defendant." The time had come for Tunisia to stop labouring under two different rites. Undoubtedly the competition between the partisans of the two rites for dominance in Tunisia was partly responsible for Tunisia's being far behind the eastern Islamic states in codifying and modifying the substantive law of the Sharīʿa. Discrepancies in salary reflected the conflict. During most of the years of the Protectorate, the Sheikh ul Islām received more salary than the Mālikī Bach Muftī because the Ḥanafī muftī be-

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205. Article 5 (Decree of 1948): The muftūn who have, in their capacity as representatives of the qādī, had to hear an affair in first instance or to give to the qudāh of the interior provinces directives on which the qudāh have based their judgments, cannot sit on the supreme court of appeal (taʿqīb) to pass sentence on these same judgments.

longed to the same rite as the ruling family. Just before World War II, the salaries were equalised, After World War II the members of the two rites collaborated to draft the Code of Procedure for the courts of the Sharī'a.[206] They further agreed to consolidate certain domains of law (article ten). In these domains all litigants would be subject to only one law, regardless of their usual ritual tenets. There was no right of option for the defendant in these domains. Only a special beylical authorisation could ask one of the judges of rites to rule on an affair which normally fell under the competence of the judge of the other rite. The Code of 1948 assigned to the qudāh of the Hanafī madhab cases dealing with the following subjects: non-exercise of jabr by a father over his adult virgin daughter;

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206. In 1865 under Muhammad Sādiq Bāy the Hanafī Sheikh ul Islām and the Mālikī Bach Muftī received the same salary, according to a letter sent by the Mālikī muftī and qudāh of Tunis to the Bāy, 30 March 1930. In 1876, the Bāy gave the Hanafī Sheikh ul Islām a special lifetime indemnity for his help in preparing the decree of 25 May 1876 on the organisation of the courts of the Sharī'a. By an administrative error the compensation was incorporated into the salary of the post of Sheikh ul Islām. Thus his salary became more than the salary of the Mālikī Bach Muftī. In 1928 the Bāy refused to equalise the salaries because the Sheikh ul Islām had the prestige that came from belonging to the same rite as the Husseinite ruling family (Letter from Director of Tunisian Justice to Resident General, 27 June 1928). By 1939 the Sheikh ul Islām and the Bach Muftī were given equal salary (note of 24 November 1945, No. 5614, for Resident General from Röger Grømand).

shufʿa exercised by neighbours; validity of sale reserving the right of repurchase to the seller (baiʿ al wafāʾ); validity of sale whose price was raised by a small amount outside the agreed upon contract of sale (kamsha majhūla); validity of a hubus founded for the profit of the founder. The Mālikī qudāh had exclusive jurisdiction over the following types of cases since they were not provided for in Hanafī law: talāq because of the inability of the husband to pay maintenance; talāq because of injuries (ʾadrār) committed by the husband on his wife; sale of property by auction in the situation where the co-owners inherited property in common because the land was of an indivisible nature; division and distribution of rights by inzāl; contract of mogharsa (mugārasa), or sharecropping; validity of a will in favour of persons not yet existing; validity of a gift of indivisible land held in joint tenancy.

The reform in article ten was an effort to liberalize the law by means of taqlīd, in the sense that all Muslims were allowed to take advantage of liberal rules found in the school to which they did not belong. It was also an effort to make the law catch up with practise. For example, Tunisian Mālikī girls were known to

marry according to Ḥanafī ceremony in order to avoid a marriage to be forced upon them by their Mālikī fathers, or in order to marry against the wishes of their fathers. Prior to the promulgation of the Code of 1948, the Mālikī father had the right to go before the Mālikī magistrates to have the marriage annulled. There resulted a conflict of laws. The marriage was valid by Ḥanafī law, but invalid by Mālikī law. The magistrates of the Mālikī court in Tūnis agreed to allow the Ḥanafī magistrates to hear such cases on the following conditions: 1) that the marriage guardian was the plaintiff; 2) that his action was for annulment of an union contracted without his authorisation, or for disputing the social parity of the spouses; 3) that the act of marriage had been concluded by virtue of authorisation from the Ḥanafī judicial authority; 4) that the marriage had been consummated.[207] The Minister of Justice (who was also the Mālikī Bach Muftī) at the time of the reform in article ten recognised that the reforms could be justified as being in the public interest. However, the words "public interest" ring hollow unless one knows how the courts would tend

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[207] Letter from Jaʿīt to Secretary General of the Tunisian Government on proposal for royal announcement for expanding the meaning of article ten of the draft of the Code of Procedure for the courts of the Sharīʿa. Letter dated 21 February 1949.

to fulfill the requirements of "public interest". In a memorandum[208] the Minister implied two possible ways by which the qudāh could go about adjudicating cases where parties were asserting rights under two different laws. One way was to find points, however detailed, of agreement between the two laws and make actionable only those points of agreement. A second way was to decide which party had best proved that his needs and interests were more important and in greater need of immediate fulfillment. Whether the qudāh were to realise it or not, the second way to judgment would logically lead them to rethink and change the substantive law of the Sharīʿa. The change would not be due to political exigency or penance for neglecting ritual duties; it would be due to a clear recognition that a given rule created more abuses than it cured and so should be dropped.

A year after the Code of Procedure for the courts of the Sharīʿa was promulgated, the same Minister of Justice (and Mālikī Bach Muftī) was appointed to head a commission for drafting another code, the Code of the Sharīʿa (decree of 16 June 1949, J.O.T. No. 55 of 5 July 1949). No unusual case occurred to motivate the

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208. See footnote 207.

commission, as had been the case before the Code of Procedure was drafted. The commission in 1949 was appointed to fulfill the promise made in article sixteen of the Code of Procedure for a code of the Sharī'a. An order from the Tunisian Minister of Justice in 1952 (J.O.T. No. 52 of 27 June 1952) expressed disappointment in the commission appointed in 1949. It had failed to finish carrying out its duties. Only the first section on marriage had been completed. The order of 1952 expanded the commission and instructed it to meet regularly and complete the drafting of the code of the Sharī'a. Places on the enlarged commission were fairly evenly distributed among magistrates of the courts of the Sharī'a of Tūnis (two chief muftī from each rite, two Mālikī muftī, one Mālikī qādī, one Ḥanafī muftī, one Ḥanafī qādī); representatives from the Ouzāra (Wazāra) and the Tribunal Mixte; several professors from the Grand Mosque Zaitūna; some Tunisian lawyers and notaries. Less than one-half had participated in the drafting of the Code of Procedure for the courts of the Sharī'a.

The specific task of the commission was to reduce the case law of the courts of the Sharī'a and the authoritative works of the Ḥanafī and Mālikī jurists on the Islamic law of persons, succession, and land rights to

a single code. Such a task was selective and meant that among several possible views of authoritative jurists and commentators for a particular case, the commission would have to settle on one view. The Commission opted for the more conservative of the choices which the Minister of Justice had implied three years before were possible in reform (see page 309 above). That choice was to scrutinize the laws of the two rites for points of agreement and make as many as possible of those points actionable rather than rethinking the entire law in the light of what abuses had crept into the law. The result was a code of two thousand four hundred sixty-three articles, divided into Book One on Personal Status (ʾAḥkām alʾAḥwāl As Shakhsīya) and Book Two on Land Claims and Procedure (ʾAḥkām al Masāʾil al ʿAqārīya). The Code was divided into two columns, one for Mālikī rules and one for Ḥanafī rules. The commission modeled the code along the intent underlying article ten of the Code of Procedure, that is, certain rules were to be within the exclusive competence of only one rite. In other domains both sets of courts were competent.[209] To crown its work, the commission

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209. Article 4 of one of the several drafts of the decrees for promulgation of the First Book of the Code of the Sharīʿa: "Each rite, Ḥanafī or Mālikī, is competent only in the affairs requiring the application of the pro-

proposed that the two majlis of the Sharīʿa in Tūnis create a body to rule on gaps in the Code then add their solutions to the Code when the occasion arose. Not every opinion could be put in the Code; not every case envisioned or not envisioned in authoritative works could be put in the Code. The proposal was in harmony with another principle protected by the Code of Procedure. That was the principle of consigning the protection of the interest of the judiciary to the few muftūn in Tūnis. The average qādī was not allowed to interpret the Code where precision was lacking. He was to consult the learned muftūn of Tūnis as had been expected long since the nineteenth century. While the Code of Procedure assured to the judiciary of the Sharīʿa independence from interference from the executive administration in judgments for cases, the commission for the draft of the Code of the Sharīʿa had to

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visions of the present code that are inspired from the doctrine and jurisprudence of the rite. One rite must refuse to continue a case in favour of the other rite when the litigation will require the application of provisions designated for this other rite.

Each rite will continue, however, to hear matters when they involve application of provisions admitted uniformly by the doctrine and jurisprudence of the two rites."

I am indebted to the Honourable Sīdī Mahmud Al ʿAnnābi and Professor J.N.D. Anderson for their making available to me copies of the Code of the Sharīʿa.

compromise the independence of the judiciary to change the laws themselves. The muftūn and qudāh of Tūnis were to be responsible for initiating proposals for changes in the Code of the Sharīʿa once promulgated, but the opinions of the muftūn had to be sanctioned by the Minister of Justice and in turn the Bāy. Gone was the power of the judiciary of the Sharīʿa to choose what rule it wanted to apply. According to the proposal of the commission, the judiciary would have won freedom to give judgment without interference while losing freedom to choose the bases on which judgment was to rest.[210]

The work of the commission was of little avail, however. The reactions of the judicial counselors, especially the French, were unfavourable to the monumental and monstrously lengthy draft code. The draft code won praise as a work of Islamic erudition. For it was

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[210]. Article 3 of one of several drafts for the decree promulgating the Code of the Sharīʿa: "The cases which are submitted to the jurisdiction of the court of the Sharīʿa after complete editing of the Code, completion of the work of the Commission, and final promulgation, and which are recognised as belonging to the categories not provided for in the text of the Code, will be the subject of common deliberation of the magistrates of the two majālis, Hanafī and Mālikī. They will search respectively for solutions, agreeing or diverging, according to the two rites and they will note the one which appears to them the most well-known. These two majālis thus meeting will substitute for the commission of the Code and will present to Our Minister of Justice

an exhaustive reproduction of Mālikī and Hanafī rules on family law, succession, land claims, and procedure in a trial before a qādī. Yet the commission and its critics differed over the function of a code and forms and substance most befitting that function. The critics argued essentially that a code should unify rules of law in one edition. Unification of the law meant that all the competent judges would use the same source of law to serve as a basis for the reasons underlying their decisions. The merit of unification is the limit which it places on arbitrary decision-making. The form appropriate for a code is the form appropriate for a reference book, namely, broad classifications and sub-classifications under which one can quickly find what one seeks. If one is going to limit judges to only one source of law, then the substance of that code should comprise rules which the judges wish and need to consult. The rules which a judge would want to consult would be those designed to cover most of the situations coming before his court. Otherwise, the judge cannot fulfill satisfactorily his basic job, namely, to settle

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a detailed report on the points of agreement or of divergence which came out in the course of their deliberation. A Beylical decree will promulgate the solution which will be adopted in the particular case and in all similar cases. The solution will be the subject of an addendum to the part of the Code treating the matter."

as many of the disputes as possible. This means that the substance of the codes must be kept up to date with the behaviour of a society. Otherwise, the code becomes a collection of knowledge that the judge would have little need to consult. He would have to go elsewhere, like persons seeking the latest editions of an encyclopedia. The commission drafting the Code of the Sharī'a had members who were familiar with the form of a code, that is, classification of material and numbering of articles. The substance, however, consisted of much more than general rules; it posited past cases which many qudāh had encountered and hypothetical or possible cases which a qādī might encounter. Certainly any set of rules reflect the general behaviour and drives (marriage, end of marriage, death, maintenance of a child) of a society, but a collection of detailed cases -- past or possible -- runs the risk of being outdated, as the details of general behaviour and drives change. Or it runs the risk of being irrelevant as the society may not follow the course which was hypothesized. For example, one of the earliest drafts of the Code of the Sharī'a contained articles on hadd for adultery (article one hundred eighty-five), a domain in which the qudāh were no longer competent.[211]

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[211] Ministry of Justice, Note 918TSJ4 of 28 July 1950

Inheritance by slaves (article six hundred fifty-six) was another example. It was an area that was relevant to only a few possessions that fell into the hands of the Chief of State in case of cessation of the line of a former slave, for slavery had been abolished in the nineteenth century.[212] Since the substance of the draft code was divided into two possible rules or case situations, according to Mālikī and Ḥanafī views, the draft code did not serve the function which French critics expected. It failed to unify the rules and to cut off all option of choice of rite. We noted that the commission wrote the code in the vein of article ten of the Code of Procedure, allowing only one rite exclusive competence in certain domains and shared competence in others (see page 311 above). Yet article sixteen had promised an end to shared competence. Only one view on a given rule or situation was to be sovereign, to the exclusion of other rules or views. This failure to carry out the mandate in article sixteen reflected how the Islamic jurists differed from the French in notions about the material sources of law (as op-

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for the Secretary General of the Tunisian Government.

212. Minister of Justice to His Excellency the Prime Minister of the King of Tunisia on the Code of the Sharī'a.

posed to abstract sources like morality or habit). The material sources of Islamic law are essentially two kinds: the Qurʾān and the commentaries. The ʿaḥādīth are the commentaries from the Prophet and his Companions; the works of the founders of schools of thought and the fatāwin are commentaries of jurists on what has preceded them as well as on their contemporary situations. The function of the commentaries is to make order out of the Qurʾān, whose form would scarcely qualify it as an easy reference book of rules. Each succeeding commentary attempted to make order out of the preceding. The fatāwin especially represented efforts of muftūn to bring order to preceding commentaries so that the wisdom of precedents could be brought to bear on factual situations that were not foreseen in any previous commentary. For lack of elaborate dogmatism Islamic jurists could not impose one man's commentary on all believers, for the concept of law based on one man's view would rival with the authority of the Qurʾān. Nor could they use the Qurʾān as a direct source of law because of its unwieldy form. Islamic jurists agreed with the merits of the function of a code, namely, to unify the law and thereby reduce arbitrary decisions. Yet given the absence of dogmatism and the disorganised form of the Qurʾān, the Islamic jurists

had to achieve the same functions as a code would serve by a different route. The Islamic judiciary was subject to limits other than codified material sources. These limits were the satisfaction of the litigants with the jurisdiction of a given qāḍī; the conscience of the qāḍī; and the power of the muftī in urban centres to review decisions of the quḍāh. These were the tools which the Islamic society had for enforcing the limits of judicial reasoning as expounded in treatises studied at the mosques. The judges were no longer to use ʾijtihād on the Qurʾān and ʾaḥādīth. The basic authoritative books of the founders of the madhāhib had delimited the basic principles governing general social behaviour, such as no marriage without consent, legitimacy only through valid marriage at the time of conception of the child, validity of polygamy, sharing of inheritance between the ʿaṣaba and the farāʾiḍ, talāq as the right of the husband. No one dared change these fundamentals. Only minor details or rules for new situations were open to ʾijtihād exercised by the muftūn, and that freedom was more or less a matter of choosing which of the several established differing views should apply. The commission for the draft of the Code incorporated this complex of tools and limits in the draft. The substance covered broad principles as well as im-

probable and hypothetical case rules. Islamic jurists did not assume automatically, as French jurists, that a judge only wanted substance which he would find practicable most of the time. For the Islamic jurists had a different concept of the role of a judge. Given that the muftī was one of the tools which Tunisian society had for unifying the laws, the presence of a muftī resulted in an hierarchy of judges -- two kinds of judges with two different functions. One, the provincial qāḍī, was to pass judgment according to set rules. He judged with certainty only conflicts for which he had predetermined rules. If there were no rules for a particular set of facts, he was to pass the conflict on to more learned judges. Therein stepped the muftī who had the right of review over the muqallid qāḍī, and the right of limited ʾijtihād in new types of conflicts. As we saw, the draft of the promulgation decree for the Code of the Sharīʿa institutionalised the power of the muftūn in Tūnis by allowing the majālis of Tūnis to propose rules to fill in the gaps in the Code once promulgated (see pages 311-313 above).[213]

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[213] Jaʿīt uses the term "muqallid decision" (al ʿadl al muqallid); page ٢٠ , article 328. Reversal of a decision upon appeal applied in Mālikī law only to muqallid decisions. Since the rule in Tunisia was applicable only to the qudāh of the provinces and not to the

The draft of the Code of the Sharīʿa raised so many objections that it was fundamentally revised over the seven years following the creation of the commission. During those seven years Tunisia was simultaneously preparing for independence. The agreements and the struggles between the French and the Tunisians over the price of independence profoundly affected the judicial order of Tunisia. How new demands caused the government to deal with past institutions is the topic of the following section.

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magistrates of the capital, one can infer that the muftūn of Tūnis when judging as single qādī were not considered muqallid.

On page ٤٤, footnote 1, Jaʿīt uses the term ʾijtihād in the broad sense of discrétion, as when a judge decides to punish by taʿzīr rather than apply the hadd. The conditions for making such a choice were disputed among the Mālikī jurists.

The Tunisian secular jurisdictions (Regional courts, Ouzāra) used the term ʾijtihād to mean power of a magistrate to interpret a code. For example, the Ouzāra (Wazāra) decided in 1945 the following: "It is possible for first instance judges to exercise unlimited ʾijtihād on the question of whether a contract in which something has been sullied (mukhdush) is necessarily invalid because of a state of illness by virtue of article 59 of the Code of Obligations and Contracts. Because of that, the Superior Court (Ouzāra) does not have the right of enforcing its power of supervision over the ʾijtihād if it is valid and if there is no obvious mistake in the judgment." Article 59 of the Code of Obligations and Contracts reads: "The motives for annulment of consent to a contract because of illness and other analogous cases are left to the appraisal (nazar) of the judge." (Ministry of Justice, qarār 4624, in Arabic, of 6 March 1945) I am grateful to Hādī Madīnī in the Ministry of Justice for making available to me this collection of decisions from the Wazāra.

Reforms in the Tunisian Legal System Preceding and Succeeding Independence

Between 1955 and 1957 politics grew heated in Tunisia. The result was independence from France, a new legal system, and the overthrow of the Bāy. Although each of these three events can be analysed in their individual merits, one must also understand how they affected one another. Tunisian and French officials were negotiating constantly during these years, and negotiations involve give and take in the matter most immediately at hand as well as matters only indirectly relevant. The strictly legal justifications for the legal reforms of these years will be discussed later on their own merits (see Chapters IV and V), while, here, one's attention will be turned to the political exigencies which forced leaders of a nation to find new jurisprudential bases for reforms.

The seeds of the legal reforms of 1956 and 1957 were sown in the Convention of 3 June 1955 between France and Tunisia (J.O.T. No. 71-73, 6 September 1955). The Convention was an agreement on how Tunisia was to exercise her right of internal autonomy. In regard to the Tunisian judiciary, the primary aim of the two governments was "the creation of an order of modern Tunisian

courts" (article three, paragraph three, Convention Judiciaire, III). In regard to the legal rights of Frenchmen and Tunisians, the two governments aimed to assure that Tunisia "would engage in taking all measures of law or fact appropriate for assuring foreigners (Frenchmen, French protegés, non-Frenchmen for whom France assumed responsibility), within the framework of (Tunisia's) internal legislation, free exercise of their cultural, religious, economic, professional or social activities as well as for guaranteeing conformity with traditions a complete equality among her (own) nationals whatever their ethnic origin or religious confession, notably in regard to enjoyment in law and in fact, of civil rights, individual and public liberties, economic, religious, professional or social rights, the collective rights generally recognised in modern states" (article five, General Rules, I).

To fulfill these aims of equality among Tunisian nationals and protection of French nationals, the Convention itself gave only the broad principles for guiding the judiciary. The French nationals were to continue to be subject to the French courts:

> The French nationals will continue to be regulated in Tunisia by their personal status. (Article one, Chapter one, Convention II on Status of Persons)

A thorny problem lay with the Christians who were originally of French or Italian nationality but who acquired Tunisian nationality by virtue of birth in Tunisia. A modern judicial system as aimed for in the Convention would require a more uniform law than had existed under the Protectorate. Uniformity meant that all Tunisian nationals regardless of origin would have to fall under the same jurisdiction. The Tunisians of non-Tunisian origin did not like the proposed scheme. France was planning to limit the jurisdiction of her courts to persons of non-Tunisian nationality and matters of public security:

> These transfers (of French jurisdictions to Tunisian mixed courts) will not affect the competences of the French courts in regard to litigations where no Tunisian is party; litigations relating to the personal status of non-Tunisians; criminal affairs where a non-Tunisian is involved and other penal affairs in which a non-Tunisian is charged. (Article three, paragraph two, Judicial Convention, III).

It would have been contrary to the principle of internal autonomy if French courts had continued their former jurisdiction over any Tunisian national. Yet it was unfair that nationals of European origin go before the courts of the Sharī'a or the Hebrew courts since neither of them was competent to appreciate non-Muslim or non-Hebraic laws of personal status. The secular

Tunisian courts [Regional (jihawī), cantonal (nawāḥi), Ouzāra (Wazāra)] had no legislation promulgated to turn to for ruling on matters of personal status. France and Tunisia finally agreed that the French courts would apply temporarily the law of origin in cases of personal status for this category of Tunisian nationals of foreign origin. During the interim Tunisia had to prepare a legislation that would be appropriate for all three types of personal status found in Tunisia (Muslim, Hebrew, Christian). Nationalism heated the air and the discussions. It was a concept foreign to Islam. Islam had dealt with non-Muslims by creating a status of dhimmī, a second class citizen. Nationalism, however, needed uncompromising solidarity among all citizens, regardless of their personal customs. Hence, Tunisians were willing to condition their eventual solidarity on a modern code of personal status.

To fulfill the aim of a modern Tunisian court system, the French and Tunisians settled for another interim measure. Into the system of triple jurisdictions was to be injected mixed courts. Their jurisdiction rationae personae covered Tunisians and non-Tunisians who were involved together in a dispute. Their jurisdiction ratione materiae comprised cases falling under social legislation and commercial law:

> The mixed jurisdictions will be competent in any litigation occurring between a Tunisian and a non-Tunisian concerning social legislation or commercial law.
>
> In this connexion the two governments will study the question of jurisdictional competence in regard to companies. (Article two, paragraph three, Judicial Convention, III)

Whether the judges of the mixed courts were to be Tunisian or French was to depend on the choice of the defendant.[214] Yet both French and Tunisian assessors were to be present always.[215] These mixed courts were to be transitional. Their political purpose was to provide training for Tunisian judiciary officials before they assumed all

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214. Article 2 (Judicial Convention, III): The servicing of these jurisdictions (mixed) will be assured by the magistrates and clerks of French and Tunisian nationality to whom there devolve equivalent functions. To pass sentence legitimately, each court must be composed of a president and an equal number of French and Tunisian assessors.

In case of first instance, the nationality of the President will be left to the choice of the defendant. In cases of appeal, the President will be French if one of the parties so demands...
(The article implies that ordinarily the President in cases of appeal would have been Tunisian.)

215. See footnote 214, part one of Article 2.

powers appropriate for completely autonomous government. The mixed courts were to be only one of many steps by which power was to be transferred from French jurisdictions to Tunisian. This was part of the agreement expressed in article three of the Judicial Convention (paragraph one): "The two governments shall agree by successive matters and steps on new transferals of competence from the French courts to the Tunisian mixed courts. These transfers will be effected by taking into account in the area of jurisdiction under concern the guarantees which the legislation applicable and the conditions for the functioning of the new jurisdictions will assure to Frenchmen and foreigners." After fifteen years the "two governments (were) to name a commission composed of magistrates and qualified persons from the two countries with the purpose of examining whether the legislative and jurisdictional conditions have been fulfilled so that the courts of the Tunisian state would hear all affairs deriving from the powers of internal autonomy" (article three, paragraph three, Judicial Convention, III).

Such terms of the Convention were stiff. They revived some of the issues which had confronted the Bāyāt in the nineteenth century. Those issues were mixed courts versus an uniform system of Tunisian courts having

jurisdiction over all litigants (excepting when consular jurisdiction was applicable). The Tunisians of the twentieth century were not any more willing to accept the mixed courts than they had been in the nineteenth century (see page 64 et sq. of Chapter I above). The French were going to have to reckon with the eventuality of complete internal autonomy which would be a step away from independence. Tunisians prepared fro a quicker way to winning back the judicial independence and uniformity which the Bāy had lost in nineteenth century. They aimed to achieve within a year what France had planned to evolve over fifteen years, namely, a modern Tunisian judicial system applying legislation which was modern.[216] The first step was to consolidate Tunisian courts (Sharīʿa and secular to the exclusion of the Rabbinical), as,under Bourguiba the highly nationalist Neo-Destour party (constitutional party crying for the return of a constitution since its suspension in 1864) gained seats on the executive council. By the decree of 3 August 1956 (J.O.T. No. 65, 14 August 1956, 7 Moharrem 1372), the Code of Procedure for the courts of the Sharīʿa of

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[216] Ministry of Justice, "Note for the Council of Ministers" : Reform of the judicial organisation, the Code of Personal Status, outline of the steps needed for a shorter Code of Personal Status, the streamlining of the judicial system, and the abolishing of the courts of the Sharīʿa were all to have taken place by 1st of October 1956.

1948 and the decree of 25 May 1876 concerning the organisation of courts of the Sharī'a were abrogated. The decree of 3 August 1956 aimed primarily to consolidate the Tunisian jurisdiction over land disputes. Under the Convention of 3 June 1955 France had transferred jurisdiction over disputes involving land registered under the Code Foncier of 1885 to Tunisian courts.[217] The Convention specified that only the Tunisian secular courts would be the beneficiary of the powers of the French courts. The decree of 3 August 1956 transferred the jurisdictions of the courts of the Sharī'a over non-registered property to the secular Tunisian courts so that the secular courts held competence over all land matters, whether registered or unregistered lands were in question. The transferal also meant that the secular Tunisian courts usurped the position proposed by the Convention of 1955 for mixed courts. For the courts hearing land cases could try both non-Tunisians and

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217. Annex 1 to the Judicial Convention of 6 June 1955: "Jurisdictions ratione materiae attributed to French courts and which will be suppressed according to the conditions provided for in article 1 of the Judicial Convention: Litigations relating to registered immoveables ...will be judged, to the extent of their jurisdictions ratione personae, by the Tunisian secular courts applying the Beylical decree of 1 July 1885."

Tunisian courts were limited in their jurisdictions ratione personae to Tunisian citizens, since French jurisdiction according to the Annex was to be based solely on nationality, that is, it covered only Frenchmen.

Tunisians (article two).[218] The more general aim of the decree of 3 August 1956 was to reorganise the entire system of secular courts and to attribute to them the jurisdictions which had previously belonged to the courts of the Sharī'a by virtue of the decree of 25 May 1876 and the Code of Procedure of 2 September 1948. The cantonal courts (nāwāhī) remained (article two). The court of appeal created in Tūnis was originally one of the chambers of the Ouzāra (Wazāra) called ʾistīʾnāf.[219] The court of final appeal (taʿqīb) (in article eight) also was a former chamber of the Ouzāra (Wazāra).[220] The new courts were given jurisdiction

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218. Article 2: Article one of the Tunisian code for civil procedure is completed by the following:...and likewise (they have jurisdiction in) lawsuits occurring among Muslim Tunisians and among all other persons in the inheritance of a Muslim Tunisian and in lawsuits occurring among Tunisians and among non-Tunisians in cases of land claim (ʾistihqāq). (Decree of 3 August 1956, J.O.T. 14 August 1956)

219. Jambu-Merlin, page 154 (see footnote 158 above).

220. Jambu-Merlin, page 154.

Article 7: The title of the second part of chapter four (of the Code of Civil Procedure) is modified as follows: Part Two on Final Appeal (taʿqīb). Article 103 of the Tunisian Code of Civil Procedure is changed as follows: Every judgment of common law can be transferred to the supreme court of appeal (taʿqīb), even after its conclusion or execution, and that would be in accordance with the demand from the public prosecutor before the supreme court of appeal in case it was necessary...(rest of article remains the same)...

over cases of personal status and land which had once been attributed to the courts of the Sharī'a. Article one of the Code of Procedure of 1910 for the secular courts was expanded to read: "Cases occurring among Muslim Tunisians and among non-Muslim Tunisians in the inheritance of Muslim Tunisians and in litigations occurring among Tunisians and non-Tunisians in matters of land claims (istiḥqāq) [fall under their jurisdiction]." Article two of the Code of 1910 was modified to state the maximum monetary limits on the cases of personal status and moveables coming before the cantonal courts, the courts of first instance (ibtidā'i), and the courts of appeal (isti'nāf), and cases of immoveables coming before the courts of first instance and appeal. As for the law which the new courts would apply in exercising their newly acquired jurisdiction, article four of the decree of 3 August 1956 simply read: "The [judgments of the] courts aforementioned in the matters of land claims would be issued on the basis of principles and rules in force at the time of our present decree." For registered land, one would expect the courts to apply the Code Foncier of 1885. For unregistered lands the law of the Sharī'a applied.[221] What law applied in matters

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221. According to a judgment issued from the Supreme Court of Appeal, No. 2228 of 29 April 1963, under the presidency of Muḥammad Al Waṣīfa (Al Qadā' wa'l tashrī' No. 9 of 1963, page 39).

of personal status was left unclear. Whether the courts of the Sharī'a were to exercise jurisdiction concurrently with the secular courts remained unclear. A government notice later explained that the decree of 3 August 1956 had "merged" the jurisdictions of the Sharī'a and the secular jurisdictions, while leaving unclear their exact position vís à vís each other.[222]

The next step in the Tunisians' campaign for reform was the promulgation of the Code of Personal Status in the decree of 13 August 1956 (J.O.T. 28 December 1956). The Code settled the confusion existing over what law the secular courts, created in the decree of 3 August 1956, were to apply in matters of personal status. The more important purpose of the Code was to fulfill the stipulation in the Convention of 3 June 1955 that Tunisia promulgate a modern code of personal status:

> The individuals who will acquire Tunisian nationality by virtue of the provisions of article eight (on Frenchmen by way of naturalisation), article eleven (on any foreigner by way of naturalisation), article twelve (claim by a person one of whose parents is of Tunisian nationality), article thirteen (only unmarried minors of twenty-one could acquire naturalisation or claim citizenship through parentage) and who would not be of Muslim or Hebrew confession, will be regulated by the rules of their personal sta-

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222. Ministry of Justice, Announcement on the Abolishing of the courts of the Sharī'a and the Promulgation of the Code of Personal Status, paragraph one, page 1 (**'ilgā' al maḥākim as shar'īya wa ṣadūr majallat al 'aḥwāl as shakhṣīya**)

> tus of origin until the Tunisian legislation comes to include a modern statute for personal status. (Article fourteen, Chapter two, Convention on Status of Persons, II)

Since the Code of the Sharī'a of substantive law, drafted by the commission of Tunisian jurists in 1949, had not been acceptable to the juridical counselors in the Ministry of Justice, the Ministry of Justice directed that another code be drafted.[223] The second code did away with Ḥanafī and Mālikī jurisdictions and reconciled the views of both schools on all matters in question. Nonetheless, the code remained too traditional in substance for the tastes of the Ministry of Justice. The Ministry itself drafted then a code of personal status. The new draft was a much shortened summary (about one-quarter of the length of the second draft of 1950) of the earlier drafts and was confined to personal status, to the exclusion of land matters, since personal status was the most immediate concern of the times since the Convention of 1955. The style was concise; the wording of the articles was limited to principles and generalisations governing categories of matters. Detailed points were left to the reasoning, or Ijtihād,

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223. Ministry of Justice, Note for the Council of Ministers on the Code of Personal Status and Reform of the Judicial Organisation.

of the judges.[224]

The substance of certain articles jolted Islamic legal thought and placed Tunisia, in the eyes of many Western Islamicists, in the forefront of reforms in Islamic law and jurisprudence. The "door of ʾijtihād was opened on the issues of polygamy and talāq. The traditional Islamic law in these two domains was reversed and replaced with a new interpretation of the Qurʾān and ʾaḥādīth, respectively:[225]

> "And never will you be able to treat women equally even if you strive to do so."
>
> ولن تستطيعوا ان تعدلوا بين النساء ولو حرصتم
>
> (Sūra four, Al-Nisāʾ, verse 129)

> "Of all legal actions, the most reprehensible to God is talāq."
>
> ابغض الحلال الى الله الطلاق

Yet in terms of the more immediate political concerns of Tunisians, the reforms in polygamy and talāq fulfilled some of the basic requirements of modern legislation. Those requirements for modernity were set by the French public order established by the French courts of the Protectorate (see page 258 above & ftn.226 post). The French

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[224] Ministry of Justice, Announcement on the Abolishing of the Courts of the Sharīʿa and the Promulgation of the Code of Personal Status, listing 2, page 2.

[225] Ibid.

critics of the 1949 draft of the Code of the Sharīʿa had pointed out the challenge which such a code presented to the French public order.[226] Later when the French and Tunisians agreed on assuring non-Muslim Tunisians a code in harmony with their personal status of origin (namely European), they were essentially agreeing to a code of personal status that would satisfy Muslim and non-Muslim attitudes on basic public issues like polygamy and talāq. One of the critics of the early draft of the code of personal status had argued that the code attributed to the competence of the courts of the Sharīʿa the marriage of persons converted to Islam.[227] This was contrary to the decree of 31 July 1884, which at-

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226. Ministry of Justice, Note for the Attention of the Secretary General of the Tunisian Government, 918TSJ4, 28 July 1950, on the Code of the Sharīʿa. The author of the note equates modernity with French public order. "Codification (of the Sharīʿa) does not bring any innovation: none of the prescriptions contained in the Code of Muslim Marriage can be considered for the legislator as being inspired by the necessities of evolution and universal progress. Any effort to bring Islamic law into the present has been neglected by the Commission of codification. This is why one encounters in the draft archaic provisions that are sometimes shocking and certain ones of which even go against our notion of public order (marriage or persons not of the age of puberty, assimilating marriage to a rescindable sale for latent defects, prohibition to the Muslim woman to marry a non-Muslim, etc...)."

227. Ibid.

tributed to the courts of the Sharī'a competence over only Tunisian Muslims who had regulated their affairs according to Islamic rules. The Sharī'a did not apply to converts to Islam whose marriage had been contracted prior to the conversion, albeit the marriage might have been contracted more islamica. The French courts or the Rabbinical courts, depending on the original personal status of the parties, had competence to pronounce on the validity of marriage, its annulment, and the legitimacy of the children. While the French were willing to give competence over all Tunisians to Tunisian courts, the French also wanted a code of personal status which would avoid complications arising from marriage between non-Muslims and Muslims, especially after the conversion of one of the spouses. Other Islamic countries, such as Pakistan, have faced difficulties in litigation concerning the rules governing religiously mixed marriages.[228] The French had been accustomed to having only one law, namely, French law, applicable. In marriages between persons whose original personal status was different (such as between a Muslim Tunisian and a non-Muslim European) the French courts had competence.

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[228] Doreen Hinchcliffe, "Law of Marriage and Divorce in India and Pakistan," Ph.D. Thesis, University of London, 1971.

In marriages between Muslim protegés, like the Algerians, the French courts had competence.[229] To the Algerians the French applied the Sharī'a only to the extent that it did not contradict principles of French public order, such as the French would allow no divorce without the intervention of the courts regardless of the reasons or absence of reasons for divorce; nor would they allow marriage of minors. A code of personal status which reconciled Muslim and French standards would reduce the political friction between the French courts and the Tunisian courts. The prohibition of polygamy and the prohibition of divorce without the intervention of the courts in the new code of personal status were two grounds where Islam was reconciled with modernity. The pressures for such reforms were political, a drive to throw off the French, but the approach was strictly in Islamic terms.

The last step -- one month after the promulgation of the Code of Personal Status -- towards fulfilling the conditions of the Convention of 6 June 1955 was the outright abolition of the courts of the Sharī'a in the decree of 25 September 1956 (19 Sfar 1370) on the inte-

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[229] Ministry of Justice, Note for the Secretary General of the Tunisian Government on the draft of the Code of the Sharī'a, 28 July 1950, No. 918TSJ4.

gration of the magistrates of the jurisdictions of personal status into the cadre of magistrates of the jurisdictions of common law (J.O.T. No. 77, 25 September 1956). The abolition of the courts of the Sharī'a was a logical necessity since the decree of 3 August 1956 gave to the secular courts the same jurisdiction in personal status and land matters as the courts of the Sharī'a had at the time. The decree of 13 August 1956 then promulgated a Code of Personal Status with which most magistrates of the Sharī'a agreed, but not all. Nor was the Code of Personal Status in any form with which the magistrates of the Sharī'a were long familiar. The form was more appropriate for the secular courts. Hence, the jurisdictions of the Sharī'a became obsolete, and a chamber of personal status was established in each secular court, which hitherto had only chambers for civil (contractual) and criminal matters. Article one of the decree of 25 September 1956 read: "The class of magistrates of the former jurisdictions of personal status (Supreme Court of the Sharī'a of Tūnis and the majlis and the mahkama of the provinces) are suppressed and their officers turned over to the class of magistrates of the common (secular) law. The magistrates of the Sharī'a, thus integrated, will submit to the same rules of remuneration, promotion, and discipline as those reg-

ulating the magistrates of the jurisdictions of common law." On the same day there were several other decrees (J.O.T. 25 September 1956, pages 1288 to 1292) pronouncing the retirement of some of the former qudāh and muftūn, removal of others to non-judiciary posts, and nomination of many to positions in the secular courts. Both of the chief muftī of the Ḥanafī and Mālikī rites, who had been presidents of the supreme appellate courts of the Sharīʿa, resigned, as did two other Mālikī muftī. Another Mālikī muftī, a judge on the supreme court of the Sharīʿa of Tūnis and a former member of the commission which drafted the original Code of the Sharīʿa, was placed at the disposition of the Ministry of Education. Five other Ḥanafī and Mālikī muftun, all of whom had been on the courts of Tūnis and three of whom had been on the commission for the original draft of the Code of the Sharīʿa, were dismissed. As for the reappointment of the judges of the Sharīʿa to secular courts, the number of former judges of the Sharīʿa appointed to judgeships (excluding counselors) was slightly less than one-half of the number of former secular judges appointed to judgeships. Three of these former judges of the Sharīʿa had been on the commission for the draft of the original Code of the Sharīʿa. In Tūnis where the number of positions to be filled was highest (Supreme Court, Court

of Appeal, Court of First Instance, Cantonal Court), the number of former judges of the Sharī'a appointed to secular courts was about one-third of the number of secular judges reappointed to the new courts. In the provinces (first instance courts only), the average number of former judges of the Sharī'a in judgeships was two for every three former secular judges. The statistics imply that the integration of the former judges of the Sharī'a into the new system was complete. How much judges allowed the Islamic tradition to influence their interpretation of the Code of Personal Status in details left out remains to be discussed in the following chapters which analyse particular judgments.

