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Tunisia

A Political Profession?

Eric Gobe

On 14 January 2011, after 23 years in power and a month of popular protest demanding his resignation, President Ben Ali fled Tunisia. Images of Tunisian lawyers demonstrating in their robes in front of the Ministry of the Interior, broadcast around the world on television and the web, made people think these lawyers had played a fundamental role in the protest movements that led to the fall of the authoritarian regime, which had ruled the country since Independence (1956). Although such a brief causal account does not tell the whole story, the fact remains that, due to their right of defence in judicial procedures, lawyers, more than any other profession, enjoy a close relationship between their function and politics. The socio-historical approach taken in this chapter demonstrates the extent to which professional facts may assume a political dimension. The profession had already shown a greater ability than other social groups to resist the regimes of Ben Ali and Habib Bourguiba ('the father of independence'), allowing it to benefit symbolically and materially from the fall of the Ben Ali regime.

Tunisia's colonisation has been the matrix of the constitution of its liberal professions based on the French model: shortly after the country's independence, the Tunisian rulers (for the most part lawyers trained at French universities) reproduced the organisational model of the protectorate's legal profession by conferring public powers on Tunisian Bar associations. Furthermore, by ensuring the profession's autonomy, the new Tunisian state adopted the liberal inheritance of the French legal profession, elements of which contended with future regimes' logic of authoritarianism.

I. The Legal Profession between Tutelage and Emancipation

The law of 15 March 1958 governing the legal profession, though adapted to the Tunisian situation, did not differ from earlier laws regulating the profession under the protectorate. It 'Tunisified' and unified the profession by merging the Tunisian proxies exclusively practising within the local judiciary (*oukils*) and lawyers attached to the French judiciary, while

reproducing the decentralised French model of allocating lawyers to the local Bar Associations practicing within the Tunisian courts of appeal (Tunis, Sousse, Sfax).

Local Bar associations were endowed by the state with delegated public powers. Each was represented before all political and administrative authorities by its *bâtonnier* (president), charged with disciplinary and conciliatory functions. He was responsible for investigating complaints directed at members of the Bar, convening and chairing membership meetings as well as meetings of the *Conseil de l'ordre* (roughly equivalent to board of governors), which had comprehensive regulatory and disciplinary powers mirroring those enjoyed by French Bar associations.

Furthermore, the law of 1958 (as amended) required applicants for admission to the Bar to show a certificate of aptitude for the profession of advocate (*certificat d'aptitude à la profession d'avocat*, CAPA) issued by the Tunisian state after applicants passed an examination organised by the Ministry of Justice. By exempting from the CAPA requirement judges with at least three years' experience as well as holders of a third cycle legal qualification, the 1958 law intended to open the examination to students enrolled in their final year for their *licence* (master's in law) (Quentin 1972).

The prerogatives of public power and the autonomy granted to local Bar associations at independence soon irritated the new authoritarian state. President Bourguiba, who studied law in France and briefly practised, likened lawyers to judicial assistants who should content themselves with helping judges 'in the search for truth and the establishment of justice amongst men' (Youssef 2004).

In the late 1950s and early 1960s local Bar associations, dominated by the regime's opponents, resisted Bourguiba's authoritarian project. The nationalist and repressive atmosphere following the July 1961 confrontation between French and Tunisian troops at the Bizerte military air base offered the head of state the chance to neutralise the associations. The restrictions following that episode caused nearly two-thirds of Jewish Tunisian lawyers to leave for France or Israel, reducing the number of lawyers from about 400 to 277 in 1962–63 (Debats parlementaires 1989: 437; Hélin 1994: 66–67). This trend was reinforced during the early years of independence by integrating Neo-Destour activists (Bourguiba's party) into the government and judiciary. This served to introduce jurists trained in modern branches of the law, such as private international and commercial law, into a judiciary trained during the French protectorate in indigenous justice with religious and secular dimensions (Hélin 1997: 42–43).

The implementation of economic policies prioritizing the public sector encouraged legal studies strongly oriented towards careers within it (Larif-Beatrix 1988: 232). The 1960s saw only a slow increase in the number of Bar registrations, an average of five a year (including trainees). In this context of declining Bar membership, it became relatively easy to abolish the profession's elected bodies. In 1961, after arresting the *bâtonniers*, Bourguiba dissolved the governing councils of Tunis, Sfax and Sousse and replaced them with administrative committees.¹ Although these operated for four years, Bourguiba still was unable to control the profession entirely. Some lawyers from the Neo-Destour party wanted the profession to exercise normal functions through its elected representatives (Gobe and Salaymeh 2016: 325–29).

Negotiations between Bourguiba and the Bar led to a 1963 law creating the national *Ordre National des Avocats de Tunisie* (Tunisian Bar Association, TBA), intended to 'strengthen the influence of the president over the bar and the authorities'.² The Bourguiba regime, reflecting an authoritarian state's logic of corporatism (Schmitter 1974: 93–94, viewed this as an opportunity to coopt the TBA president, while accepting 'normal' elections for the Bar's governing council. By contrast, lawyers viewed the unified Bar as a unique interlocutor with the government, allowing the profession to represent its interests more effectively (Cherif 1990: 175). In fact, the TBA could not be entirely co-opted, and the Bar's autonomy gave it political leverage.

But though lawyers regained the ability to elect their own representatives, most TBA presidents were members of the Neo-Destour party or aligned with the regime. The TBA's first president was a party member who had served as Minister of Social Affairs in Bourguiba's first government, and subsequent presidents in the 1970s were also more or less connected to the authoritarian regime or the Neo-Destour party.