In the next year, 1957, Tunisia undertook a series of measures which completed her independence of France. On 9th of March 1957 Tunisia and France signed another Convention which authorised the suppression of French courts at a date far sooner than the fifteen year period of French judicial presence agreed upon in the Convention of 3 June 1955. Tunisia had instituted a modern system of courts and a modern Code of Personal Status as required in the Convention of 1955. She had proved herself in the judicial domain to France and

no longer felt the need for French judges to train the Tunisian judges by sitting on mixed courts or by setting examples in French courts. The decree of 24 June 1957 (26 Doul Kaada 1376) abrogated the decrees relating to the French courts in Tunisia. It abrogated the decrees of 18 April 1883 (creation of French courts applying French law in Tunisia), of 5 May 1883 (end of consular courts and extension of French courts' competence over all Europeans in Tunisia), and of 31 July 1884 (procedure and limits of competence for the French courts). The decree of 24 June 1957 (J.O.T. of 25 June 1957, page 749) specified the procedure for the suppression of the French courts agreed on in the Convention of 9 March 1957. The system of Tunisian courts created in 1956 had the same structure as the French system, and hence, the cases before the French courts in 1957 could be easily transferred to the equivalent jurisdictions in the Tunisian system, as declared in article three: "The Tunisian jurisdictions will hear affairs in process before the French courts on 1 July 1957 sitting in the same places as the French courts; the court of appeal (ʾistīʾnāf) (will take) the affairs before the French court of appeal of Tūnis; the courts of first instance (ʾibtidāʾī), the affairs before the French courts of first instance; the Can-

tonal Courts", the affairs before the French justices of peace; the councils of prud'hommes, the affairs before the conseil des prud'hommes. The [Tunisian] jurisdictions thus involved will apply their own rules of procedure and of competence. If there be need, the president of the jurisdiction concerned will refer, by simple order of transmission and without costs, the case and the parties before the competent jurisdiction according to the said rules and will transmit the dossier by way of the chief clerks." The only time the Tunisian courts were expected to apply non-Tunisian law to affairs which had been in process before the French courts was in criminal matters. Article twenty-five provided that the Tunisian courts would apply Tunisian law ordinarily to the cases transferred from the French courts, but "if the fate of the accused would be more serious under Tunisian law the courts would apply the law which the French courts would have applied."

Upon the abolition of French courts in Tunisia there arose again the question of the status of the non-Muslim and non-Hebrew Tunisians. The decree of 24 June 1957 (J.O.T. of 25 June 1957, No. 51) on the personal status of Tunisians placed the non-Muslim and non-Hebrew Tunisians in a transitory state. They, like the French nationals, were to have only the Tunisian courts,

no longer the French courts, to hear their disputes, but the Tunisian courts were to apply French law:

> (Article I) Article 1 of the decree of 12 July 1956 (3 doul hidja 1375) is abrogated and replaced by the following provisions: Foreigners are regulated in matters of personal status by their own national law. For a temporary period Tunisian nationals of non-Muslim or non-Hebrew confession remain regulated in this matter by the provisions of the French civil law, in force at the date of the present decree.

The decree of 13 August 1956 promulgating the Code of Personal Status had given all non-Muslim Tunisians (Hebrews, Christians, etc.) the right to choose to submit to the provisions of the Code of Personal Status (article four).[230] The choice once made was irrevocable. In 1957 the only change was in the courts; the law applicable remained the same. The Convention of 3 June 1955 had justified the application of French law to non-Muslim Tunisians by virtue of the absence of a modern code of personal status. Yet when Tunisia did promulgate such a modern code, the non-Muslim and non-Hebrew Tunisian nationals remained exempt from the Code of Personal Status unless they chose otherwise.

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230. Article 4: Despite that, the Code of Personal Status is applicable to those persons under Tunisian jurisdiction mentioned in the preceding article (Hebrews, non-Muslims, non-Hebrews) who present a petition of choice (to be judged by the Code of Personal Status) on the basis of the conditions set out in article 5...

The reason was that as long as Tunisia permitted the law of personal status to be divided, one for Muslims applied by secular courts and one for Hebrews applied in Rabbinical courts, the non-Muslim and non-Hebrew Tunisians had a case for equal treatment; they too would have their own laws of personal status.

The law of personal status was finally consolidated once Tunisia became a republic. The Bāy was deposed and Bourguiba proclaimed president on 25 July 1957. Absolute unity of the nation became imperative. On 27 September 1957 (J.O.R.T., 27 September 1957, 2 Rabia al Awl 1377, No. 19) the Rabbinical courts were abolished (Law No. 40-1957). All cases in process before the Rabbinical courts on 1 October 1957 were to be transferred to the court of first instance in Tūnis, which was to apply the principles and rules in force (namely, the Code of Personal Status). Still a special chamber was to be designated by the president of the court of first instance for judging on former Rabbinical matters. The same decree nullified parts of the decrees of 12 July 1956 (article one, paragraph two) and of 13 August 1956 (articles three, four, five) which had allowed the non-Muslims and non-Hebrew Tunisian nationals to be exempted from the Code of Personal Status.

Thus, all Tunisian nationals were in September 1957

made subject to the Code of Personal Status. Yet the law of 27 September 1957 abolishing the Rabbinical courts recognised that uniformity in the law applicable to all Tunisian nationals might not be absolute. For article two of the decree provided that if there were no positive or legislated law on a question in point, then Hebrew law could be used to fill the gap.[231] This meant that while the principles expounded in the Code of Personal Status were applicable to all Tunisian nationals, the "ijtihād" which judges could use to determine detailed rules would differ according to the original personal status of the litigants. The principles of the Code of Personal Status had been derived from the Sharīʿa. Even the radical reforms in polygamy and talāq, which reconciled Muslim and non-Muslim mores, were based on Islamic jurisprudential reasoning. Yet there was no indication that for detailed points the judges could turn only to Islamic texts for guidance. The law of 27 September 1957 allowed them to refer to Rabbinical sources if need be. By analogy, judges could also turn to any non-Muslim sources for any non-Muslims

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231. Article 2: One will undertake the new suits which would have been under the jurisdiction of the Rabbinical court before the competent courts of common law. Yet the questions for which no secular legislated law is found remain subject to the rules which were effective before the Rabbinical court. (Law No. 40, 27 September 1957, J.O.R.T. of 27 September 1957).

and to texts of the Sharīʿa for Muslim litigants. No case yet has arisen specifically on the authority of the judges relying on ʾijtihād of the Code of Personal Status to consult non-Muslim texts when the litigant is non-Muslim. The case which one might use to indicate how such a hypothetical case might be solved arose ten years after the law of 27 September 1957 appeared. The supreme court (cassation, taʿqīb) ruled on a case known as the Hourya case, involving interpretation of the Code of Personal Status when it is silent on a given issue.[232] Article eighty-eight of the Code names specifically homicide as a cause for disinheritance. Two lower courts interpreted the article strictly by ruling that homicide was the only impediment to succession. The supreme court interpreted the article broadly by ruling that homicide is only an example of an impediment to succession. For other impediments the court relied on Islamic law. In the case one party involved was a Muslim. The other was originally of Muslim personal status. The opinion of the supreme court was criticised for being an obstacle to the secularisation of Tunisian law, if one defines secularisation as basing rules on what befits the welfare of litigants or befits public

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232. Judgment No. 3384, 31 Janurary 1966, civil chamber, Supreme Appellate Court (taʿqīb). Found in Al Qadāʾ waʾl tashrīʿ, No. 6, June 1967, p.37.

policy, not what sacred sources of law merely prescribe.[233] The Hourya case, however, was in line with the concession made in the law of 27 September 1957 to religious sources, when, in case of the silence of Tunisian legislation, the need for ʾijtihād arises.

Land law during 1956 to 1957 was less subject to change than the law of personal status. On 31 May 1956 the public lands in ʾahbās, that is, lands whose revenues were destined for charitable or public uses, were abolished. A year later the decree of 18 July 1957 abolished the category of private and mixed ʾahbās (lands whose revenues went to private uses and charitable uses). Lands in ʾahbās had covered about one-quarter of the total acreage of Tunisia.[234] The hubus had been an important source of political leverage and revenues for the State. In the centuries after the Hafsīds the Tunisian rulers created ʾahbās for powerful military families.[235] Given land for their use, the families

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233. Revue Tunisienne de Droit, 1968, page 116 et sq.

234. Jambu-Merlin, page 299.

235. Jean Poncet, La Colonisation et l'agriculture européene en Tunisie depuis 1881 (Paris: Monton, 1962), page 58.

were indebted to the Bāy; but the inalienable nature of the hubus prevented them from controlling the land completely and from exerting commercial pressures on other landholders favoured by the Bāy. Many lands also kept their status of melk (milk), that is, land whose ownership as well as whose usufruct could be alienated. Owners of melk (milk) founded ʾahbās often in favour of their own families as well as for charitable works. When the European powers imposed an international commission on Tunisia to bring order to the finances of the State after the fall of the Prime Minister Khaznadar, one of the first bureaux which Khair ad Dīn organised was the Jamʿīya al ʾahbās (decree of 19 March 1874). This government department had charge of administration of the public ʾahbās. By keeping regular account of the revenues due to charity, public health, teaching, and upkeep of religious buildings, the Government could keep its budgetary contribution to these domains at a minimum and assure that revenues exceeding the needs of the beneficiary institutions went into the budget of the Jamʿīya. The revenues of the public ʾahbās were also used to pay for the salaries of the judges of the Sharīʿa and maintenance of their courts. By the 1920's the importance of the Jamʿīya as a source of revenue was diminishing;

the Public Treasury had to contribute to the maintenance of the courts of the Sharīʿa.[236] By 1954 the Jamʿīya was known to be an impecunious institution.[237] Whether the public ʾahbās were abolished or not, the Public Treasury would have had to shoulder the costs of charitable and religious institutions. Upon abolition of public ʾahbās all lands and revenues administered by the Jamʿīya were transferred to the Public Domain where the State was free to sell or dispose of them as it liked.

While the abolition of the public ʾahbās could be justified solely for financial reasons, the private hubus came under attack for both economic and legal reasons. The private hubus, it was well known, had been used to exclude certain heirs from the inheritance. The public hubus had stayed within the pious charitable bounds for which the institution of hubus was originally intended. The private hubus thus had selfish ends contrary to the law of mīrāth, but the French government had never taken steps to curtail the creation of more private ʾahbās. The Code Foncier of 1885 recognised constitutions

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236. Ministry of Justice, Note for the Resident Minister on the Salaries of the Sharīʿa. See page 281 above.

237. Proposal from the President of the Tribunal Mixte on publicity of ʾahbās and census of ʾahbās, 25 May 1954. He proposed that the Jamʿīya replace negligent muqaddam to safeguard private property.
Ministry of Justice, Remarks of the Committee of Juridical Studies, June 1954.

of ʾahbās (article twenty-two) and allowed registration of all the obligations attached. The most notable obligation on a hubus was enzel (inzāl), perpetual rent. Enzel (inzāl) essentially meant that a person, especially a non-beneficiary, bought, as in a sale, rights to rent exclusively the hubus. This right was fully alienable or exchangeable, unlike the land itself. The price of the sale went to the beneficiaries of the hubus. The price was paid at set intervals like a rent, but no date could be fixed for the termination of the contract; nor was the value of the rent ever changed. That is why enzel (inzāl) was called perpetual rent. While a hubus was perpetually subject to an enzel (inzāl) once made, the person holding the right of enzel (inzāl) could change; for an enzelist could sell his rights of usufruct to another. Many of the early French colonisers acquired use of lands through contracts of enzel (inzāl).[238] Despite the French's willingness to allow hubus to continue, they were constantly aware of the abuses which the private hubus engendered and continuously passed legislation on the matter. In 1913 (J.O.T. of 3 May 1913) a Beylical decree made administrators of ʾahbās whose beneficiaries were minors responsible to a government bureau (Bureau of the Muqaddam, Section d'Etat).

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238. From a survey of the Minutes du Tribunal Mixte for the latter years of the nineteenth century.

Left unsupervised were the muqaddam of ʾahbās whose beneficiaries were of the age of majority. Cases brought before the courts of the Sharīʿa revealed complaints of beneficiaries against the corrupt muqaddam. Often the muqaddam himself had been named a beneficiary of the revenues of the hubus and looked more often after his own interests than the interests of his co-beneficiaries. Account books were known to belie the real state of matters; while the muqaddam marked in an expense for improvement and maintenance of the property, in actuality the sum went for the personal use of the muqaddam. Rather than abolish the problem, the Tunisians preferred improving the supervision of the muqaddam.[239]

Just after the abolition of the public ʾahbās in 1956, the Ministry of Justice pointed out other abuses which warranted the abolition of private ʾahbās too. The main inconveniences listed were: 1) lack of publicity for the constitution of the hubus: This meant that if there had been a sale of the property after the hubus had been formed, the sale was null and the purchaser in good faith could go back only to the seller who was often insolvent.

2) the abuses of the usufructuary: His interest was to draw within the

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239. Muhammad Tabet, "Report on the situation of the private hubus (olive groves and fruit orchards) adminis-

quickest time the maximum profit from the private hubus, even to the detriment of the property.

The remedy for these abuses in Tunisia had been enzel (inzāl). This meant that the beneficiaries, the ones most expected to take pride in the property no longer had the right of enjoyment of the hubus, only the right to the rents. Duty of maintenance of the property was no longer in the hands of the beneficiaries, but in the hands of the lessees. Variations on the types of leases multiplied. One type (kirdar) was revalued according to the value of the property as assessed every three years. Where a house was made into a hubus often the space in the house was sold and owned by one person while the walls of the house were for the use of the beneficiary. There remained dissatisfaction with these expedients, for the leases for rent attracted only amateurs. Persons who had capital wanted to buy, not to be tied with a perpetual rent. The decree of 22 January 1905 aimed at allowing the beneficiaries of the revenues of the hubus to free their lands of rents by paying one-third of the rent or an indemnity to the lessee. The drawback to the decree of 1905 was undoubtedly that in cases where beneficiaries had no capital to in-

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tered by muqaddam," Services economiques indigènes, on behalf of beneficiaries of a hubus of 19,000 olive trees, Tūnis, 1920 (in French).

vest in the land those who did still could not buy from the beneficiaries.[240]

Hence, when the decree of 18 July 1957 abolished the private hubus there were several kinds of rights which the government had to consider, specifically rights of beneficiaries versus rights of actual users of the land. The general rule was that the beneficiary would become pure owner of his share in the hubus, with rights of full disposal like melk (milk). The share of a beneficiary was made equivalent to what would have been his inheritance share in the property if it had never been made a hubus.[241] If a founder of the hubus were still alive at the time of the partition of the hubus, the property reverted to him, unless the beneficiaries whom he named were already in actual possession of the property.[242] Devolution of shares in the hubus by in-

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240. Ministry of Justice (Juridical Service), "Le Doctrine du habous du droit musulman" (The Doctrine of Hubus in Muslim Law and Legislation), n.d. (probably no earlier than September 1956).

241. Article 2: Every private hubus that is existing at the time of the present decree is dissolved and the estate reverts as property to the beneficiaries according to their quota in distribution (of inheritance)...
However, if the act of foundation provides for an order of devolution by generation the ownership of the estate will revert to the present beneficiaries and to the heirs of those of the same degree, deceased, according to their quota in the devolution (of inheritance), or according to the quota of their parent...

242. Article 2: ...If the founder is still alive the

heritance quotas was particularly important for female descendants. The decree abolishing ʾahbās allowed female descendants to share even where they had been excluded by the founder of the hubus. Yet this innovation was qualified by the provisions protecting the rights of occupants and tenants of the rural ʾahbās. The decree of 2 July 1935 on occupation of rural lands was still applicable. The decree of 1935 made the beneficiary of a hubus the one who detained and cultivated the land in a direct and continual manner for thirty-three years before 1926. Such rights of occupation were transmittable only to the male descendants of the deceased occupants. This provision cut short any problems of female descendants ceding to their husbands rights to invest in the lands.[243] The decree of 1957 only changed the number of years necessary for claiming status as an occupant: "There would be kept on the land the occupants who, belonging to a Tunisian family traditionally installed on a rural hubus, could justify

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estate of the trust will revert to him in full ownership, but if the beneficiaries had already taken over possession the estate reverts to the beneficiaries in full ownership...

243. Letter from Director of Judiciary Services, Juridical Counselor of the Government, to the Director of the Interior, Tūnis, 11 July 1928.

that they detained and cultivated a parcel of this land in a direct and continuous manner, either by themselves or their ascendants, since 1 January 1947" (article nineteen). Many such occupants included tenants leasing land by a contract of kirdar (variable rent). All contracts of kirdar were to remain valid for at least ten years. Enzel (inzāl) was ended (article twenty).[244] Yet the commissions which were set up for supervising the abolition of ʾahbās were to enforce redemption of rents so that the land returned to beneficiaries, a practise which had been only voluntary before 18 July 1957.[245] The French who leased land by enzel (inzāl) were to be removed and the land returned to Tunisians. For a founder of a hubus could be only Tunisian and his descendants -- the persons who could inherit the private hubus converted to melk (milk) -- could be only Tunisians or naturalised Frenchmen of Tunisian origin.[246]

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244. Article 20: The procedures for subjecting hubus to enzel (inzāl), that are effective at the time of the present decree, will be pursued in conformity with the previous legislation until they come to expiration.

245. Ministry of Justice, Committee of Juridical Studies, "Explanation of the Remodeling of the Regulation of ʾahbās." (In French)

246. Judgment No. 3384, 31 January 1966, Supreme Court of Appeal (taʿqīb).
Letter from Director of Tunisian Justice to the Resident General, No. J-766-I, stamped 18 April 1933, on naturalised French Muslims.
See problems raised in Hourya case, pp. 482-486 of Chapter IV post (footnote 36).

Hence, among Tunisians themselves the reform was not to be too upsetting. It aimed to protect the occupation rights of peasants who would have been a source of trouble if the conversion of the ʾaḥbās to melk (milk) had not protected them against eviction. The rights of women in the property became important, but subject to the priorities of long-time occupants, especially in rural areas.

The next most important land legislation was the Code of Property Rights (majallat al ḥuqūq al ʿaīnīyat) promulgated by law number 65-2 of 12 February 1965. In relation to previous laws, the Code was a consolidation of all previous land laws. The Code Foncier of 1885 is no longer applicable in Tunisia, but the procedure for the Land Court (Tribunal Immobilier, or al maḥkama al ʿaqārīa, no longer the Tribunal Mixte) remained basically the same. The decree of 3 August 1956 (modifying the Code of Procedure for secular courts) was abrogated, thus ending the application of the rules of the Sharīʿa for lands as defined in the texts of the jurists to unregistered lands. One code at last came to prevail for registered and unregistered lands.

Despite the abrogation of these previous texts, they also served as sources of principles for the Code of Property Rights. The authors of the Code borrowed from

the Majallat al 'Ahkām as Shar'iyya (Code of the Sharī'a), Part II, on land matters, for prescription and division of lands, as opposed to co-ownership of lands. The Majallat as Sharī'a was the code originally drafted by the commission headed by Ja'īt, the Minister of Justice and the Mālikī Bach Muftī, in 1949 (see page 309 et sq.). The Majallat had originally covered land rights (shuf'a; prescription; muqāsama; co-ownership, called shuyū'; land claims, or 'istihqāq, because of sale or the contract of muqārasa; gratuitous transferals of property through will and gift; and waqf). Since 1959 the law of wills and gift had been incorporated in the Code of Personal Status. The waqf (hubus) had been abolished. Only land rights in general and land claims remained to be incorporated in the national law. The principles taken from the Sharī'a were mostly those not elaborated in the Code of Obligations and Contracts of 15 December 1906 and the Code Foncier of 1 July 1885. The Code of Obligations and Contracts was a monument to an attempt to reconcile the Sharī'a and French law on all types of obligations and contracts, whether involving moveables or immoveables. It was applied at first only by Tunisian secular courts, though the judges of the Sharī'a were encouraged to make sure that Muslim notaries

were familiar with the provisions of the Code.[247] Many of the provisions of the Code of Obligations and Contracts are still in force today. The Code Foncier and several foreign laws (Swiss, Egyptian, Syrian, French) were used for classifying most of the land rights which had been recognised since 1885 for registered property: usufruct, usage, habitation, servitude, emphytéose (emphyteusis, long term pledge of enjoyment of land to pay a debt), sureties, hypothecation (mortgage). Like the Code Foncier, the Code of Property Rights included provisions for the procedure for voluntary registration of lands by decisions of the Land Court.

The innovations in the Code of Property Rights were not as striking as in previous reforms. The Code carried farther certain trends already started by the law abolishing the private ʾahbās. The commissions set up for transforming the lands of ʾahbās into melk (milk) and distributing the various parcels to their rightful owners were responsible for accepting or rejecting any agreement made among the former beneficiaries on whether to subject the land to qasama, or to sell the

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247. Draft of the Prime Minister's circular to the qudāh on the Code of Obligations and Contracts at the time of promulgation in 1906.

land as a whole unit to a third party or to one of the beneficiaries, as long as the rights of long-time tenants were not prejudiced (article five).[248] In the event that beneficiaries could not agree, the regional commission could order total or partial division of the land, leaving some in a state of co-ownership (shuyūʿ), or could order the sale of the property in part or in total by public auction (article eight).[249]

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248. Article 5: Within a delay of six months from the day of the appearance of the present decree the beneficiaries will be able, without prejudice to the rights of the third party holders of real property rights over the estate, to proceed by friendly agreement to the division of the property or to sell it for the benefit of themselves or of a third party.

The agreement of the beneficiaries must be the subject of a notarised document which will be submitted, according to the conditions of article ten, for approval from the Regional Commission for the Liquidation of ʾAhbās, provided for in the following articles. (Decree abolishing private and mixed ʾahbās, 18 July 1957).

249. Article 8: The Regional Commission for Liquidation of the ʾAhbās will hear all litigations born out of the application of the present decree.

The Commission can, after having tried to reconcile the parties and undertaken the necessary investigations, take the following decision:

1) to approve the agreement among the parties in the conditions provided for in article 5;

2) order total or partial division of the estate of the hubus;

3) order public auction of all or part of the said estate;

4) concede by title of kirdar...to the occupants of the rural estates, the object of article 19, the surface of the lands they occupy, within the conditions of the present decree...

In cases involving mixed ʾaḥbās, particularly lands given in ḥubus for the benefit of religious shrines and descendants of persons caring for the shrine (zaouia, see pages 24-25 of Chapter I above), the commission had to consider the shares of the beneficiaries after having assigned to the shrine or institution the part necessary for its economic viability (article thirteen).[250] It was hoped that the decisions of the commission in whatever case presented itself would stimulate the economy by putting many lands back into commerce. However, Tunisia still found itself saddled with many properties held in co-ownership. Co-ownership or co-tenancy had derived from voluntary agreement or had been forcibly imposed when a succession was opened.[251] According to the Islamic law applicable by the decree of 3 August 1956 (modifying the Code of Procedure), the co-ownership could not be broken, except by unanimous agreement. A partner could never take his share

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250. Article 13: ...According to the status which will be given to the institution, the Commission will determine in the estate of the trust:
1) the part necessary for the maintenance and functioning of the institution;
2) the part that must revert to the beneficiaries...

251. Chief of the Juridical Services, Ministry of Justice, "Explanation of the Code of Property Rights" (in French).

out of co-ownership and dispose of it as he liked. He could sell his share to a third party; but then the third party had to enter co-ownership.[252] This rule had been applicable only to non-registered lands during the years of the Protectorate. Registered lands had been subject to French law (article eight hundred fifteen of the Code Civil), which allowed a co-partner to demand an end to the co-ownership.[253] Article seventy-one of the Code of Property Rights of Tunisia essentially adopts French law: "No one can be constrained to remain in co-ownership (shuyūʿ); each of the co-owners has the right to ask for division (qasama) and any condition which conflicts with this is considered

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252. "In Muslim law, the co-owner is not forced to remain in co-ownership, but neither can he demand division; he is free only to sell his part in the co-property. Article 815 (of the French Civil Code) being a rule of propertied status is not applicable in Tunisia to non-registered immoveables held in co-ownership by Muslims. But this article would be applicable if the immoveable were registered (Judgment of civil court, Tunis, 29 May 1896, Journal Tunisien (J.T.) 96, 319; Susa, 18 June 1897, J.T. 444)." (From Code Foncier, Annotated, t. I, paragraph 5 from top, page 6)

253. Article 815 (Code Civil of France): No one can be forced to remain in co-ownership and division can always be invoked, regardless of any prohibition and agreements to the contrary.

One can, however, agree to suspend division during a limited period: this agreement cannot be obligatory beyond five years; but it can be renewed.

ineffective. However, the co-partners have the right to agree in writing not to divide the property for a defined period of time, and the court has the right to decide on the nullification of the agreement and can order division (qasama) when valid reason is found. And the period of time agreed upon cannot surpass five years and if it does the period of time will be cut to five years, and that period cannot be renewed at the time of its expiration except by another written agreement." Article eight hundred fifteen of the Code Civil reads: "No one can be constrained to remain in co-ownership, and division can always be invoked, regardless of prohibitions and agreements to the contrary. One can, however, agree to suspend division during a limited time: this agreement cannot be obligatory beyond five years; but it can be renewed." In regard to heirs who want to end the state of enforced shuyū', article one hundred thirty-one of the Code of Property Rights in Tunisia permits division of inheritance only by value (al qasama bi'l qīma), not by kind (lā qasama riqāb). The decree of 18 July 1957 abolishing private and mixed 'aḥbās had allowed division (qasama) under traditional law or by sale of the property. Articles one hundred thirty-one to one hundred forty-one of the Code of Property Rights allow only sale of the

whole property to one person and distribution of the proceeds to the heirs, or allotment of units that form an economically viable whole (such as a factory) to one heir and compensation to the other heirs. The purpose of the reform was to avoid fragmentation of land and to encourage consolidation of land into cooperatives.[254] However, the abolishing of division by

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[254] Ministry of Justice, "Explanation of the Code of Property Rights" (in French).

A judgment of 1964 illustrates the difference between the traditional law of qasama and the changes introduced by the majallat al huqūq al ʿainiyat (Civil Case No. 2753 (madani) of 11.4.1964 in the Court of First Instance, Tūnis). The muwarrith of the parties had left several registered properties to his heirs. The plaintiffs (the widow and sons of the muwarrith) claimed to be prejudiced by the state of co-ownership and wanted the defendants (the daughters and one son-in-law of the muwarrith) to agree to qasama or liquidation by sale. The defendants so agreed. The report of the expert conducting investigations on the properties observed that qasama in kind (ʿainan) was not possible because of the minute size of the shares, but that it was possible that the properties be divided so that the plaintiffs got some and the defendants got some, but the defendants would have to pay eighty-two dinars to compensate the plaintiffs for getting more of the actual property than they were due. The Court of First Instance observed that the Islamic fiqh would not allow qasama in kind in this case because it was not possible to divide the property on the basis of the least of the shares; nor could the Islamic fiqh apply to allow the defendants to compensate the plaintiffs in a case where all the property was to be divided because the parties did not all agree to this method. The only action which the court could adopt was liquidation of the entire property by sale, according to article 1355 of the Code of Obligations and Contracts (this article is now abrogated by the Code of Property Rights).

kind raises many questions of interpretation, which will be discussed in subsequent chapters. One such problem is the validity of a will that distributes an estate in kind to the heirs, the value of each item being equal to the fractional shares of the ʾirth. Whether the reform has in practise upset traditional patters since the drive to cooperatives has died remains to be seen.

On the matter of registration oflands, the Code of Property Rights kept registration voluntary (article three hundred seventeen).[255] The decisions of the Land Court also remain definitive, no appeal being allowed from them (article three hundred thirty-two).[256] The decree abolishing the private and mixed ʾahbās and creating commissions to decide who received what was a boost, no doubt, to registration. The decision of the regional commission for the liquidation of a hubus constitutes a title to the parcel in question (article eight, decree of 18 July 1957). The methods of cadastral surveying used by the commission for determining

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255. Article 317: Registration is by choice.

256. Article 332: The decisions of the Land Court are not subject to challenge by opposition, appeal (ʾistiʾnāf), or any other recourse.

boundaries are the same as the Land Court uses.[257] There is no question of the validity of the decision of the commission (unless appealed to the supreme court),[258] as compared to the ancient Arabic titles presented to justify a petition for registration. Hence, if one could present a decision of the commission of ʾahbās one could facilitate registration.

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257. Article 7: The Regional Commission for Liquidation of ʾAhbās, created in each Governorship, includes:
1) a magistrate...
2) a representative of the Governor
3) an official appointed by the Ministry of Finances
4) an engineer from the Agricultural Services and an agent of the Service for Land Affairs, appointed by the Ministry of Agriculture.
The Commission will be assisted by a topographer or any expert of its choice... (Decree of 18 July 1957)

258. Article 10: ...The Commission passes judgment in last resort in the presence of the beneficiaries and eventually in the presence of third party holders of real property rights, or occupants, or of their respective representatives, or those duly summoned.

The decision rendered is brought to the notice of the parties who have not appeared and who were not represented. A copy of the judgment can be delivered to any interested party. The Secretary of the Commission is responsible for notification.

The occupants, the beneficiaries, third party holders of real property rights and the Public Minister can, within a delay of twenty days since the pronouncement of the decision or the notification, whatever the case, make an appeal against the decision of the Commission for violation of the law.

The Supreme Court of Appeal rules on the appeal. If the decision is reversed, the affair is sent back to the Regional Commission composed of other members.

Conclusion

One can say that the legal legacy left by the French to the Tunisians and the reforms which the newly independent Tunisians made were often motivated by political exigencies. The threats of the Europeans in the nineteenth century forced the Bāyāt to change the Islamic rule that no foreigner could own property in Tunisia. The negotiations for independence in the twentieth century pressed on Tunisia reforms in the procedure of her judiciary and in the substantive law of public order (such as marriage and divorce). After independence economic evolution became the dominant force in reform. Article one of the Code of Property Rights of 1965 stresses the need for the law to look at life from a commerical and economic point of view: "Properties are all things which are not left out of commerical transactions because of their nature or because of a provision of the law, and which can be the object of a right (haqq) having a monetary value." The French Civil Code (Code Civil) only begins its second book on properties by classification: "All properties are moveables or immoveables" (article five hundred sixteen). If reforms in the law continue in this vein, reforms will be most likely less frequent for lack of consensus (see pages 543 & 545 of the Annotated Bibliography of Chapter IV)

and based on less concise jurisprudence.

In the following chapters we shall examine one aspect of the reforms. The purpose is to see how Tunisian judges have interpreted the codes, that is, to what extent they do and can justify reliance on the Sharī'a in their search (ʾijtihād) for correct application of the codified principles to the factual details of cases.

Annotated Bibliography

Archive of Wizāra al ʿAdl

The Ministry of Justice has a comprehensive collection of all official correspondence written by officials in the Ministry and written to officials of the Ministry. Although the Ministry was established only in 1921, some documents relate to events in the late nineteenth century. The archive also contains a daftar of complaints from private individuals to the government. Many of the original drafts of legislation are found in the Ministry, though in recent years the Conseiller d'Etat in the Prime Minister's Office in the Kasbah has often supplemented the work of the Ministry of Justice.

The staff in the archive have not yet completed a system for a comprehensive classification of the documents.

CHAPTER III

PROMULGATION OF THE LAW OF WILLS

Introduction

This section is devoted to a specific part of the Tunisian law, the law of wills. The purpose of having one's attention focused on one aspect of the law is to see how difficult it can be in an Islamic legal system to develop a coherent jurisprudence which would support a thorough reform throughout Islamic law.

To understand such difficulties one must look to the history that forged the law of wills. Chapter II already described the introduction of reforms in marriage and divorce appearing in the Code of Personal Status as motivated by political concerns (namely independence from France) but as implemented and expressed in a purely Islamic manner. The law of wills was not part of the original Code of Personal Status when it was promulgated by a decree of 13 August 1956. It was not until well after the fall of the Bāy that the law of wills was added to the Code of Personal Status by law 59-77 of 19 June 1959 (J.O.R.T. no.4 of 1959). Law 59-77 reproduced the traditional principles of the Islamic law of wills.

One cannot quarrel with tradition simply because it is tradition; for coherency of the law may require that certain parts of the law remain unchanged. But one can gather from the history of the provisions on wills that the drafters of the law borrowed from various sources of law without having a coherent philosophy or political pressures to guide their choices. Consistency within a legal system becomes particularly significant for the domain of testamentary rights because the exercise of such rights is influenced by the land laws. When law 59-77 was enacted, the land laws were basically traditional. The only reforms had been those made in the law of waqf, and indeed the provisions of one article, article 182[1], were written with the reforms in waqf in mind. Six years later the Code of Property Rights (majallat al ḥuqūq al ʿaīnīyat) was enacted. The Tunisian Ministry of Justice, as Chapter II has shown (pages 359 to 362 , supra), has made it clear in its explanation of the Code that the Code was designed to reform the Islamic law. It was clear also that the

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1. Article 182, Code of Personal Status: The waṣīyya of usufruct (manāfiʿa) is valid only for one generation and upon their dying out the waṣīyya will have the corpus (ʿaīn) returned to the estate (tarika) of the testator.

new land law was based on an economic philosophy. Meanwhile, the law of wills remained the same, based on a traditional philosophy of jurisprudence (namely, reliance on the ʿahādīth and isolated opinion). If one accepts the Code of Property Rights as a basic core around which other related laws should be built, then one wonders whether certain provisions of the law of wills cease to have a raison d'être. For example, the provisions for the obligatory waṣīyya for grandchildren originated out of concern over orphaned grandchildren. For it was highly unlikely that they would ever have a share in the fruits of the labour of their predeceased parent since they would most likely be excluded from the estate of their grandfather by persons of higher degree or another class. Such a plight was undoubtedly a by-product of the system of co-ownership (milk shāʾiʿ) which had developed out of a need to counteract the fragmentation which the Islamic law of mīrāth induces.[2] Co-ownership is more

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2. Ustaad Tayyib Bessīs, Deputy President of the Court of Land Matters (Tribunal Immobilier, mahkama al ʿaqārīya), Tūnis. "Al Waṣiyya al wājiba fīʾl tashrīʿ at tūnisī," Al Qadāʾ waʾl tashrīʿ, No. 10, 1965, pages 9-10. My argument derives more from an interest in the origin of the problem than does the argument of Sayyed Bessīs. He defends the obligatory waṣīyya as part of general family responsibility. Since the father of the orphaned grandchild contributed most likely to the making of the estate of the grandfather, then the children should have the benefit of their father's work.

appropriate for an economy based on immoveables while fragmentation best survives in an economy based on moveables like sheep. Given the prevalence of co-ownership in Tunisia, when a parent died before his own parents he most likely did not have any property of his own because all family lands were owned by his father and uncles. He would have expected to succeed to the family property in joint ownership with his brothers and cousins. He would not have had an individual holding to pass on to his children until his own father died; so alas for his children if he predeceased his own father. The majallat al huqūq al ʿaīnīyat attempts to mitigate the effects of co-ownership, since it favours individual ownership and partition of land over co-ownership. Encouragement of such individual ownership could reasonably be expected to lead to either of the following situations: a father would assign portions during his lifetime by gift or sale to his adult sons so that by the time a married adult son predeceased his father, the grandchildren would have received a share in the dead son's land; or else, a father would prefer to keep his own individual holdings and encourage his sons not to depend on the family heritage for their fortunes, but rather to depend on fortunes which they would build up individually.

Should a parent then die before his own father, the parent's independent fortune would go in part to his own sons (grandsons) so that failure of the grandchildren to obtain a share in the grandfather's estate would not pose a problem. Then the need for obligatory wasīyya would become less.

Another difference in the aims of the land law and the aims of the law of wills arises in the case of wills made to an heir. The Code of Property Rights gives preference to division of an estate by value rather than by item (article one hundred thirty-one). The Code of Personal Status forbids wills to heirs in principle (article one hundred seventy-nine). The only type of will that does not fall within this prohibition is a will specifying which items of an estate shall go to which heirs, as long as the value of the item does not exceed the fractional value of the intestate share due to the heir (article one hundred eighty).[3] If the Code of Property Rights is meant to cover all estates, whether testate or intestate, then the land law might be interpreted as rendering the will of "specification" useless if the court disagrees with the apportionment of the

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3. Code of Personal Status, article 180: The testator's designating during his lifetime for all of his heirs or some of them specific items from his property which are equal to their intestate shares is permitted and is upheld upon his death...

items. If the court agrees that the testator has wisely apportioned the property in the economic interests of the property, the will stands. Article one hundred forty[4] of the majallat al huqūq al ʿaīnīyat allows the court to interfere in estate of landed property. Article one hundred forty-one of the same code allows interference of the court in moveable property if it be of the nature of papers of the family or objects of affection.

Reforms in the law of wills have been proposed. None have been implemented. Reluctance to implement them probably reflects both the social and jurisprudential forces which are responsible for the obstacles that stand in the way of a coherent jurisprudence that could justify thorough reforms in Islamic law. The law of wills probably reflects what still exists in rural Tunisia, namely an economy based on immoveables held in co-ownership; whereas the Code of Property Rights reflects what the government would like to see for the future. The case law will reveal how the courts (regular and the court of land registration) bridge the gap.

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4. Article 140 of the Code of Property Rights: If there be among the properties of the estate an agricultural or industrial or commercial productive unit which constitues an economic whole, one is allowed to designate it to one of the heirs according to what is most beneficial...

History of drafting of the law of wills: the law of property or law of personal status?

When the Code of Personal Status appeared in 1956, surprisingly, the law of wills was absent. It was particularly surprising since the decree of 12 July 1956 on the personal status of non-Muslims and non-Hebrew Tunisians had included in its definition of personal status succession, wills and dispositions connected with death.[5] The 1956 Code of Personal Status covered inheritance (mīrāth) but not wills (wasīyya). The lacuna has usually been attributed to the haste with which the Code of Personal Status was written.[6] It would appear, however, from a study of the

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5. Decree of 12 July 1956, article 2: Personal Status includes disputes relating to status and to capacity of persons, to marriage, to matrimonial systems, to reciprocal rights and duties of spouses, to divorce, to repudiation, to separation, to paternity, to recognition and to disavowel of paternity, to relations between ascendants and descendants and to the duty of maintenance between relatives, to legitimacy, to adoption, to guardianship, to custody, to minority, to majority, to gifts, to succession, to testament, and other dispositions due to death, to absence, and to presumption of death.

6. Muḥammad Snoussi, Conseiller d'Etat, Office du Premier Ministre.

R. Jambu-Merlin, Le Droit privé en Tunisie (Paris Librairie Général de droit et de jurisprudence, R. Pichon et R. Dran, 1960), page 120, pages 182, 263, 266.

Jules Roussier, Professeur à la Faculté de Droit d'Alger, chargé d'enseignment du Droit musulman, "Le Code Tunisien du Statut Personnel", Revue Juridique et politique de l'Union française (1957) volume 11, pages 213-230, at p. 215.

The absence in the Code of Personal Status of provisions for wills was obvious and commented upon by several authors, but no explanation given.

documents which were available to the persons drafting the Code of Personal Status that the absence of provisions on wills was not due to oversight. It was rather due to indecision over how far the new codes should reflect the Code of the Sharī'a which had been drafted since the late 1940's by the commission headed by 'Abdulazīz Ja'īṭ (Minister of Justice and Mālikī Muftī). The Code of the Sharī'a had been divided into two main books: one on personal law and one on property law. Intestate inheritance (mīrāth) had been a chapter unto itself. The law of wills and the law of gifts during mortal illness were included in the book on property law.[7] Apparently the government's judicial counselors thought it best to retain the basic distinction between personal law and property law and to publish each of the two books separately, after much re-editing, of course. After the promulgation of the first book on personal law (marriage and divorce and guardianship) and the provisions on intestate inheritance in the Code of Personal Status, the Ministry of Justice turned its attention to re-editing the second book of the

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7. Later the law of gifts (hiba) was enacted as part of the Code of Personal Status by Law 64-17 of 28 May 1964, J.O.R.T. No. 27 of 1964. Article 206 of the Code of Personal Status provides that gifts in death sickness will be governed by the rules of al wasīyya .

Code of the Sharī'a on real status (ʾahwāl al ʿaqārīya). What the Ministry had to deal with was a book comprising chapters on claims (ʾistiḥqāq), shūfaʾ, partition and distribution (qasama) of property held in co-ownership, and gratuitous dispositions (including testamentary dispositions).[8]

This second book of the draft of the Code of the Sharī'a was considerably re-edited and renamed the majallat al ʾistiḥāqīyat. One of the early drafts of the majallat contained a section on succession and settlement of estates (al mīrāth wa tasfīya al tarika). Its provisions were intended for testamentary disposition of landed properties, chattels, and usufruct. The appearance of testamentary dispositions in a code of property laws was not unusual. There was the French example to follow. For the laws of testamentary dispositions in the French Civil Code (Code Civil) are included in the third book on the different ways by which one can acquire property.[9] As part of the law of property in the majallat al ʾistiḥāqīyat,

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8. Memo from ʾAbdulazīz Jaʿīṭ to the Bāy, 1 Feb. 1955.

9. Dalloz, Code Civil Annoté, 1970-1971 edition. Beginning article 711: Ownership of goods is acquired and is transmitted by succession, by gift inter vivos or testamentary gift, and by obligations.

the law of wills was regarded as a matter of a gratuitous disposition when treated as a transfer of ownership (article one hundred twenty-four).[10] When treated as an obligation on the estate of the testator the will was regarded as a contract which would reach perfection only upon the death of the testator:

(article one hundred twenty-five of the draft): The mūṣī must have capacity to contract to form a will as well as to revoke unilaterally his offer.

(article one hundred thirty-nine of draft): When the consent of the heirs of the mūṣī is needed to validate certain wills, these heirs must have the capacity to contract.

These articles differed from both the Mālikī law in the Code of the Sharī'a (article eleven hundred fifty) and the Ḥanafī law (article eleven hundred forty-five), which provide that such heirs of the mūṣī must have the capacity to make gifts.[11] The Mālikī and Ḥanafī laws probably were

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10. Draft of the majallat al 'istihāqīya, article 124: Waṣīyya is taking possession of what exists after death by way of gift [gratuitous disposition] whether it be of corpus or of usufruct.

11. Code of the Sharī'a, article 1150 (Mālikī): If the heirs permitted after the death of the mūṣī the waṣīyya to an heir or a waṣīyya exceeding the one-third, that is deemed from the start a gift from them. It is not execution of the waṣīyya...

article 1145 (Ḥanafī): Waṣīyya to an heir is not allowed, nor is waṣīyya exceeding the one-third to a non-heir unless the heirs consent to it in the two cases after the death of the mūṣī and they have capacity of gift (tabarru').

not followed because provisions for capacity to make gifts had not been enacted whereas provisions for capacity to make contracts had long been codified in the Code of Contracts and Obligations (decree of 30 June 1907, J.O.T. of 6 July 1907, page 557).[12] Hence, it was not surprising that general principles in the Code of Contracts and Obligations were intended to be part of the law of wills. Article one hundred twenty-eight of the draft of the majallat al ʾistihāqīya corresponded to article sixty-two of the Code of Contracts and Obligations, that is the object of a will (or object of an obligation) had to be something which was a valid object of commerce. Article one hundred twenty-nine of the draft agreed with article four hundred forty-one of the Code of Obligations and Contracts. Article four hundred forty-one requires written evidence as proof of the existence of an obligation. Article one hundred twenty-nine of the draft of the majallat recognized only written documents as proof of wills -- notarised or signed and dated by the testator -- as valid. Even revocation could not be implied (e.g. converting the object of the will). Revocation had to

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12. Code of Contracts and Obligations: article 1 reads: Obligations derive from agreements and other declarations of will, quasi-contracts, responsibility for damages and quasi-responsibility.

be in writing.[13]

Despite the fact that the provisions on wills were part of the property code, there were in the draft of the majallat al 'istihāqiyat only three provisions relating directly to wills disposing of landed property. By virtue of article one hundred twenty-six the traditional Islamic rule that the law of wills is not limited to Muslims (article eleven hundred twenty-six, Mālikī and Ḥanafī of the Code of the Sharī'a)[14] was to be qualified: "The foreigner could not have unfettered right to enjoy landed property by way of will: Intent on the part of the testator had to be subject to the limits of any Tunisian law issued

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13. Draft of the majallat al 'istihāqīya, article 140: The mūsī has the right to revoke the wāsiyya either explicitly or by implication and explicit revocation is by writing.

Article 177 of the Code of Personal Status: The will can be revoked but such is proved only by provisions of article 176 (creation of will only by written document).

14. Sharī'a Code, article 1126 (Mālikī): A waṣīyya from the free man is valid in the matter of the object being to pass ownership of property conclusively. Rushd is not required nor majority nor Islam.

(Ḥanafī): Conditions for validity of waṣīyya are existence of the mūṣī as a free adult, sane, free in will, and having capacity to make gift (gratuitous disposition, tabarru'); and that the legatee be alive in fact or by implication; and that the bequest be capable or being accepted as a thing to be possessed after the death of the mūṣī. Islam is no condition; for the waṣīyya of a Muslim to a dhimmī is valid and vice versa; a bequest to the apostate is not valid.

on the subject." This disposition was probably intended to incorporate into the law of wills the nationalist feelings which were running high against foreigners owning land (page 354, supra, of Chapter II). Article one hundred forty-two of the draft allowed a will of landed property to stand in regard to the surface of the land if the testator eliminated the plants and buildings on the land when the will was orignially formed.[15]

When the Tunisian government decided to remove testamentary dispositions from the draft of the majallat al 'istiḥāqīya and to place them in the Code of Personal Status, the number of articles dealing with the subject remained the same. What changed was the emphasis on the will as a gratuitous disposition taking effect upon the death of the testator and giving expression to the testator's intent. This is reflected in the treatment of the object of the will. The draft of the majallat al 'istiḥāqīyat had defined a legal object of a will as anything that could be used in commerce. The draft for the Code of Personal Status merely required that the object, if it

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15. Draft of the majallat al 'istiḥāqīyat, article 142: If the mūṣī undertakes an increase or diminishing of the value of the thing bequeathed without affecting the obvious character of nature of the thing, the waṣīyya is not null.

If the thing bequeathed were landed property and the mūṣī eliminated the plants or buildings on top of it, the waṣīyya is effected only in relation to the surface area...

were especially designated, had to exist at the time the will was being made (article one hundred ninety-eight of the draft, presently article one hundred eighty-six of the Code of Personal Status).[16]

The second draft for the law of wills for the Code of Personal Status also placed more emphasis on the will as an instrument of succession. This is reflected in three of the articles:

1) Article two hundred one of the draft (presently article one hundred eighty-eight of the Code of Personal Status) added the right of the testator to surpass the usual limit of the one-third and to dispose of all his possessions by will, provided that he had no heirs upon his death and notwithstanding the rights of the Bait al Māl under Mālikī law.[17]

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16. Code of Personal Status, article 186: The object of the will must be existing at the time (of the making) of the will in the property of the testator when the object is specifically designated by its essence.

17. Sharī'a Code, article 1148 (Ḥanafī): If one bequeathed all of one's wealth and one did not have any heir the will is effected and there is no need for permission from the Bait al māl. Footnote: Mālikī jurists generally disagree. Only Ibn 'Arafa accepted the Ḥanafī view.
This article agrees with the Code of Personal Status, article 188.
Sharī'a Code, article 1142 (Mālikī): A will to a dead person whom the mūṣī knew to be dead at the time he made the will is valid and the will is effected to pay for his debts if there be any or effected to his heirs. If he had no debts; and if he had no heirs, the will lapses and is not given to the Bait al Māl. (This is to say that there is an exception to the rule that the Bait al Māl is entitled to the vacant estate of a deceased person. It is not entitled to that part of the vacant estate which came from a bequest made to one known dead at the time the bequest was made.)

2) Article two hundred five (presently article one hundred ninety-one of the Code of Personal Status) introduced the wasīyya al wājibīya, which makes the succession of grandchildren to the estate of their deceased grandparent obligatory.[18] The grandchildren are to receive the share which their predeceased father or mother would have received had he or she been alive at the time of the death of the grandparent. The concept of substituting grandchildren for their predeceased parents had existed in Tunisian law in the form of the Mālikī law of "inzāl" (inzalahu manzilata fulān), also called "tanzīl".[19] The main difference between the obligatory wasīyya and inzāl is that the former is an obligatory charge on the estate and the latter depended on the discretion of the testator.

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18. Draft of the provisions of wills for the Code of Personal Status, article 205: There is instituted an obligatory bequest in favour of the grandchildren of either sex whose father or mother died before or at the same time as their ancestor. The bequest is equal to the inheritance share which their father or mother would have had to receive in the estate of the said grandfather and it cannot in any case surpass the one-third...

An Arabic version read: This [obligatory] wasīyya will be effected for the first generation of agnatic grandchildren and it will be divided on the basis of two shares to the male.

19. Sharī'a Code, article 1183 (Mālikī): If a person substitutes the children for his dead son, their father, that is a wasīyya which comes out of the one-third, but

is divided among the substitutes on the basis of two shares to the male for every female. Footnote: Istūlī, p. 510.

article 1163 (Mālikī): There is permitted a wasīyya to the son of one's heir or to one of one's near relatives and the wasīyya is made by someone who suspects that the bequest will be returned to the heir. So if the heir pleas that that was an imposition and transfer by will the heir has the right to have the legatee swear. If he does not swear he is not given the bequest. If the testimony established that generally the testator intended to favour some heirs over others the wasīyya is null and the bequest becomes part of the intestate inheritance. Testimony is by open hearing or by a condition set by the testator or by the legatee deeming it so. Footnote: Tasūlī, p. 513.

M. Hachemi Karoui of the Centre d'Etude et de Recherche economiques et scientifiques (formerly CERES, now IPSEJES, University of Tūnis) brought my attention to the practise of "inzāl" in Southern Tunisia where he was undertaking field research.

3) As for the rights of heirs, article one hundred eighty-nine (presently article one hundred eighty-two of the Code of Personal Status) brought the rules of will of usufruct more in line with the rules for will of corpus. Under Hanafī law in the Code of the Sharīʿa[20] the heirs had no rights in the usufruct of a specified thing if the

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[20] Code of the Sharīʿa, article 1187 (Hanafī): If the legatee was given a specified usufruct, then the legatee dies in the lifetime of the testator, the wasīyya is null; and if he dies after the testator died the object of the usufruct returns to the heirs of the testator and not to the heirs of the legatee.

(Mālikī): If the legatee was given usufruct of something for a specified time, and the legatee takes it then dies the heirs of the legatee inherit it if there remains any of the specified time left.

article 1188 (Hanafī): If the wasīyya of usufruct was made to apply without any limit of time or if it were made for forever, the legatee has the right to avail himself of it for his lifetime. Then after his death it reverts to the heirs of the testator. If the wasīyya was made for a specified time the legatee has the right to avail himself of it for that time. If the testator said that he bequeathes to the legatee usufruct of something for some years without further explanation, the wasīyya is effected for three years, and no more.

legatee died regardless of whether the will specified a definite time for the duration of the usufruct or provided that use could be forever. Yet in regard to a will of corpus, the heirs of the legatee under Ḥanafī law[21] could accept the bequest in place of the legatee if the legatee died after the death of the testator but before having accepted the bequest. Article one hundred forty-seven of the draft of the majallat al-ʾistiḥāqīya had followed the Ḥanafī law on the will of usufruct. Article two hundred two of the draft of the Code of Personal Status did the same. Yet article one hundred eighty-two, which

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21. Code of the Sharīʿa, article 1137 (Ḥanafī): If the legatee dies before the death of the testator and before having accepted the wasīyya or rejected it, his death presumes his having accepted the wasīyya and the bequest enters in the property of his heirs.

(Mālikī): If the legatee rejected the wasīyya before the death of the testator, he then has the right to accept it after the death of the testator and that is obligatory once given. If the legatee so designating dies after the death of the testator and before having accepted the wasīyya his heirs stand in his place. If some of them accept and some others reject, then the portions which were not accepted return to the intestate estate. Footnote: Tasūlī, p.512.

appears presently in the Code of Personal Status, allows one generation of persons to make use of a bequest of usufruct of a defined object. Undoubtedly the aims of article one hundred forty-seven of the majallat al 'istihāqīya and article two hundred two of the draft of the Code of Personal Status were the same, namely, to constrain persons from using wills to create what would in effect amount to a hubus, a kind of disposition which had been prohibited in 1957 (Decree of 18 July). The final version of the law in article one hundred eighty-two of the Code of Personal Status has the same intent, but when read with articles one hundred eighty-nine and one hundred ninety-four of the same Code,[22] it also gives the first generation of heirs of the deceased legatee a chance to benefit from a will of usufruct as the immediate heirs of a deceased legatee would from a will of corpus.[23]

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22. Code of Personal Status, article 182: The waṣīyya of usufruct is valid only for one generation and upon their dying out the waṣīyya will have the corpus returned to the estate of the testator.

Article 189: The waṣīyya giving usufruct of a specified thing is effective for a fixed period; when this period is not indicated, the legatee enjoys the thing for his lifetime, unless the waṣīyya establishes the contrary.

Article 194: Rejection of the waṣīyya must be after the death of the testator within a period of two months from the time the legatee is notified of the waṣīyya. The silence of the legatee despite the notification of the waṣīyya during these two months is deemed to be acceptance.

(continued next page)

23. Next page

If he dies during this period his heirs will step in his shoes from the day they are notified of the waṣīyya.

23.

Contrast with the Code of the Sharī'a, article 1166 (Mālikī): If one bequeathed the one-third to a child of one's own child the waṣīyya is divided among the descendants (ʾaḥfād) after the extinction (by death or otherwise) of the generation of the father (i.e., the child does not take the bequest until after the generation of the father dies). If the bequest consists of landed property its corpus is preserved and its proceeds are of benefit. If the bequest is not landed property one buys with the bequest a landed property if most possible, and if not, deals in trade, and what comes out in the form of revenue before the existence of the descendants belongs to the heirs. If some of the descendants exist, the present revenue is divided among them preferably. If there are found persons other than descendants, the distribution is determined for them. When one of them dies none of the revenue goes to his heir. Thus it goes on until there is no hope of increasing the legatees. Then one supervises (administers) the waṣīyya as rightful property of the descendants at the time of no hope of increasing them, disregarding anyone who died before the time when no hope set in, for nothing belongs to the heirs.

(Ḥanafī): If one bequeathed the one-third to the child of one's own child, the waṣīyya is divided among the descendants living in law or in fact on the day of the death of the testator and the bequest becomes their property. If there are not existing on the day of the death of the testate any of his descendants the waṣīyya reverts to his heirs.

The debate as to whether the law of wills should have remained part of the law of property or become part of the law of personal status had significance only as long as certain Tunisians were exempt from the Code of Personal Status (Decree of 12 July 1956)[24] because of their religious law. If during the years of such exemption wills had been part of the law of personal status, then the law of wills would have varied from community to community. If instead, testamentary law had been part of the law of property, then the Islamic version would have been applicable to all inhabitants, all persons being subject to the lex loci regardless of religion. Once the Rabbinical Court was abolished (Decree of 27 September 1957) and all Tunisian citizens subjected to one written law, the law of wills became the same for everyone. Hence, it made no difference by that time whether the law of wills was part of the law of property or the law of persons. However, the decision to include

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24. Article 1 of the decree of 24 June 1957 on the personal status of non-Muslim and non-Hebrew Tunisians:

> Article 1 of the decree of 12 July 1956 is abrogated and replaced by the following provisions: Foreigners are regulated in matters of personal status by their own national law. For a temporary period Tunisian nationals of non-Muslim or non-Hebrew confession remain regulated in this matter by the provisions of the French civil law, in force at the date of the present decree.

See page 341 above of Chapter II.

the law of wills in the law of persons had the merit of good form, that is, the decree of 12 July 1956 on status of persons had listed the law of wills among the concerns of personal status. Such decision was also consistent with history, for under the Protectorate the French courts had treated succession as part of the law of personal status. This had meant that even though land was registered and accordingly subject to the jurisdiction of French courts,[25] succession to registered land was still governed by the laws of personal status of the de cujus. Today the appearance of the provisions for wills in the Code of Personal Status will serve the advantage of those persons who wish to argue that by article two of the decree abolishing the Rabbinial Court the Tunisian courts are bound to apply the personal law of the liti-

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25.
Article 2 of the Code Foncier (Zeys, p. 899): The provisions of the French civil code which are not contrary to either the present law or to the personal status (A) or to the rules of successions (B) of the holders of real landed rights apply in Tunisia to the registered immoveables and to the real rights over these immoveables (thus modified by Decree of 16 May 1886).

(A) The Tribunal Mixte does not have the power to settle disputes relating to the personal rights connected to the registered immoveables (Civil Court of Tunis, 23 May 1894, Journal Tunisien (J.T.) 94,350).

(B) Succession is regulated in Tunisia by the national law of the deceased, even in regard to immoveable property. This rule is established by the customs which have the force of law (Civil Court of Tunis, 31 May 1892, J.T. 99,588).

See pages 242 and 243, supra, of Chapter II.

gants where the Code of Personal Status or any other secular legislation fails to provide for the problem in litigation.[26]

Nonetheless, the fact that the provisions for wills appear in the Code of Personal Status does not mean that the Code is exclusively intended to govern wills. The majallat al huqūq al ʿaīnīyat promulgated in 1965 replaced the provisions for settlement of estates (tasfīq al tarika) in the original draft of the majallat al ʾistihāqīya with provisions for the general administration and distribution of estate (qisma al tarikāt). Articles one hundred thirty-one and one hundred forty-one of the Code of Property Rights on the distribution of estates give no indication that they apply only to intestate estates. One could presume that they would apply to both testate and intestate estates.

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26. Law No. 40, of 27 September 1957, J.O.R.T. of 27 September 1957, on abolishing the Rabbinical Courts article 2:

> One will undertake the new suits which would have been under the jurisdiction of the Rabbinical Courts before the competent court of common law. Yet the questions for which no secular legislated law is found remain subject to the rules which were effective before the Rabbinical Courts.

See page 344 above of Chapter II.

History of the promulgation of the law of wills: underlying jurisprudence

As for most of the laws enacted in Tunisia, the Ministry of Justice prepared an explanation of the documents used to prepare the provisions on wills.[27] The Tunisian legislation, according to the Ministry of Justice, was derived from the draft of the Code of the Sharī'a, the laws of the Sharī'a (traditional), and the codes of personal status found in other contemporary Islamic states.

As for the derivations from the Code of the Sharī'a, there have been noted those sections of that Code which agree and do not agree with the provisions for wills as found presently in the Code of Personal Status.

As for derivations from the codes of personal status found in contemporary Islamic states, the provisions for al wasīyya al wājibīya (articles one hundred ninety-one and one hundred ninety-two of the Code of Personal Status) are similar to those in the Egyptian law.

Nonetheless, all of the four provisions of the law 59-77 of 1959 on wills which the Ministry of Justice considered outstanding and noteworthy were based on Islamic jurisprudence:

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[27] Ministry of Justice, Bayan mustanadāt (n.d.).

1) Article one hundred seventy-six, refusing recognition to oral wills, was supported by writings of certain fuqahā' as well as by public policy and requirements for witnessing contracts. The jurist Tasūlī made witnessing crucial for the validity of the will. The will under the Code of Personal Status may be notarised or written by the testator. As for the will written and signed by the testator, it was regarded in traditional law as licit but mubāh (indifferent from a moral point of view).[28] Article one hundred seventy-six of the Code of Personal Status does not state whether witnesses are required or not for a will written, signed, and dated by the testator. Whether courts would follow the Mālikī law on this matter has not been established. By Mālikī law (article eleven hundred seventy of the Code of the Sharī'a)[29]

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28. Ibid.

29. Code of the Sharī'a, article 1170 (Mālikī): If the mūṣī wrote the waṣīyya in his own handwriting, then it is found in his estate and it is known that it is his handwriting according to the testimony of two upright witnesses... If the written waṣīyya is found in the hands of the legatee or in the hands of an 'amīn and evidence establishes that he possessed it during the lifetime of the testator, the waṣīyya is proved and effected and if possession during the lifetime of the testator is not established, the waṣīyya lapses.

a will written in the hand of the testator and found among his possessions upon his death would be recognised if two upright witnesses testified as to the handwriting being that of the testator. If the written will were found in the hands of the legatee or in the hands of an *amīn, then the court would have to be satisfied that the legatee or the *amīn took possession of the will during the lifetime of the testator. Most likely the Tunisian courts would apply article four hundred fifty-nine of the Code of Contracts and Obligations, which provides that the written unwitnessed paper (al kitāb al ghair al rasmī) would stand as valid unless the heirs or an interested party disputed the handwriting, in which case proof and verification of the handwriting would be ordered by the court.

2) In regard to the rights of the testator to designate which items of his estate should go to which heirs (article one hundred eighty of the Code of Personal Status, as long as the value of the item does not exceed the share of the farūḍ of the heir),[30] the explanation

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30. Code of Personal Status, article 180: The testator's designating during his lifetime for all of his heirs or some of them specific items from his property which are equal to their intestate shares is permitted and is upheld upon the death of the testator.

Any amount exceeding the intestate share is subject to the rules for wills to heirs.

from the Ministry of Justice notes that this is derived from some of the Shāfiʿī and Ḥanbalī fuqahāʾ. There are not like provisions in the Mālikī or Ḥanafī majority opinions expressed in the Code of the Sharīʿa. Although the explanation from the Ministry of Justice does not say so explicitly, the provisions of article one hundred eighty of the Code of Personal Status are consistent with the view expressed by the Ḥanbalī jurist Ibn Qudāma in Al Mugnī.[31] Ibn Qudāma surmised that if one made a will of a particular item whose value was equivalent to the share of the farūd due to the heir, then the will would be valid, even though made to an heir. For example, if one willed a male slave worth one hundred dirhams to the son and a slave girl worth fifty dirhams to the daughter, the will would be consistent with the principle of taʿsīb. He deduced this conclusion by defining the inheritance rights of the heirs as rights in fixed proportions and not rights in particular property.[32]

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31. Abd Allāh Ibn ʾAhmad, called Ibn Qudāma, al Maqdisī, Al Mugnī: A Treatise on the law according to the Ḥanbalī school, edited according to the abbreviated version of Khanafī, by Muḥammed Rashīd Riḍā, 3rd edition, 1947, pp.6-7 of "Kitāb al waṣāyā".

32. Consistent with article 131 of the Code of Property Rights of 1965: In matters of succession distribution is by value (qīma) and not by kind (riqāb).

Another kind of will to an heir was subject to more controversy. There is no provision in the Code of Personal Status explicitly for or against it. According to Ibn Qudāma, there was no dispute among the jurists about the Prophet's dictum, no wasīyya to an heir (unless consented to by an heir -- which seems to be a juridical deduction). However, jurists held different opinions about the validity of wills made to benefit the heir indirectly. Ash-Shāfi'ī and 'Abū Ḥanīfa agreed that if a person by way of will absolved his heir from a debt or willed the settlement of that debt, or if a woman absolved by way of will her husband from paying the mahr, or if a person made a will to the debtor of an heir, then the will was valid in each case. 'Abū Yūsuf disagreed, on the principle that even though considered as an indirect will to an heir, it was still subject to the bar of no wills to an heir, for the heir would profit from having his debt fulfilled out of the will.

3) One of the most striking innovations in the Tunisian law of wills was the obligatory will (al wasīyya al wājibīya). The Ministry of Justice accepted the interpretation of a minority of early Islamic writers on the verse in the Qur'ān on bequests: "It is written that when any of you approach death and should you leave properties the wasīyya belongs to the father and mother and the close

relatives in all fairness as a right in kindness." (sūra two, verse one hundred eighty:

كتب عليكم اذا حضر احدكم الموت ان ترك خيرًا الوصية للوالدين والاقربين بالمعروف حقًا على المتقين

The explanation from the Ministry of Justice names Ibn Ḥanbāl and Daud Ẓahirī as supporters of the obligatory wasīyya to near relatives. Ibn Ḥazm was particularly known for regarding as obligatory the bequest to close relatives who could not inherit as intestate heirs. To his mind, the verse of bequests had been abrogated by the verses of inheritance only in regard to relatives who could inherit and not in regard to relatives who could not inherit. Just as in the law of talāq the Tunisian government felt justified in abolishing what was considered reprehensible (makrūh), the government also felt in regard to the law of wills for close relatives justified in making obligatory something which was recommended as good (mandūb). Such reasoning implies that there is nothing sacred about certain categories of actions. What is forbidden or what is obligatory by revelation cannot be changed, but any type of action in between, namely, recommended, (mandūb), indifferent (mubāh), or reprehensible (makhrūh), can be made a part of one of the two extreme categories (prohibited or obligatory). Once the principle of the obligatory wasīyya was written into the Tunisian

law, there arose the question of which close relatives would be eligible. Just as there was a limit on who shall be an intestate heir, the Tunisian Ministry of Justice must have felt that there had to be a limit on who would qualify as a testate claimant. The Ministry interpreted the term "bi'l ma'rūd" appearing in the verse of bequests to mean that in all fairness only the grandchildren of the de cujus should take the share of the predeceased father or mother (article one hundred ninety-two of the Code of Personal Status).[33]

Finally in support of the principle that the obligatory waṣīyya have priority over the ordinary bequest, the Ministry of Justice cited Ibn Muflih as reported by Imām 'Aḥmad and Ṭā'ūsī.

4) A fourth innovation which was not mentioned in the bayān from the Ministry was the restriction in article one hundred eighty-two of the Code of Personal Status on wills of usufruct. The article forbids one to make a will of usufruct to a particular person and his family for an indefinite length of time. The usufruct is limited to

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33. Code of Personal Status, article 192: The obligatory waṣīyya benefits only the first generation of grandchildren, the issue of a child of either sex, and the qasama among them is on the basis of two parts to the male and one part to the female.

one generation. After the end of one generation the object of the usufruct returns to the heirs of the testator. No doubt this rule keeps the law of wills consistent with the law that abolished ʾahbās in Tunisia. Otherwise, a person could have used his will to create a usufruct which for all intent and purposes would have had the effect of a hubus. There appears to be no rule in the Sharīʿa which was directly contrary to the limiting of the duration of usufruct as in article one hundred eighty-two of the Code of Personal Status. According to the Code of the Sharīʿa, the Mālikī law allowed the heirs of a legatee to enjoy the will of usufruct when the will specified usufruct for a fixed length of time and the original legatee had died before that time had expired (article eleven hundred eighty-seven).[34] Article one hundred eighty-two of the Code of Personal Status limits the length of time to one generation; it does not adopt the Ḥanafī

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34. Code of the Sharīʿa, article 1187 (Mālikī): If the legatee has the right of usufruct of a thing for a specified period, then the legatee takes it and he dies it is inherited from the legatee if there remains any of the time for the use of the thing left.

Article 1187 (Ḥanafī): If the legatee has the right of usufruct for a specified period, then dies during the lifetime of the testator, the waṣīyya is null. And if he dies after the death of the testator, the corpus with the usufruct returns to the heirs of the testator and does not revert to the heirs of the legatee.

rule that the usufruct could not go to the heirs of the legatee if he died before the time specified in the will had expired.

When viewing the bayān from the Ministry as a jurisprudential document, one cannot help comparing this explanation on wills with the explanation from the Ministry on the law of talāq and polygamy. By comparison, the law of wills offered far less striking innovations. This is seen in the difference in sources used to draft the codified rules. The rules for talāq and polygamy derived from direct reinterpretations of the ʾahādīth of the Prophet and verses in the Qurʾān. The rules for wills, however, derived from opinions of old jurists; however much they were in the minority in their time, such jurists never challenged fundamental interpretations of the ʾahādīth and the Qurʾān. Two reasons may account for the difference in approach to the laws of marriage and divorce and the law of wills. One explanation, as noted in the introduction to this chapter, is that there was not as much political pressure from the French for reform in the law of property as there was in the law of marriage and divorce. The French having themselves a complex system of inheritance could hardly quarrel with an Islamic system which agrees with the French principle of an estate con-

sisting of a disposable quantity and an indisposable quantity (article nine hundred thirteen of the Code Civil).[35] A second reason is that the law of wills is closely related to the law of mīrāth. The law of mīrāth in the Qur'ān is much more explicit than the law of marriage and divorce. Likewise, the laws of wills in the 'ahādīth appear more explicit than the law of talāq in the 'ahādīth. For this reason, reforms in the laws of mīrāth and wills would require that the legislator go directly against the words of the hadīth or the Qur'ān, or that he devise hiyal. Neither way is very appealing. There is need, instead, for rethinking the degree of reliance on hadīth. This in turn requires rethinking the science of 'ahādīth and the historical reliability of 'ahādīth. The fourth and fifth chapters shall be devoted to the problems of reform in al-mīrāth and al-wasīyya. For now it suffices to say that the law of wills of 19 June 1959 amending the Code of Personal Status retained the fundamental principles governing the ultra vires bequest (that is, no will beyond the one-third and no will to an heir).

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35. Code Civil, article 913 (Chapter 3 on the portion of the disposable property and on reduction): Gratuitous dispositions, whether inter vivos or by will cannot exceed one-half of the properties of the person disposing of them if he leaves upon his death only one legitimate child; one-third if he leaves two children; and one-fourth if he leaves three or more children...

History of the law of wills: comparing past practise and present law

Given that the law of wills of 1959 brought in some innovations without disturbing the principles which no jurist ever seems to have disputed, one should measure these innovations against pre-Independence practises. An analysis of some cases and situations during the Protectorate will reveal that the law of wills of 1959 did not deviate far from practise.

On the question of written wills as opposed to oral wills, one can turn to a royal ma'rūḍ which laid down the value of written evidence in court. In 1941 the Bāy was advised to order every Ḥanafī qāḍī "to give as much weight to titles and written documents as was given to any other (oral) forms of proof in Islamic law."[36] Specifically in matters of distribution of proceeds from waqf, the qāḍī was ordered to give priority to the written evidence of the wishes of the founder of the ḥubus. The written documents could be opposed by oral evidence and testimony of witnesses on what was the established practise in mat-

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[36] Ma'rūḍ of 16 June 1941.

ters of ḥubus, or by oath, but the object of the order of the Bāy was to prevent any Ḥanafī qāḍī from throwing out titles and written documents simply because they were written. The intervention by the Bāy into the law applied by the Ḥanafī courts was justified by the fact that the Ḥanafī quḍāh were divided on the issue. No doubt such division caused concern over whether a defendant could get justice, for such division of opinion among the quḍāh would have allowed a plaintiff to choose the qāḍī who was known to hold the opinion more favourable to his case.

Although the maʿrūḍ was intended specifically for matters of ʾaḥbās, the explanation attached to the maʿrūḍ covered principles that apply to many other matters. The explanation stated the arguments in favour of courts totally rejecting written documents simply because they were written. The main argument was that custom and usage (ʿurf) of a particular location determined whether the qāḍī would even admit a written document as evidence. In some areas written evidence was admitted only if it were a written public document from the political sovereign. In other areas any written evidence was admitted whether publicised or not. For example, in such areas, a creditor (for that matter, a legatee) could demand from the heirs of the deceased payment of a said sum by producing a written agreement between himself and the deceased. If hon-

ourable witnesses declared the handwriting authentic, the debt had to be paid out of the estate. In other areas, however, the payment of the debt would have been allowed, not because of the establishment of the authenticity of the handwriting, but because such kind of agreement conformed to the custom of the area (that is, it was a likely agreement between such kind of parties).[37] In opposition to the opinion that written documents in themselves are not admissible evidence because of the custom prevailing in the area, the author of the explanation of the ma'rūd pointed out that the general custom in Tunisia was to admit written documents as evidence. The system of notaries and all the written official work of the qudāh themselves were evidence of the acceptance of written documentation as valid. Secondly, the author of the explanation pointed out the injustice of a law that admitted evidence only according to the customary practises prevailing in various regions.[38] Under such a legal system there was no protection for the person who had received possession of some land by a written agreement whose terms constituted a general legal alienation, though the alienation was not by the usual cus-

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37. Muḥammad al Mokhtar, "As Shahāda al Khaṭṭ," 15 June 1941, based on Ibn Abidine's "Nachir al 'Urf".

38. Ibid., cites fatwā of Tunisian Sheikh 'Aḥmad Belkhoja.

tomary way in that area. If the original owner then by a customary transaction of sale alienated the same land to a second person, custom would uphold the second sale, supported by oral evidence, and not admit the written evidence of the first alienation. Even if the written document were admitted, it might not have settled the matter in favour of the person claiming priority, but at least it would have given him a basis for opposing eviction from the land.

Among the Mālikī courts admission of written evidence was no problem. Imām Mālik was known to have advocated admissibility of written documents.[39] Admissibility, however, did not preclude evidence as to its authority or falsity.

The Code of Personal Status continues the official line of thinking expressed in the ma'rūd of 1941.[40]

As for cases of succession under the Protectorate, the types of problems which came to the attention of the Administration arose from disagreement among heirs about

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39. Ibid., cites Ibn Abidine's "Nachir al 'Urf".