Only during the late 1970s and early 1980s – a short interval of liberalisation in the Tunisian government – did the TBA elect presidents who were not close to Bourguiba or his political allies. The first was Lazhar Karoui Chebbi, who had been the personal secretary of Salah Ben Youssef, Bourguiba's political adversary at the beginning of Tunisia's independence. The next was Mansour Cheffi, president four times in the 1980s and early 1990s, who was a

¹ *Journal officiel de la République tunisienne (JORT)*, 'Décret n° 61-266 du 8 août 1961 portant dissolution des conseils de l'ordre des avocats près les cours d'appel de Tunis, de Sfax et de Sousse', 8 August 1961, p 1042.

² Débats de l'assemblée nationale, *Rapport sur le projet de loi modifiant la loi n° 37 de l'année 1958, daté du 15 mars 1958 et réglementant la profession d'avocat* (in Arabic), 1963, p 233.

leftist with ties to Habib Achour – the General Secretary of the *Union Générale Tunisienne du Travail* (UGTT), which had tense relations with the regime (Tabib 2006: 83).

The 1970s and 1980s saw a rapid increase in the number of Bar registrations: from 309 in 1971–72 to 466 in 1974–75, 707 in 1979–80, 981 in 1985–86, and 1,429 in 1991–92.³ In the 1980s the economic situation of young lawyers became a recurrent topic in annual Bar reports. The TBA complained about the lack of training for young lawyers and the growth of the profession, while new entrants demanded that the state pay lawyers-in-training to serve as court-appointed lawyers, claiming that the ‘democratisation’ of the Bar meant that fewer lawyers could be supported by their families while they waited to earn enough to live on. During the final years of the Bourguiba regime, the profession proposed legislation strengthening entry barriers: making CAPA a requirement for lawyers and judges and reducing from 50 to 40 the maximum age for inscription in the Bar register in order to prevent retired public servants from qualifying as lawyers to increase their old age pension.

During the nearly two years of political liberalisation following Ben Ali’s successful 1987 coup d’état, the profession hoped the TBA proposals might be adopted. Instead, however, Ben Ali pushed parliament to vote in 1989, during the tenure of TBA President Cheffi, on a Bill limiting the profession’s autonomy. The TBA’s governing bodies challenged two provisions of the law. Article 46 authorised a judge, after notifying a regional TBA representative, to charge an attorney with ‘bad faith’ in arguments or statements in court.⁴ The second disputed provision permitted judges to become lawyers after serving on the bench for ten years, even if they had retired. As a result, retired judges increased from 10 per cent of the Bar in the mid-1970s to a peak of 22 per cent in the early 1990s before beginning to decline as new graduates entered the profession.

The TBA wanted to add a clause requiring judges to pass an exam to become members of the Bar. The secretary of its governing council argued it was inconceivable that someone who spent many years ‘as a magistrate could be authorised by the provision to join the bar, while young lawyers, recently graduated, cannot even find the money to pay their electricity bills’ (Tabib, 1988). The TBA also distrusted judges it saw as aligned with the authoritarian

³ TBA tables, the judicial years: 1971–72; 1974–75; 1979–80; 1985–86; 1991–92.

⁴ *JORT*, ‘Loi n° 89-87 du 7 septembre 1989, portant l’organisation de la profession d’avocat’, 12 September 1989, pp 1385–92.

regime. Because of TBA's opposition, its president, Cheffi, was denied access to a military court.⁵

In response, the TBA's governing council convened a general meeting, which called on Tunisian lawyers to strike for two hours on 1 November 1990 to protest the repeated violations of lawyers' rights (Ben M'barek 2003: 409). This collective action, the first of its kind in post-independence Tunisia, had little effect. The TBA was unable either to amend the 1989 law or prevent government harassment of its members. Indeed, the 1990s was a dark decade for the TBA. In 1992, thousands of Ennahadha party members, including lawyers, were arrested, tortured, and sentenced for 'conspiracy against state security' or membership of an illegal organisation. In addition, the Ben Ali regime gradually tightened its grip on all autonomous public bodies, including the TBA, which elected two presidents close to the Ben Ali regime, hoping their professional and economic demands would be considered by the regime. However, the Ben Ali regime simply denied the TBA's requests, intensifying tensions between government and professional bodies (Gobe 2010).

II. The Social Structure of the Bar under Ben Ali: From Mass Production of Lawyers to the Emergence of a 'Revolutionary' Lawyer

From the mid-1990s the Tunisian state, believing in the emergence of a 'knowledge economy', embarked on a policy of massification of higher education even though the labour market could not absorb the influx of new graduates. Between 2000 and 2011 the proportion of the relevant age group enrolled in higher education rose from 19 to 36 per cent.⁶ The World Bank study of 2008 found that the number of unemployed with a higher education diploma almost doubled in 10 years, from 121,800 in 1996–97 to 336,000 in 2006–07. Management, finance and law accounted for over 60 per cent of diplomas awarded in the mid-2000s at a time when unemployment was at its peak, reaching 68 per cent 18 months after graduation among those with an LLM (World Bank & Ministry for Employment and Professional Insertion 2008).

⁵ Mohamed Abdelkefi (Interview), 'Abdelwaheb el Béhi: la grève est une tentative pour que l'on prenne en considération l'avocat (in Arabic)', *al-Sabâh al-usbû'i*, 5 November 1990.

⁶ Organisation internationale du travail, *Analyse du système éducatif Tunisien* (2013), available at [adapt.it/adapt-indice-a-z/wp-content/uploads/2014/09/oit_analyse_syst%C3%A9me_%C3%A9ducatif_tunisien_2013.pdf](http://adapt-indice-a-z/wp-content/uploads/2014/09/oit_analyse_syst%C3%A9me_%C3%A9ducatif_tunisien_2013.pdf).

During Ben Ali's reign, the legal profession experienced continuous exponential growth, a trend the regime hoped would disguise the joblessness among recent graduates (Gobe 2017). From 1991 to 2011, Bar membership increased nearly sixfold, from approximately 1,400 to 7,759 members (1,500 lawyers entered the profession between June 2008 and June 2011). During the same two decades, the total labour force grew only 1.6 times (from about 2.3 million people to just over 3.7 million). In 2011, trainees represented almost 40 per cent of the legal profession, with the result that new entrants found themselves surrounded by trainers and internship supervisors little older than themselves.