40. Code of Personal Status, Article 176: The wasīyya is proved only by notarised document or by a writing drafted and dated and signed by the testator.

Article 177: Revocation of the wasīyya is allowed but proof of revocation is according to the provisions of article 176.

the appointment of an administrator of the estate, from doubts over the existence of particular heirs (especially the ʿasaba), and from doubts over calculations appropriate for tanzīl (inheritance by a grandchild from the estate of his grandparent by representing his predeceased parent) (see page 382 above).

In a case of Muslim Moroccans before the French civil court in Tūnis[41] the heirs were a germane brother, a widow, and two daughters. The women were to receive their fixed shares and the brother the remainder, but they disagreed over the appointment of the brother as administrator to settle the estate. The Mālikī qādī appointed a judicial administrator, but the brother appealed to the French court for an appointment. The present law of administrator of estate as found in the majallat al ḥuqūq al ʿaīnīyat would have been applied similarly in such case. Article one hundred thirty-three[42] of the majallat allows the heirs to

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41. Abdullah, son of El Kader v. Madame Khedija Bent Belgacem El Kader and Misses Behina and Fatima, intervention by Sherifs of Ouezzan, Affaire Marocaine, copy of minutes of public audience of 17 June 19___ (n.d.)(in Wizāra al ʿAdl).

42. Code of Property Rights, article 135: If one of the heirs demand appointment of an administrator of the estate the president of the competent court will appoint by an order an administrator either upon which choice the heirs agree unanimously, or who, as far as possible, is one of the heirs.

decide on an administrator, who would then be officially appointed by the competent court. Should the heirs fail to agree unanimously on an administrator, the president of the court would have the authority to appoint an administrator, preferably from among the heirs.

In another matter during the years of the Protectorate the administration of the estate posed a problem when it appeared that the only heirs left by the deceased were his widow and an uncle who lived in Morocco.[43] The widow was not appointed administrator of the estate.. The uncle would not answer any letters asking him to place a claim in the estate. The former employer of the deceased suggested that the Bait al Māl represent the uncle and proceed, in the presence of the widow, with an inventory of the estate, However, two other ʿasaba were found to be existing. These relatives were residing in Morocco. In a document notarised by the local court in Morocco twelve members of the tribe of the deceased attested to the fact that the two ʿasaba knew the deceased and were the sole male heirs. The uncle was declared judicially absent.[44]

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43. Letter from Director of Caisse Foncière to Resident General, Tūnis, 2 September 1939, re: estate of El Hadj Massaoud, Affaire Marocaine.

44. Letter from the French délégué at the Ministry of Tunisian Justice to the Director General and Common Administration, 8 December 1931.

The Bureau of Private ʾAḥbās and Supervision of Property refused to place the estate under their supervision for the protection of the interests of the absent heir, for he was not a minor and did not lack ability to secure his own representative to supervise his interests once notified of the opening of the succession.[45] Only these two ʿaṣaba from the Moroccan tribe communicated an interest in the succession. They appointed a representative in Tūnis and the appointment was brought to the notice of the Mālikī qādī in Tūnis.[46]

Besides illustrating problems of locating distant relatives, the above case also illustrated the principle underlying the rights of the Bait al Māl in an estate o-

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45. Note from the Bureau de Tutelle et ʾAḥbās Privés (dāʾrā at taqādīm waʾl ʾahbās al khāsa), 4 November 1939, re: succession of Hadj Messaoud.

46. Letter from Resident General to French délégué at the Ministry of Tunisian Justice, 20 May 1940.

Series of letters on the Moroccan affair: 2 Sept. 1939, Director of Caisse Foncière to Resident General; 9 Sept. 1931, Resident General to Secretary General, No. 2234; 16 Sept. 1939, Commandant of Algerian-Moroccan border to Resident General, No. 4.599; 14 Oct. 1939, French délégué at Ministry of Tunisian Justice to Director of General Administration, No. 386 SD; 4 Nov. 1931, Note from Office of Tutelle and Mokkadems; 8 Dec. 1939, French délégué at Ministry of Tunisian Justice; 20 May 1940, Resident General to French délégué at Ministry of Tunisian Justice.

pened for succession. At first the authorities of the Bait al Māl thought that the estate was vacant and were prepared to collect the entire estate. Then when the authorities of the Bait al Māl thought that the only heir of the deceased was his widow, they were prepared to take the surplus as ʿaṣaba. Upon the discovery of blood ʿaṣaba the question of inheritance by the Bait al Māl was dropped. Today the same situation would be treated very similarly. By virtue of article eighty-seven of the Code of Personal Status the Bait al Māl continues to enjoy rights in a vacant estate. By virtue of articles one hundred fourteen and one hundred fifteen of the same Code the Bait al Māl is treated as ʿaṣaba whose rights in the succession can be exercised only in the absence of any other ʿaṣaba by blood (or agnatic daughters, according to article one hundred forty-three bis of the Code of Personal Status). (See page 410 et sq. post.).

In the law of wills, however, there appears to be a difference between the solutions of the 1940's and those of today. If the deceased had given by way of will all his property to his wife and she had been in fact the only heir by family relation upon his death, the Islamic law of 1940 would have voided the will to

an heir.[47] The Code of Personal Status today is not so clear. Article one hundred eighty-eight removes all rights of the Treasury in the estate when a testator wills away all his estate, provided that the testator has left no debts nor any heirs.[48] While article one hundred eighty-eight is an exception to the general principle that one cannot dispose of more than one-third of one's estate by will (article one hundred seventy-nine), except by consent of the heirs (including the Bait al Māl in Mālikī law), there appears to be no explicit exception to the general principle that one cannot dispose in favour of an heir if the bequest exceeds the heir's share in the farūd. Hence, it appears today that a testator cannot will all his property in favour of his wife even if she were the only heir. It is not even clear from the terms of the article one hundred forty-three A

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47. Sharī'a Code, article 1145 (Mālikī): Wasīyya to an heir is null under any circumstances as is wasiyya to a non-heir for more than one-third unless the heirs allow it.

(Hanafī): Waṣīyya to an heir is not allowed, nor is waṣīyya to a non-heir exceeding one-third, unless the heirs allow the waṣīyya in the two instances after the death of the testator, and the permission would take the nature of a gift (gratuitous disposition, tabarru').

Article 1148 (Ḥanafī, none for Mālikī) provides for one instance when waṣīyya of more than one-third is allowed, namely when the testator has no heir.

48. Code of Personal Status, article 188: One who has no debts nor any heirs can execute a waṣīyya even if it covers all his wealth without depending on the Treasury (for permission).

whether the widow as sole heir could collect the entire estate according to the law of intestacy.[49] For article one hundred forty-three A allows only the agnatic daughters or granddaughters to collect the entire estate as intestate heirs whether in the presence of blood ʿasaba or the Bait al Māl. Nonetheless, the widow who is the beneficiary of a will of the entire estate as the sole heir might succeed by referring the court to the terms of the first paragraph of article one hundred forty-three bis. By article one hundred forty-three bis the widow might be able to inherit the entire estate by radd. For the first paragraph provides for radd to the farāʾid in the event of the absence of ʿasaba. Given that the Bait al Māl is always present, one could reason that the rights of the Bait al Māl are to be overlooked for the purposes of the operation of radd. Otherwise, if the word "ʿasaba" as used in the first paragraph of article one hundred forty-three bis were interpreted to mean that the Bait al Māl

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49. Code of Personal Status, article 143 A (bis): When the ʿasaba are not present and the shares of the farūd do not absorb the estate the remainder returns to the sharers of the farūd in proportion to their fixed shares.

As for the daughter whether plural or single or the daughter of the son howsoever low, they shall have the remainder even despite the presence of ʿasaba of the nature of brothers, uncles and the Bait al Mal.

is always present, the provision would have been a dead letter from the start. Hence, if the spouse relicit were the only surviving heir, the Bait al Māl for all intent and purposes would be regarded as absent like any other ʿasaba; and while a will that disposes of the entire estate to her might be ultra vires, the court could approve it on the principle that she would be entitled to the entire estate anyway by radd, under the rules of intestacy.

Besides the legal rights of the Bait al Māl, the French administration also encountered the problem of inheritance rights of grandchildren in their grandparent's estate. A few years before Egypt introduced the law of obligatory bequests (1946), the Director of the Caisse Foncière in in Tūnis was presented with a case of distribution of the proceeds of a hypothecated loan among the widow, children and grandchildren of the deceased. The Director never questioned the right of the grandchildren to share in the estate by tanzīl. What he questioned was the method he should use for calculating their shares in the estate. In describing his problem to the officials at the Ministry of Justice, the Director wrote: "It happens sometimes that the Caisse Foncière is presented with claims from debtors who fall under the title of legatees or representatives of their predeceased father."[50] The

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[50]. Letter from Director of Caisse Foncière to French délégué at Ministry of Tunisian Justice, No.932, 6 March 1940.

solution, as the Director was told, depended on whether one treated the grandchildren as legatees to a will or as representatives of a predeceased son who would have inherited by the laws of intestacy had he remained alive. The treatment of the grandchildren and hence the systems for calculating their shares varied from region to region in Tunisia. The Director of the Caisse Foncière wanted to know what principles determined which calculations were to be used, but wanted no method to do harm to anyone's rights in the estate. The Ministry of Justice consulted the Mālikī muftī.[51] The muftī's opinion was consistent with an opinion voiced by Professor Si Muhammad Es Sadok Ech Chatti, of the Grand Mosque in Tūnis, in a treatise published about that time on succession according to the Mālikī rite. Both agreed that there were two ways one could treat grandchildren and hence two methods for calculating their shares in the estate of their grandparent. Whichever one was adopted was supposed to depend on the express wishes of the grandparent.[52]

According to these two Mālikī jurists of the 1940's,

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51. Note from Belhassen En Nadjar, Mālikī muftī, 3 April 1940 (25 Sfar 1359).

52. Belhassen En Nadjar
Director of Caisse Foncière to French délégué, 6 March 1940, referring to Ech Chatti's treatise.

if the de cujus had said that he "constitutes his grandson as an heir to the same rights as his (predeceased) son", then the share of the grandchild was treated simply as a legacy.[53] The method used for calculating the amount of such legacy was called the "adamou hirmane" (the person who was excluded from inheritance). According to this method the administrator of an estate was to calculate first the share of the grandchild, then remove it from the estate, and finally distribute the remainder of the estate to the heirs by the rules of intestacy. It was the same as if the de cujus had willed one-third of his estate. The obligation of the one-third was met like any other debt, then the remaining two-thirds was distributed among the intestate heirs. The difference between the legacy by representation and the ordinary legacy was that the amount of the legacy by representation was not specified by the testator. The calculation of the grandchild's share was left to the administrator of the estate. When the administrator interpreted the words of the testator to mean that the administrator should use the method of "adamou hirmane", the administrator undertook a two-

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53. Hachemi Sebai, Chief of Bureau of Personal Status and Land Litigations, for the commissionnaire of the Government, in response to question from Director of Caisse Foncière, 24 April 1940.
Belhassen En Nadjar.

step calculation for finding the precise amount of the share of the grandchild. In the example posed by the Director of the Caisse Foncière in 1940, the claimants to the estate were a widow, three sons, and a grandson. The first step an administrator of the estate would have taken would be based on the fiction that the fourth son -- the father of the grandson -- were still alive. The results would be: 1/8 to the widow, 7/32 for each of the three living sons and the fourth fictitious son. The share then of the fictitious son was to be taken out and assigned to the grandchild. The remaining 25/32 was to be divided among the heirs (widow and three living sons).

The two jurists, Muftī En Nadjar and Professor Ech Chatti, were not the only ones agreeing to this method of calculating the shares of grandchildren. For half a century at least, the notaries in Tūnis who were responsible for liquidating estate had tended to sue the same method of "adamou hirmane".[54]

According to the jurists, a second method of calculation was used if the de cujus had said that "the child representing the predeceased child will receive a share equal to that of my other sons". The grandchildren were treated

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54. Letter from Director of Caisse Foncière to French Délégué in Ministry of Tunisian Justice, No. 5516C.F.1, 6 March 1940.

as equals to their uncles[55] (within the limits of the one-third).[56] The calculation befitting such intention was called "tessaoui" (tasāwin, equivalence). Professor Ech Chatti was known for his conclusion that most grandparents really intended that the administrator of the estate use this method of calculation regardless of the words they actually used in constituting their grandchilren as sharers in their estate. By the rules of "tessaoui" (tasāwin) the administrator of the estate was to undertake a two-step calculation for determining the exact amount of the share of the grandchild. In the initial calculation he determined the shares of the widow and the three sons as if there were no grandchildren. Next the equivalent of the share of one son was assigned to the grandchild (or total of grandchildren). The grandchild was then allowed to enter the estate and his share added to the previously calculated shares of the intestate heirs. Because the sum of the shares then would be more than the whole of the estate, each share of each claimant was then reduced proportionately by ʿawl. The absolute

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55. Belhassen En Nadjar

56. Ustaad Muḥammad al Qaruī, Deputy Public Prosecutor for maḥkama al taʿqīb, "ʾAḥkām al waṣīyya waʾl tanzīl" ("The rules of wills and tanzīl"), Al Qadāʾ waʾl tashrīʿ, No.5, 1959, p. 8.

amount of the shares of each claimant was reduced, but the intent that the uncles and the grandchild take in equal proportion was preserved. By contrast, the calculation called "adamou hirmane" preserved for the grandchild the absolute fraction of the estate which the predeceased father would have received had he remained alive; how the share of the grandchild related to the share of his uncles was irrelevant.

While both notaries and jurists accepted the method of calculation called "adamou hirmane", the notaries disregarded the notion of the jurists of the calculation called "tessaoui" (tasāwin).[57] The practising notaries treated all claimants as if they were intestate heirs, the grandchildren standing in the shoes of the deceased son. The result was that the widow received her part of the farūd and the remainder of the estate was divided among the three living sons and the grandson equally as if there were four sons living. There was no need for ʿawl.[58]

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57. Hachemi Sebai to Commissionaire of the Government, No. 5516 C.F.L., 5 March 1940.

58. Notaries' version of "tessaoui" (tasāwin) would be difficult to apply where the share of the grandchild would exceed one-third. Presumably if the share of the grandchild exceeded one-third, the notaries would have then applied the rules of testate distribution, that is, the one-third would be assigned then the remaining two-thirds redistributed among the intestate heirs. For example :

W	1/8	ʿawl	1/15
S	7/8	ʿawl	7/15
S's S	7/8	ʿawl	7/15

Given that the share of the grandson of 7/15 is more than one-third, one would suppose that the notaries would have used the following calculations:

W	1/8 = 3/24
S	13/24
S's S	1/3 = 8/24

How can one explain this difference between the version of the notaries' "tessaoui" (tasāwin) and the version of the jurists? One explanation is that the notaries were concerned with simplicity while the jurists were concerned with finer points of law. To the mind of the practicising notary, a claimant was treated either as a legatee or as an intestate heir. If he were treated as a legatee, his share was calculated and subtracted from the total of the estate. The calculation called "adamou hirmane" was apt for such purpose, that is, when the claimant was a grandchild representing his predeceased father. If the grandchild were treated as an intestate heir, there was no need to affect his share by such further calculations as ʿawl. Compared to the simpler version of the notaries of "tessaoui" (tasāwin), the version of the jurists added a third category to the already existing two categories of legatee and intestate heir. This third category was a half-way house, half-way between the rules of testate distribution and the rules of intestate distribution. For the jurists borrowed from the rules of testacy by calculating the share of the grandchild separately from the shares of the intestate heirs; but then, instead of subtracting the share of the grandchild from the total of the estate, the jurists added the

share to the shares of the intestate heirs, then applied ʿawl as if the estate were intestate overburdened with sharers of the farūd.

To the minds of the jurists, no doubt, the notaries sacrificed an important principle of law to simplicity. That important principle of law, which any administrator of an estate had to keep in mind, was that the sharers of the farud and the ʿasaba are fixed by law. When a given relative such as a grandchild is excluded de jure (or de facto[59]) from inheriting according to the rules of intestacy, he cannot be made a rightful heir by the will of the de cujus. At best the de cujus can only make him a legatee, subject to the laws of al wasīyya with a minimum of variation. The jurists could very well charge the notaries with violating this basic principle in their version of "tessaoui" (tasāwin). For their version was based on a fiction, a fiction that the grandchild was always the same as the living son, and accordingly the share

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59. By normal testamentary rules even exclusion de facto entitles an excluded relative to a legacy. Furthermore, according to social principles underlying the obligatory will, no inheritance rule should be interpreted to work hardship on the orphaned grandchild (Bessīs, Al Qadāʾ waʾl tashrīʿ, No. 10, 1965).

of the grandchild was the same as the deceased would have received if he had remained alive. The jurists could not deny that they had also relied on that same fiction in their calculations, whether in the one called "tessaoui" (tasāwin) or the one called "adamou hirmane". Yet the jurists had relied on the fiction as only one of the steps in the calculations needed to arrive at the share of the grandchild. The version of the jurists of "tessaoui" (tasāwin) did not result in the grandchild receiving exactly the same as his pre-deceased parent would have received had he remained alive. All that mattered was that the ratio between the share of the grandchild and the share of the uncles was the same as the ratio would have been between the shares of the live sons and the share of the deceased son.

As a corollary to their concern that heirs and non-heirs be kept distinct, the jurists could also have argued in support of their version of "tessaoui" (tasāwin) that the intestate heirs should equally share the burden that a grandchild placed on the estate.[60]

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60. Muftī En Nadjar: "In deciding that his grandchildren will represent his son (by either tessaoui or adamou hirmane) the testator wanted to conserve a judicial fiction, the survival of his said son. There then must take place a calculation of the share of the said son as if he were living and then a distribution among

If any one heir were to suffer from the presence of a grandchild allowed to share in the estate, then all other heirs had to share the consequences. Of the three possible methods for calculating the share of a grandchild, the version of the jurists of "tessaoui" (tasāwin) was the most equitable for the intestate heirs. This was because the percentile reduction which any one intestate heir suffered in his original intestate share when the grandchild entered the estate was exactly the same as any other intestate heir suffered in the same estate. Below are tables showing the steps an administrator of an estate would go through to arrive at the shares of heirs and grandchildren. If one compares columns A and C one can see by what percentage the shares of the intestate heirs have been reduced or raised because of the presence of a grandchild representing the interests of his deceased parent. In the table labeled "adamou hirmane", the wife and two sons -- the only intestate heirs -- have suffered re-

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his children on the basis of 2:1 in favour of the males. As a result, the interests of the heirs, both the sharers of the farūd and the ʿasaba must be equally compromised. The grandchild representing his parent is not assimilated in all aspects to his parent: for if he were, the prejudice (to the heir's interests) would affect only the residuary heirs."

ductions from the initial shares by almost the same percentage. There is a very slight weighting in favour of the sons. In the table labeled "jurists' version of tessaoui", the wife and the two sons have all suffered a reduction of thirty per cent. In the table labeled "notaries' version of tessaoui" it is only the sons who suffer the burden of the presence of the grandchild; the wife gets the share she would have received had there been no grandchild taking part in the estate.

"ADAMOU HIRMANE"

	A intestate share by ordinary rules of mīrath	B tanzīl: 1st step: fictitious son	C tanzīl: final allocation
		common denominator 8832	
Widow	1104	1104	782 reduced from 1104 by 29.2%
Son	3864	2576	2737
Son	3864	2576	2737
Sons' total	7728	5152	5474 reduced from 7728 by 29%
Son's son	X(excluded)	2576	2576
	W:sons=1:7		W:sons=1:7

JURISTS' VERSION OF "TESSAOUI" (TASĀWIN)

	A intestate share by ordinary rules of mīrāth	B tanzīl: 1st step: fictitious son	C tanzīl: ʿawl
		common denominator 8832	
Widow	1104	1104	768 reduced from 1104 by 30.4%
Son	3864	3864	2688
Son	3864	3864	2688
Sons' total	7728		5376 reduced from 7728 by 30.4%
Son's son	X(excluded)	3864	2688
	W:2 sons=1:7		W:2 sons=1:7

NOTARIES' VERSION OF "TESSAOUI" (TASĀWIN)

	A intestate share by ordinary rules of mīrāth	B tanzīl: 1st step: fictitious son	C tanzīl: final allocation
	common denominator 8832		
Widow	1104	1104	1104
Son	3864	2576	2576
Son	3864	2576	2576
Sons' total	7728		5152 reduced from 7728 by 33.3%
Son's son	X(excluded)	2576	2576
	W:2 sons and grandson=1:7		W:2 sons and grandson=1:7

The result of the query of the Director of the Caisse Foncière about the rules governing the succession of grandchildren by tanzīl was that the Ministry of Justice rejected the version of the notaries of "tessaoui" (tasāwin) and left to the discretion of the Director the choice between the version of the jurists of "tessaoui" (tasāwin) and the calculation called "adamou hirmane".

After the Independence of Tunisia the question of inheritance of orphaned grandchildren arose again when the Code of Personal Status was completed by amendments for the law of wills. The Tunisian government accepted the notion that a grandchild can inherit as a special legatee when that grandchild is excluded from the inheritance and when the parent of that grandchild has predeceased the de cujus (the grandfather of the grandchild). Going beyond this basic principle, which was part of the rules of tanzīl, the Tunisian lawmakers brought about major variations on an old theme. These variations are considerably different from the details of the rules of tanzīl. For a start, article one hundred ninety-one of the Code of Personal Status no longer left the question of grandchildren taking part in the estate to the whims of the grandfather; article one hundred ninety-one made the legacy to a grandchild obligatory. Since the Ministry of Justice found justification for such a forced

will in the doctrines of Ibn Hazm of the extinct Zahirī school, and not in the rules of tanzīl, the details of the law of obligatory wills are fewer than those for tanzīl and are more consistent with the laws for ordinary wills. The rules for calculating the share of the grandchild illustrate this point. The starting point for the calculations is found in the rule that the grandchild inherits the share his predeceased parent would have received from the grandfather's estate if the parent had died immediately after or simultaneously with the grandfather (article one hundred ninety-one of the Code of Personal Status). The illustration in the 1970 edition of the Code of Personal Status does not reveal all the steps by which the share of the grandchild is to be determined.[61] In the example, the grandparent leaves two

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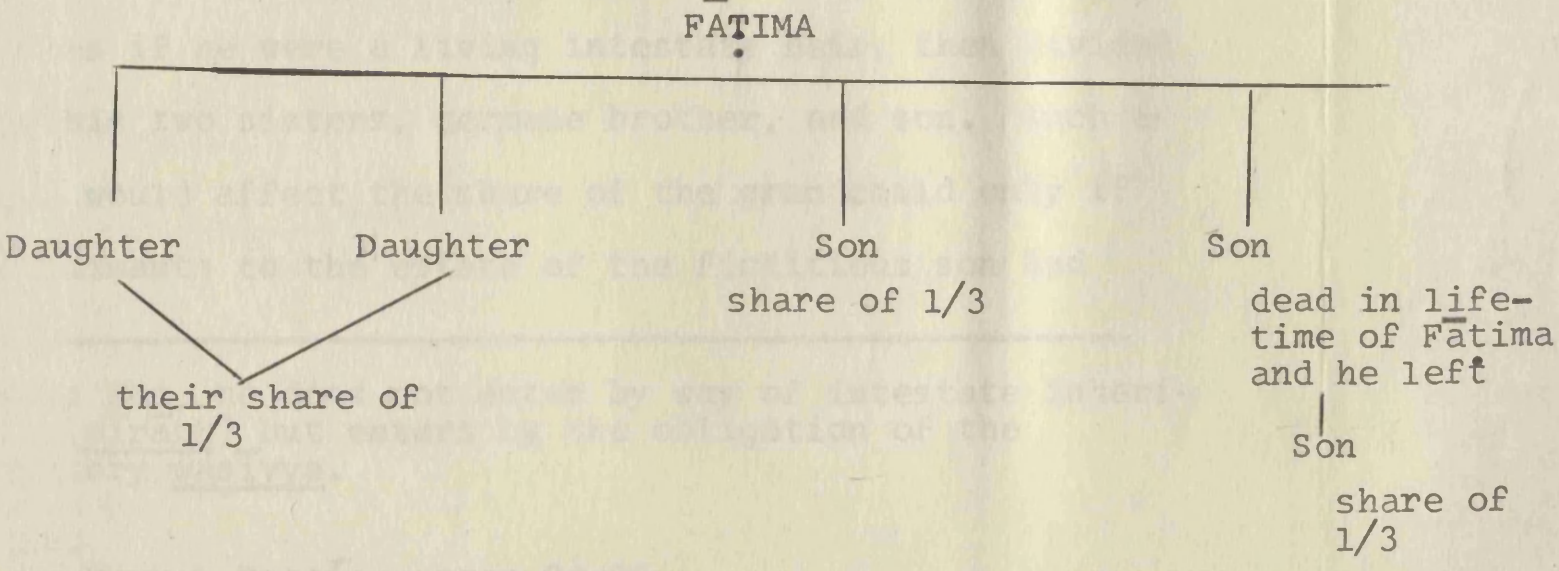
61. M.T. Es Snoussi edition. Article 191 (Arabic version only), footnote 1: An illustration of the theory of al wasiyya al wājiba:



Does the designated grandson enter (the estate) validly or not?

(cont'd)

daughters, one son, and one grandson (child of a predeceased son). One can turn to a commentary on the obligatory wasīyya for an interpretation of all the steps of of calculation.[62] According to the author of the commentary, Sayyed Bessīs, the administrator of an estate is to treat the predeceased son as if he died immediately after the grandfather but only as a preliminary step in determining the share of the grandchild. This step is the same step used in the calculations for tanzīl, whereby the predeceased parent is treated as living then forgotten, as his share is then assigned to the grandchild. The share of the grandchild is treated as a legacy and like ordinary legacies removed from the estate while the remainder is divided among the intestate heirs. Sayyed Bessīs does not thus interpret the rule of article one hundred ninety-one literally ("as if the son died immediately after the grandfather"); for if he did, the share of the fictitious son would have been first determined as if he were a living intestate heir, then divided among his two sisters, germane brother, and son. Such a method would affect the share of the grandchild only if the claimants to the estate of the fictitious son had

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Answer: Yes, he does not enter by way of intestate inheritance (mīrāth) but enters by the obligation of the obligatory wasīyya.

62. Tayyeb Bessīs, pages 24-26.

included a mother.[63] The interpretation by Sayyed Bessīs of article one hundred ninety-one corresponds to the method of "adamou hirmane" in the rules of tanzīl. Apparently today, the grandparent has no more freedom whatsoever in deciding whether the grandchild shall take a share according to the calculations of "tessaoui" (tasāwin) or "adamou hirmane".[64]

63.
Calculation for literal interpretation of words "as if the son died after the grandfather" :

(1) GF dies (estate of £768)

Daughter	Daughter	Son	Son_a
1/6 =£128	1/6 =£128	2/6 =£256	2/6 =£256

.....

(2) Son_a dies (estate of £256)

Germane sister	Germane sister	Germane Brother	Son
X	X	X	All

The results of the second calculation are the same as in footnote 61. The results would not be the same if a widow were present:

(1) GF (estate of £768)

Widow	Daughter	Daughter	Son	Son
1/8=£96	7/48=£112	7/48=£112	14/48 =£224	14/48 =£224

.....

(2) Son_a dies (estate of £224)

Mother	Germane sister	Germane sister	Germane brother	Son
1/6=£37.3	X	X	X	5/6 =£186.5

64.
Next page

64.

There has not been any court case in Tūnis, court of first instance, or appellate, to my knowledge specifically directed to problems of calculating the share of grandchildren. A more traditionally minded judge could accept the interpretation of Sayyed Bessīs of aDaughter91; a more liberal minded one could determine the 1/4 n by construction.

If the de cujus left no will all the courts would probably adopt the interpretation of Sayyed Bessīs of article 191: for if they wished to adopt the calculation of "tessaoui" (tasāwin) they would not be in a position to decide with which heir the grandchild should take equally.

If the de cujus did leave a will, a more conservative judge might disregard the will in relation to the calculation of the shares of the grandchildren and apply the interpretation of Sayyed Bessīs; while a more liberal judge might allow a calculat Daughter rding to the rules of "tessaoui" (tasāwin) 1/4 ruction of the will lends itself to such. The illustration in the footnote to article 191 gives no indication in itself that "adamou hirmane" has been used in preference to "tessaoui" (tasāwin). Because of the particular combination of heirs in the example, calculations by either method would result in the same fractions for each claimant:

FĀTIMA (according to "adamou hirmane")

Daughter	Daughter	Son	Son predeceased
1/6	1/6	2/6	2/6 ↓
			son (grdson of Fātima) 2/6 = 1/3

.....

FĀTIMA (according to "tessaoui") -- jurists' version

Daughter	Daughter	Son	Son predeceased
1/4	1/4	2/4	2/4 ↓
			son (grdson of Fātima)
ṣawl	ṣawl	ṣawl	ṣawl
1/6	1/6	2/6	2/6

Such freedom of choice would have been useful on at least two counts. First, the method of "adamou hirmane" could be used to favour the rightful ʿasaba over the grandchildren where poverty dictates. For in the steps of calculation, the method of "adamou hirmane" allows the rightful ʿasaba to move from a 1:1 ratio in relation to the grandchildren to a ratio favouring, even if slightly, the ʿasaba. The method of "tessaoui", or tasāwin, ("let the grandchildren take as one of the living children") would have been useful for a grandparent who wanted to avoid the case where a granddaughter takes more than the daughter when the only claimants are a son, a daughter, and a granddaughter (daughter of a predeceased son). The application of the rules of "tessaoui" (tasāwin) would result in the "child of the loins",[65] namely the daughter, taking at least the same amount as the more remote issue (the granddaughter). This would be of particular satisfaction to persons who are interested in preserving the most one can for the more immediate family.[66] This aim becomes particularly desirable for this combination of claimants (daughter, son, granddaughter) because the daughter would have no more of a second

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65. Tayyeb Bessīs, page 25, footnote 2.

66. See J.N.D. ANderson, "Recent Reforms in Islamic Law

chance than the granddaughter to inherit in the estate of the son (the daughter's brother) should the son die before the daughter and leave a son.

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of inheritance," International and Comparative Law Quarterly, vol. 14, April 1965, pages 348-365, at page 357:

> Under the 1961 reforms in Pakistan, the grandchild steps into the shoes of his or her predeceased parent; no limit of one third applies to the share of the grandchild. Professor Anderson objects to the following anomaly that can arise under the Pakistani law:
>
> > "P. has two children, a daughter (A.) and a son (B.). The son predeceased, leaving daughter (C.). If no other relatives are involved, the Pakistani law will result in the son's daughter (C.) taking two-thirds of the estate, as the share which her deceased father would have taken, and the daughter (A.) taking one-third; whereas the usual rule in all the Sunni schools would have intially allotted one half to the daughter and one-sixth to the son's daughter, and would then have given them (after application of the principle of return) three-fourths and one-fourth respectively."

In Tunisia the share of the granddaughter would be limited to one third of the estate. Under the rules of "tessaoui" (tasāwin) the granddaughter could inherit the equivalent of the daughter or the son, according to the instructions of the grandparent:

	Initial allocation	ʿAwl - final allocation
Son	2/3 (mīrāth)	2/4
Daughter	1/3 (mīrāth)	1/4
Son's daughter	1/3(equivalent to daughter's share)	1/4
Total	4/3	

continued next page

	Initial allocation	ʿAwl - final allocation
Son	2/3 (mīrāth)	2/5
Daughter	1/3 (mīrāth)	1/5
Son's daughter	2/3 (equivalent to son's share)	2/5 = 6/15, more than 1/3; hence, must be reduced to 1/3.
Total	5/3	

If the share of the granddaughter were determined according to the rules of "adamou hirmane" then the granddaughter would receive more than the daughter:

Grandparent

Son	Daughter	Son predeceased
		Daughter (grdchild of grandparent)
2/5	1/5	2/5 = 6/15, more than 1/3; share reduced to 1/3

remaining 2/3 distributed:

2/3 x 2/3 = 4/9	1/3 x 2/3 = 2/9

final distribution:

4/9	2/9	3/9

While the rules for calculating the obligatory legacy of the grandchildren come closer to rules of wills in that the child's share is determined then removed and the remainder distributed among the intestate heirs, there is one rule in the amendments which works hardship on an obligatory legatee. This is a rule of "hotchpot" (article one hundred ninety-one), that is, any gifts made by the grandparents inter vivos to the grandchild shall be counted against the maximum one-third allowed to the obligatory legatee. It is a rule for which neither the method of "tessaoui" (tasāwin) nor "adamou hirmane" provided. It emphasises even more the peculiar position of the obligatory legatee. By virtue of article one hundred ninety-one, he becomes the only type of claimant (legatee or heir) to an estate who cannot receive gifts inter vivos with impunity. If the gift to the obligatory legatee in itself or in combination with the obligatory wasīyya exceed the quota of one-third, the heirs must consent to the excess. Presumably if the heirs do not consent, then the grandchildren must return the excess gift. There is thus no assurance of immediate benefit, unless the gift consists of a property in which rights of usufruct can be exercised immediately.[67] In regard to any

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67. A similar problem would arise under the French law of revocation of gifts inter vivos. Article 953 of the Code Civil names survival of children of the donor as one of the exceptions to the rule that a gift once made is ir-

strangers or intestate heirs, the de cujus has every right during his lifetime (if he is in good health) to dispose of the whole of his estate by gift in their favour. The gift takes immediate effect and no intestate heir would have the right to have the gift revoked on the ground that the deceased donor deliberately had his estate reduced by the passing of the gift. The heirs are thus protected from inter vivos gifts only when favouritism is exercised for the benefit of grandchildren who qualify as obligatory legatees.

The "hotchpot" rule of article one hundred ninety-one has no precedent in Islamic law, regardless of whether one wants to classify the obligatory legatee as an intestate heir or testate beneficiary. The equivalent of an "hotchpot" rule in French law is found in article eight hundred forty-three of the Code Civil.[68]

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revocable. According to article 962 of the Code, "The gift (inter vivos) will remain likewise revoked, even when the donee would have been put into possession of the goods given...; without however, the donee being held to restore the fruits collected by him, whatever the nature of the fruits be, if this was not done from the day of notification of the birth of the child or its legitimation by subsequent marriage..."

68. Article 843 of the French Civil Code (Code Civil): Any heir, even a beneficiary, entering the succession, must yield to his co-heirs everything that he received from the deceased by way of gifts inter vivos directly or indirectly: he cannot retain the gifts made to him by the deceased, unless they were given to him expressly by

stipulation of advantage (preciput, or praecipuum) or with dispensation from yielding account of the gifts.

The legacies made to an heir are deemed to have been made by advantage (preciput) unless the testator expressed contrary wishes, in which case the legatee can claim his legacy only by taking the least amount.

Article 191 on the Obligaotry Bequest in the Tunisia Code of Personal Status states:

"Whenever a person dies leaving children, male or female, whose father or mother died before or at the same time as that person, those children shall be due a wasīyya, calculated according to the share their father or mother would have received from his ancestor (the praepositus), without this share exceeding one third of the estate.

These descendants cannot claim the above wasīyya (1) If they inherit (intestacy) from the parent (grandfather or grandmother) of their parents.

(2) If their grandfather or grandmother bequeathed to them in his lifetime, or gave them a gift without recompense (ʾiwad), whose value is that of the obligatory bequest (al wasīyya al wājibīya).

But if the grandparent bequeathed (or gave) something that is less (than the amount of the obligatory wasīyya the grandchildren would have received), it is counted as a supplement for the difference between the obligatory wasīyya and the voluntary bequest (al wasīyya al ʾikhtiyarīya). If the grandparent bequeathed more than the obligatory wasīyya the grandchildren would have received, then it is deemed an excess and general rules of al wasīyya (al ʾikhtiyariya) apply to it.

The obligatory bequest (al wasīyya al wājibīya) takes precedence over the voluntary bequest (al wasiyya al ʾikhtiyarīya). Several voluntary bequests are on an equal footing and if in competition, they are distributed in proportion (abate proportionately, as opposed to first in time taking precedence).

Paragraph one of article eight hundred forty-three applies an "hotchpot" rule to any intestate heir and non-heir beneficiary taking a share in the estate. The grandchild in Tunisia, in order to qualify as an obligatory legatee, cannot simultaneously qualify as a legal intestate heir. Hence, article one hundred ninety-one of the Code of Personal Status agrees with paragraph one of article eight hundred forty-three. When compared with the French Civil Code (Code Civil), the Tunisian law for the obligatory legatee treats the grandchild as a non-heir beneficiary. However, under French law, the deceased could provide expressly that these heirs and beneficiaries be exempt from having to report all gifts inter vivos. However, French law and Tunisian law diverge when an heir (and grandchild to qualify as an obligatory legatee in Tunisia cannot be an heir) is also the beneficiary of a bequest; the French law presumes that he need not account for gifts inter vivos made to him by the testator. If the testator expressly provided that the testamentary gift is subject to account of gifts inter vivos, then the law will comply with his wishes.

It would appear that the writers of article one hundred ninety-one of the Tunisian Code of Personal Status adopted the French notion of the "hotchpot" rule without considering reasons for which the obligatory legatee should

be so radically distinguished from the other heirs to the estate. The Tunisian legislator may have been motivated by the fear that the grandfathers would continue their traditional ways of using tanzīl either by way of wills or the equivalent in gifts inter vivos to orphaned grandchildren; in which case, the "hotchpot" rule would keep the obligatory bequest from duplicating the share given by tanzīl. However, it would seem that the legislator could have limited the "hotchpot" rule only to testamentary gifts made in excess of the obligatory bequest and not have discriminated against the obligatory legatee in regard to gifts inter vivos.