This coincided with rapid feminisation of the profession: women increased from 5 per cent of the profession in 1980 to 25 per cent in 2001 and 43 per cent in 2015.⁷ The class backgrounds of lawyers also changed: those whose fathers operated or worked at small farms increased from 8 per cent in 1945–79 to 25 per cent in 2000–09, while those whose fathers operated medium-sized or large farms decreased from 16 to 3 per cent; those whose fathers were middle managers, senior technicians or elementary school teachers increased from 25 to 32 per cent, while those whose fathers were professionals or senior executives decreased from 31 to 25 per cent.

Until 2008 entrants could qualify either via CAPA or with a Master of Advanced Studies in Law. Two-thirds qualified by the first method between 1985 and 1994 and 70 per cent between 1995 and 2009. But the latter path became more accessible with the multiplication of postgraduate law courses in Tunisia from 30 in 2004–05 to 61 in 2012–13.⁸

After 2000, the search for internship (lasting at least two years) constituted an important obstacle for newly registered lawyers, who had to present a certificate of internship issued by a lawyer who had been registered before the Bar of either the Supreme Court (Cour de Cassation) or an Appeals Court for at least three years. Those unable to find a supervisor could ask the President of one of the regional TBA branches for help. Because lawyers with the required experience sometimes refused to accept trainees (20 per cent of those interviewed in 2008–10), citing a lack of office space, there was a waiting list, and the search could last a year. Some trainees had a professional address with their training supervisor but no space in the office. In 2010, this led the TBA's governing council to appeal to lawyers qualified to receive trainees

⁷ TBA, *Rapport moral de l'année judiciaire 2014–2015, assemblée générale ordinaire* (in Arabic), 2015.

⁸ Statistical volumes consulted on site at the Tunisian Ministry of Higher Education, November 2016.

‘to make their offices available to young lawyers and so help them train under appropriate conditions’ and avoid the issuance of sub-standard certificates (*attestations de complaisance*).⁹

The Bar adopted a dual policy toward the stream of new entrants. First, it sought to prevent certain categories of law graduates from registering. Second, it asked the Ministry of Justice to implement reforms limiting access to the profession. Both initiatives were blocked by the authorities. During the early 2000s the governing council refused to register certain categories of diplomas, particularly Algerian CAPAs and LLMs. As early as 1996, the Tunisian Bar had begun disqualifying Algerian lawyers who lacked a Tunisian CAPA. This provoked the Algerian Bar to disqualify 28 Tunisian lawyers; but though most wanted to return to practise in Tunisia, the TBA refused to reintegrate them because their CAPA was Algerian. Following intervention by President Ben Ali, the TBA’s governing council was forced to register the 28 lawyers.¹⁰ Even if the number of lawyers involved was small, the episode revealed the feeling of TBA members that the Bar’s subordination was unacceptable. The creation of a higher authority within the TBA to monitor and control admission to the profession generated further confrontations between it and the government, which firmly refused to delegate recruitment of lawyers to the TBA.

After 2000, the Bar argued for uniform access to the profession through a Bar Institute, qualified to award the CAPA and controlled by the TBA. In May 2006, the Ben Ali regime seemed to respond positively by passing a law establishing a Higher Bar Institute, which became the obligatory portal into the profession except for magistrates and teachers in higher education.¹¹ But the TBA found itself marginalised within the Higher Bar Institute, a public institution supervised by the Ministries of Justice and Higher Education. The Institute’s Scientific Council consists of 12 members: four lawyers, four political appointees of the two ministries, and two each from the judiciary and the university faculty.

By authorising holders of a law degree to join the Bar directly (during the four years beginning with the effective date of the 2006 law), provisional arrangements laid out in the law

⁹ TBA, *Rapport moral pour l’année judiciaire 2009–2010. Assemblée générale électorale* (in Arabic), 19 June 2010.

¹⁰ ‘Sur décision du conseil de l’ordre: une dizaine d’avocats privés d’exercer leur métier’ *Tunis Hebdo*, 19 May 2003.

¹¹ Parliamentary debates, *Projet de loi modifiant et complétant la loi n° 87 de l’année 1989, daté du 7 septembre 1989 et portant organisation de la profession d’avocat* (in Arabic), 9 May 2006, n° 22, p 928.

of May 2006 allowed the Bar to grow 25 per cent between 2008 and 2010.¹² The TBA criticised these ‘unjustified transitional measures’ as a means of ‘submerging the profession’. Since the fall of the Ben Ali regime the requirement of qualifying via the Institute has limited entry to the 150–200 a year to whom it awards the CAPA, with the result that the number of practising lawyers increased just 10 per cent between 2011 and 2016.¹³

The Tunisian legal profession functions along liberal, individualist lines: salaried work is almost unknown, and almost 90 per cent of lawyers are self-employed. Almost 80 per cent have just a secretary and a clerk who attends court proceedings, or a single person performing both roles. The few law firms (about 100 in 2010) containing 5 per cent of the Bar were often composed of just two or three lawyers, sometimes belonging to the same family, three-quarters of them with 1–4 employees. Partnerships were permitted only in 1998. Tunisian lawyers attribute the paucity and small size of firms to the modest legal market and the professional culture.

Most lawyers are generalists representing individual clients and to a lesser degree enterprises; only a fifth specialise, half in commercial law. The four largest firms have annual revenues of \$500,000–2,500,000; another eight solo commercial practitioners have revenues of \$50–500,000. Generalists had revenues of \$5–35,000. (A Tunisian earning the minimum wage would have an income of about \$1,800.)