CHAPTER IV

COURT JUDGMENTS: NO WASĪYYA TO AN HEIR: NO WASĪYYA BEYOND THE THIRD

Introduction

The most distinctive features of the Islamic law of bequest are: no bequest beyond the third, and no bequest to an heir. Their jurisprudential base is not the Qur'ān; it is the ḥadīth. The two ḥadīth for the bequest are deemed to be early and unimpeachable.[1] They are perhaps among the most illustrious examples of Islamic legislation apart from the Qur'ān. They do not merely affirm a verse in the Qur'ān or clarify an ambiguous verse. They fill in a significant omission.

The Qur'ān dictates the fractional intestate shares of the family of the deceased. The a'imma interpreted them as obligatory.[2] As for testate succession, the Qur'ān speaks of Muslims fulfilling a bequest or paying

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1. R. Marston Speight, unpublished Ph.D. Thesis, Hartford Seminary, Connecticut, 1969. He proposes that the authenticity of a ḥadīth be determined by its literary form ("A Study of Islamic Ḥadīth as Oral Literature").

2. Sūra four (Al Nisā'), verse thirteen: حدود الله

Sūra five (Al Mā'idah), verse eleven: فريضة من الله

a debt left by the deceased before giving the remainder of the estate to certain relatives of the deceased. When the deceased leaves no child, but parents and brothers (sūra four (An Nisā'), verse eleven); or no child, but spouse, or child and spouse (sūra four, verse twelve); or no child, but brothers and sisters (sūra four, verse twelve), the Qur'ān enjoins the administrator of his estate to pay the bequest and debts first. Where the deceased leaves children and/or parents (sūra four, verse eleven) the Qur'ān makes no mention of bequest excepting that Allāh Himself would bequeathe to the deceased an order that he provide for his children (one share for the female and twice that for the male); it would thus seem that the wasīyya of a devout Muslim would be Allāh's wasīyya. If an interpreter of the Qur'ān were to take the verses at face value, they could mean that a deceased Muslim who had no children and left only brothers and any other collateral relatives could will away his property any way he wished and expect his bequests to be fulfilled after his death. Thus, the rights of children and parents of the deceased would seem to be more protected than the rights of brothers and sisters (sūra four, verse eleven: "You know not which is closer, your parents or your children."[3]).

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3. آباؤكم وأبناؤكم لا تدرون أيهم أقرب لكم نفعًا

If the Qurʾān is seen in the light of a distinction between issue of a deceased Muslim competing with bequests for shares in the estate and the collateral relatives of a deceased Msulim competing with bequests for shares in the estate, then the hadīth forbidding the bequest beyond the third can be seen in a perspective other than the traditionnal one. The traditional view is that Saʿad Ibn Waqqās, the dying testator, who wished to bequeathe all of his property for charitable motives, was forbidden by the Prophet to deprive his family of the entirety of his wealthy estate. This interpretation fails to give any significance to the details in the hadīth. One such detail is the fact that the family of Saʿad Ibn Waqqās consisted of an only daughter. Though Saʿad might have had other blood relatives, his daughter constituted the only family eligible to be an heir. The argument which Saʿad put to the Prophet for bequeathing away all or most of his estate was that he had only a daughter to inherit from him. This fact takes on a new significance if one remembers that the Qurʾān enjoins fulfilling bequests made by the deceased when heirs are present in a certain combination, but is silent about bequests per se when the only heirs are children (or parents) and exhorts the dying to leave a provision for

such children. Thus, it may be said that the Prophet was chastising Sa'ad Ibn Waqqās for wanting to bequeathe his property for the reason that he had an only daughter to inherit from him. The reluctance of the Prophet to grant Sa'ad's request would be respectful of the silence of the Qur'ān on the administering of bequests bequests when issue are the only heirs. Nor does the Prophet forget the duty of care for one's children which the wasīyya of Allāh to the dying bids to be done, for the Prophet finally relented to Sa'ad's request with these words: "The third is much and it is better not to leave relatives begging in the streets."[4] If the presence of issue in the hadīth had been given crucial significance by jurists, then the limit of the one-third would have applied only when issue (or parents) were the

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4. والثلث كثير إنك ان تذر ورثتك اغنياء خير من ان تذرهم يتكففون الناس.

Translation of the full hadīth: "Mālik from...from... from Waqqās reported from his father that he said the Messenger of God came to me, an ill person, in the year of the Prophet's last pilgrimage. I was severely ill. I said, 'Oh, Messenger of God, it is a very hard illness as you can see and I have some property and the only heir I have is a daughter (wa lā yarithunī 'illā 'ibnatūn lī). Should I give ('atasaddaqu) two-thirds of my property as charity?' Then the Messenger of God said, 'No.' 'One-half?' He said, 'No.' Then the Prophet said, 'One-third and the third is much. It is better to leave your heirs richer than it is to leave them begging from other people.' "
(Reported by Imām Mālik in the Muwatta', found in Muhammad ibn 'Abd al Baqī, al Zurqānī, Sharḥ al Zurqanī 'alā 'al-Muwatta' of Mālik bin 'Anās, Volume 4, page 62,530, Cairo, 1355/1936)

only heirs, and no limit would have been applicable when collateral relatives (alone or with parents; or spouses with issue) were the only heirs.

Instead, traditional juristic reasoning refused to restrict the meaning of the hadīth of Sa'ad Ibn Waqqās to its particular details. The result of juristic reasoning was that the making of a bequest was allowed regardless of who the intestate heirs were; likewise, the amount of the bequest was limited regardless of the degree or class of relationship of the intestate heirs. The rationale for limiting the bequest came to be that the interest of the family of the deceased as a whole had to be protected. Thus, brothers and sisters are treated no differently from children so far as bequests are concerned.

In summary, the argument is that the Qur'ān prima facie allows a testator to make bequests when he or she does not leave children or parents, that is, he or she leaves brethren or brethren plus parents.[5] Whether

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[5]. The concept that the right to bequeathe depends on the kind of heirs left was well-known to Hebrew legal scholars. Baba Bathra, 8.1 from the Mishnah reads:

> "Certain (near of kin) both inherit and bequeathe property, some inherit but do not bequeathe, some bequeathe but do not inherit, and some neither inherit nor bequeathe. These both inherit and bequeathe: a father inherits from his sons, and sons from their father and brothers by the same father, and they can bequeathe property to them. A man

a testator cannot leave bequests when he leaves children is not explicit in the Qurʾān. The ḥadīth relating the plight of Saʿad Ibn Waqqās shows that a dying person can leave bequests when he leaves a child. The ḥadīth thus serves to solve an ambiguous point of interpretation. Nor does the Qurʾān forbid the dying Muslim to bequeathe away all of his property so that his brothers and sisters or spouse has nothing to take. The ḥadīth again has an answer for the gap. The dying Muslim must leave his relatives two-thirds of the estate. The ḥadīth thus becomes a significant piece of legislation, laying down the magic figure of one-third, which does not appear in the Qurʾān.

The second ḥadīth introducing a rule for the law of bequests has a less substantive story behind it than the one of Saʿad Ibn Waqqās. The second ḥadīth merely appears as a dictum: "No waṣīyya to an heir."[6] The

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inherits from his mother, and a husband from his wife and sisters' sons, but they do not bequeathe a property to them. A woman bequeathes property to her sons, a wife to her husband and maternal uncles, but they do not inherit from them. Brothers by the same mother (but another father) neither inherit (from one another) nor bequeathe property (to one another)." Translated by H. Danby, The Mishnah, Oxford: Clarendon Press, 1st edition,1933,p.376.

6. Mālik, Al Muwattaʾ, ed. ʿAbd Al Baqī, Al Zurqānī, Cairo, 1355/1936, volume 4, chapter 532, sect.1535,page68:

"Yaḥya said I heard Mālik say that this verse was abrogated: if you have property the waṣīyya is for the parents and near relatives. It was abrogated by the revelation on the farāʾid in the

Qurʾān merely provides for giving shares to named classes of relatives after paying the bequests and debts. It does not say whether these bequests and debts belong to strangers, or non-heirs, or heirs. Again any interpretation of the Qurʾān that allows a testator to deny certain heirs (such as collateral relatives) rights in the estate by bequeathing all rights to one heir is foiled by the hadīth, "No bequests to an heir."

The hadīth forbidding a bequests to an heir does not give details of a story whose meaning could throw light on the motives which lie behind the rule of no bequests to an heir. Nonetheless, this hadīth does raise some interesting questions when it is juxtaposed, from the point of view of chronology, with the hadīth on the limit of the one-third. If the hadīth on the one-third came first,[7] in point of time, jurists would have found that the hadīth left some questions open. One

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Qurʾān. He said I heard Mālik say the established undisputed sunna among us is that a waṣīyya to an heir is not allowed unless the heirs consent thereto."

7. According to the theory of R.M. Speight (footnote 1 above), most likely it would come first, since ʾahadīth in the form of dicta, like the one forbidding bequests to heirs, appear to be a later form of reporting than the story type. The hadīth about Saʿad Ibn Waqqās is a story type.

such question would be whether a dying Muslim could use his limited testamentary power for the benefit of any heir. For example, the dying testator might wish to augment the share of a daughter who gets only one-half of the share of the son (see page 560 et sq, of Chapter V post). The second hadīth sufficiently answered the question: no bequest to any heir. Such hadīth could be justified by the effect which it would have of reducing dissension[8] among the heirs who could expect only set shares, and of relieving a judge of the task of construing the words of a testator when an heir complained that the reasons for which the testator favoured one heir over another are unjustified and inequitable.

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8. Dissension among heirs is still a problem today. One relative is inevitably accused of fabricating a disposition which counteracts the will -- Civil Case (madanī) No. 9360 of 3.6.1967 and Personal Status (shakhsīya) Case No. 27375 of 11.5.1971. In case no. 9360, the defendant, claiming as legatee, accuses the plaintiff of fabricating a hiba disposing of the same property that was disposed of in the will. When the petition was refused, the same parties appeared in case no. 27375.

Later in this chapter we shall discuss more Tunisian cases of wasīyya in which the Court is asked to decide between two dispositions, a bequest and a hiba.

If the hadīth limiting a bequest to one-third was reported second in time, subsequent to the hadīth forbidding a bequest to an heir, then it is arguable that the rationale underlying the hadīth forbidding bequests to heirs without any regard to quantitative limits was to prevent any one favoured heir from receiving all of the estate at the total expense of other heirs. Even the subsequent reporting of the hadīth restricting bequests to one-third would still have left open another question, namely, can an heir receive a bequest as long as it is within the limit of one-third? The answer, arguably, could have been in the affirmative and still be consistent with the policy that no one heir should take the entirety of the estate by testamentary disposition. For a bequest which did not exceed one-third, but was made to an heir, would augment the intestate share of the favoured heir, but would not cut off other heirs from partaking of the remaining two-thirds. Hence, a bequest to an heir up to the limit of one-third would be legitimate, as advocated among the Shiʿī jurists, not the Sunnī.[9]

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9. N.J. Coulson, Succession in the Muslim Family, Cambridge: The University Press, 1971, page 240: "According to the Shīʿa, the ruling of the Prophet is to be interpreted as abrogating the duty to make bequests to near relatives (as enjoined in the Qurʾanic verse of bequest) but not the right to do so."

Since it is impossible to date one hadīth vís à vís another, one can appreciate the approach of the Mālikī madhab, prevalent in Tunisia (see page 26 of Chapter I and pages 127, 128, 131 of Chapter II above). That approach was to treat the two traditions as totally unrelated. One is deemed to deal with the size of the legacy; and the other with the eligibility of a beneficiary. Thus, if the jurists and qudāh could determine from a simple dictum who is a beneficiary of a bequest, namely, a non-heir, then they need not complicate matters by wondering whether beneficiaries of bequests could be heirs as well, as long as there was always something remaining in the estate for the other heirs who were not named beneficiaries. It was simpler to deal with a dictum saying, "No bequest to an heir," than with a discretionary principle which determined who was a beneficiary to a bequest according to the degree to which such a bequest to an heir prejudiced the interests of the other intestate heirs.[10]

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10. According to Mālik in Al Muwattaʾ, the sunna in his community accepted beyond dispute that verse 180 of sūra 2 (Al Baqarah) which allows a wasīyya to parents was abrogated. Thus, logically, something that is abrogated is not then allowed in the least. Thus, no bequest to an heir under any circumstances.

The commentary on the Muwaṭṭaʾ cites a hadīth in which the Prophet said: "Each has his lawful share. Therefore no wasīyya to an heir."
(Al Zurqānī, Volume 4, page 68)

A commentary on the Muwattaʾ indicates that the rule of no bequest to an heir is based jurisprudentially on the sunna of the community and ʾijmāʿ. Jurists agreed that sūra two (Al Baqarah), verse one hundred eighty of the Qurʾān on bequests to parents was abrogated by the verses of inheritance found in sūra four (An Nisāʾ), even though there was no direct proof of abrogation.[11] Another treatise, Al Mughnī by Ibn Qudāma[12] refers to the rule of no bequest to an heir as a rule of ʾijmāʿ among the ʾahl al ʿilm, for the hadīth of the Prophet announcing no bequest to an heir because each heir has his legal share was reported only by Daʾūd and Tirmidh.[13]

The Tunisian legislators will continue to accept these two basic rules governing bequests until they find a jurisprudential base to replace them. The pressure to find a new jurisprudence will probably rise as reforms in land laws are more extensively enforced. Reforms in the law of waqf (hubus) in 1957 and the distribution (qasama) of property (under the majallat al huqūq al ʾistihqāqī) already are working to clear away economic cobwebs. For one, the abolition of ʾahbās ends co-owner-

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11. See footnote 10 above.

12. Edited by Muhammad Rashīd Ridā, Third edition, 1947, from the version of Al Khanafī, page 6 of Kitāb al Waṣāya.

13. Ibn Qudāma, Kitāb al Waṣāyā, page 1.

ship of many estates (see pages 357-358 of Chapter II above). Each beneficiary goes to the Commission for Abolition of the ʾAḥbās (lajna tasfīya al ʾaḥbās) to get a ruling on abolition and collects his share in the farūd. When no hubus is involved, articles one hundred twenty to one hundred forty-one of the Code of Property Rights (majallat al ḥuqūq al ʿaīnīyat) of 1965 authorise courts to interfere in the qasama of the property of succession so that individual ownership of one economically viable unit of land is encouraged (see pages post). Finally, the decree of 4 June 1957 (J.O.R.T. No.45 of 4 June 1957), modified by Law No. 63-25 of 15 July 1963 (J.O.R.T. No. 33 of 12-16 July 1963) aims to prevent excessive fragmentation of real estate. The law requires that the authorisation of the administrative officer in charge of the district where the property is located be given before the property is subjected to any division. The authorisation is given only if the property be of a minimum size and is applicable only when the property is of agricultural nature.[14]

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14. Civil Case (madanī) No. 11811 in the Court of First Instance, Tūnis, of 11.2.1969, applying amendment to the law of 1957.

Civil Case (madanī) No. 4057 in the Court of First Instance, Tūnis, of 28.1.1964, in which the expert investigator reported to the Court that the acreage of the property in question was only 500 square metres. The

minimum for qasama is 800 square metres.

Law No. 63-26 of 15 July 1963, relating to immoveables: "Article 1: The first article of the decree of 4 June 1957 relating to matters of immoveables, modified by law no. 59-68 of 9 June 1959 is abrogated and replaced by the following new text: 'Article 1: In order to be valid, subject to whatever is ordered, contractual transactions (sale or gratuitous alienation) inter vivos of property and of the enjoyment or any transferal or apportionment (taqsīm), affecting the immoveables or the propertied rights in Tunisia, and affecting lands used for agricultural purposes as well as lands not having any constructions or not being partitioned and hereinafter enumerated, must be authorised by the Governor of the district where the immoveable is situated:

1) cession in exchange for compensation, or gratuitously, inter vivos of the entire property or of the usufruct
2) formation of enzel (inzāl)
3) formation of servitude
4) taking shares in companies
5) leases of a duration of more than two years
6) any distribution (qasama) or any act or any operation which has the effect of transmitting or attributing, in whatever manner, to a partner (sharīk) or third party, the full ownership or usufruct of immoveables, resting on the assets of a company
7) formation of a hypothecation (mortgage, rahn).

The preceding dispositions apply equally to any ceding of actions, obligation, company shares, shares of founders, shares of beneficiaries in the companies, whatever be the form but whose main or subordinate object is the exploitation of lands of agricultural use.'

The present law will be published in the Journal Officiel de la République Tunisienne (al rā'ida al rasmī li'l jumhurīya at tūnisīya) as one of the laws of the state.

Issued at Tunis, on 15 July 1963 (24 Sfar 1383). President of the Tunisian Republic, Habib Bourguiba (Al Habīb Bu-Raquibah)."

If the property be below that minimum size, the co-owners may agree to a sale[15] of the property at a public auction. Then the proceeds of the sale are divided among the co-owners. Co-owners are allowed to bid in the auction like any other non-owner.[16]

The laws which aim at discouraging co-ownership and excessive fragmentation of land at least create an atmosphere which is conducive to reforming the law of wills. For there is hardly any point in changing the laws of testamentary disposition unless a property owner is unfettered by concerns for a score of relatives who share in the ownership of the property and unless the testator is able to pass on more than his minute

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15. Article 120 of the Code of Property Rights of 1965: When physical division of the property is not possible or if it entails a considerable depreciation of the property, the judge will order sale of it.

The sale will take place , depending on the case, according to the rules of the Code of Civil and Commerical Procedure on the matter of sale of moveables or adjudication of immoveables, to the extent that they are not contrary to the dispositions of the present chapter and to the nature of the division.

If the co-owners, being masters of their rights, are unanimously against calling a third party to the public auction, the sale can take place with the waiving of legal publicity.

The proceeds of the sale are distributed among the co-owners in proportion to the share of each of them.

16. Civil Case (madanī) No. 4714 in the Court of First Instance, Tūnis, of 4.1.1964, in which one of the brothers co-owning a house that was inherited from their father offered to buy the house when it was accepted that the house could not be subjected to qasama. The Court informed him that he could not buy immediately, but could bid in the public auction if he wished.

share. An example in point arose in Personal Status case (shakhsīya) No. 27375 in the Court of First Instance, Tūnis, of 11.5.1971. Briefly, the facts were that in 1946 the deceased had made a bequest of one-third of all his property to the plaintiff. One half hour after having the will notarised, the testator made a hiba of one-fourth of the house whose ownership he shared with the uterine sister of the defendant. The hiba was for benefit of the defendant. The defendant had taken possession of the one-quarter share of the house before the donor died. The plaintiff claimed that the hiba was invalid because it touched on the same property as the wasīyya. The Court of First Instance of Tūnis ruled that both dispositions were valid. They were not in competition for the same property. The hiba disposed of a specific piece of property, namely, one-quarter of a house. While it is true that the one-quarter was part of the total property of the testator when he made the will, he did not make a specific bequest of the house. He made a general bequest of a fraction of his entire possessions, including moveables and immoveables. This fraction was to be taken out of whatever property was legally part of his estate at the time of his death. By the time of his death the one-quarter of the house in question had in fact departed from the estate via the

hiba.

The hiba in this case served to mitigate the fragmentation of the estate. If the one-quarter of the house had been deemed to have remained in the estate and been calculated in the one-third of the total due to the legatee/plaintiff, the fractions of property due to the survivors of the testator and the beneficiaries of his will would have been even more ridiculously reduced.

The above case is only one example of the several which form the subject of this chapter. They all deal with the law of wills. They illustrate the application of the rules of no bequest beyond the one-third and no bequest to an heir. For each case we will examine possible reforms in the law and point out jurisprudential bases for such reforms.

Cases

No. 20510 (shakhsīya) of 15.2.1966

The number of disputes over wills coming to the Court of First Instance (ʾibtidāʾī) in Tūnis since independence in 1956 are few, but raise a number of problems.

The first case arising under the rules of no bequest beyond the third and no bequest to an heir was personal status case no. 20510 of 15.2.1966 (date of judgment). One of the main issues was a question of conflict of laws. Since the parties were of Judaic confession, though of Tunisian nationality, and the disposition left by the deceased was made according to Mosaic law, the Court of First Instance was asked to decide whether the Mosaic law applied[17] or the Code of Personal Status of Tunisia. The Court applied the Code of Personal Status since all Tunisians regardless of religious affiliation are subject to the one and same law in matters of succession, and the estate was opened for succession after the date when religious laws ceased to apply in Tunisia.

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17. Standard source of Mosaic law used by the courts and lawyers is S. Tibi, Le Statut personnel des israélites et specialement des israélites tunisiens, Tunis, 1921-23. Tibi was a lawyer in Susa and member of the Grand Conseil.

The facts of the case were the following:

The plaintiff was the wife of the deceased Maarek. He had made a written disposition dated 29.2.1952, at a time when Rabbinical law was in force in Tunisia. In the document he gave to his wife a share in the building whose ownership he shared with the children of his predeceased brother. The property was registered property (Title 8276). Twelve years later, on the 1st of October of 1964, the husband of the plaintiff died. The lower District Court (nāhīya) of Tūnis deemed that the wife, the plaintiff, and the widowed germane sister, the defendant, were the heirs of Maarek. The Court also determined that Maarek left a building registered under TF (Titre Foncier) 8276. The plaintiff was living in the same building at the time of the dispute.

The plaintiff then asked the defendant to aid her in having the gift that was made in 1952 registered on the title deed, as all transfers of ownership of registered property must be registered.[18] The sister re-

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[18]. Article 204 of the Code of Personal Status: Gift is valid only by official document (hujja rasmīya). As for tangible personal estate, the tradition of delivery shall apply, subject to the special rules for registered personal estate (manqūlāt).

Article 204 is consistent with the provisions of article 373 of the Code of Property Rights of 1965: The following must be rendered public by being inscribed on the title of property, in order to be opposed by third parties: 1) All transactions and agreements inter vivos of a gratuitous nature or incurring obligation, all judg-

sisted. The wife then asked the Court of First Instance of Tūnis to declare the gratuitous disposition of 1952 valid. She also demanded one thousand dinars[19] in damages from the sister for resistance without justification, or else payment of all legal costs by the sister.

The Court of First Instance accepted written proof of the marriage between the deceased and the plaintiff according to Hebraic law. The Court accepted the provisions of the gratuitous disposition to be the following:

"My wife shall in co-ownership have one-half

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ments that have the effect of constituting, transmitting, declaring, modifying, or extinguishing a real landed right, of rendering it inalienable, of restraining free circulation, or modifying any other condition of its inscription;

2) Transactions and judgments on the ceding of use of common walls;

Leases of immoveables exceeding three years as well as the leases of less duration or their renewal when they bring about disposing of the enjoyment of the immoveable for a period of time whose term exceeds the expiration of the third year from the date on which they made agreement...

4) Transactions and judgments confirming the liberation or ceding of a sum superior to a year of rent...

5) Transactions and judgments confirming the liberation or ceding of a sum superior to a year of arrears of enzel (inzāl).

(This article 373 is a duplication of article 343 of the former Code Foncier; see page 211 of Chapter II above).

19. One dinar in 1971 was equivalent to about £1. It was the same in 1965 also.

> of the property that is registered under TF 8276, and located in Tūnis. She also has four cubits of land located in the Holy Land.
>
> "I give her for her lifetime all of the revenue accruing from both halves of the property located in Tūnis. She has likewise the moveable furnishings, jewels, and clothing in that place. She will live there for all her life without paying rent, but she will pay taxes and water and electrical bills. After she dies the place goes to my adopted daughter for as long as she likes.
>
> "The nu-property of the place in Tūnis goes to my wife from today. The usufruct will commence one hour before my death.
>
> "The children of my brother cannot possess the revenues until after my wife's death."

The Court of First Instance deemed the document to have taken effect at the date of the death of the author, namely, in 1964. The Court determined that the law governing the effect of the document was the law in force at the date of the death of the author of the disposition. The law in force on that date, concerning the classification of gratuitous dispositions, was the Code of Personal Status. For Law No. 4 of 27 September 1957 had abolished the application of Mosaic law (J.O.R.T. of 27 September 1957). Given the nature of the disposition and the fact that its author specified that it would take effect fully and completely upon his death, the Court deemed the document to fall within the rules of al wasīyya, not al hiba. Since the document was deemed a will, the wife automatically lost capacity to take under the will (article one hundred seventy-nine of the

Code of Personal Status: "No bequest to the heir and no bequest that exceeds one-third (of the estate) unless the heirs permit after the death of the testator."). Nor was the sister willing to approve the bequest. No mention was made in the judgment as to whether the nephews qualified as ʿaṣaba who would also have to give their consent. The Court then dismissed the petition and ordered the property named in the will to be distributed according to the rules of intestacy in the majallat al ʾahwāl as shakhsīya (Code of Personal Status).

The widow appealed to the Court of Appeal (ʾistiʾnāf) of Tūnis, under case no. 26728/3, judgment no. 599966, rendered on 31.7.1967, (affirmed the decision of the Court of First Instance).

It should be noted that the plaintiff argued that the gratuitous disposition should take effect as a gift (hiba) inter vivos. Since both the Court of First Instance and the Court of Appeal accepted that the law applicable was that of the Code of Personal Status, the hiba still would not have been valid. What would have made it ineffective was the fact that the donor had specified that effective use of the property would not be immediate, as required by article two hundred one of the Code of Personal Status. The widow sought to transfer ownership and possession in her name only after

the donor's death. Given that the property was registered, possession and ownership could, according to the actions of the widow, be deemed to have been established only from the date of the registration of the gift on the title deed.[20] It was unfortunate that the date of attempted registration was not the same as the date of the deed of disposition.

The case well illustrates the dilemma of a husband who wishes to provide solely for certain designated members of his family after his death. He can provide by making a gift inter vivos, but this is not wholly satisfactory. For if the husband should make the completed gift, then afterwards the wife predeceases him, or has been divorced from him before he dies, the purposes of the donor/husband are frustrated. In the event

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20. The Code of Personal Status reflects the Hanafī strictness on gratuitous dispositions such as hibā. A comparison between the Hanafī and Mālikī provisions from the draft of the Code of the Sharī'a illustrates the strictness of Hanafī law:

Article 1227 (Mālikī) -- If the donee works hard at possessing the hiba, but the donor procrastinates until he dies, the hiba is valid, and the endeavour spent on taking possession takes the place of actual possession.

(Ḥanafī) -- Hiba is void with the death of the donor before possession is seized by the donee, even if the donee has worked hard in demanding the gift.

Article 201 of the Code of Personal Status -- Hiba is completed by the delivery of the thing given to the donee. And the hiba is void (bātil) if the donor or donee dies before the delivery and even if the donee has tried to his utmost to demand the thing given.

of the wife predeceasing him, he has to share the property with the heirs of the deceased wife. In the event of the donor divorcing his wife after the completion of the hiba, he loses the property entirely to his wife's heirs, including her second husband if she remarried.

The same problem would arise if a husband named his wife beneficiary in his will; but by the time he died and before he had a chance to revoke the will, she was no longer his wife. Being no longer his wife, she would qualify, under the provisions of article one hundred seventy-nine of the Code of Personal Status, as a non-heir beneficiary. However, the husband might think to resolve the problem by conditioning the bequest on her still being his wife by the time of his death. Yet even this condition would not save the bequest since no bequest can be made to an heir.

A third possibility which a husband could explore is a bequest of usufruct. In the above case of Maarek, the main purpose of the bequest was to provide the wife with use of a building and use of the revenues for income.[21] The Code of Personal Status does not explicitly

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[21]. Article 143 of the Code of Property Rights of 1965: The holder of usufruct has a right to the natural and civil fruits.

Article 145: Civil fruits are rents, enzel (inzāl) in arrears, interests of credits and other similar items.

draw any distinction between a bequest of usufruct and a bequest of corpus in regard to the rule of no bequest to an heir (article one hundred seventy-nine). The term "bequest" could prima facie be interpreted in its widest sense to mean bequest of corpus and/or usufruct. Such interpretation would agree with the Mālikī and Hanafī provisions of the draft of the Code of the Sharī'a. Article eleven hundred eighty-five of that Code specifically subjected a bequest of usufruct to the rule of the one-third (the one-third is calculated out of the value of the corpus whose usufruct is bequeathed). One would then expect by way of logical extension the rule of no bequest to an heir also to apply to a bequest of usufruct.[22]

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22. Code of the Sharī'a, article 1185 (Mālikī): If one bequeathes usufruct of a property, like habitation of a house, one refers to that property whose usufruct is the legacy. If it rests on one-third of that corpus, the bequest is executed; if not, on the third of the value of the corpus, the heirs choose between allowing the bequest or bestowing one-third of that corpus and all else left by the deceased. It is a gift.

(Hanafī): It is valid to make a bequest of usufruct like living in a house or getting revenue or getting fruits of the field. If the corpus and profits of the house derive from one-third of the property of the testator, delivery is to the legatee who makes use of it according to the calculation of the wasiyya. If it does not derive from the testator has no other property, the property is divided by thirds or as joint usufruct (muhāya'a) for the time of the usufruct. The legatee gets one-third and heirs two-thirds. If the testator has property other

In terms of sources of jurisprudence, these rules on usufruct derive from human legal reasoning. Hence, they are not binding for all time. It is possible to argue that the corpus and the usufruct of a property could be the objects of two distinctly different rules. The usufruct could be given freely without any limits by the testator for a maximimum period of the lifetime of the legatee and without consent from the heirs of the testator. Whereas, ownership of the corpus could continue to be subject to the limits of the one-third and the prohibition against heirs taking bequests. In this way a husband who has been responsible for maintaining his wife during his lifetime could continue to provide for her maintenance notwithstanding his death (via rules of usufruct) and leave the nu-property intact within his family upon the death or remarriage of his wife.

The existing legislation in Tunisia, however, does offer some limited possibilities. The will of specification is worth examining as a possibility. It is provided for in article one hundred eighty of the Code of Personal Status. In a will of specification the testator is allowed to assign to each of his heirs

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than the corpus whose usufruct was bequeathed, the one-third is calculated out of all the property.

specific pieces of his property as long as the value of each piece does not exceed the value of the intestate share of the particular heir in question. In the case of Maarek neither the lawyers nor the Court discussed whether the value of any of the items bequeathed to the wife was equivalent to or exceeded her legal intestate share. If it were she would be entitled to have it without sharing its ownership with the sister. The will of specification has one obvious drawback, it being that the intestate share of the wife will not always be large enough to encompass the amount with which the husband may want to provide for her.

No. 21647 (shakhsiya) of 14.1.1966

Again in another case decided by the Court of First Instance (ʾibtidāʾī) of Tūnis, the Court had to judge on the validity of a gratuitous disposition left by a husband to his wife and minor children borne by her. In the Court's daftar the case is labelled with the heading ʾibtāl al wasīyya (invalidity of bequest). In the record of the judgment the advocate for the plaintiff uses the words mūsī lahu and wasīyya when referring respectively to the beneficiary under the document and the document itself. The Court, on the other hand, specifically calls the document a sadaqa and legally treats it as a hiba . Hence, the rules of al wasīyya were not applied. Yet the case will be discussed as an example of the difficulties facing a person who wishes to provide for his family after his death by means other than the rules of the farāʾid.

The facts of the case were as follows:

Muhammad bin Yusuf Al Fusāṭawī (فساطوي) wrote on 9.7.1963 a document disposing of a sadaqa. It was notarised by two notaries in Djerba. The sadaqa was in favour of Muhammad's wife and her two minor sons, the defendants, and any other children whom she might have in future. He died two years later, on 27.1.1965 in Tūnis. The District Court (nāḥīya) of Tūnis determined

in judgment number 4841 of 20.2.1965 that Muḥammad left as sole heirs his son Ḥabīb, his daughter Beya, the two plaintiffs; his wife, and his two minor sons borne by her. Two months later the chamber for matters of guardianship conferred on the widow the status of muqaddam (legal guardian) over her minor children (No. 4502 of 10.4.1965). In the same month, two notaries in Tūnis drafted an inventory of the estate, establishing that the deceased left moveables and immoveables located in Tūnis and Djerba (16.4.1965). The itemization of the estate in the judgment of the Court of First Instance shows that the estate was quite large, containing many unregistered pieces of real estate.

The Court of First Instance of Tūnis in case no. 11835 (shakhsīya) of 28.4.1965 authorised one of the plaintiffs, namely, the adult son of the deceased Al Fusāṭawī, to act as administrator of the estate, according to article one hundred thirty-five of the majallat al ḥuqūq al ʾistiḥqāqī (Code of Property Rights).[23]

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[23] Article 135: At the request of one of the heirs, the president of the competent court shall appoint, by order on request, a musaffī (administrator) for the estate, either upon unanimous agreement of the heirs on the choice, or upon the choice of the court from among those who are capable among the heirs.

By way of comparison, the French law gives the court even fewer guidelines. The Dictionnaire de Droit, Paris, 1966, paragraph 29-4 on the appointment of provisional administrator reads: "a) Provisions of the Civil Code

When he reported to the Court within three months of the appointment, as specified in the court order, he told the Court of the document of sadaqa. The defendant wife had presented it to him in the course of the administration of the estate.

The plaintiff and his sister then brought a suit demanding nullification of the sadaqa and distribution of the estate by the rules of intestacy.

The Court found that the document purported to dispose of a number of the properties in the estate on the following terms:

> "The deceased made a sadaqa of a number of properties to his wife and the two sons he had by her and any other children she would bear in future. The latter would share in the properties according to intestate calculations. In particular he made a sadaqa of two commercial houses in Tunis to the existing minor sons. To the plaintiffs he gave a house and land planted with olive trees and dates, located in Djerba. The deceased explicitly denied immediate effect to the sadaqa. He reserved for himself the usufruct (ʾintifāʿ) of the gifts for his lifetime. Nor were the donees to take possession (tahwīz) of the gifts until after his death.

(Code Civil): the heir is in a position to handle the provisional administration of the inheritable estate. In case of a plurality of heirs, the administration of the estate assumes the agreement of the co-owners (estate devolves on heirs in a state of co-ownership, then division takes place). One can also resort to the court for appointment of a provisional administrator. The courts can confer on the administrator the widest powers, and even charge him with liquidating the estate when there is need to provide payment of a debt which is immediately due.

> However, the donor gave possession to the donee wife by way of agency, that is, he gave a mandate to the named Ibn Mahmūd bin Zakarī to hold the property on behalf of his family until his death."

The Court deemed the rules of hiba in the Code of Personal Status applicable to the sadaqa. According to articles two hundred one and two hundred two of the Code, the donees had to take possession (taslīm) of the gift as a purchaser does of a thing sold, if the transaction is to be valid. The donor died before the gifts were actually delivered into the hands of the donees. Therefore the gift was void. The Court ordered the estate to devolve according to rules of intestate inheritance, al farḍ as sharī'a.

The widow appealed to the Court of Appeal (ʾistiʾnāf) in case no. 26477/2. Judgment no. 59140 of 25.10.1966 affirmed the decision of the lower court. The Court of Appeal expounded in more depth on the legal principles applied.

First of all, the Court of Appeal applied the rules of hiba to sadaqa for determining whether possession of the gift by the donees must take place before or after the death of the donor. The Court argued that the only difference between sadaqa and hiba is that sadaqa is done out of gratuitude to Allāh, and hiba out of gratitude

towards the donee. They both result in transfer inter vivos of property without recompense (ʿiwaḍ). Furthermore, the Code of Personal Status does not explicitly or implicitly distinguish between the two.[24] Completion of hiba, and likewise of sadaqa, must take place before the death of the donee or donor. Completion is signified by delivery of the gift into the hands of the donee. In the case of Al Fusāṭawī the donor kept the gifts in his hands until he died.

As for the legal significance of the claim of the wife that possession passed to a third party on behalf of the donees, the Court relied on the opinion of

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[24]. The draft of the Code of the Sharīʿa agrees. Article 1196 (Hanafī and Mālikī) reads: Hiba is transfer of ownership without compensation for sake of gratuity. Sadaqa is transfer of ownership without compensation for sake of spiritual profit. (Hanafī: Sadaqa is like hiba in its rules except there is no revocation of it if it is completed.)

Article 1273 (Hanafī): In no way is revocation of sadaqa valid once delivery has taken place (qabd).

Article 1274 (Hanafī): Revocation of hiba is allowed in part or totally; even if the donor lets drop his right, as long as one of the obstacles to revolcation is not present.

Note that when parties to a case are Muslim, the court is not instructed explicitly in any written law to fill gaps in Tunisian legislation by referring to the Islamic fiqh. The court that turns to Islamic fiqh could only argue by analogy from article 2 of the law no. 40 of 27 September 1957 (abolishing Rabbinical Courts). Article 2 permits courts to apply traditional Mosaic law when there is lacking Tunisian legislation dealing with the matter arising; by analogy Islamic fiqh will apply when parties are Muslim and the statutory law does not specifically deal with the question that has come before the court. See page 344 of Chapter II above).

the fuqahā' for an answer. The fuqahā' had ruled that the gift in order to be effective must leave the hands of the donor at some time, regardless of whether the gift be returned to the hands of the donor within the course of the year. The donee may himself take possession, or he may appoint a wakīl to do so; or the legally appointed muqaddam of a minor may take possession. The Court found that the mandator named by the donor in the document of the sadaqa was neither the wakīl nor the muqaddam of the donees.[25]

The wife also lost on a third count. The rules of al wasīyya were applied to the detriment of her cause. The Court of Appeal likened al hiba to al wasīyya since both are gratuitous dispositions. The rule that no wasīyya be made to a person not yet conceived by the time the will is made (article one hundred eighty-four of the Code of Personal Status) was applied equally to hiba. The sadaqa made to whatever more children the wife of the deceased was to bear was thus void.[26]

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25. These same words appear in article 1233 of the draft of the Code of the Sharī'a (Hanafī): If the hiba is to an adult, he must take possession (qabd) himself or a wakīl can, even if the donee be dependent on the donor.

(Mālikī): If the donor had his making of a hiba witnessed and the thing given was lent and in the possession of the borrower (musta'īr), the possession of the borrower suffices for validity of the gift to the donee even though he himself has not possessed it (yaqabada) and the thing given remains in the hands of the borrower until the term of borrowing ex-

pires, at which time the donee takes the thing.

26.

The draft of the Code of the Sharī'a does not specifically provide that no hiba can be made to a person not in existence, or that no hiba can be made to a foetus. Yet the conditions for making a gift -- offer and acceptance then delivery -- presuppose that the donee is actually living, not merely conceived.

Article 184 of the Code of Personal Status permits a wasīyya to a child not yet born by the time the testator dies, but the child must have been conceived by the date of the will. The legacy will be preserved for the child between the date of the testator's death and the birth of the child. In this case at hand (no. 21647) the wife of the testator was not even pregnant by the time he died.

It is not uncommon for testators to provide for their children already born and to be born. The case no. 5589 (madanī) in the Court of First Instance, Tūnis, of 15.3.1965 involved a wasīyya of one-third which the deceased grandfather had made to the sons of his own four sons. Each descent group was to receive one-fourth of the one-third. The testator named in the will two of the grandsons living at the time the will was notarised on 26.1.1949. He forgot to name a third grandson, Husain, also living then. The father of this third grandson had two more sons born after the making of the will. The father brought a suit on behalf of his three minor sons along with his two adult sons. He wanted the Court of First Instance of Tūnis to deem Husain a legatee. The Court found that even though he was not specifically named in the will, he fell within the class of persons called "sons of my sons already alive and to be born". Husain was already born by the time the will was made. The Court granted the request. The father then was allowed to register Husain on the title deed as one of the owners of property bequeathed.

Nothing in the case file indicates the date of the death of the testator. It could well have been about 1959, when the qasama of the property took place. If so, then it is strange that no one questioned whether the one child of the petitioner born after the date of the qasama could legitimately be a party to the suit.

The deceased Al Fusāṭawī had the same problems as the deceased Maarek in the previous case. They both wanted to provide for families after their deaths by means other than mīrāth. One made a Hebrew death gift, giving the wife the ownership of the property but reserving the usufruct for himself. The other made a sadaqa, violating the rules of delivery of the gift to the donee before the death of the donor.

In the case of Al Fusāṭawī, the donor had the right to make a sadaqa of any size to any of his living children.[27] Nonetheless, Al Fusāṭawī obviously wanted control over his own property. While he could have controlled the property given to his minor sons since he could be their legal guardian, he would have had no control over the property given to his adult son and daughter, the plaintiffs.

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[27] Draft of the Code of the Sharīʿa, article 1205 (Hanafī): Everny owner of property is allowed if he has capacity for gratuitous disposition to give in a state of health all of his wealth or some of it to whomever he wishes no matter whether it be a direct family member or a collateral or a near relative or a stranger, even if he be of a different religion from the donor.

(Mālikī): It is valid for a father to make a hiba of all or part of his wealth while he is in good health to some of his children (i.e., he can favour some over others if he wishes).

However, a hiba from a mother cannot be unlimited. According to article 1203 (Mālikī) the law allows a wife to make a hiba only up to one-third. Beyond that she must get the consent of her husband (no like stipulation appears in Hanafī law). This restriction is also cited in the Report of the Sheikh ul Islām on the Law of the Sharīʿa, published for the benefit of

An alternative which Al Fusātawī could have considered is the sadaqa of usufruct. We submitted in the discussion of the Maarek case that the law bequests be reformed to the extent of releasing bequests of usufruct -- not bequests of corpus -- from the limits of the one-third and the rule of no bequest to an heir (see page 463 above). The fuqahā' were divided in their opinion about the hiba of usufruct. The Mālikī opinion as found in the draft of the Code of the Sharī'a (article twelve hundred thirty) allowed a hiba of land or a house if use of the fruits or revenue were excluded and if the donee took control (riqba) of of the thing given before any impediment arose. No opinion was given for a hiba of use of the fruits without use of the land or house. The Hanafī opinion in the Code of the Sharī'a definitely ruled against a hiba that bestowed on the donee land out of which he was to maintain himself. The hiba was fāsid. Yet if the donor gave something like olive trees whose fruits the donee was to use to maintain himself, the hiba of fruits was deemed valid, but the condition of maintenance deemed void. Any condition attached to a hiba

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foreigners who wanted to know local law of sale, dated 22 Caada 1300 (c. 1883). Found in the archives of the Dār al Bay, Series E, carton 155, Dossier 6 (Sharī'a law of property). See footnote 142 of Chapter II above.

(such as, given for the lifetime and maintenance of the donee) was deemed void (article twelve hundred thirty-two, Hanafī, no opinion being given from the Mālikī madhab).[28]

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28. In Civil Case (madanī) No. 10522 of 6.11.1967, the Court of First Instance of Tunis did not challenge the validity of a hiba of a house which the plaintiff gave to her sister (so the relationship appears from the names of the parties). The hiba was based on the condition that the defendant use it for her lifetime. (It is not clear whether the Court means lifetime of the donor or of the donee, but the wording in the summons tends to give the impression that the Court means lifetime of the donee.)
The document of the hiba was notarised on 3.2.1967. On 24.4.1967 the wilāyat (district administrator) of Tunis granted to the defendant permission to accept the hiba. The defendant, however, showed towards the plaintiff obvious dissatisfaction with the conditions of the hiba. The plaintiff brought suit to nullify the hiba according to article 210 of the Code of Personal Status. Article 210 allows the donor to "revoke the hiba...if the donee fails to fulfill the obligations towards the donor inasmuch as this failing is a serious ingratitude towards the donor (amounting almost to rejection of the gift)." The defendant did not deny her ingratitude. The Court then deemed applicable, in addition to article 210 of the Code of Personal Status, article 414 of the majallat al ʾittizāmāt waʾl ʿuqūd (Code of Obligations and Contracts). Article 414 allows contractual obligations to end when, as soon as they are concluded, the parties agree to abandon them, in the instances where such termination is permitted by law (e.g., by ingratitude in article 210 of the Code of Personal Status).

A decision from the Supreme Court of Tunisia (taʿqīb), number 1823 of 7.5.1963 (reported in Al Qadāʾ waʾl Tashrīʿ "Nashriya Mahkamati Al Taʿqibi," Ministry of Justice Publication, 1964, pages 22-23) affirmed a ruling from the Court of Appeal of Sfax on the Mālikī rule found in article 1230 of the draft of the Code of the Sharīʿa. In the case the donor had made a sadaqa

The Mālikī opinion when expanded to include a hiba specifically of use of fruits or revenue while the ownership of the nu-property remains in the hands of the donor would best serve the aims of a husband who wishes to make provision for his family before dying. Nothing in the Code of Personal Status prevents extension of the Mālikī opinion in this way. Such solution would mitigate the fears which the donor might have about maintaining himself if his only, or main, source of income were revenues from his lands. The donor would probably have to reach an agreement, separate from the hiba, with the donees about the sharing of fruits of the land.

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but reserved the revenues of the land for herself for her lifetime. The Court exercised its jurisdiction according to Mālikī law, which, it said, nullifies a donor's stipulation that the donee be excluded from all revenues for the lifetime of the donor. Furthermore, possession of the gift was found to be incomplete.

No. 33137 (shakhsīya) of 12.1.1970

Another case found in the chamber of personal status in the Court of First Instance of Tūnis does not involve violation of the limit of the rule of the one-third. It does illustrate the competition that can arise among heirs, in this case, between the immediate family of the testator and a collateral relative of the testator.

The facts of the case were as follows:

Rābih made a notarised will on 13 September 1948. He bequeathed to his brother's son, the defendant, one-third of all his estate located within Tunisia and outside Tunisia. Eighteen years later on 15th of March 1966 he made another notarised will in Tūnis. In this one he said that he was revoking a will which he had made in favour of the issue of his brother. He further explained in the document of revocation that he had made a bequest of one-quarter of his estate to such issue.

The testator died two years later on 21.1.1968 in Tūnis. He left a house registered under TF 53715. The house was located in the very same suburb of Tūnis where the testator's wife was living at the time of her petition to the court. Presumably, she was living in the same registered house left by the testator.

On 13.3.1968 the defendant recorded his acceptance of the bequest in a notarised document. The wife of the deceased, being obviously keen to prevent her husband's nephew from sharing in the estate, petitioned the court to prevent the bequest from taking effect. Her petition in essence argued that the testator had made a mistake in his will of revocation of 1966. The petitioner accepted that the testator had in fact mentioned that he had made a bequest of one-fourth to his nephew and he was revoking that bequest. The petitioner argued that he really meant to say that he was revoking a bequest of one-third. She wanted the court specifically, first, to correct the mistake in the will, changing one-fourth to one-third, and then to declare the bequest of 1948 to the nephew null and void, it having been revoked in 1966.

There was no formal explicit indication in the file of the case as to who were the surviving heirs of the deceased. If they were only the widow and nephew, the bequest to the nephew would have been subject anyway to the rule of no bequest to an heir.[29]

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[29]. Article 143 A of the Code of Personal Status would not apply in this situation. The article allows the principle of radd to operate in favour of the daughter and agnatic granddaughter when she is the only one of the farā'id present with the collateral ʿaṣaba. Wives are not named in the article to a position where they can take advantage of the radd in the presence of collateral relatives.

Nor was the Court of First Instance concerned with the document of the wafāh (certificate of death) naming the surviving heirs. It addressed itself to a preliminary question of jurisdiction. The Court recognised that there was one legal aspect of the situation falling within its jurisdiction. That aspect was the need to interpret the intention of the testator (article five hundred fourteen, paragraph one of the majallat al ʾittizāmāt waʾl ʿuqūd (Code of Obligations and Contracts):[30] Did the testator mean to refer to the previous bequest of one-third or had there been a bequest of one-fourth? On one hand, the Court knew that one-fourth referred not to another bequest but to one-third, for one-fourth was deemed a customary contractual expression not to be taken literally. On the other hand, the request of the petitioner was, un-

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[30] Article 514, paragraph 1 of the Code of Obligations and Contracts: "Interpretation of the agreement (ʿaqd) is warranted when : 1) the terms (or expressions) used are inconsistent with the evidence aim that the author had in mind in writing the agreement;..."

An annotated version of the majallat cites brief summaries of nine decisions from the Supreme Court of Tunisia (al qarār at taʿqīb). These would serve to guide lower courts. The second ruling cited forces a court to interpret documents solely according to article 514 et sq. and not according to field investigations. Ruling number 5 allows a court of original jurisdiction the right to interpret the agreement (from Majallat al ʾIttizāmāt waʾl ʿUqūd at Tūnisīyya: muʿaddala ʿalā faṣūlihā biʾl ʾaḥkām al qadāʾi, by Maḥmūd Ibn As Sheikh, Advocate General for the Secretariat of Justice, 1966, page 197).

fortunately, in the nature of correcting the will of revocation of 1966. The Court found that its jurisdiction for correcting documents was limited by law to only two instances: 1) mistakes in certificates of civil status, a subject of public importance, regulated by article sixty-three of the Law of Civil Status (qānūn al hālatī al madanīyatī), No. 3 of 1.8.1957, amended by Law No. 42-64 of 3.11.1964 in J.O.R.T. No. 53 of 1964;

2) mistakes in judgments, and decisions, and reports of inquiry in court proceedings, regulated by article two hundred fifty-six of the Code of Civil and Commerical Procedure (majallat al murāfaʿāt al madanīya waʾl tijārīyya).[31]

The Court deemed the terms of the petition outside the purview of these two types of legal correction.

The Court also determined that the nature of the intent underlying the petition made the case one that fell within the domain of land claims (ʾistihqāqī), which were to be handled by the chamber of madanī affairs, not the chamber of shakhsīya affairs. The Court, thus, refused on another ground to entertain the

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31. Examples of corrections: spelling errors, substantive (material) errors in name, calculations, obvious irregularities.

petition.

The social tensions underlying the case of Rābiḥ (no. 33137) afford an opportunity to re-examine the hadīth which put forth the rule of no bequest beyond the one-third. The particular words of the Prophet in that hadīth that are relevant to this case are: "The third is much. Indeed it is better to leave your heirs in no need than to leave them as dependents who beg from people..."[32] Different scholars placed different interpretations on these words. According to Ibn Qudāma[33] Abū'l Khattāb and one qādī said that if a testator is rich, a maximum wasīyya of one-third is preferred (istiḥabb), meaning, if a testator leaves his relatives well-off and has even more to spare, he should use his power of charitable bequest to the fullest extent allowed. This implies that if a testator has not much or does not leave relatives well-off, he should either not make a bequest, or make only a small one, less than one-third. Another hadīth supporting this interpretation is that of 'Umar. It tells of a sheikh who said that he was a powerful sheikh with much money and that his heirs upon his death would be Bedouin of distant relation. He was told not to be-

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[32] Mālik, Al Muwaṭṭa', ed. Al Zurqānī, Chapter 530, section 1533, page 63.

[33] Al Mughnī, ed. Muḥammad Rashīd Riḍā, version of Al Khanafī, Chapter on Al Wasāyā, pages 4-5.

queathe all his property, for "Ishāq said that the one-fourth is the sunna unless the testator be a man known to have gotten his wealth by ill means or otherwise. Then he has the capacity for giving the one-third."[34]

However, the seeming reluctance of the Prophet to allow Ibn Waqqās to make a bequest of even one-third and the hadīth of Sa'ad bin Mālik would support the idea that even the wealthy -- and the poorer more so -- should be discouraged from bequeathing the full one-third. The hadīth of Sa'ad bin Mālik reports that Sa'ad had much money and his heirs were rich already. He was told to bequeathe only the one-third, and the one-third is much.[35]

From a social point of view, however, one can see that the limit of the one-third served well the interests of an early Muslim community. The limit would have helped to conserve property within the hands of the Muslim members, as opposed to the non-Muslim members, of a convert's family. The laws of intestate in-

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34. Al Mughnī, page 4. Reported from 'Umar of conversation between him and the wealthy sheikh.

35. Ibid. Reported from visit by the Prophet.

heritance favoured Muslim members by barring a non-Muslim relative from inheriting from his Muslim blood relative. The limits on testamentary powers introduced a compromise by allowing a non-Muslim to be a testamentary beneficiary. At the same time, however, the rule of the one-third kept a Muslim testator from sympathising with his non-Muslim relatives to the larger detriment of his Muslim relatives; at least two-thirds of the property would remain with the faithful. In the twentieth century, in Islamic countries, the chances of a Muslim having non-Muslim relatives are slim.[36]

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[36] Article 88 of the Code of Personal Status names only murder as an impediment to succession. In the well-known Hourya case, the Supreme Court of Tunisia held that it would have extended [illegible] article 88 to include difference in religion (reported in Al Qada' wa'l Tashri', No. 6 of June 1967, page 37, decision no. 3384 of 31.1.1966, originating from judgment no. 1005 of 3.3.1964 of the Court of Appeal of Sousse; commented on in Revue Tunisienne de Droit, Faculté de Droit de l'Université de Tunis, 1968, pages 114-120). In the case three co-heirs wanted to divide the property inherited. A brother resisted allowing one of his sisters to share in the qasama. He argued that she was an apostate, a non-Muslim, who could not inherit from their deceased Muslim mother. He believed her to be an apostate on the ground that she had married a Frenchman. The Supreme Court rejected the ground. It reasoned that while marriage to a non-Muslim was void, the woman's religious status remained intact. But if it could be proved that the woman had acquired a French nationality then she could be deemed an apostate. In the end the Supreme Court rejected the brother's petition because the lower court had not fully investigated the truth of the allegation that the woman had acquired French nationality. The Court did not specify further that the

investigators should also discover whether she had acquired a non-Muslim religion in addition to a non-Tunisian nationality. The argument was that a change in nationality, not necessarily religion, is sufficient to remove a Muslim from the purview of the authority of the rules of his religion (ʾahkām ad dīn).

The Court's final order seems to contradict all its prior reasoning based on the traditional Sharīʿa. The Court accepted that difference of religion is a bar to inheritance, and should be incorporated by judicial reasoning into article 88 of the Code of Personal Status. The Court also accepted that marriage between a non-Muslim man and a Muslim woman does not render the Muslim party an apostate; only the marriage is affected. Yet when the Court ordered the trial court to reinvestigate the question of nationality, it implied that change in nationality renders one an apostate. Without saying so, the Court would thus make a change in nationality an exception to the traditional rule that only religious confession, not any other behaviour, such as marriage or change in nationality, is the key to determining who is an apostate. The Court's reasoning raises the following anomaly, an anomaly at least by standards of the Sharīʿa: A Christian Tunisian heir can inherit from a deceased Muslim Tunisian relative; but a Muslim French heir cannot inherit from a deceased Muslim Tunisian relative. Surely the fuqahāʾ never intended that a Muslim be barred from inheriting from another Muslim relative. The fuqahāʾ did, however, have difficulty in dealing with the Muslim who belongs to an enemy territory (Muhammad Jawād Mughnīya, Al Wasāya waʾl Mawārith, Sharika at Tabāʿa al Hadītha, n.d., pages 10-13). Whether such Muslim lī harbī should have been accorded full rights in general was arguable. In particular there was question about the right of a Muslim lī harbī to take a bequest from a Muslim lī dār; one would expect equal doubt to be raised about a Muslim lī harbī taking a share of the estate of a Muslim lī dār under the rules of mīrath. In such politically delicate matters, the legislator or jurists should try to keep the question of whether a foreigner can be an heir quite distinct from the question of how freely a foreigner who is an heir can dispose of the property which he or she has inherited. If the unstated, but very real, concern of the Court in

the Hourya case was that the State is reluctant to allow foreign nationals, regardless of religion, to own property in Tunisia, then it would seem that a special law forbidding ownership by non-Tunisian nationals would be the most convenient way to solve the problem rather than extending the scope of the article 88 on impediments in the Code of Personal Status. So far it is only in regard to agricultural holdings that Tunisia has enacted a law forbidding non-Tunisians to own land in Tunisia (Law No. 64-5 of 12 May 1964 in J.O.R.T. No. 24 of 12 May 1964). In regard to non-Tunisian heirs, the Tunisian legislature could consider enacting a law which allows a non-Tunisian to inherit from a Tunisian relative; but the other Tunisian heirs would exercise a kind of trust with certain limited rights of disposal over the share of the non-Tunisian heir.

For the sake of juridical clarity for the present, the Court in the Hourya case could have tried to deal with the decree of 12 July 1956, the law no. 40 of 27 September 1957 (J.O.R.T. of 27 September 1957), and the Code of Personal Status, and show how they relate to one another and support the ruling of the Court. It would have pointed out that article 1 of the decree of 12 July 1956 allows persons of non-Tunisian nationality to have their own personal law (meaning religious or national is not clear in the decree) applied to them. Correspondingly all persons of Tunisian nationality are subject to the Code of Personal Status, regardless of their religious confession (see pages 342 - 344 of Chapter II above). Therefore, if a non-Tunisian is not subject to the Code of Personal Status, then he or she is outside the Code of Personal Status, as well as outside Tunisian Muslim law, for the Code of Personal Status, especially its provisions on inheritance, is rooted in Muslim law. In a very technical sense then, a non-Tunisian who may in fact confess the Islamic religion, is not a Muslim for purposes of Tunisian law of personal status; but a Tunisian who may in fact confess Christianity is a Muslim for purposes of Tunisian law of personal status. However, the Court could have brought technicality and fact closer if it had made a distinction between the law applicable to the estate of the de cujus and the law applicable to the heir. On the basis of such a distinction the Court could have argued that the estate of any deceased Tunisian national is subject to the explicit provisions of inheritance found in the Code of Personal Status,

footnote

and in the Hourya case the deceased mother was a Tunisian national. But what finer details of rules not explicitly found in the Code of Personal Status would apply to the rights of the heirs would depend on the rules of the religious confession of the deceased. Application of the rules of the religious confession of the deceased could be justified by extending the spirit of article 2 of law no. 40 of 27 September 1957 (J.O.R.T. of 27 September 1957, on the abolition of the Rabbinical Courts) to all non-Muslim Tunisians. Article 2 allows courts to apply Mosaic law when there is no Tunisian legislation dealing with the matter being raised between parties of the Judaic confession. Consequently, if the Code of Personal Status is not clear about difference of religion being a bar to inheritance, then, if the de cujus be a non-Muslim Tunisian, then traditional non-Muslim law applies to the question of whether religion is an impediment. If the de cujus be a Muslim Tunisian, then traditional Muslim law barring non-Muslims from inheriting applies. It so happened in the Hourya case that the deceased was a Tunisian of Muslim confession. If her surviving daughter were of Muslim confession, albeit of French nationality, she should have been allowed to inherit, according to the traditional rules of apostasy in the Sharī'a, but subject to any separate rules which the legislator might wish to make concerning foreign nationals owning property in Tunisia. (Example of traditional rules of the Sharī'a being used to interpret the Code of Personal Status is personal status case (shakhsīya) no. 21647 (Al Fusātawī)of 14.1.1966. All parties had Muslim names. See page 469 et sq. above).

When the Hourya case is placed in historical perspective, the confusion that the ruling raised is not surprising. There is precedent in Tunisia for a rule that difference in nationality is a bar to inheritance, as seen in a decision of the Court of First Instance of Tūnis, no. 8657 (madanī) of 12.11.1966. This case originated in a request by the son of the founder of a hubus to have distributed the lands of the hubus as milk between himself and the sons of his deceased brother. The evidence presented before the Court showed that the muwarrith of the plaintiff had in fact three sons. When he died the qādī of Tabaraba (طبربة), where the muwarrith had died, ruled, on 13.12.1954, that the third son was interdicted from inheriting from his father because the son had become a French national. The Supreme Court of

the Sharī'a supported the qādī in its judgment of 27.7.1955. Another precedent is the case of the Tunisian Muslim who wanted to become a French national in order toe get the revenues from a hubus. But he was warned by the local qādī that he would be cut off entirely from the Muslim jurisdiction, to the point of being eliminated from the list of beneficiaries to the revenues of the hubus (see pages 276-278 of Chapter II above). The French were more flexible. While French courts had jurisdiction over Algerian nationals, they applied the personal Muslim law of the Algerians in matters of family and inheritance (see page 264 of Chapter II above). The harshness which Muslim Tunisians felt towards naturalised Muslims probably has roots in the conflict that arose in the nineteenth century between the Bāy and the European consuls over the status of the European nationals living in Tunisia (see pages 167-68, 203 of Chapter II above). The result of that conflict was that the European was not to be treated as a dhimmī subject to the sovereignty of the Bāy, but remained in law a harbī. Understandably the Tunisian Muslims would then make the Tunisian who preferred the nationality of the foreigner to the sovereignty of the Bāy pay the price that entailed being ostracised from his or her Muslim community.

Thus, the spirit of those ʾaḥādīth which discourage even a wealthy person from bequeathing the full one-third would befit the early Muslim community. Whereas, the spirit of the ʾaḥādīth which encourage a wealthy person to make use of the full one-third, but discourage a poorer person, would befit the twentieth century.

From a jurisprudential point of view, the interpretations of the ʾaḥādīth are not fixed for all time. The opinion of ʾAbū'l Khaṭṭāb that a wealthy person make use of his powers of bequest would serve the interests of the widow of Rābiḥ in case no. 33137. If her husband had left her only one house and that was to be her means of livelihood, she would be reluctant to share with a nephew any revenue which she might derive from the property. On the other hand, if she were a woman of wealth and her husband left several houses, sharing of the wealth would probably do good. On the basis of ʾAbū'l Khaṭṭāb's opinion, the Tunisian legislators could formulate a law whose essence would resemble, but even be more extensive than, the family maintenance provisions found in English laws of testacy.[37] If a

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37. Inheritance (Family Provision) Act (1 & 2 Geo.6, c.45) of 1938, as amended by the Intestates' Estates Act 1952; the Family Provision Act 1966; Family Law Reform Act 1969; the Law Reform (Miscellaneous Provisions) Act 1970.

By way of comparison, article 205 of the

husband left only enough for sustenance of his heirs or less, the courts would have discretion to reduce the fraction of the bequest according to the needs of the surviving heirs, no heir being automatically disqualified by the fact that the deceased had not in fact been responsible prior to his death for the maintenance of all the surviving heirs. The effectiveness of such a proposal will depend on a much larger issue. That issue is the credibility of the judiciary. Only a judiciary whose reputation warrants trust from people would be able to handle the power of discretion. In turn a judiciary can build its good reputation if it be supported by good investigatory services. Otherwise, only laws of set formulae not admitting of much equitable discretion will hold sway.

Code Civil (1971 edition) reads: "The children owe maintenance to their father and mother or other ascendants who are in need. The estate of the predeceased spouse owes it too, in the same case, to the surviving spouse. The period within which the claim must be made is one year from the date of the death and can be extended, in case of division of the estate among the heirs, until the completion of the division.

"Maintenance is raised out of the estate that is inherited. It is supported by all the heirs, and in case of an insufficient estate, by all the specific legatees, in proportion to their shares.

"However, if the deceased has expressly declared that such a legacy will be paid out of preference to the others, it will apply article 927 of the Code (legacy to be fulfilled as long as the portion of the reserve is not exhausted)."

Annotation no. 8: "The surviving spouse can obtain maintenance only in the amount of the properties which compose the estate after

payment of debts; then the maintenance is taken out of the remainder of the solvent estate. Trib. Civ. d'Avesnes, 13.7.1894, D.P. 95.2.201, note de M. Planiol."

Annotation no. 10: "The gift, made by the predeceased spouse to his or her spouse, of the usufruct of the estate, does not prevent the donee from demanding maintenance out of the estate, when it is recognised that the usufruct is insufficient to keep the surviving spouse alive. Grenoble, 23.7.1909 D.P. 1910.2.288."

No. 33276 (shakhsīya) of 4.7.1970

In this case the testatrix seems to have been wealthier than the testator in the preceding case. She left only two heirs, who were not of the immediate family. They were her germane brothers.

The facts of the case were as follows:

Umm Hānī had two brothers. She bequeathed land to the issue (hafīd) of one of her brothers by a notarised will dated 14.3.1961. She died on 6.4.1969, according to the wafāh approved by the District Court of Tūnis on 30.4.1969. The Court determined that her heirs were her germane brothers. Her estate comprised parcels of five hanāshir (large country estates whose acreage can be one thousand hectares or more)[38] located in various places in Tunisia, portions of olive groves, jewelry, clothes, and cash (over £300). The defendant accepted the legacy of land by notarised document on 15.11.1969, thinking that he had thus completed the transfer of ownership.

The two brothers of the deceased then brought a suit against the legatee, who by relation, was the nephew of the first plaintiff and the son of the second

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38. J. Saurin, Constitution de la Propriété et les contrats de culture indigènes en Tunisie, Paris: Berger-Levrault et Cie, 1897, page 11.
J. Dufour of F.A.O./Tūnis gave figures of 500 to 2000 hectares ("Le Problème des terres collectives en Tunisie," typewritten manuscript, dated 4.11.1970, Tūnis, F.A.O. Headquarters, page 4).

plaintiff. The brothers at first alleged that the legacy amounted to more than one-third of the estate. The bequest, therefore, would have needed their consent to be valid.

The Court of First Instance entertaining the petition determined that the will specifically referred to the portions which the deceased held in a hanshir at Fahs, known as ʿain al fatīya, registered property having TF 115972, and to a portion in a hanshir located at ʾAwlād Al ʾAmīr, in the province of Beja.

According to the calculations of the defendant, the two properties amounted to less than one-third of the estate; the plaintiff argued that they exceeded the one-third. The expert appointed by the Court and accepted by both sides in the dispute, investigated the property and found that the legacy was less than one-third of the estate. The plaintiffs then presented the argument that the permission of the heirs of a testator is needed whenever the legacy is not equivalent exactly to one-third. If more or less than the one-third, it was executable only by consent of the heirs.

Before the final judgment was rendered, the second plaintiff died. He was the father of the defendant. He left a wife, two daughters and two sons. The defendant asked the Court to continue the proceedings, render

judgment in his favour, and explain to the heirs that the bequest was valid if one-third or less. Then its validity would not depend on the permission of the heirs.

The Court of First Instance applied articles one hundred seventy-nine and one hundred eighty-seven of the Code of Personal Status. Article one hundred seventy-nine reads: "One cannot dispose by will in favour of an heir; one cannot dispose of more than one-third of one's estate. The bequest made for the benefit of an heir or which exceeds one-third is executed only upon the consent of the heirs after the death of the testator." Article one hundred eighty-seven reads: "The bequest made in favour of someone other than an heir is carried out only in regard to one-third of the estate without depending on the consent of the heirs." The Court ruled that a bequest of less than one-third is allowed automatically as long as it is not for the benefit of an heir. The original petition of the brothers of the deceased was not accepted, and the bequest declared valid.

'Umm Hānī's bequest would have been approved by 'Abū'l Khattāb (from Al Mughnī; see page 480 above), since she was well-off, left few heirs and exercised her charitable sense by a bequest. In this case, therefore, there is little need to consider the plight of deprived

dependents surviving the deceased.

An aspect which distinguishes this case from the previous ones is the alleged right of the intestate heirs to approve the bequest before it can be executed. The plaintiffs, in trying to extend the power of consent to bequests which were not exactly equivalent to the one-third, but more or less, were obviously keen that the defendant be subject to the control of his parent, the second plaintiff. It is conceivable that the second plaintiff may not have wanted one of his sons to be favoured over his other children. He died in the course of the case, leaving to his children the share which he had received from the estate of his sister. His son, as legatee to his aunt and as son of his aunt's brother, would have received a double portion from the aunt's estate. On the other hand, the deceased aunt may have wanted the particular portions of land which she had bequeathed to be kept as whole economic units under the management of one person.

Thus, there could be two very legitimate, but conflicting, concerns at stake in the case.

The father, the second plaintiff, would have favoured a law based on the spirit of the rule against double portions in the law of obligatory bequests.[39]

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[39]. Article 191 of the Code of Personal Status: "The

If the rule against double portions were extended beyond the obligatory wasīyya, it would read thus:

> If intestate heir A sees that his own future heir B was left a bequest from the estate in which A inherits, then the bequest shall take effect to the one-third. When the intestate heir A in turn dies before B, the legatee, the bequest to B shall count against the intestate share which B claims from A's estate, unless the co-heirs sharing in A's estate consent to his taking his full intestate share. Their consent shall be given in the same way as required when a bequest exceeds the one-third or is in favour of an heir of the testator. If the bequest exceeds or equals the intestate share due to B, B shall not receive any of his intestate share from the estate

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descendants of the deceased cannot claim the obligatory wasīyya: ...2) if their grandfather or grandmother bequeathed to them in his or her lifetime or gave them a gift without any recompense (ʿiwad) whose value is that of the obligatory wasīyya. But if the grandparent bequeathed something and it is less than the amount of the obligatory wasīyya the grandchildren would have received, it is counted as a supplement for the difference between the obligatory wasīyya and the voluntary bequest. If the grandparent bequeathed more than the obligatory wasīyya the grandchildren would have received, then it is deemed an excess and the general rules of al wasīyya (voluntary) apply to it."

> of A, unless the co-heirs consent. If the bequest be less than his intestate share and the co-heirs do not consent to his taking his full intestate share, the difference between the legacy and the intestate share of B shall be distributed equally among all heirs of A, including B, according to the rules of mīrāth.

The above rule is complicated and illustrates how too much concern for equality among heirs can be detrimental to juridical clarity. For, preserving equality, to the extreme, among heirs leads to more fragmentation and co-ownership, and in turn more litigation to effect qasama. The effects of fragmentation and co-ownership can have far more detrimental effect on the economy than some inequality among heirs has on the psychology of the family. If cooperatives are not encouraged, by either the legislators or the people, as a way to transform co-ownership into an energetic force, then the curing of ill-effects of fragmentation will have to be left to the rules of qasama.[40]

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[40] Moshen Chebil, Directeur des Affaires Foncières, Sous-Secrétariat d'Etat à l'Agriculture, Tunis, in his paper "L'Evolution du régime foncier Tunisien en liaison avec les programmes de developpement agricole," Exposé sur les projets nationaux No. 5, F.A.O. (United Nations), Centre de developpement sur la politique et la colonisation agraires au proche-orient, Tripoli, 16-28 October

of 1965, shows that in 1965 three-fifths of Tunisia's lands were held in hubus, tribal nomadic lands (terres collectives) and co-ownership (indivision) of the extreme degree. The remaining two-fifths were privately owned, the numbers of co-owners on any one plot being less than the number on the other three-fifths of land.

J. Dufour of F.A.O./Tunis gave a short history of the cooperative movement in Tunisia in his typewritten manuscript "Le Problème des terres collectives en Tunisie," 4 November 1970, with a bibliography of thirty-four references (in dossier of J.P. Dufour, File C.C. 4.2.25, F.A.O. Headquarters, Tunis). The law of 4 June 1964 on collectives provided for grouping small plots into units of 100,000 hectares for cooperative farming. After the political disgrace of the main promoter of cooperatives, the law of 22 September of 1969 was passed. It maintained the rights of the cooperatives, but emphasised the freedom of a person to join or not to join a cooperative and softened the movement towards collectivisation considerably. As a result nearly every one took back his lands and reverted to the traditional system. But Mr. Dufour had hopes for continuation of the large cooperatives started by the Programme Alimentaire Mondiale (F.A.O.). Mr. Dufour lamented the fact that there is no law limiting the number of owners that can possibly own one plot of agricultural land. He does not specifically refer to the law of 1963, but there is a law (Law 63-257 of 15 July 1963, J.O.R.T. of 12-16 July 1963, No. 33) prescribing the minimum number of square metres into which land can be sub-divided and given to each co-owner. If the land cannot be sub-divided, then it is sold at the request of the co-owners who share the proceeds of the sale. But no law limits the number of co-owners. Mr. Dufour would agree that the rules of qasama in article 140 of the majallat al huqūq al ʿainiyat (Code of Property Rights) could be used to reduce the ratio of co-owners to hectares of land.

Already the majallat al huqūq al ʿaīnīyat allows the competent court to interfere in the qasama of an estate on the grounds that the welfare of the property may require that the normal rules of inheritance not operate. Article one hundred forty of the majallat allows the courts to assign a productive economic unit -- whether agricultural, industrial, or commercial -- to one of the heirs. All other heirs will be compensated in cash if the value of the economic unit exceeds the value of the legal share (the fard) of its new owner.

The deceased brother in the case of ʾUmm Hānī would probably have wanted article one hundred forty extended to cover property devolving by consent of co-heirs, that is, property that is the subject of an ultra vires bequest (see footnote 56 post). In other words, if the heirs failed to give consent to the testator's wishes and if failure of consent works any hardship on the economic operation of the property as provided for in article one hundred forty, the heirs' decision would be subject to the approval or disapproval of the court of competent jurisdiction. Failure on the part of the heirs to give consent would automatically give rise to a court investigation. This investigation could be part of the District Court's

jurisdiction to certify wafāyāt and inventories of an estate.[41]

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41. This proposal would be one answer to J. Dufour's pessimism about the effectiveness of the majallat al huqūq al ʿainiyat. In a paper entitled "Devolution successorale, morcellement et indivision de la propriété agricole en Tunisie" (6 June 1967, F.A.O./Tunis, dossier of J.P. Dufour, file C.C. 4.2.25) Mr. Dufour fears that the majallat will not have far reaching effects for three reasons:
1) The provisions come into operation only at the request of the heirs.
2) The State does not support financially the operations needed to effect the majallat.
3) The majallat does not control fragmentation of property occurring in transactions inter vivos.

In answer to the last criticism the Tunisian legislator could extend Law 63-25 of 15 July 1963 (J.O.R.T. No. 33 of 12-16 July 1963). That law already requires authorisation of the concerned administrative official to sub-divide agricultural lands. The authorisation could be extended to control transactions inter vivos so that any kind of property does not become so weighted with co-owners that it cannot be sub-divided when co-owners wish to end co-ownership.