The profession continued to be attractive, despite its economic problems: 42 per cent of lawyers worked before joining the Bar, about evenly divided between the public and private sectors. Becoming lawyers often allowed them to increase their independence and earnings. Civil servants also could convert their social capital into a client base, although some were excluded from cases involving state companies and institutions after expressing criticism of the Ben Ali regime (Gobe 2013b).

The authorities rewarded and penalised each group according to a patronage-based logic. The ‘Bar of the State Party’ (*le Barreau du parti-État*) – lawyers belonging to the RCD (*rassemblement constitutionnel démocratique*) – reaped many material and symbolic

¹² JORT, ‘Loi n° 2006-30 du 15 mai 2006, modifiant et complétant la loi 98-87 du 7 septembre 1989 portant l’organisation de la profession d’avocat’, n° 41, 23 May 2006, p 1364. The end in 2010 of the transitional period pushed nearly 1,000 law graduates to apply for registration with the Bar. TBA, *Rapport moral de l’année judiciaire 2009–2010*, assemblée générale électorale (in Arabic), 19 June 2010.

¹³ TBA, *Rapport moral de l’année judiciaire 2015–2016* (in Arabic), 9 July 2016.

advantages. During the ‘revolutionary’ phase (December 2010–January 2011), this ‘Bar of the State Party’ tried in vain to prevent lawyers from organising strikes.

III. Bar of the State Party and Commercial Lawyers: Defenders of the Authoritarian Status Quo

Under the patronage of the Ben Ali regime, politically connected lawyers (about 500 or 7 per cent of the profession) enjoyed a virtual monopoly of litigation work from the public administration and state-owned companies. In exchange for these financial advantages, the governing elites expected those lawyers to expose and counter collective action by their colleagues. The lower rung of the Bar strongly resented these privileges. Belonging to the RCD, however, could not guarantee work representing public institutions; over 40 per cent of party members had briefs only from individuals or private companies. Some young RCD lawyers complained that public work was monopolised by others.¹⁴

A committee of RCD party bosses charged with examining the files of lawyers representing administrative and public institutions regularly compiled lists of lawyers who were and were not eligible for such work, distinguishing between strong supporters (*mutahammisin*) who participated in party activities and ‘ordinary lawyers’.¹⁵ There was ferocious competition among young RCD members seeking public sector clients. Those who could claim a connection to a senior party figure or, better yet, the President of the Republic or his family circle, would see their public client rolls grow.

If the militant RCD lawyers engaged in counter-mobilisation during the protest movement of December 2010–January 2011, the youngest party members, who joined in the hope of gaining access to public litigation, at least did not try to thwart their colleagues’ mobilisation, notably during the profession’s general strike on 6 January 2011. This apathy among the young RCD lawyers is largely explained by the collapse of the party’s patronage resources. Because the RCD could not distribute enough business to its supporters it was unable

¹⁴ Interview by the author with A, a young member of the RCD and Appeal Court lawyer of less than a year’s standing, October 2009.

¹⁵ Secrétariat général, présidence de la République, *Mémorandum adressé par le secrétaire général de la présidence à la haute attention de son Excellence le président de la République, Objet: la liste des avocats traitant avec les établissements publics* (in Arabic), Carthage, 30 May 2000. Archives of the National Commission of Inquiry into the facts of corruption and embezzlement.

to mobilise the young RCD lawyers, whose sociological profile resembled that of their colleagues on the 'lower rung' of the Tunisian Bar.

Another segment of the profession that failed to mobilise against the Ben Ali regime was specialised lawyers at the top of the income hierarchy (fewer than 10 per cent of the total), especially commercial lawyers too preoccupied with money making or concerned that political involvement might negatively affect their incomes. Some of these instead compromised with the authoritarian regime. Prospering as a commercial lawyer required at least the appearance of support for the governing power. Some lawyers in large firms also belonged to the RCD, not necessarily in anticipation of getting business from public institutions but rather as a form of insurance against unwarranted state intrusion into private legal affairs and a way of facilitating contacts with a potentially lucrative international clientele. (These lawyers were often involved with foreign direct investment, privatisations, international calls for tender, and arbitration.) A 1998 law also allowed lawyers who were retired or not practising (including RCD members holding high state positions) to have an equity interest in law firms.¹⁶ Symbolically, Tunisian commercial lawyers became the equals of American and European professionals operating in the international market of legal services (partly because foreign law firms and lawyers could not settle in Tunisia or plead before Tunisian courts). 'Large' law firms (more than 10 employees) represent only a small segment of the Bar but make the greatest contribution to business volume. Their decision to organise as a limited liability company or joint-stock corporation indicated their 'modern' character. Furthermore, this legal structure allowed them to establish branches throughout Tunisia.

In a majority of the larger firms structured around a strong family network, the older generation occupied the position of managing partner and rainmaker. The FAR firm is one of the largest legal practice in Tunisia. It was established in the early 2000s by EGO (a commercial lawyer), who retained 60 per cent of the shares and was joined by an RCD oligarch and a firm controlled by two Sfaxian associates (holding the other 40 per cent). EGO, who had practised commercial law since the mid-1980s, came from a Monastir family (in the Sahel) close to Bourguiba. In the late 2000s, the two Sfaxian associates sold their shares to EGO, who transferred a stake to his son.

¹⁶ *JORT*, 'Loi n° 98-65 du 20 juillet 1998, relative aux sociétés professionnelles d'avocats', 28 July 1998, pp 1640–42.

In 2008/09 the firm had a staff of 60, including 25 lawyers, four accountants and ten graduates of the *Institut supérieur des hautes études commerciales*, the most important Tunisian higher education institution for management and accountancy. The legal trainees, collaborators and degree-holding managers had to be fluent in French and English. The firm was divided into two main departments, legal advice and litigation; clients that sought legal advice often then retained the firm for litigation. The latter, however, was only marginally profitable because of the human resources required: litigation produced no more than 5 per cent of the firm's turnover but required five full-time trainee lawyers and support staff.