A recent judicial decision leads one to conclude that the task of meeting Mr. Dufour's criticisms will have to be done by the legislator rather than the courts. The Supreme Court of Tunisia (cassation, taʿqīb) held that the kinds of considerations that the courts must take into account when allowing qasama according to article 131 (qasama by value, not by kind; see footnote 32 of Chapter III above) and article 140 (an economic unit within an estate should go preferably to one of the heirs and the other heirs be compensated; see page 373 of Chapter III above) of the Code of Property Rights apply only when the property is an estate open for succession. Articles 131 and 140 do not apply when the property presented for qasama is acquired by sale. Case reported in Al Qadāʾ waʾl Tashriʿ, No. 7 of July 1972, pages 40-42;

Nos. 24713 of 17.1.1967; 25486 of 17.4.1967; 25685[42] of 13.6.1967; and 27650 of 2.7.1968 (all shakhsīya)

Only four cases of obligatory wasīyya were recorded in the daftar of the chamber of personal status of the Court of First Instance in Tūnis.[43] Only case no. 27650 dealt specifically with the limit of the one-third on the obligatory wasīyya. The other cases arose from petitions requesting correction of notarised wafāyāt or correction of errors in District Court judgments when notaries and judges neglected to take into account the provisions of article one hundred ninety-one of the Code of Personal Status (on obligatory wasīyya, part of Law No. 59-77 of 19.6.1959, J.O.R.T. No. 34 of 1959).[44]

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42. Commented upon by E. LaGrange in Revue Tunisienne de Droit, Faculté de Droit de l'Université de Tunis, 1968, pages 120-123.

43. The madanī chamber of the Court of First Instance of Tūnis admitted two obligatory legatees to the share of the obligatory wasīyya in the revenues of the estate. The defendant, son of the muwarrith (who died on 25.1.1961) was ordered to share the revenues with his sisters, and nephew and neice, the plaintiffs. The case was number 9631 (madanī) of 15.6.1968, confirmed on appeal by judgment no. 62132 of 21.7.1970 for appellate case no. 28677/2.

44. In judgment no. 27892 of 24.6.1971 the Court of Appeal of Tūnis held that a notary's determination of heirs is not conclusive on the Court (Al Qadā' wa'l Tashrī', No. 1 of January 1972, pages 89-93).

The parties in case no. 27650 of 1968 had been the same parties to case no. 25685 of 1967. In the earlier case of 1967 the grandchildren of the de cujus won the right to take from the estate as obligatory legatees. The other heirs, the defendants, had argued that the provisions of the law on obligatory wasīyya had effect only from the day of the enactment of the law, namely, 1959. The mothers and father, whom the plaintiff grandchildren represented, had died in 1934 and 1943. The Court of First Instance of Tūnis rejected the argument of the defendants and accepted the argument that the law of obligatory wasīyya operates from 1959 onwards. The only other material date is the date of the grandparent's death (in this case, on 20 March 1964). Thus, the date of the death of the parents whom the grandchildren are representing is immaterial, for article one hundred ninety-one directs the court to calculate the amount of the obligatory wasīyya as if the parent of the legatees had remained alive after the death of the grandparent of the legatees.

The totality of shares of the predeceased parents, nonetheless, was subjected to a ceiling of one-third of the estate of the grandparent. The original summons in case no. 27650 of 1968, issued in the name of the grandchildren to their two aunts, demanded that the estate be

equally divided among the claimants:

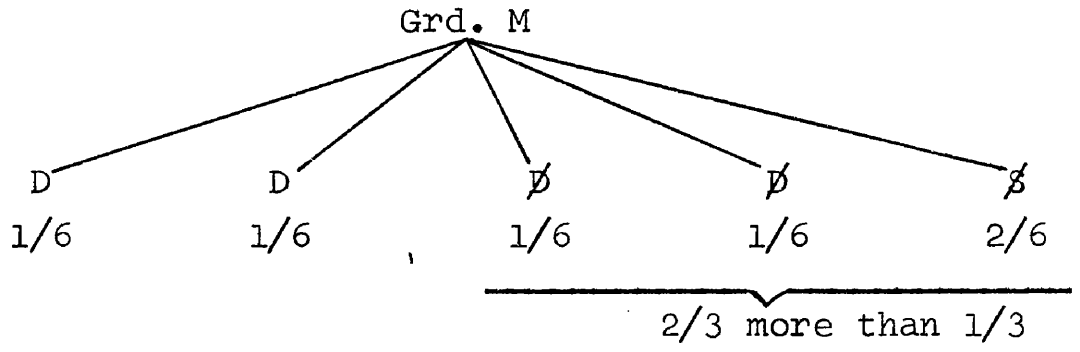
one-fourth to one aunt

one-fourth to the second aunt

one-fourth to the children of one predeceased daughter

one-fourth to the children of a second predeceased daughter.

The share of the child of the predeceased son was not even included in the calculation. Even if it had been included the total amount which the grandchildren would have claimed would have been equal to two-thirds of the estate. See diagram below:



The Court of First Instance rejected the original claim since the totality of the shares of the predeceased parents exceeded the one-third. The Court accepted the notarised wafāh of the deceased grandmother as valid; according to the wafāh two-thirds was distributed to the two living daughters, the defendants, and one-third to

the grandchildren, the plaintiffs.

The final distribution ordered by the Court to the obligatory legatees was 2/4 of the one-third to the sons of the predeceased sons; 1/4 of the one-third to the daughter of the predeceased daughter; and 1/4 of the one-third to the two sons and two daughters of the second predeceased daughter on the basis of a two to one ratio in favour of the males.

Madanī Cases

The next series of cases were decided by the civil (madanī) chamber of the Court of First Instance of Tūnis. These cases are actions in ʾistihqāqī,[45] that is, claims to real property. Often an heir will appeal to the court to force a co-heir to release the inheritable estate when the co-heir collected the estate and uses it all for his own benefit.[46] Or else the claimant/ heir has become dissatisfied with the management of the co-heir in whose hands the co-owned (ʿalā shuyūʿi) estate has been placed for administration (such as, collection of revenues is centralised in one heir) and he wants the state of co-ownership ended so

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45. In the draft of the Code of the Sharīʿa articles 1533-1534 define ʾistihqāq as judgment for the plaintiff to extricate his right of possession from the hands of the one holding it so that it goes to the hands of the plaintiff.
The origin of the right of possession can be contract (muʿāwada) or donation (tabarruʿ) or inheritance (ʾirth) or possession of sections of uncultivated lands in which there has not been established any privilege.

46. Civil Case (madanī) No. 9563 of 27.1.1968: The petitioners were the sons, daughters and widow of the deceased (died 20.5.1964). The defendant was a son of the same deceased. The petitioners accused the defendant of taking over the administration of the house left by the muwarrith and of refusing to acknowledge the claims of the petitioners. At first the defendant denied the claims of the petitioners, then admitted them before the investigating judge. The Court of First Instance of Tūnis then proceeded to approve qasama on the basis of rules of intestate distribution, applying articles 95 (widow's share) and 103 (paragraph 3: daughters agnatised by sons) of the Code of Personal Status.

that each partner is given his own share to administer by himself.[47]

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47. Civil Case (madanī) No. 4675 of 8.2.1964: The plaintiff claimed her share in her mother's estate which had originated from the estate of the petitioner's maternal grandfather. The defendant had been vested with co-ownership and supervision over all the land. He had forbidden the petitioner to administer her share in the estate. Thus she sought detachment of her share and the end of co-ownership. She established her nasab to the latter's father by wafāh. Her petition, however, was not granted, for lack of an official inventory[1] of the estate, or document establishing hubus, or a decision from the Commission For the Abolition of 'Ahbās (lajna tasfīya al 'ahbās).

(1) Dictionnaire de Droit, Paris, 1966, "Succession," paragraph 29-3: "Inventory -- Inventory is obligatory only exceptionally. But it is always useful to allow the heir to know the cause for the inventory. The inventory is a notarised document. It is preceded by a title of inventory (intitulé d'inventaire) which serves to establish the capacity of heir for the claimant of this right."
While the Tunisian courts require an inventory (kashfa al 'ahsā' to know what the heir can claim (article 136 of the Code of Property Rights names taking of inventory as one of duties of administrator of estate), French law uses inventory for other reasons found in article 802 of the Code Civil: "The effect of the benefit of inventory is to give the heir the advantage: 1) for not being held responsible for payment of debts of the estate except to the amount of the value of the properties which he has received[2] and even for being able to discharge payment of the debts while abandoning all the properties of the estate to the creditors and legatees;

2) for not confusing his personal properties with those of the estate and to preserve against the estate the right to claim payment of what is to his credit."

(2) In Tunisian law the heir is not held responsible personally for the debts of the estate; only the de cujus is held responsible. In French law the heir, who has the right to choose to accept or reject his in-

testate share in the estate, is personally responsible out of his own pocket for the debts of the deceased if the heir accepts his intestate share. Article 241 of the majallat al huqūq al ʿainiyat provides that when the heirs refuse the accept their shares, they cannot be forced to accept, and they are not held responsible for the debts of the estate; the creditors can in this case only pursue the debts against the estate. Sīdī Al Bashīr Zahra, of the Court of Appeal of Tūnis in his essay "Al ʾIrth al muwāẓafa ʿalaihi dīn wa ʿalāqa al waritha bī daʾinī at tarika," ("The inheritable estate upon which is laid a debt and the relation of the heirs to the creditors of the estate") Al Qadāʾ waʾl Tashrīʿ, No. 5 of May 1969, page 9, writes that article 241 means that the heir cannot claim in the estate unless he accepts the share without any condition and any bond (qaid). This shows the great difference between Tunisian law and French law. French law allows debts of the deceased to be fulfilled from the personal property of the heir if need be (article 724 of the Code Civil: "The legitimate heirs, the natural heirs, and the surviving spouse are attached with absolute rights in the properties, rights and actions of the deceased, on condition that they are obligated to acquit all the debts of the estate...").

Or else one heir might have purchased the legal shares of some of the co-heirs, but the sellers had not yet turned the property over to the purchasing heir.[48]

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48. Civil Case (madanī) no. 7515 of 26.6.1966: The plaintiff claimed her share of inheritance from her deceased father's lands as well as half of the share of her father's wife and all the share of her uncle. She alleged that she had bought the latter two shares. The sisters of her deceased father had usurped control over the estate since 1950, the date of the death of the muwarrith. The Court of First Instance of Tūnis did not accept the petition because sufficient evidence of the sale was not presented.

In a Personal Status Case (shakhsīya) No. 17353 of 5.7.1965 (on appeal to the Court of Appeal of Tūnis, case no. 26201/3, judgment no. 58824, rendered on 19.5.1966, affirming lower court), the Court of First Instance of Tūnis accepted as proved the purchase by the son of the shares of the wife and daughter.

Civil Case (madanī) No. 9163 of 11.2.1967: The petitioner claimed that she and her brother had bought together ten years ago a portion of land. Her brother built on the land, then proceeded to register the real estate in his name without specifying the partnership with the sister. He then wished to sell the property. The sister protested and sought judgment attributing half of the property to her. The Court of First Instance of Tūnis had to refuse the petition for lack of documentary evidence establishing her claim.

In Civil Case (madanī) No. 9263 of 17.1.1967, the son of the deceased bought the share of the widow of the deceased and recorded the sale in a notarised document dated 11.2.1965. The son and his brother then sought judgment against their sisters forcing them to complete qasama of a house in which the two sons of the deceased and one daughter resided at the time the suit was instituted. The competent administrative official in the district had refused to authorise qasama. The Court of First Instance of Tūnis refused the petition.

Civil Case (madanī) No. 9390 of 25.2.1967: The daughter of the deceased (who died on 12.8.1950) claimed her inheritance share in the deceased's estate as well

as the share which she had bought from the deceased's widow and germane brother (sale on 9.10.1952). The mother, germane sisters, and another daughter of the deceased controlled the estate. The petitioner sought control of her shares by demanding qasama of the estate. The expert who carried out investigations of the real estate deemed the land unsuitable for qasama. Liquidation by sale was recommended. The parties to the case accepted the recommendation. The Court of First Instance of Tūnis ordered distribution of the proceeds of the sale according to the rules of mīrāth, taking into account the purchase of shares by the petitioner and by her sister, one of the defendants.

An action in *istihqāq* could also arise when administration by co-ownership is impossible; hence, co-owners demand termination of the state of co-ownership[49] **(see footnote 254 of Chapter II above and page 248).**

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49. Civil Case (*madanī*) No. 6345 of 14.6.1965: The petitioner requested liquidation of the estate by sale. The defendants opposed the sale because the sale would deprive them of a place of habitation. The defendants lost because of the rule that no one co-owner can force another to remain in a state of co-ownership (article 71 of the *majallat al huqūq al ʿaīnīyat*). Although it was not noted in the judgment, article 120 of the same *majallat* allows co-owners to take an unanimous decision that the sale not be open to any third party. In this way the property is kept in the hands of the co-owners who need it.

No. 8704 (madanī) of 28.2.1967

This case in the madanī division of the Court of First Instance in Tūnis corresponds to the Maarek case in the shakhsīya division (no. 20510, page 455 above). It dealt directly with the validity of a hiba bi'l wasīyya that was in favour of an heir and exceeded the one-third.

The facts of the case were as follows:

Sa'āl made a notarised hiba on 12.6.1952, according to Mosaic law, in favour of his children and grandchildren. The Rabbinical Court having jurisdiction at the time approved the gift, verifying the validity of its form in a judgment rendered on 1.7.1952. Some years later Sa'āl hypothecated one of the registered properties that had been disposed of in the gift, and on 25.3.1959 (inscribed 1-4-1959 depot. vol. 59, no. 323) had inscribed on the title deed of the second property disposed of in the gift a sale to a third party. Sa'āl died on 10.8.1964. In 1966 his children and grandchildren registered the transfer of ownership by gift on the title deed for the first property which had been hypothecated. The Conservateur Foncier had accepted the 1952 deed of gift as valid for legal transfer of ownership.

Sa'āl had also left among his heirs his wife. She

was not the mother of the children whom Sa'āl had favoured with the gift of 1952. She brought a suit against the children and grandchildren, requesting the Court of First Instance of Tūnis to 1) nullify the hiba bi'l wasīyya because it was contrary to article one hundred seventy-nine of the Code of Personal Status; 2) to have the registration of the transfer of ownership on the title deed annulled; and 3) to attribute to her one-eighth of the properties of her husband.

From the submissions of the advocates kept in the case file one saw that by the terms of the gift the two sons of the deceased's son (that is, the two grandsons of the donor) and the wife of the deceased's son (that is, the daughter-in-law of the donor) were to have shares of two-fifths, two-fifths, and one-fifth, respectively, in the house which had been hypothecated. The deceased's daughter-in-law was living on the property at the time of petition. Another property, which was later sold, was originally given totally to the daughter of the deceased's son. The moveables owned by the deceased were given to the deceased's son and grandsons in equal proportions.

The Court deemed the gratuitous disposition a gift inter vivos, which had been made effective by the de-

cision of the Rabbinical Court. As the law of 27 September 1957 abolishing the application of Mosaic law was not retroactive, the Court of First Instance deemed itself bound by the Rabbi's ruling of 1952. The decision of the former court took precedence over the fact that the gift was not registered on the title deed until after the death of the donor, usually registration is deemed an indication of delivery and completion of the gift (see page 460 above).

The Court did not refer to the shakhsīya decision no. 20510 of 15.2.1966, confirmed on appeal in appellate case no. 26728/3, judgment no. 59966 of 31.7.1967 (Maarek's case, page 455 above) in which a gift made according to Mosaic law was deemed a wasīyya; and since it was made to an heir it was declared void. The difference in facts between case 20510 and the Saʿāl case is that the deceased in case no. 20510 ordered that his disposition not be read before the Rabbinical Court until after he had died. By the time he had died the competent court was the Court of First Instance, applying the Code of Personal Status. The instructions left by the testator were deemed to mean that the disposition was not to take place until after he had died. The legal nature of such disposition is testamentary.

The madanī chamber in the Saʿāl case(no. 8704) went on to rule that the gift of the landed property was valid, and hence, removed from the estate of the deceased.

The widow appealed to the Court of Appeal under case no. 27640, judgment no. 60070, being rendered on 15.11.1967.[50] The Court of Appeal affirmed the decision of the lower court. The widow could not inherit the property that was the object of the gift. The terms of the gift cited in the judgment do not correspond exactly to the terms cited in the advocates' submissions (perhaps because the Court was exercising jurisdiction only over the immoveables and not the moveables). The Court referred only to the property given to the sons and wife of the deceased's son, and to the property originally given to the daughter of the deceased's son then later sold. The widow's share in the estate was limited to what remained after the properties were given away to the children and grandchildren. Within that remainder she was entitled to claim one-eighth according to article ninety-five of the Code of Personal Status (the Code being cited

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50. The judges rendering the decision in this case were not the same as the ones rendering the Court of Appeal judgment confirming shakhsīya decision no. 20510 (Maarek's case).

in her plea, not in the judgment). The Court did not specify what constitued the remaining properties.

The kind of gift inter vivos validated by the Court in the above case is the kind which Al Fusāṭawī in the shakhsīya case no. 21647 of 14.1.1966 had wanted to effect (see page **465 et sq.** above). He had wanted to retain control over the properties during his lifetime but assure that they passed to his wife and her minor children upon his death. He failed to win the law to his side since the Islamic rules in the Code of Personal Status were applied. His disposition of sadaqa was null and void by the rules of both hiba and wasīyya. In the Sa'āl case at hand, the gift was valid because of Mosaic law, and even if it had been deemed a bequest subject to the Code of Personal Status, it would still have been valid. For in so far as the beneficiaries were concerned, it was a bequest to non-heirs, the children of a living son of the deceased and the daughter-in-law of the deceased. Only the submissions of the lawyers in the case file suggest that the gift would have been nullified because of the amount, which was alleged to exceed the one-third of the estate.

While the wishes of the deceased were granted in the case of Sa'āl, one must still ask whether their effect

was fair to the widow. The plight of the widow in this case does not seem as grave as that of the widow in the case of Maarek. Maarek's widow seemed to be depending solely on the one property left by her husband, who wanted her to have it, but whose wishes were foiled by the law. In the Sa'āl case at hand the property in dispute was inhabited by one of the beneficiaries (daughter-in-law) of the gift and the two other beneficiaries were living in France (at least at the time the suit was instituted).

If the plight of the widow were grave, she would be an example (until she remarried if she did) that encourages the arguments proposed for reinterpreting the words of the Prophet, "And the third is much" (see page 480 above). By virtue of the reinterpretation she would have the court exercise its discretion in such a way that gratuitous alienations that are not registered until the death of the donor will be varied according to the resources and needs of the surviving widow of the donor.

The Sa'āl case is also similar to the situation found in the shakhsīya case no. 33276 of 4.7.1970 (Umm Hānī 's case). In both cases an heir to an estate sees that his own future heirs have been given a gratuitous share in the estate. In the case no. 33276 the

father disputed the gratuitous disposition to his son. In the Saʿāl case the son of the deceased did not object to the gift to his children. Yet had Saʿāl's son died before his own children and wife, the donees, his wife and children could, according to the rule proposed for case no. 33276 (see pages 494-495 above), decide whether or not the amount of each gift should count against the amount of each intestate share due to them from the estate of Saʿāl's son.

As for the state of co-ownership prescribed by the deceased donor in the Saʿāl case (two fifths to each grandson and one-fifth to the daughter-in-law in one property), the welfare of the property would probably require that the court not wait for a request from the co-owners for qasama. The court of competent jurisdiction could at the time the succession opened have applied article one hundred forty of the majallat al huqūq al ʿaīnīyat. At that time the court could have decided whether or not the interests of the property and the individual members of the family would best be served by attributing ownership to only one owner.

Case No. 11012 (madanī) of 15.4.1968

One of the most interesting issues in a case of a wasīyya to an heir is found in case no. 11012. It is an example of traditional Sharī'a encountering twentieth century financial customs.

The facts of the case were as follows:

Yūsuf, the deceased, was the son of the plaintiffs. He had taken out a life insurance with an insurance company located in Tūnis. He made his wife, the defendant, the beneficiary of the insurance in the event that he died. The insurance was valued at two hundred fifty dinars.[51]

When Yūsuf died, his parents wished to benefit from the insurance also. In a petition of claim (ʾistihqāq) to the Court of First Instance, they called the benefit derived from the insurance a wasīyya. They argued that since no bequest to an heir is valid and they were not willing to consent to it, the Court should deem the insurance money part of the taraka (estate) of Yūsuf. Then the estate would be distributed among the heirs mentioned in the wafāh of Yusuf. They wanted the wife to be forced to pay them their share.

Unfortunately, the Court of First Instance was not

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51. In 1971 one dinar was the equivalent of about one pound sterling. It was the same in 1965.

able to pass judgment on the petition for two reasons. One was that the parents did not bring any evidence of the insurance policy. The other was that the defendant never appeared. The dispute turned on the outcome of the interpretation of the insurance policy, and until that was settled, the Court could not make a decision.

Although the petition was not judged upon, the facts are cause for speculation. As the Court observed, the terms of the insurance policy would determine the outcome of the case. No doubt the Court had in mind the fact that the terms would determine who was the actual owner of the policy by the time of the death of the person insured. The terms of some policies allow the insured to be paid the proceeds if he is still alive once all the premiums have been paid. In that case the person insured is the owner of the policy. The terms of other policies allow payment only to the beneficiary. All interest vests in the beneficiary who becomes the owner of the policy. In case of such policies the creditors of the insured generally cannot claim rights in the policy, even though the debtor/insured has paid the premiums.

How might one then interpret the legal effects of life insurance policies in terms of the Sharī'a? One might start with the instructions from the Qur'ān that

debts must be paid before the inheritance is paid (sūra four(An Nisā'), verses eleven to twelve).[52] The rights of the creditors thus could determine the rights of the heirs vís à vís the beneficiaries of the policy. If the terms of the insurance policy be of such nature that creditors of the deceased could not touch it, then the insurance policy can be deemed outside the estate of the deceased. As to how the law could justify a conclusion that the creditors could not touch the proceeds of the policy, the Court would have to examine the essence of the insurance policy. It would have to determine whether insurance is a gratuitous contract or a contract of 'iwad. The Court would have further to decide whether the policy constitutes two contracts or one. It could be two contracts in the sense that the interest of the beneficiary arises from a gratuitous transfer of ownership but the responsibility of the insured for paying the

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[52]. Sūra 4, verse 11 (inheritance verses): "...but if he has brothers, for his mother is the sixth, after (payment of) a bequest he may have bequeathed or a debt..."

verse 12: "...your share is a fourth of what they leave after (payment of) any bequest they may have bequeathed or a debt. ...but if you have a child, their share is the eighth of what you leave after (payment of) a bequest you may have bequeathed or a debt."

(From translation of Maulana Muhammad Ali, The Holy Qur'ān)

premiums arises from a contract of ʿiwad. In this case the gratuitous transfer to the beneficiary would be subject to the rules of al hiba; and if the Court considered that delivery was not immediate and the insurance remained in the estate, then the insurance would be subject to the rules of al wasīyya. On the other hand, the policy could be deemed one contract in the sense that the terms of the contract necessitate a beneficiary. As long as the price is paid, and the contract valid in itself, the effects of the contract derive from the contract itself, not being subject to any other special rules like those of al hiba or al wasīyya. Therefore, as the contract stipulates who shall be the beneficiary, no person outside this stipulation should be able to claim to be a party who benefits from the contract.[53]

Should the Court decide that the proceeds of the life insurance policy are part of the estate of the deceased insured, then it can accordingly apply rules of wasīyya of specification. If the amount of the insurance policy exceeds the share of the inheritance of

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53. The problem can be cast in the form of the arguments which Ibn Qudāma presented about the validity of bequests which indirectly benefit an heir, such as a bequest that absolves an heir of a debt (see page 395 et sq. of Chapter III above).

the wife, then the wife depends on the good graces of the parents of the deceased. If they fail to consent to the excess, the wife could put her hopes in the proposal previously discussed for case no. 33276 (shakhsīya) of 4.7.1970. It was submitted that failure of consent to a bequest should be subject to the scrutiny of the Court (see page 497 above). However, the argument for the interference of the Court rested on concern for the welfare of the property as well as for the interests of the family members. This argument is more appropriate for immoveable property than moveable property like money, which is the nature of proceeds from an insurance policy. A more apt argument in favour of the wife would be based on the words of the Prophet, "It is better to leave your relatives in no need than to leave them as dependents who beg from people" (see page 480 above). If a testator has made a bequest to an heir with the purpose of continuing maintenance that was due during the lifetime of the testator, then if co-heirs do not consent to the bequest, the Court should scrutinise their failure to give consent. The Court would determine in its inquiry whether the consent is refused for selfish reasons, or for the reason that the co-heirs were as dependent on the testator in his lifetime

as the legatee. Where the legatee is a spouse and the Court would grant the bequest in his or her favour, he or she would have to relinquish to the co-heirs whatever remained of the bequest when he or she re-married or returned to his or her parents for main-tenance.

Conclusions

The volume of petitioners appearing before the Court of First Instance in Tūnis for nullifying a bequest on grounds that it is to an heir or exceeds the one-third is not overwhelmingly large. The problems which the petitioners in fact raise, however, inspire a re-examination of the two most fundamental rule of bequests. The two most fundamental rules arise from two traditions: no bequest to an heir; no bequest beyond the one-third. The reasoning of the fuqahā' has prevented these two rules from becoming hard and fast in the extreme. For the consent of the heirs of the deceased (in part or in unanimity) determines the extent of the testator's testamentary powers. They can consent to a bequest to an heir or a bequest beyond the one-third. Article one hundred seventy-nine of the Code of Personal Status embodies these rules. Its provisions have the same tenour as the Hanafī provisions in the draft of the Code of the Sharī'a.[54]

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54. Draft of the Code of the Sharī'a, article 1149: (Hanafī) -- The permission of the heir for the wasīyya to another heir or a wasīyya to a stranger exceeding the one-third is not deemed permission unless it occurs after the death of the mūsī. If it occurs during the lifetime of the mūsī, the heirs have the right to revoke their permission after the mūsī's death. If

their permission be after the death of the mūsī, they have no right to revoke consent and they can be forced to hand over the bequest if they refuse. If some of the heirs permit the wasīyya and some of the heirs deny the wasīyya, the wasīyya is permitted up to the amount of the share of the one giving permission and is bātil in regard to the right of the other heirs.

(Mālikī) -- If the heirs permit before the death of the muwarrith a wasīyya from the muwarrith to an heir or exceeding the one-third, and the permission was given during a state of good health of the mūsī, the permission is not binding. If the permission were given during a state of illness of the mūsī, the permission is binding on the following conditions:

1) that the sickness be feared (be a cause of death);
2) that the mūsī does not clearly recover after his illness;
3) that there is not a justification in their permission like their being maintained or their having luxuries, or they fear his (the mūsī's) influence against them;
4) that the person giving permission is not someone who feels (yahmala) that he has the right of refusal and permission; if the person giving permission be one who is ignorant, his swearing that he did not know that he had the right to reject the wasīyya renders his permission unbinding;
5) if the person giving permission has full legal capacity (mukallaf) without being subject to any interdiction.

When one of the conditions is not fulfilled, the permission is not binding.

Article 179 of the Code of Personal Status:"...There can be no wasīyya to an heir and none exceeding the one-third except by permission of the heirs after the death of the mūsī."

If legislators wish to reform the law in order to meet a diversity of needs of people, they would begin by asking the following question: Will the law allow malicious withholding of consent by the heirs? If the answer be no, the legislators can turn to sūra two (Al Baqarah), verse 180 of the Qur'ān for affirmation.

According to sūra two, verse 180, it is incumbent upon a Muslim to bequeathe to his parents and near relatives. The fuqahā' reasoned that this verse was abrogated by the verses of inheritance because a dead person's wishes should not automatically upset the rules of the farā'id (see footnote 10 above). If he were allowed this power, he would make a farce of the laws of succession. It is for the farā'id and 'asaba to decide the fate of their rights. However, it is well known that some legal thinkers did not think that sūra two, verse 180 was completely abrogated, Ibn Hazm being one of them. It was thought not to be abrogated in regard to orphaned grandchildren. The Tunisian legislators have already incorporated Ibn Hazm's opinion in article one hundred ninety-one of the Code of Personal Status (see page 396 et sq. of Chapter III above). The opinion of Ibn Hazm was appealing to the Tunisian legislators for probably two

reasons. One being that logically there was no reason that sūra two, verse 180 should be abrogated since such grandchildren were not heirs; hence, bequests to them would not violate the rule of no bequest to an heir. A second reason would be that in practise Tunisian grandfathers were already providing for their grandchildren by way of tanzīl. Tanzīl had the same effect as an obligatory wasīyya, except that tanzīl was a voluntary action. The provisions in article one hundred ninety-one of the Code of Personal Status that any voluntary wasīyya or gifts made by the grandparent to the obligatory legatee would count against the amount of the obligatory wasīyya cover situations where grandparents continue to think in terms of tanzīl today (see page 438 of Chapter III above).

The Tunisian legislators could have gone a step farther and found a third justification for the obligatory wasīyya, namely, in sūra two, verse 177:

> "It is not righteousness that you turn your face towards the East and the West, but righteous is the one who believes in Allāh and the Last Day, and the angels and the Book and the prophets, and gives away wealth out of love for Him to the near of kin and the orphans and the needy and the wayfarer and to those who ask and to set slaves free and keeps up prayer and pays the poor-rate; and the performers of their promise when they make a promise, and the patient in distress and affliction and in the time of conflict. These are they who are truthful; and these are they who keep their duty." [55]

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55. Translation from Maulana Muhammad Ali, The Holy Qur'ān, 5th edition, Lahore: The Ahmadiyyah Anjuman Isha'at Islam, 1963.

This verse gives the moral basis on which rests the prescription of a bequest to parents and near relatives in verse 180.

If the Qur'ān says that it is good to give wealth to near of kin, the orphans (including children and widows, who are called orphans in sūra four (Al Nisā'), verse three, which authorises polygamy), and the needy, then why should not the refusal of heirs to consent to the bequest which is ultra vires[56] be subject to the scrutiny of the courts? The purpose of the scrutiny would be to determine whether refusal does injury to the near relatives, the orphans, or the needy. The issues in the cases discussed in this chapter suggest that the power of the courts to scrutinise the heirs' refusal to consent could fall within the provisions of article one hundred forty of the majallat al huqūq al ʿaīnīyat. That article allows the court to interfere in the qasama of an estate if the interests of the property so require.[57]

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[56] N.J. Coulson, Succession in the Muslim Family, Cambridge University Press, 1971, page 235: "In the context of succession law, an act or transaction of the praepositus which offends against the interest of the legal heirs established by the laws of inheritance may properly be termed ultra vires since it exceeds the permitted limits of the discretionary transmission of property at death."

[57] Article 140 of the Code of Property Rights: "If

However, there would be need for a law which covers both moveable and immoveable property in an estate. Such a law could first of all purport to implement the prescription of sūra two, verse 177 of the Qurʿān. Such a law then would borrow from the law of talāq as reformed in the provisions of the Code of Personal Status, which provides that the court can use its discretion to grant the wife damages (gharāmāt) from the husband if the divorce causes her injury (darar), or grant the injured husband consideration (taʿwīdāt). The court's powers derive from article thirty-one, paragraph three of the Code of Personal Status. This provision is based on the exhortation of sūra two, verse 241 of the Qurʾān:[58]

وللمطلقات متاع بالمعروف حقا على المتقين

(And for the divorced woman, provision (must be made) in kindness. This is incumbent on those who have regard to duty.[59])

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there exist in the wealth of the estate a productive unit, agricultural, or industrial, or commerical, which is considered to be one economic unit, it can be attributed to one of the heirs according to what is welfare requires.

The amount of cash for balancing [or compensating] the shares of the rest of the co-owners will be determined."

58. Footnote three of the annotated version of the Code of Personal Status by M.T. Es Snoussi, 1970 edition, page 32 of Arabic version, pages 24-25 of French.

59. Translation from Maulana Muḥammad Ali, The Holy Qurʾān, 5th edition, Lahore: The Aḥmadiyyah Anjuman Ishaʿat Islam, 1963.

The spirit of this verse, like the spirit of sūra two, verse 177 on charity to the near relatives, orphans, and needy, is one of concern that works against the laws that work harm to the deserving.

There is already a provision in Tunisian statutory law which allows generally for compensation for injury resulting from a legal right being exercised by another. This provision is in article one hundred three of the majallat al ʾittizāmāt waʾl ʿuqūd (Code of Obligations and Contracts:

> "No civil responsibility (liability) falls on a person, who without intention to do harm has done what his right requires. When the exercise of this right causes serious (fādih) injury to another, and this damage can be avoided or discontinued, without damage (khasāra) to the holder of the right, then there is civil responsibility to do what is necessary to prevent or discontinue the injury."

A 1968 case of ʾistihqāq illustrates the application of article one hundred three. In case no.11796 (madanī) of 21.10.1968, ʾAhmad, a former husband, petitioned the Court of First Instance of Tūnis for revocation of a hiba which he had made to his divorced wife Fāṭima and their six children (minors). The hiba had been made by notarised document on 21.8.1965 and comprised a villa in the suburbs of Tūnis. On

27.10.1966 the husband obtained a judgment of talāq against his wife. The wife was awarded seven hundred dinars in damages,[60] payable in monthly installments. The husband remarried and had five children by his second wife. He wished to revoke the hiba to his first wife on the grounds that article two hundred ten of the Code of Personal Status allows revocation of hiba if the donor finds himself in a state of relative poverty which prevents him from maintaining the standard of living that is consistent with his social position, or from meeting his legal obligations of family maintenance.[61] In addition, the former husband wanted dam-

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60. In 1971 one dinar was equivalent to about one pound sterling. It was the same i n 1965.

61. The provisions for revocation of a hiba in the draft of the Code of the Sharīʿa are divided into two kinds. There is revocation taking place because of certain conditions relating to the donee; there is revocation taking place because of certain conditions relating to the donor.

Article 1278 (Mālikī): "There are four obstacles to revocation: ...3) the donee married or incurred debts (ʾistidānāt) after the hiba: if the donee was given the hiba while he was married or indebted, revocation is not prevented."

The Hanafī provision allows revocation on grounds of marriage when the marriage is between the donor and the donee.

In regard to the behaviour of the donor, Article 1218 (Mālikī) reads: "A condition for completion of hiba is that the donee take possession before there occurs some obstacle like the donor's death, his insanity, or his charging a debt on the property given."

(Ḥanafī): "A judgment of hiba is completed only by

ages of two hundred dinars from his former wife, the defendant. The Court of First Instance granted the petition after examining the monthly salary of the petitioner, a government employee, and the number of obligations which he had to meet. His obligations were found to exceed his income. The Court deemed the petitioner impoverished, and the house comprising the hiba the only property owned by the petitioner. Accordingly, the Court allowed revocation of the hiba, and ordered the defendant and her children to leave the house. The Court reduced the petitioner's demand for two hundred dinars in damages of inconvenience and lawyers' fees to twenty dinars, which the defendant was ordered to pay.

The defendant appealed under case no. 28867/3, whose judgment no. 61340 was rendered on 19.6.1969. The Court of Appeal of Tunis reversed the judgment of the lower court. For the Court of Appeal accepted the

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the donee taking possession before there occurs an obstacle like the death of the donor, insanity, or a debt charged to the property given."

The provisions of the Code Civil of France do not contain the Tunisian provisions for revocation for reason of poverty. The Code Civil (article 953, Dalloz edition, 1970/71) has the same provisions as the Tunisian Code of Personal Status has for revocation for reason of ingratitude of the donee or birth of a child to the donor after the gift (article 210, paragraphs 1 and 3 of the Code of Personal Status).

emotionally moving arguments of the advocate for the former wife. The advocate first submitted that it was not the former wife who had done injury to the husband by holding the house. It was the husband's revocation of the hiba that made him guilty of injuring her according to article one hundred three of the majallat al ʾittizāmāt waʾl ʿuqūd (Code of Obligations and Contracts). The husband had married her for his own pleasure, and enjoyed her by having six children by her. She then became the servant of him and his children, to the neglect of her own health. He abused her with talāq after ten years of marriage; and in the case at hand he wanted to abuse her with revocation of the hiba.

The second submission of the advocate of the former wife dealt with the finances of the husband. It was discovered that he had in fact bought a second house with his second wife. He and his second family were living in that house. Furthermore, a bank in Tūnis had high enough esteem for the financial position of the husband and had made him a loan. The bank had not attached his salary, a fact which indicated that the former husband was not insolvent, as the lower court had been led to believe. A third house which the former husband used to own had been sold to pay for the

seven hundred dinars in damages due to the first wife upon talāq. Hence, the payment of damages was not coming from his salary. In summary, the advocate for the former wife proved that all conditions for the operation of article one hundred three of the Code of Obligations and Contracts were met; that is, first, the exercise of the right of revocation would do injury to the former wife and her six children; and secondly, forcing the husband to desist from exercising his legal rights of revocation would not cause him grave financial inconvenience since he was financially solvent.

The advocate for the former husband tried one more defence. He argued that the husband was having to increase the amount of legal maintenance due to the five children of his second wife.[62] The advocate for the former wife scoffed and contended that the law does not allow a man to change responsibilities like shirts. He had no right to ask for more maintenance for his second family than for his first. All eleven children were his. He had not been forced to procreate a second family; he did so voluntarily.

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62. Papers in the court file of the case show that the District Court in case no. 1837 of 20.8.1965 ordered twenty-five dinars per month for nafaqa of the former wife and children.

The Court of Appeal ruled in favour of the former wife and returned the twenty dinars in damages which the lower court had ordered her to pay. The respondent was ordered to pay the legal costs.