Other firms have diversified geographically while remaining dominated by one family. MED was founded by commercial lawyers from Médenine, in Southern Tunisia, to represent emigrants from Ghomrassen (in France, Germany, Italy and the Middle East) who invested their savings in property in Tunis or Ghomrassen. In order to be better represented in Tunis, the founding partner (a former judge) and his older brother joined forces with two Tunisian lawyers, one a former examining magistrate (*juge d'instruction*) able to develop a sizable clientele. The firm primarily handles property matters (mainly in Médenine and Ghomrassen) and investment law, a specialty of the elder of the brothers and a Tunisian partner, while the other two partners focus on insurance law, working with the country's two principal insurers. The company has 14 employees (10 in Tunis and four in Médenine) and four trainees who work in accounts while also serving an embryonic clientele. More than three quarters of the clients come from the south of the country. Some firms systematically try to include partners from a variety of regions in order to reach larger segments of the legal services market (Gobe 2013a).

None of the law firms studied sought to integrate trainees and collaborators into the firm's capital structure. Neither they nor salaried lawyers have much chance of becoming partners. The family-based structure and the limited workload combine to give trainees and collaborators little choice but to leave the organisation, thereby ensuring high and often rapid turnover in these firms. In addition to these legal entrepreneurs, some commercial lawyers practise alone, with up to five employees and one or two trainees.

This prosperous Bar has little to do with the segment of the profession that mobilised against the Ben Ali regime: lawyers of the 'lower rung', inspired by opposition lawyers who went into the streets to support the popular manifestations demanding the resignation of President Ben Ali.

IV. The Social Frustrations of the ‘Lower Echelon’ of the Tunisian Bar

The qualitative interviews I conducted before the fall of the Ben Ali regime with ‘young lawyers’ (the largest segment of the Bar) provide valuable insights into how political and professional variables influenced lawyers’ mobilisation. Feeling harassed by an authoritarian regime determined to serve them, these lawyers were unable to realise their socio-professional expectations. Their discontent provided a strong leaven for mobilisation among the lower-echelons of the legal profession during the popular uprising of December 2010–January 2011.

These lawyers serve an almost exclusively individual clientele, usually from the working-class neighbourhoods where they themselves were raised. They work primarily in the areas of family law (divorce, alimony, etc), real estate (writing sales contracts for inexpensive properties), petty crimes (primarily misdemeanours), and neighbourhood disputes. Their incomes are very low, especially during the first ten years of practice, because they compete with non-lawyers to perform functions that do not strictly require a lawyer’s assistance.

Competition to establish a client base has led to large-scale soliciting of clients, an illegal practice lawyers call ‘lesser *samsara*’ (*al-samsara al-sughra* in Arabic). The difficulty of finding work in Tunisia’s main cities – Tunis, Sfax and Sousse – encouraged lawyers to resort to third party intermediaries paid to ‘hustle’ clients. This phenomenon developed extensively in Tunisia where, unlike most Western countries, potential litigants did not have access to legal aid. For lawyers with little social capital, *samsars* are an important resource, especially in market sectors that are particularly competitive and volatile, where ‘price is the only distinguishing feature’ (Karpik 1995: 273). Similar institutional arrangements exist in India (Gandhi 1982) and in the US, where some lawyers developed networks of police and hospital employees to gain access to traffic accident victims and persuade them to sign retainers (Carlin 1962: 87; Abel 2011: 67–120).

Samsars mediate between two parties, one seeking to sell legal services and the other to purchase them. But unlike simple brokers, *samsars* tout. They receive a commission from the service provider (ie the lawyer). Clients do not remunerate them and do not always recognise them as touts because *samsars* try to create a relationship of trust, presenting themselves as disinterested parties desiring only to lend a friendly helping hand and offer the client ‘good advice’.

Touting could occur either through direct interaction independent of any institutional relationship (in the course of a more or less coercive transaction) or within an institutional context. The first type normally occurred in the Palace of Justice and frequently involved clients with limited education, who had come to court either to attend a hearing for which a lawyer was not required (eg to collect a copy of a judgment) or to find somebody (eg a public writer) to draft a petition.¹⁷ They would be approached within or near the court by a clerk,¹⁸ a lawyer's assistant,¹⁹ or a policeman who offered to help them find their way around and, in so doing, suggested the right lawyer for the job. A similar thing could happen to a relative who attended court to discover a detainee's situation and was approached by a *samsara*, who introduced the client to a lawyer who had an office nearby or was a 'roaming' lawyer active in the cafés around the Palace of Justice.²⁰

The second type of *samsara* operated in an institutional setting such as a prison, hospital, or police station, where the intermediary held an office that allowed him to 'lean' on the client (sometimes literally). Informants described policemen and members of the National Guard (a rural equivalent of the police, which is officially part of the military) directing detainees to a lawyer who paid a commission, which the intermediary shared with police colleagues. Detainees were at the mercy of police officers, who could harass them in many ways. Road accidents were a particularly fertile ground for the development of *samsara*, which normally involved four or five different actors: the lawyer, a police or National Guard officer, a paramedic, and a doctor or nurse. The last three suggested to hospitalised victims that the police officer or mandated expert might be able to write a favourable report.

During the 1990s and 2000s, the TBA disciplinary council sometimes severely sanctioned lawyers involved in *samsara*, but the appeals court systematically reduced or eliminated the punishment. Given the systemic corruption within the Ben Ali regime, the *samsara* allowed certain members of the security forces to be the main beneficiaries of payments by the *samsara*.

¹⁷ A public scribe offers his services to those who lack the writing skills to produce legal, administrative, or private documents.

¹⁸ A clerk (*greffier*) registers documents submitted to court, compiles the files, informs parties of hearing dates, drafts reports and decisions, and assists the judge at hearings.

¹⁹ The lawyer's clerk (*clerc d'avocat*) runs errands at the court.

²⁰ In 2008/09 I found that 6 per cent of lawyers had no employees. Some had no office. Others registered their private address as their professional one but did not receive clients there, working instead in cafés near the courts either by using *samsars* to attract clients or by touting themselves.

Young generalist lawyers at the bottom of the hierarchies of income and status were especially sensitive to the divergence between their difficult material situation and their idealised image of the profession, rendering them receptive to the actions of militant lawyers and political opponents of the regime well before the December 2010 outbreak of violence in Sidi Bouzid. Throughout the 1990s and even more during the 2000s, these lawyers ‘in search of a cause’ (Siméant 1998: 394) [???AQ: this is not included in the References section – please add???) systematically sought to highlight acts of government repression in order to mobilise protests against the Ben Ali regime.

V. The Opposition Bar under Ben Ali: Lawyering for Defensive Causes

Tunisian cause lawyers engaged in defensive cause lawyering focused on specific demands, such as ending torture, defending human rights, or protecting the rights of labourers. Many employed their professional skills to challenge the status quo (rather than simply serve client interests) (Hajjar 2001: 68). Although marginalised and attacked by the authoritarian regime, Tunisian cause lawyers persevered and eventually shaped how other Tunisian lawyers viewed the legal profession.

Political activist lawyers fall into two groups in terms their age and activist socialisation. The first includes opposition lawyers born in the 1950s, who engaged in highly transgressive activism as part of the mobilisation during Bourguiba’s era. A few (about 15) concentrated in Tunis were affiliated with the far left (Marxist-Leninists and Maoists, sometimes associated with Arab nationalism) and to a lesser extent with political Islam. All were arrested and beaten by police and most were imprisoned, a biographical rupture that constituted a fertile period for redefining their activist identity and professional vocation. Their lifelong involvement as opposition lawyers was a continuation of their past political involvement. Defending human rights and defendants’ rights conferred a ‘moral dimension’ (Agrikoliansky 2010) on both their previous political activism and their later professional work: in activist groups and the courts and as elected officials of professional organisations. Harassed by the state’s repressive machinery (beatings, car tampering, telephone wiretapping, tax inspections, etc), these lawyers shared the difficult financial situation of their younger colleagues in the lower level of the profession.

The second group of opposition lawyers (about 60) were younger professionals, born in the 1970s, involved in less transgressive political activities because they confronted the repressive apparatus that had suppressed the Ennahdha Islamist party in the early 1990s. Arab nationalists, affiliated with radical left fringe groups, Islamists or human rights advocates, they represented labour leaders and political activists and mobilised against the RCD lawyers in TBA elections. As members of the lower level of the profession, they became spokespersons for young lawyers' financial demands while also championing the profession's values (human rights, criminal defence). Opposition lawyers acted collectively during the 2000s, urging TBA officials to condemn the oppressive policies of the Ben Ali regime, staging a courtroom strike, and instigating the sit-in protest against the arrest, incarceration and sentencing of their colleague Mohamed Abbou in 2005.²¹

Mobilisation of 'lower rung' lawyers was facilitated by the growing gap between the profession's self-image and the reality of the hand-to-mouth existence during the 1990s, especially among the more vulnerable young lawyers who experienced frustration and material difficulties from the start of their careers. Lawyers were one of the few groups to protest in the early 2000s. But until the eruption of the protest movement leading to President Ben Ali's ouster, their collective actions had been limited to legal professional concerns. The popular uprising of 2010–11 transformed lawyer mobilisations into an important part of the global opposition to the Ben Ali regime.

VI. Lawyers in Post-Ben-Ali Tunisia: Collective Actors of the Revolution and Political Transition in Tunisia (2011–16)

The collective action of lawyers between December 2010 and January 2011 began in courthouses in the capital and provinces. Activist lawyers encouraged their colleagues to express solidarity with the protesters by joining marches, rallies and sit-ins. Lawyers could appear in political protests as a collective body, identified by wearing black robes. Courthouses, as topographical embodiments of justice situated at the core of urban life and the protest movements, became the sites where the lawyers' mobilisation crystallised.

²¹ A politically active lawyer and member of the Congress for the Republic (CPR) Party, which was not recognised under Ben Ali, Abbou was arrested and imprisoned in 2005 during the World Summit on the the Information Society (SMSI) for publishing an article comparing President Ali with Israeli Prime Minister Ariel Sharon. Abbou was appointed Minister for Administrative Reform in the first government of the troika.

The popular uprisings at the end of December 2010 were not the result of organisations representing the legal profession. Having remained inactive at the beginning of the protest movement, the TBA's governing bodies acted more to restrain the uprising than to foment it. In fact, from his election as TBA President in June 2010, Abderrazak Kilani was intent on negotiating with the Ben Ali regime to forge a compromise that would satisfy the professional demands of the 'lower rung' of the Bar in exchange for conceding professional demands the regime saw as explicitly political (defence of human rights, respect for the rule of law, protection of public and private freedoms). In the end, it was the scope of the protests, as well as decisions by the regional UGTT federations to call general strikes starting 12 January, that finally drove the TBA to join the protest movement and call for a lawyers' strike on 14 January (Gobe and Salaymeh 2016: 325–39). The TBA representatives thereby reduced the risks of their opposition and acted as free riders on collective actions led by others, letting the Association profit from the fall of the Ben Ali regime, at least symbolically, until the election of the National Constituent Assembly on 23 October 2011.

The mobilisation of lawyers between December 2010 and January 2011 endowed the TBA with a 'revolutionary legitimacy' on which it could draw, after Ben Ali's departure, to play an important political role and consolidate corporatist gains. Its moral capital allowed the TBA to participate in February 2011 in creating the National Council for Safeguarding the Revolution, which became a rival to the provisional governments headed by Mohammed Ghanouchi and subsequently let the TBA advance professional demands it had formulated under the Ben Ali regime.