This decision sets a progressive precedent for equitable application of time-honoured rules. This was the first time. Such a spirit motivated some of the reforms brought by the 1948 Code of Procedure for the Courts of the Sharī'a.[63] The same spirit of equity could be applied to the case of a potential legatee who is an heir of the testator or claimant to a bequest of more than the one-third, if the petitioner proves that the refusal of the heirs to grant the bequest causes injury to him. Reform in the law of bequests would require that the established opinions about the abrogation of sūra two, verse 180 be revised. A new version of abrogation would recognise that sūra two verse 180 was abrogated in so far as a be-

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63. See pages 307-309 of Chapter II above. A Minister in a memorandum on codes for the Sharī'a implied that one way a court could go about adjudicating cases where parties assert rights under two different laws is to decide which party has best proved that his needs and interests are more important and in greater need of immediate fulfillment. This would seem to cause judges to recognise more easily when an established rule begins to create more abuses than it cures.

quest to an heir or a bequest exceeding the one-third becomes an ultra vires bequest; but the verse was not abrogated to the extent that consent of heirs should be withheld from the needy. A statutory law based on this reinterpretation could interfere with the consent or refusal by the heirs by allowing damages to a legatee who was proved to be wronged by refusal; or the statute could allow power to a court to decide which plan of qasama would best fit both the needs of economic operation of the estate and all the claimants (legatees and heirs), if consent or denial by the heirs worked hardship.

Tunisia has earned, among European scholars of Islām, the reputation as the holder of the key to the door of ʾijtihād.[64] In the tradition of Ibn Hazm -- the proponent of the obligatory waṣīyya -- the science of abrogation involves the most fundamental rules of ʾijtihād.[65] A re-examination of the established opinions about the abrogation of sūra two, verse 180

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64. See page 333 of Chapter II above.

N.J. Coulson, A History of Islamic Law, Edinburgh: University Press, 1964, page 210.

65. Muhammad ʾAbū Zahra, Ibn Hazm, Dār al Fikr al ʿArabī; n.d., page 328.

would be yet another way in which Tunisia could continue to keep the door of ʾijtihād open.

Annotated Bibliography

Chebil, Moshen."L'Evolution du régime foncier Tunisien en liaison avec les programmes de developpement agricole," October 1965.

The department of Affaires Foncières in the Ministry of Agriculture has the important task of supervising land tenure in Tunisia. It keeps documentation on cooperatives and lands held as ʾahbās.

In this conference paper the Director of this department, M. Chebil, gives a statistical outline of the average acreage for plots, and gross figures for the amount of acreage tied up in ʾahbās, tribal collective lands in the southern frontier, private ownership, and co-ownership in the more productive areas of the north. The lands which support the highest number of co-owners were in 1965 in a very precarious legal position, since many of the inhabitants on the land could not easily justify their right to be on the land.

The author briefly touches on foreigners owning lands in Tunisia. The law of 12 May 1964 (J.O.R.T. no. 24 of 12 May 1964) forbids persons of non-Tunisian nationality to own agricultural land from 12 May 1964 onwards. Under this law 460,000 hectares returned to the State domains.

The paper reviews the laws and functioning of machinery set up for quick easy registration of lands. It remains for the reader to obtain the actual texts of the laws, read them for himself, and evaluate them.

Archives of the Court of First Instance, Tūnis

All cases referred to in the thesis, unless otherwise noted, were collected from the Qasr al ʿadāla (Palais de Justice). All judgments are written only in Arabic (only a few early ones in French).

Each chamber in the Court of First Instance, Tūnis, keeps its own daftar (in Arabic) since 1957. Cases are listed in order by number. The number means that the case was filed for suit and hearing. Beside the number are written the names of the parties, a brief classification (e.g., talāq) of the nature of the suit, the date of the hearing for final judgment, the outcome of the decision (e.g., rejected), and the amount of fees paid.

The number of the case is the key for finding the court file on the case. All files for the shakhsīya and madanī chamber are kept in the same store room. The files are stored in order of number, thus facilitating the search for them. Many files contain the original summons to the defendant, the advocates' submissions (although sometimes the advocates will remove these when the case is terminated), a record of the outcome of every session held by the court on the case, copies of documents (e.g., marriage certificate, wafāh,

although these too are sometimes removed by the advocates), and the original, usually handwritten, of the final decision of the court. Typewritten copies of the decisions can be obtained from another section, which is responsible for reproducing copies of judgments for parties to suits.

When a case has gone to the Court of Appeal, which is located in the same building as the Court of First Instance, there is a note in the case file in the archives of the Court of First Instance that the contents have been removed to the Court of Appeal. In the Court of Appeal case files are found under the case number, while copies of the judgment are found under a second number, the judgment number.

Another place where files are sometimes sent is the office of the Wakīl al ḥaqq al-ʿāmm (Procureur Général), when a question of public importance arises.

As for the old judgments of the courts of the Sharīʿa and the decisions of the Rabbinical courts, the system of storage and indexing is rather haphazard. The archive of the Court of First Instance has judgments going back to 1950. I found the texts of some of the judgments of the Sharīʿa which were referred to in post-Independence cases. When the courts were consolidated and transferred to one building, many of the old records

were not removed to a central place, and hence, are store in various places (e.g., the former Dār as Sharīʿa, now a library, and the headquarters of the Destour Party).

A register for the judgments of the former French courts is kept in the office of the chief clerk of the Court of Appeal.

The total number of cases in the shakhsīya chamber dealing with the laws of succession between 1957 and 1970 was twenty-one. Several deal with wills made by Europeans and Hebrews, but the testators were subject to European laws. There is a large number of petitions for correcting wafāyāt, so that the number of heirs appearing on the death certificate will increase or decrease. The main problem in inheritance cases seems to be deciding who are the relatives of the deceased.

In the madanī chamber of the Court of First Instance, the files of cases on succession are more numerous, but the issues usually centre around proof of the nasab with the muwarrith, inventory of the estate, and judgment ordering intestate shares due to the claimant. The number of cases actually dealing with wills since 1957 totalled twenty-four.

The number of cases in the courts is of course no indication of the number of wills made. Only a search

among the files of hundreds of notaries in Tūnis would reveal that. Some of the lawyers in Tūnis feel that the number of wills being made is decreasing, since the law of monogamy was passed. They maintain that under the system of polygamy, wills were used to specify which child and which wife was to get what out of the estate.

The other important archive for decisions is found in the office of the Chief Greffier of the Court of Land Matters (al mahkama al ʿaqārīya), next to the Court of First Instnace, Tūnis. All decisions issued by the Court of Land Matters since its establishment as the Tribunal Mixte applying the Law of 1st July 1885 are bound and stored on open shelves in the Court.

Dufour, J.P.
"Devolution successorale, morcellement et indivision de la propriété agricole en Tunisie," 6 June 1967, Tūnis

"Le Problème des terres collectives en Tunisie," 4 November 1970, Tūnis.

J.P. Dufour was with F.A.O. , Tūnis, which was advising on a large cooperative scheme, while he wrote two manuscripts (Dossier J.P. Dufour, file C.C. 4.2.25, O.N.U. Office, Tūnis). He has since left and joined the Université Libre in Brussels.

The first paper discusses the theory of succession in several countries. The author concludes that despite the ideological differences that dominate various economies, the trend has been towards breaking down the individual right of property. The principle of the social function of property comes to predominate.

The Islamic system of land-holding and succession is likened to the Napoleonic system, which also led to fragmentation and co-ownership. France and Tunisia have adopted similar solutions in regard to succession to lands, that is, one heir gets the land and the others are compensated in cash.

The vast majority of Tunisian agricultural lands were known in 1967 to be fragmented and carrying many co-owners. The ten year plan aimed to end this problem by using cooperatives. Dufour reviews succinctly the

legislation dealing with cooperatives in Tunisia, and compares it briefly with the legislation of other countries. He faults the Tunisian legislation for not covering transactions inter vivos, for what is the use of regulating succession when fragmentation can take place during the lifetime of a person? He cites legislation from other countries, especially European, which controls every transaction so that the land will not be fragmented to its disadvantage. The situation in Tunisia should improve as more lands are registered; then transactions are more publicised.

Just how serious the land situation in Tunisia was in 1967 was difficult for Dufour to judge definitively. He notes that precise statistics on the number of owners and extent of fragmentation are lacking. Some local intensive field reserach studies in some areas reveal some statistics, which are taken as representative more or less of most of the country. But Dufour warns the reader that the statistics so far do not say much about the economic functioning of the land. Hence, he does not say exactly how a plot carrying many co-owners is in fact managed, and whether Tunisian farmers know how to avoid these problems of co-ownership. One does not know how often it is that only one person manages the land as if it were his own and his co-sharers virtually leave

him alone; or whether management is too often hampered by "too many cooks spoiling the broth."

Dufour proposes solutions to the problems which he sees Tunisia has in agriculture. The solutions are similar to the German ones, namely, all co-heirs ceding their parts to a principal heir. He proposes expropriation from those owners who own very small plots and do not farm them themselves for five years. To avoid fragmentation in cooperatives, he recommends that the heirs no longer succeed to rights in the land, but succeed to the right to acquire the status of a member of the cooperative.

The paper is the work of an adviser on economic problems which the government has pinpointed. The author in proposing solutions presupposes that the reader knows the problems in depth. He abstracts the problems of Tunisia so that in essence the reader sees that Tunisian problems are no different from those in European countries. Therefore, the solutions proposed are general ones which have worked in other countries. A student of Islam, naturally being interested in the peculiarity of Islamic institutions, would ask whether the author might be oversimplifying in his effort to get at the essence of the problem and to phrase that essence in technical economic language. Hence, he does not consider how his

solutions would be applied in depth within the Tunisian Islamic context.

The 1970 paper reviews by regions the types of land holdings in Tunisia and average acreage of each (e.g., milk, hanshir, hubus, tribal collective lands, which vís à vís tribal members, are a collection of individual plots, and vís à vís foreigners, land subject to the control of the group).

Dufour also reviews the stages of thinking, liberal and conservative, through which Tunisian land policy has progressed since the colonial days until 1970. Until a full cadastral survey of land and registration are completed, it will be difficult, the author concludes, to know what to write precisely in legislation that aims generally at limiting monopolisation by large land-owners, while also avoiding tiny fragmented plots.

The 1970 paper contains a comprehensive bibliography of research studies (all in French) made on land tenure in Tunisia from the turn of the century to the present.

The paper basically does not propose solutions; rather it brings attention to the groundwork that is needed before legislation can be enacted.

Muganiya, Muhammad Jawār. Al Wasāyā wa'l mawārīth ʿalā al madhāhib al khamsa (Al Jaʿafarī, al Hanafī, as Shāfiʿī, al Hanbalī), Sharika at Tabāʿa al Hadītha, n.d.

This slender volume, found in Lebanon, gives in clear simple language the basic principles of succession, and how they relate to marriage and divorce. At a quick glance one has all five schools of thought compared on all points. In several places the author notes which points of law in all schools are not really established, since opinion is more or less evenly divided.

My thanks to the Honourable Sīdī Mahmūd Al ʿAnnābī, First President of the Court of Appeal, Tūnis, for lending me his copy with notes.

Revue Tunisienne de Droit and Al Qadā' wa'l Tashrī'

The Revue is published yearly, sometimes every two years, in French by the Faculty of Law and Political and Economic Sciences at the University of Tūnis, and is printed by the Government Printer. The chief editor for volumes 1963 to 1970 was Mlle. E.D. de LaGrange, professor of law at the University. The committee of editing changes from year to year.

Each volume contains four to five articles by legal luminaries in Tunisia on a topic of current interest. The bulk of each volume is devoted to translations of judgments that have been selected from the Supreme Court and lower courts in Tūnis. It duplicates some of the material found in Al Qadā' wa'l Tashrī', a Ministry of Justice publication of cases (in Arabic, sometimes with brief summaries in French) mostly appellate, but the latter contains a much more comprehensive review of cases since it is published more often (monthly) than the Revue. The Revue differs also in regard to its publication of cases in that the decision is annotated. In the note to the case, the reviewer points out the merits and demerits of the decision. Since Mlle. de LaGrange lectures on family law, many of the decisions applying the Code of Personal

Status are analysed briefly and noted by her in the Revue. Another difference between the Revue and Al Qadā' appears in the cadre of authors of articles. In Al Qadā' many of the contributors are judges, and members of the Tunisian courts. The Revue, as to be expected in a university journal, depends on academics and practising lawyers.

Following the cases in the Revue is a chronicle of the legislation enacted for the year. This section is for information, not analytical. It contains only the titles and dates of decrees and laws, whereas Al Qadā' will sometimes print selected provisions from the laws.

The classification of cases and decrees and laws in the Revue is elaborate, in the style of European indexing, which facilitates quick reference.

Zahra, Muhammad ʾAbū. Ibn Hazm, Dār al Fikr al ʿArabī, n.d., 538 pages(in Arabic).

This is a study of the life and thought of Ibn Hazm. It is a modern study, since it covers his family roots, political background, and his legal training, with a view to understanding his thought. The book also puts Ibn Hazm into a political, social, and economic context, paying particular attention to the state of ʾijtihād in the era of Ibn Hazm.

The reader is led through his thoughts on jurisprudence and acquainted with what others have thought of Ibn Hazm. His contributions are discussed under such headings as Al Qurʾān, abrogation, ʾijmāʿ. The author then shows how his opinions in jurisprudence led him to certain conclusions on details of the rules of the Sharīʿa, particularly in the law of succession.

The book concludes with a note on the Zāhirī madhab after the death of Ibn Hazm.

CHAPTER V

GOVERNMENT PROPOSALS FOR THE REFORM OF THE LAW OF SUCCESSION

The government of TUnisia has not been insensitive to the potential for reform in the law of succession. In 1966 there were drafted proposals for amendments to twelve articles of the Code of Personal Status, including article one hundred seventy-nine, which provides, no wasīyya to an heir, and no wasīyya beyond the one-third. None of the proposals were implemented. In 1966 Law No.49 of 3 June 1966 (J.O.R.T. of 3 June 1966, page 880) did amend three articles of the Code of Personal Status on guardianship of children, but these three were not included in the ambitious original proposal for amendments.

Despite the abortion of the proposals, they are worthwhile examining. They indicate currents of thought and potential tenour of changes.[1] The policy motivating the proposals was set forth as follows:

"Ten years after its promulgation the Code of Personal Status gives us a chance to raise its numerous qualities and to affirm that it has some gaps.

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[1]. Much appreciation is expressed to the Ministry of Justice for their kind permission to me to look through the file on Tutelle, Émancipation, Égalité entre des sexes.

"Its qualities are well-known: simplicity, conciseness, flexibility. It contains the germ of great possibilities of evolution -- something which explains why the legislator can, without destroying the harmony of the edifice raised in 1956, bring to it a certain number of perfections. Let us cite, for example, the introduction of the rules relating to the will (Law No, 59-77 of 19 June 1959, in J.O.R.T. No. 34 of 1959) and the provisions concerning hiba (Law No. 64-17 of 28 May 1964, in J.O.R.T. No. 27 of 1964).[2]

"The lacuna in the Code are equally well-known. Certain rules were lacking: so it was with wills and gifts. We have seen since 1956 the Code has been completed on this point. In other domains the legislator has united purely and simply the spirit of Islamic law, disregarding the foreign customs and usages which have been grafted onto Islamic law.

"Today, a new step must be cleared. There subsist in the Code traces of inequality among the sexes, an inequality which is no longer justifiable at the present time, when the woman assumes the same responsibilities as the man.

"Here are the reforms that are projected:

"1) The marriage guardian, with authority to consent

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[2]. When the Code was promulgated in 1956 it lacked provisions on will and gift. The Tunisian legislator filled the gaps in 1959 and 1964 respectively. It is not beyond the legislator to admit imperfections and to correct them.

to the marriage of the minor must be of the masculine sex. Henceforth, the mother is also vested with these functions (article six of the proposals).[3] The judge intervenes only if the minor has neither father nor mother or where there is disagreement between the parents (article seven).

"The last paragraph of article seven provides for a particular case. When the minor has not attained the legal age for marriage, that is, twenty years for a man and seventeen years for a girl, a special authorisation of the judge is necessary (article five).[4] There the judge intervenes in order to remove the minor from an incapacity. But when the minor has neither father nor mother, the judge intervenes in capacity as guardian (walī) (article seven).

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[3]. Present article 6 of the Code: "A man or a woman who has not reached the age of majority must obtain consent for marriage from their guardian. In case of refusal of the walī and the perseverence of the minors in their desire, the matter goes before the judge.

Present article 8: "The walī is the nearest agnatic relative. He must be mentally able (ʿaqalān), a male, and of the age of majority..."

[4]. Present article 5: "... the judge will grant permission for only very serious reasons and in the interest of the two spouses."

Must there be in this case a double authorisation, since the judge acts in two different capacities? Certain people support this. Theoretically this opinion is valid. But practically one cannot conceive of the judge in capacity as walī, then giving an authorisation that he would refuse in so far as he is the legal representative of the authority. This is why it is decided that in this hypothetical case, a single authorisation is given by the judge.

"The Code of 1956 does not attach a sanction to the failure to get the authorisation of the marriage walī. This is the object of article eight. In case of absence of authorisation, the marriage is void. The effects of the nullity are those of article twenty-two of the Code.[5]

"However, this nullity is subject to a special ruling. Nullity can be invoked only by the Public Minister or by the father or by the mother who would have had to give authorisation to the marriage. Furthermore, this nullity

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5. Article 22: ...The consummation of the void marriage carries only the following effects: a) The right of the woman to reclaim the dowry fixed by the marriage contract or by the judge;
b) legitimacy;
c) The duty of the woman to observe ʿidda from the date of separation of the spouses;
d) Degrees of affinity preventing marriage.

can be changed, that is, if the consent or authorisation is given in time (later), the marriage is validated retroactively and the action in nullity is without cause. This kind of validation can come about as long as judgment has not been pronounced.

"2) Articles one hundred fifty-four and one hundred fifty-five of the Code attribute the right of guardianship to the mother after the death of the father. The mother is preferred to the testamentary guardian if there be one.

"The guardian whoever it be can renounce his functions or be discharged from them. The judge will render a decision according to whether he thinks the reasons involved are legitimate.[6]

"3) Article twenty-three of the Code obliges a woman to contribute to the costs of maintaining the household, her share being proportional to her personal property.

"In fact the idea of making the woman share in the duties of marriage already appears in the 1956 text of

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[6] Present article 154: The judge must appoint a guardian (muqaddam) for the minor who has neither father nor testamentary guardian.

article 155: Guardianship is exercised as of right by the father or the testamentary guardian. It ceases only upon order from the judge for legitimate reasons.

the Code, but it does not seem that it has been perfectly understood. The new proposed text makes it explicit.[7]

"On the other hand, the obligation of the woman persists after the dissolution of the marriage in regard to the maintenance owed to the children common to both parents (article forty-seven)."[8]

"4) Among those who can claim maintenance, the maternal grandparents do not appear. This lacuna is filled (article forty-three and article forty-four).[9]

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[7]. Present article 23: ... (The husband) must face up to the duties of marriage and provide for the needs of the woman and their children according to his abilities and the status of the wife. She contributes to the duties of marriage if she has property...

Proposed article 23: ... The husband must face up to the duties of marriage and provide for the needs of the woman and their children according to his abilities and his status. The wife shall contribute to the duties of the marriage in proportion to her personal property...

[8]. Present article 47: In case of poverty of the father, the mother precedes the grandfather in providing maintenance to her children.

[9]. Present article 43: The following relatives have a right to maintenance: a) the father and mother, and the paternal grandparents howsoever high;

b) descendants howsoever low.

Present article 44: The child or well-to-do children, male or female, owe maintenance to the parents and the paternal grandfathers and paternal grandmothers who are poverty-stricken.

"5) A question which has caused much discussion is this: whether the minor, in marrying, benefits from the new juridical capacity (tarshīd). Article one hundred fifty-nine answers in the affirmative. In effect it is a question of a person who has been recognised as capable of undergoing one of the most serious steps of civil life: marriage. There is no reason for not assimilating that person to an adult for other acts.

"However, to avoid marriages of fraud or accomodation, the judge can, after the dissolution of the marriage and on condition that the concerned party has not yet completed his twenty years, decide that the party will relapse into minority (article one hundred fifty-nine, paragraph two).[10]

"6) Article one hundred seventy-nine offers the possibility for the testator, when it is a question of his own children, not to respect the rule which forbids a disposition in favour of an heir. In this case he cannot only dispose in their favour, but also designate equal shares to sons and daughters, that is, without taking into account the principle of no bequest beyond the third.

"Such is the object of this draft."

The above proposals are obviously daring, especially the proposed amendment to article one hundred seventy-nine.

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[10]. Present article 159: THe minor cannot be made an adult (tarshīd) before fifteen years of age have been completed.

Equality of the sexes was the motivating force. This version of amendment does not aim so much at reform in the law of bequests per se; rather it aims at using the wasīyya as an instrument for reforming the law of mīrāth. It evokes the very fear which early fuqahā' held about the power of testamentary freedom overriding completely the law of mīrāth. Their fear would have a legitimate basis, given the phrasing of the draft of the amendment. The drafter may have intended that the parent use his testamentary powers only to equalise the shares of his sons and daughters. Yet the phrasing itself suggests that while the testator can equalise the shares, he is not forbidden to designate a ratio of shares that is even more unequal than the prescribed two to one ratio; he is not forbidden to prescribe, for example, a five to one ratio in favour of the son.

The motive behind the proposals is very legitimate. The need for providing equally for the daughter and son does exist. The need will become more pressing as the traditional sources of income cease to bear fruit and traditional duties of maintenance cease to fall solely on men. One of the traditional sources of income for daughters was the mahr. The Code of Personal Status supports the mahr by prescribing that the amount of mahr be serious and that no maximum limit be set (arti-

cle twelve, paragraph two). In practice, however, in urban areas, it is well-known that the President of Tunisia paid only one dinar for the mahr of his present wife. That is the example to be followed. In cases of divorce, the insignificance of the mahr has been compensated in part by the damages which a court can award a woman if divorce causes her hardship (article thirty-one, paragraph three). Yet the amount of damages awarded depends on the court's discretion and the financial circumstances of the moment, not taking into account a possible deterioration in economic standing in the future. For the woman who remains married to her husband until he dies, the insignificance of the amount of the mahr to be claimed from his estate becomes more obvious and serious. The widow gets no compensation or damages for the death of her husband. She can depend on only inheritance shares, which are half the amount which her brother could claim from the estate of their parents or of his spouse. As the law stands now, and even as proposed in 1966, the woman would have the same obligations of maintenance as the man towards children and relatives. Their contributions would be proportional to their financial capacity. From a purely statistical

point of view, the law is fair, since it takes into account the fact that women might have different levels of fortune than men. From a point of view of principle or policy, the law perpetuates the material inequality between the sexes when it comes to the basic traditional sources of income, namely, inheritance. If the policy be to create equality between the sexes in material things, then duties should be made equal, and capacity to fulfill those duties made equal in turn.[11]

Perhaps because the law seemed statistically fair, the legislators were not convinced of the need for reform. To their mind the advantages of reform would not outweigh the disadvantage of a seeming violation of the Qurʾān.

Another draft of an amendment for article one hundred seventy-nine reveals a different approach to reforming the law of succession. This draft aimed more directly at reforming the law of al wasīyya. Its approach was more in keeping with the jurisprudence of taqlīd. As the text of the proposed amendment will reveal, the drafter was relying on the rules of the Shīʿa and of radd.

The first part of the proposed amendment read as follows: "The wasīyya of the one-third of the corpus or the usufruct to an heir or a non-heir is valid and exe-

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11. Example in point is article 41 of the Code of Personal Status: "If the wife provides for herself while her husband is absent, she has recourse like a creditor against him for the amount of maintenance."

A policy of equality between the sexes would be cause for amending the article so that it applied to either spouse who is absent without providing his or her con-

cutable without resting on the permission of the heirs.

"The bequest is also valid for more than the one-third, but it is executable only by permission of the heirs."

If this amendment had been adopted, Tunisia would have joined the ranks of countries like Egypt, Iraq, and Sudan, which have allowed bequests to an heir up to the third without permission from the other heirs.[12] The interest of some of the members of the Tunisian judiciary in bequests to heirs arose from reading a book that compared the five madhāhib, a book entitled Al Waṣāyā wa'l mawārīth ʿalā al madhāhib al khamsa (al Ḥanafī, al Jaʿafarī, al Mālikī, as Shāfiʿī, al Ḥanbalī) by Muhammad Jawād Muġaniya[13] (Sharika at Tabāʿa al Ḥadītha). The author pointed out that the madhab al Jaʿafarī allows the bequest to an heir within the one-third (page thirteen). Thus, there was no difference between the dhimmī and the heir.

The second part of the amendment proposed for article one hundred seventy-nine read as follows: "And the testator has the right to equalise among his children, male, and

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tribution to maintaining the household.

12. N.J. Coulson, Succession in the Muslim Family, Cambridge University Press, 1971, page 254.

13. My warmest appreciation to Justice Sīdī Mahmūd Al ʿAnnābī, First President of the Court of Appeal of Tunis, for this book. He very kindly allowed me to use his library and to look at his lecture notes on the law of inheritance and wills.

female, whatever he bequeathes to them.

"And he has the right, when he leaves no descendants (al farᶜ al wārith), to allocate in full the usufruct of his estate or whatever augments the value of the entire corpus; and that falls within the principles of radd in mīrāth.

"The bequest of usufruct postpones the distribution of the estate to the date of the death of the usufructuary."[14]

This second part of the proposed amendment to article one hundred seventy-nine stated exceptions to the general rule in the first part that a bequest can be made to an heir up to the one-third. While the bequest of the usufruct is an obvious exception to the rule of the one-third, the bequest to children can be interpreted both as an exception and not an exception. It could be not an exception in the sense that the testator may use not

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14. تصح وتنفذ الوصية بالثلث اصلا او منفعة للوارث و غيره بدون توقف على اجازة الورثة.
وتجوز فيما زاد على الثلث لكن لا تنفذ الا باجازة الورثة وللموصي ان يسوي بين اولاده الذكور والاناث فيما اوصى لهم به.
وله تخصيص وجه عند عدم وجود الفرع الوارث بكامل منفعة تركته او بما يزيد عن اصل منابه وذلك بقطع النظر عن قواعد الرد في الميراث.
والوصية بالمنفعة توقف توزيع التركة الى وفاة المنتفع.

more than the one-third to equalise the shares of his children. It could be an exception in the sense that the testator may bequeathe whatever amount -- even more than the third -- is needed to equalise the children's shares; or even may bequeathe whatever he wishes to the children as long as the final shares of the children in the estate are equal. If the testator could bequeathe whatever he wanted to his children, then he could give them all the estate to the exclusion of any other heirs. Since the aim of the amendment was only to equalise shares between the sexes and not to favour children over other relatives, the drafter most likely meant for the testator to bequeathe whatever is necessary to equalise the shares between the sons and daughters.

Again, a bequest which upsets the ratio of shares prescribed in the Qur'ān is difficult to justify in Islamic law. There is one far-fetched possibility, and even it has its limitations. The possibility lies in re-interpreting Sūra 4 (An-Nisā'), verse 11: "Yūsīkum Allāhu fī 'awlādikum lī dhakari mithlu hazzi al 'unthayaini..."[15] It could be reinterpreted to mean that if there be one son and two or more daughters, the son gets the share of two daughters; but if there

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[15]. The Holy Qur'ān, edited by Maulana Muhammad 'Ali Fifth edition, 1963.

be one son and one daughter, or a plurality of sons and a plurality of daughters, each son gets the same share as each daughter. Any other dhawū'l farā'id inheriting along with the children would receive their shares and the calculations would be subject to ʿawl. Then there would be only one instance (one son and two daughters) where the testator would use his testamentary freedom to equalise the shares of his children. Even that power is difficult to justify except on the basis of need, sanctioned by Sūra 2 (Al-Baqarah), verse 177 ("The righteous is the one who believes in giving his wealth to the near relatives, the orphans and the needy...").[16]

The bequest of usufruct of all the estate also violates the rule of no bequest beyond the one-third. This provision can rest on raʾy since human reasoning was the origin of the belief that usufruct is treated like corpus in the law of bequests. The heirs would not suffer loss from the usufruct. For if the property be of such that it is consumed while being used, the usufructuary must return the like of such property consumed to the estate when the usufruct terminates (article

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[16]. The Holy Qurʾān .

one hundred forty-nine of the majallat al huqūq al ʿaīnīyat).[17]

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[17]. French law treats usufruct differently from absolute ownership in matters of intestate succession. When the predeceased spouse does not leave direct descendants the surviving spouse receives absolute interest in the succession, varying from one-half to total, depending on the type of other heirs present. When the predeceased spouse leaves direct descendants, the surviving spouse receives usufruct in the estate. See article 767 of the Code Civil below.

In testamentary succession it seems that the bequest of usufruct is subject to the same rules as the bequest of corpus, no article in the Code Civil drawing any distinction.

Article 767: "... The surviving undivorced spouse who does not succeed to full ownership and against whom there is no judgment of separation with force of res judicata has a right of usufruct of the estate. That right is:

> equal to the one-quarter if the deceased leaves one or several children of the marriage;
>
> equal to the portion of the legitimate child who takes the least, without it exceeding the one-quarter, if the deceased has children born of a preceding marriage;
>
> equal to one-half, if the deceased leaves natural children, brothers and sisters, descendants of brothers and sisters or their ascendants;
>
> equal to the totality in all other cases, whatsoever be the number and capacity of the heirs.

The calculation will operate on all the properties existing at the death of the de cujus, to which there will be added, by legal fiction, all those properties which he disposed of, either by transaction inter vivos, or by will, to the benefit of those who succeed, if there is not an instruction that the beneficiaries do not have to report these transactions.

But the surviving spouse will be able to exercise his or her right only over the properties which the deceased will have disposed of neither by transaction inter vivos nor by will, and without prejudice to the rights of the reserve share (as opposed to the disposable share) nor to the rights of return (retour refers to property that is returned to the donor or his descendants and not subject to rules of succession, page 303 of Amos and Walton's Introduction to French Law, 3rd edition by Lawson, Anton, Brown, Oxford, 1967).

He or she will cease to exercise this right in the case where he or she would have received from the deceased gifts, made by préciput or otherwise, and whose amount would attain to that of the rights which the present law attributes to him or her, and if this amount be inferior, he or she can claim only the supplementary in the usufruct.

Until the definitive division of the estate among the heirs, the heirs can demand, by way of sufficient sureties and "guarantee of maintaining the initial equivalence" that the usufruct of the surviving spouse be converted into a life annuity (rente viagère) that is equivalent of the usufruct.

If they are in disagreement, the conversion will be at the discretion of the courts.

The bequest of the usufruct of the entire estate is limited to one situation, namely, where the testator left no descendants (see pages 462-463 of Chapter IV above). It appears that there would have been another limitation when the author of the draft stated that the doctrine of radd underlies the proposal. It could mean that the doctrine of radd applies to the surplus of revenues which accrue from the corpus. Or it could mean that implicitly the legatee can only be one of the dhawū'l farā'id. For radd techincally means augmentation of the fixed shares. Only the Jaᶜafarī school of thought would provide some thoughts remotely akin to the proposed Tunisian amendments. That is the opinion that the husband may benefit from the radd when there are no other heirs.[18] Nonetheless, the obvious interpretation of the amendment seems to allow a bequest of usufruct of all the estate to any one the testator chooses, as long as he does not leave descendant heirs.

Despite their boldness, the amendments proposed in 1966 do not cover one obvious area where reform is needed and would be simple. There is an obvious gap in

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18. Muhammad Jawād Muganīya, Al Wasāyā wa'l Mawarīth, page 89.

the Code of Personal Status. The Code does not cover the case where the deceased leaves only a spouse and ʿasaba. Under the Code the deceased has no power to bequeathe the entire estate to the spouse. Only in two instances can a testator bequeathe all the estate: Articles one hundred eighty-eight and one hundred forty-three bis (A). Article one hundred eighty-eight allows the testator who leaves no heir nor any creditor to bequeathe all his estate to the exclusion of all rights of the Bait al Māl. Article one hundred forty-three bis (A) allows a daughter or an agnatic granddaughter to take the entire estate when competing with only collateral ʿasaba.[19] Article one hundred forty-three bis (A) also allows any heir who takes a fixed share -- like a spouse -- in the absence of any ʿasaba to take the entire estate by radd to the exclusion of rights of the Bait al Māl.[20] The testator then could make a bequest of specification (article one hundred eighty) and it would be within the limits of the law.

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19. ... As for the daughter, one or more, or the daughter of the son howsoever low, the remainder of the estate returns to them even in the presence of the ʿasaba bi nafs, as are the brothers and uncles and Bait al Māl.

20. Article 143 A: When the ʿasaba are absent and the farūd do not absorb all the estate, the remainder goes to the holders of the farūd in proportion to their shares...

An amendment to Book Eleven (Al Wasīyya) of the Code of Personal Status could extend, by way of bequest, radd to a spouse who is the only sharer of the fard competing with only collateral ʿasaba bi nafs. In deference to the reluctance of the Mālikī school to allow radd to spouses, the amendment would not render the rights of the surviving spouse to the entire estate automatic; rather the right would be subject to the voluntary will of the testator, unlike the obligatory wasīyya.[21] Yet the bequest would not be deemed ultra vires. It would be both valid and executable without the consent of the ʿasaba.

One defendant before the Court of First Instance of Tūnis in a 1967 case would well have favoured such an amendment. In civil case number 9557 (madanī) of 25-3-1967, the muwarrith of the petitioner and the defendant died 8-1-1965. He left only two heirs, his brother's son, the petitioner, and his wife, the defendant. His estate consisted of a house, a rug, and four hundred fifty-seven dinars in cash. The nephew, who lived in Libya, claimed three-quarters of the estate,

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[21] The draft of the Code of the Sharīʿa contains a provision for a bequest to a spouse in article 1152(Hanafī):

> A wasīyya from the husband to his wife and a wasīyya from the wife to her husband is valid if there be no other heir. If there be another heir, the bequest is executed according to permission of that heir.

No provision appears from the Malikī school.

and wanted a court judgment ordering the defendant to give him his share. The widow had already in fact given him three hundred dinars. The petitioner wanted the remainder of his share. The Court granted the petition, applying articles ninety-four (one-quarter to the widow without children) and one hundred fourteen (son of the brother is an 'asaba who takes the remainder) of the Code of Personal Status. The Court, however, refused to grant the petitioner's request for damages and made him pay the legal costs. For it was clear that the money he claimed had been insured by him at the Libyan Embassy. Nor had the widow disputed his legal claim to three-quarters of the estate or prevented him from taking his due.

The widow appealed in Case number 27714/3 to the Court of Appeal, whose judgment number 60408 was rendered on 14-3-1968. She tried to keep the estate by arguing that the motarised inventory of the estate was inaccurate. She also pleaded that some of the estate had been earned by hard work and was not her husband's. She brought witnesses to testify that her husband's nephew had come boldly to her house and forced her to give him most of the cash. The Court of Appeal could accept correction in the inventory of the estate of 21-1-1965, which had been approved by the District Court, only if

the widow proved that it contained a falsehood. She did not so prove, and lost the appeal. However, the Court of Appeal ordered the nephew to return the three hundred dinars which he had taken from the widow, for the judgment was only confirming a legal claim to three-quarters of the estate and not ordering the delivery of a certain sum of money. The legal costs were divided equally between the two parties.

A wasīyya of usufruct, or a wasīyya of radd from the deceased husband would have removed any challenge from the nephew. However, one of the arguments presented by the widow suggests another kind of reform which would serve the interests of the surviving spouse. The widow argued that some of the estate had been earned by hard work and did not belong to the deceased. She may have meant that her work or her money had helped her husband acquire what he did, even though the property was legally in his name. While Islamic law allows the woman total independence in administering her property, it takes no account of contributions made by one spouse to purchases by the other when the purchase is in the name of only one spouse. The law treats them as gifts, unless it can be proved that the wife was forced to make such contribution.[22]

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[22]. Draft of the Code of the Sharīʿa, article 1207(Hanafī): Hiba is no good if it occurs under coercion; even if a woman gives something to her husband and she pleads that he forced her to do it, her plea will be heard.

Where there is no proof of which spouse owns what at the matrimonial home (matāʿ), Tunisian law provides for division among the spouses according to oath from each when there is a dispute (article twenty-six of the Code of Personal Status). This law applies when the goods could be used either by a man or a woman.[23] Should one of the spouses die, the heirs of that spouse will stand in his or her place in case of such dispute (article twenty-seven). If these articles were applied liberally in disputes between a surviving spouse and other non-descendant heirs of the deceased spouse, the courts might more readily remove from the estate of the deceased those parts of properties which were gained with the help and work of the surviving spouse.

The Tunisian judiciary are to be commended for their search for perfecting the laws according to the spirit of Islam. They are to be commended for their efforts to wipe away centuries of crust that obscure the essence of the Islamic spirit. They are also to be encouraged to yield fruits of an even more intensive and penetrating search.

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[23] Article 26: In case of dispute between the spouses on the matter of ownership of the properties found in the matrimonial home and in the absence of proof, the claim of each spouse shall be legal under force of oath. Each will take respectively the goods normally belonging to men and those belonging to women. If the properties are

merchandise, they will by force of oath be attributed to the spouse who is in business. Goods that can be possessed by either men or women will be, under oath, divided between them.

A case applying article 26 is Personal Status case number 30348 (shakhsīya) of 1-4-1969. The plaintiff was the wife who had been divorced from the defendant, her former husband, by judgment number 28448 of 18-6-1968. She wanted her possessions in the matrimonial home (nature of possessions not specified) returned to her since her former husband had become a stranger to her. The Court of First Instance of Tūnis granted her the right to collect her possessions worth 1095 dinars (approximately £1095).

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