The disappearance of the old regime disqualified the lawyers of the (now dissolved) RCD party, who no longer enjoyed easy access to government following the discrediting of the Ben Ali faction. These 'party lawyers' officially lost their monopoly of state litigation, a development confirmed when the transitional government issued a circular authorising corporations and public institutions to choose their legal representation. The Prime Minister's text instructed the heads of public institutions to apply objective criteria of competence and transparency when engaging the services of a lawyer, independent of any list of names compiled earlier.²²

²² *Prime Ministerial Circular No 4, Addressed to Heads of State Companies and Establishments* (in Arabic), 9 February 2011, Prime Minister's Office.

Even so, a number of lawyers reported that some RCD members had renewed relations with their portfolio of public clients, changing their political colours while remaining close to state power.²³ In response, the TBA asked the transitional governments to ensure the transparent allocation of litigation by public institutions.²⁴ In January 2014, the transitional government of Ali Laarayedh issued a decree establishing an administrative protocol for assigning public litigation contracts in response to invitations to tender.

The *bâtonnier* clearly benefited from the collapse of the Ben Ali regime. He constructed, even fabricated, a revolutionary image by presenting the involvement of lawyers in the 2010–11 mobilisations as the concerted action of a profession united behind its President. Legislation authorising the Tunisian President to promulgate certain statutory decrees during the interim period, prompted the *bâtonnier* to accelerate a Bill reorganising the legal profession.

The proposed Bill sought to transform the profession by making lawyers more than mere agents of the law. Previously, the Bar had been ‘a liberal and independent profession whose purpose was understood as assisting with the enactment of justice’.²⁵ The first article of the 2011 Bill committed the TBA to fostering the ‘establishment of justice and the defence of human rights and freedoms’.²⁶ By raising the profession’s status, the Bill sought to enhance lawyers’ professional power. ‘Political lawyering’ was part of the Bar’s ‘professionalisation plan’ (Abbott 2003: 30); a means of legitimating its professional demands.

Lawyers invoked their support for the protest movements to justify an enlarged monopoly over legal services. The TBA accused competing professions of having received special treatment under the previous authoritarian regime, as evidenced by their failure to participate in the protests. It then used this accusation to claim a broader professional jurisdiction at the expense of notaries, tax specialists, real estate agents, and certified public accountants. The statute declared that only lawyers are ‘qualified to represent and act as counsel to clients... and to defend them in courts of law, in any other judicial, administrative or

²³ Interview with Mokhtar Jallali, lawyer at the Supreme Court, 24 April 2013 and Mohamed Ali Gherib, lawyer at the Supreme Court, 18 June 2016.

²⁴ TBA, *Rapport moral de l’année judiciaire 2014–2015*, n 7.

²⁵ *JORT*, ‘Loi n° 89-87 du 7 septembre 1989, portant l’organisation de la profession d’avocat’, 12 September 1989, pp 1385–92.

²⁶ *JORT*, ‘Décret-loi n° 2011-79 du 20 août 2011 portant l’organisation de la profession d’avocat’, 23 August 2011, p 1595.

disciplinary hearings, and against an investigating officer'.²⁷ Competing professions feared that the wording of this article would prevent them from providing legal, tax, or accounting advice to clients, as well as from carrying out certain administrative procedures. Professional bodies representing accountants, notaries, and tax specialists viewed the statute as an attempt 'by one profession to appropriate for itself the attributes and sphere of professional activity of other professions'.²⁸ The statutory language provocatively endowed lawyers with the exclusive right to 'draw up company statutes and administer certain forms of increase and reduction in the company's capital' and gave lawyers exclusive rights 'to draft contracts, real estate deeds of transfer, and certificates of capital investment in a company in the form of real estate, excepting those expressly attributed to notaries and draftsmen from the Land Registry Agency'.²⁹

This last claim, however, showed that the text finally promulgated by the Executive gave lawyers fewer advantages than had been sought by the Bar President. The Bill as drafted by the profession would have eliminated the recording function of the Land Registry. This body of civil servants had been created under President Ben Ali as a means of facilitating access to justice. For the new government, it was a means of reducing the cost of property transactions for Tunisia's poorest property owners. In the difficult economic climate of the transition, the government of Beji Caïd Essebsi feared the Bar's demand would increase property transfer costs, and it blocked that reform.³⁰

The gains effected by statutory reforms regulating the legal profession proved more modest than anticipated. The transition governments that followed either did not wish to or could not implement the measures of the new law. By questioning some of the prerogatives granted to judges under the Ben Ali regime, the TBA proposals provoked strong opposition among magistrates' associations. Unlike lawyers, judges and magistrates did not participate in the popular uprising of December 2010–January 2011. They did, however, organise themselves to influence the political process after the Ben Ali regime fell. As a central agent within the

²⁷ An investigating officer (*officier de police judiciaire*) is a representative of the legal system mandated to carry out investigations and perform arrests: *JORT*, 'Décret-loi n° 79 en date du 20 août 2011 portant sur l'organisation de la profession d'avocat', n 26, p 1596.

²⁸ *Le Temps*, 13 March 2011.

²⁹ This agency is a French colonial institution established throughout North Africa and designed to levy stamp duty on property transactions.

³⁰ Interview with Samir al-Annabi, lawyer at the Supreme Court and former President of the National Authority Fighting Corruption, April 2012.

judicial system, judges and magistrates knew how to mobilise the resources to limit the TBA's aspirations to equality.

VII. The Judiciary before the Bar: Preserving Status and Maintaining Independence

The highly controversial Article 46 of the law of 1989, which subordinated lawyers to judges, was replaced by Article 47 of the law passed in 2011, which specified that 'transactions, pleas, and submissions made by a lawyer in the exercise of her duties' could not be the basis for a prosecution, nor could lawyers 'be subject to disciplinary measures undertaken by anybody other than those instances, authorities, and establishments before which she exercises her practice'.³¹ Lawyers were granted this immunity to let them freely exercise 'their natural role as defenders of rights and freedoms and to contribute to the accomplishments resulting from the revolution'.³²

Because judges resented this loss of power as well as the fact that the law excluded retired judges and anyone over 40 from entering the legal profession, the two professional organisations representing judges strongly opposed the draft Bill initially adopted by the government. The *Syndicat des magistrats tunisiens* (SMT)³³ denounced the text as opportunist, attributed its drafting to a pro-lawyer 'lobby'³⁴ embedded in the heart of the government, called a three-day strike, and urged the interim president and prime minister not to sign the law. When the SMT assailed the immunity as a form of 'impunity', lawyers responded that it protected them only when exercising their duties – in other words, when defending their clients' rights.³⁵

But more important to judges than lawyers' immunity were the efforts to purge the judiciary of members of the old regime as well as to limit access to the Bar by retired judges. The SMT opposed the TBA's attempts to purge the judiciary. And pointing to inadequate

³¹ *JORT*, 'Décret-loi n° 2011-79 du 20 août 2011 portant l'organisation de la profession d'avocat', n 26, p 1596.

³² *ibid.*

³³ The SMT (founded in 2011) have many members linked to the Ben Ali regime. In the middle of the 2000s, some of his current leaders forced out the leaders of the historical Association of Tunisian Magistrates (AMT, *Association des magistrats tunisiens*), who were then sanctioned by the regime by being transferred to minor or regional positions.

³⁴ Lotfi Ben Saleh, "Le lobby des avocats monopolisent l'Exécutif et le Législatif" (in Arabic), *al-Sarih*, 30 June 2011.

³⁵ *ibid.*

retirement pensions and the difficult material conditions in Tunisia, judges and magistrates demanded the right to register with the Bar after retirement, winning a change in the law declaring that candidates who had practised as judges for ten years were not affected by the 40-year age limit.

After this first confrontation between the two organisations, disputes between them became a regular feature in Tunisian courts. The TBA President and Bar Council were relentless in denouncing magistrates' systematic violations of lawyers' immunity: investigating magistrates (*juges d'instruction*) continued to charge lawyers with contempt of court. Conflict between the TBA and magistrates reached a peak at the beginning of 2014, when lawyers used a debate over a constitutional amendment to assert their status vis-à-vis the judiciary.

The strong representation of lawyers in the *Asemblée Nationale Constituante* allowed the TBA to benefit from the initiative of two deputies to propose, in plenary session, adding an article on the profession and its social role. Adopted by a large majority, Article 105 reaffirmed Article 1 of the law of August 2011 declaring the equality of lawyers with judges.³⁶

Lawyers and judges continued to struggle over mobility between the two branches. In the half century after independence, the executive had elevated only a single lawyer to the bench: Bourguiba's niece, Saïda Sassi. But on 18 January 2014, the Minister of Justice appointed 533 lawyers and academics to be judges under Article 32 of Law 67-29.³⁷ The government's stated objective was to reduce the backlog of cases. The TBA praised this decision for reestablishing reciprocal circulation between lawyers and magistrates, alleviating congestion within the Bar, and filling judicial vacancies.³⁸ But the two magistrates' organisations (*Association des magistrats tunisiens* and *SMT*) denounced the action for abridging equal opportunities, capitulating to political expediency, and challenging the authority to nominate judges exercised by the Provisional Judicial Organisation (the temporary High Council of the Judiciary). After intense lobbying, the 'technocratic government' (led by Mehdi Jomaa) suspended the measure.³⁹ Disputes between the two professions intensified, resulting in strikes by both in 2014 and 2015, paralysing the courts. Although judges sought to expel lawyers from the new High Council of the Judiciary (HCJ), lawyers secured legislative

³⁶ Interview with Samir Al-Annabi, 10 May 2015.

³⁷ *JORT*, 'Loi n° 67-29 du 14 juillet 1967, Relative à l'organisation judiciaire, au conseil supérieur de la magistrature et au statut de la magistrature' 1967, p 934.

³⁸ Interview by the author with Chawki Tabib former *bâtonnier*, 28 February 2014.

³⁹ *SMT*, *Announcement* (in Arabic), 4 February 2014.

support for their presence in all HCJ organs.⁴⁰ These conflicts expressed the efforts by lawyers and judges to shape the restructuring of the judiciary.

Apparent gains by lawyers vis-à-vis the judiciary have not significantly improved the material condition of the ‘lower rung’ of the Bar, even if its jurisdiction has grown. Every year the TBA’s policy report maintains that the persistent economic crisis engulfing the country since the fall of the Ben Ali regime has negatively affected lawyers’ activities and incomes. This has motivated the TBA to seek to expand the lawyers’ domain, making their presence compulsory in all matters dealt with by a court.⁴¹ The TBA has also sought to require that companies with a minimum turnover (not yet specified) obtain legal advice, just as they must be audited by a certified public accountant. A 2016 amendment to the criminal procedure code, offering legal assistance to persons in police custody, has been represented by the TBA *bâtonnier* as not only affirming the rule of law but also extending lawyers’ field of action, thereby offering further evidence of the high esteem enjoyed by lawyers and the sympathy for their professional project.⁴²

The constant aim of the TBA since 2011 has been to make the new rulers accept an enlargement of lawyers’ market based on their expertise, which they regard as having been unjustly disparaged by supporters of the Ben Ali regime. They have legitimated that demand by pointing to the mass of lawyers who took to the streets to support the movement against the Ben Ali regime, the censorship suffered by lawyers, and the democratic character of the appointment of Bar officers.

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⁴⁰ TBA, *Rapport moral de l’année judiciaire 2015–2016* (in Arabic).

⁴¹ Interview with former *bâtonnier* (President of the Bar) Mohamed Fadhel Mahfoudh.

⁴² *ibid.*

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