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ORIGINAL ARTICLE

Emergency by Design: The "Native Repressive Tribunals" and the Normalization of Exception in Colonial Algeria, 1858–1904

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Abstract

This study is the first to explore the creation of the Tribunaux repressifs indigènes (Native repressive tribunals, TRIs), a novel jurisdiction of exception promulgated at the turn of the twentieth century in colonial Algeria. The TRIs were the product of several intersecting historical processes that took shape over the last quarter of the nineteenth century: first, this period witnessed intense settler security panics marked by genuine anxiety that Algeria might succumb to uncontrollable banditry and mass uprisings. During this same period, colonial "sciences" couched in burgeoning race theory intersected with juridical knowledge-production to form a new legal discourse on assimilation. The TRIs were advanced using this new grammar of race-bound legal relativism, reimagined as consistent with republican universalism. This ascendant juridical epistème dovetailed with debates over the both indeterminate *and* overdetermined nature of sovereignty in Algeria, whose land was juridically and administratively "Frenchified," yet whose Muslim (by definition non-citizen) colonial subjects remained excluded from access to civil rights or protections. A doctrine of racialized exception was invented and codified in the unfolding of an impassioned juristic and public debate. The TRIs were legitimized—and endured—thanks to a doctrinal rationale applied retroactively: that for Muslim colonized subjects, exception was the rule.

> *The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight.—Walter Benjamin*[1]

In July 2016, just a few days after the Bastille Day attacks that took eighty-six lives in Nice, the French former magistrate and deputy from Rhône, Georges Fenech, raised the idea (for at least the second time) of creating a

[1] Walter Benjamin, "Theses on the Philosophy of History," in *Illuminations*, eds. Hannah Arendt Benjamin and Harry Zohn (New York: Schocken, 1955/1986).

"Guantanamo à la française." He was presumed also to be speaking in his role as a member of the commission of inquiry into the 2015 Bataclan terrorist attack. He argued that this was "the simplest solution" and most expedient way to deal with the wave of Islamist militants who he anticipated would be returning to France from the Iraqi–Syrian theater as the so-called "Islamic State of Iraq and the Levant" began losing territory.[2] By that time, the temporary laws introduced during the state of emergency declared after the Paris attacks had already been extended, and powers of search and seizure broadened. What is called in France "*la justice d'exception*" was thus already becoming increasingly normalized and codified.[3] Although Fenech's statements were not without controversy, he was joined by other elected politicians calling for "preventive detention centres" somewhere overseas. Fellow deputy and later presidential candidate Nicolas Dupont-Aignan had made several public appeals to "reopen" the erstwhile (and infamous) penal colonies at Cayenne, in French Guyana, effectively resuscitating the system of punitive deportation that had been in place for nearly 100 years before being closed in 1953. Indeed, the *bagnes* of French Guyana were notorious for the detention of not only French political prisoners—perhaps most famously Alfred Dreyfus—but also colonial subjects accused of rebellion, incitement to rebellion, and even "disrespect" against French officials.[4]

I use these statements to open this article on French exceptional law in colonial Algeria for several reasons: first, they illustrate the blissful historical ignorance, buttressed by narratives of national innocence, that facilitate contemporary normalization of "*la justice d'exception*." Dupont-Aignan later apologized for his statements, which he realized were "hurt[ful] to Guyanese citizens,"[5] yet France's historical role in deporting and subjecting to forced labor thousands of dissidents and colonial subjects went unacknowledged.[6] Beyond this, such statements inadvertently alert us to the juridical and penal genealogies that run from past iterations of "Guantanamo à la française" to their present-day successors, including Guantánamo itself. The contemporary architecture of exception in France has a colonial history that can and must be traced; it has a trajectory that unfolds across legal institutions, published doctrine, law dissertations, training manuals, decrees, and in the confrontations and arguments of colonized defendants and their lawyers. Its legitimacy derives from the accretion of textual traditions and material practices that become a kind of latent institutional memory. It is instructive that

[2] TF1 INFO, "Terrorisme: le 'Guantanamo à la française' fait son chemin chez Les Républicains," July 20, 2016. https://www.tf1info.fr/politique/terrorisme-le-guantanamo-a-la-francaise-fait-son-chemin-chez-les-republicains-1515572.html.

[3] Vanessa Codaccioni, *Justice d'Exception: L'État face aux crimes politiques et terroristes* (Paris: CNRS, 2015).

[4] Michel Pierre, «Les Algériens aux bagnes de Guyane», *Histoire de la justice* 26, no. 1 (2016): 171–87.

[5] LE FIGARO, "Le mea culpa de Nicolas Dupont-Aignan aux Guyanais," March 27, 2017. https://www.lefigaro.fr/elections/presidentielles/2017/03/27/35003-20170327ARTFIG00043-le-mea-culpa-de-nicolas-dupont-aignan-aux-guyanais.php.

[6] Jean-Lucien Sanchez, "The French Empire, 1542–1976," in *A Global History of Convicts and Penal Colonies*, ed. Clare Anderson (London: Bloomsbury, 2018), 123–55.

French public figures like Fenech and Dupont-Aignan can invoke these mechanisms almost absentmindedly, as if by force of habit, without disturbing the national consciousness, oblivious to the violent histories that birthed them.

In ways that resonate with today's Guantánamo Bay, the paradoxical and unresolved nature of colonial sovereignty was a crucial component in the formulation and endurance of French legal exception over the past century and a half.[7] This article explores the making of an early and exemplary facet of this both deep and geographically broad history[8] through a focused study of a shadow jurisdiction of the "justice of exception" developed in Algeria at the start of the twentieth century: the Tribunaux repressifs indigènes (TRIs hereafter; English: Native repressive tribunals). The Algerian TRIs were quasi-legal councils that existed parallel to the regular criminal justice system. Their only defendants were Muslim men and women who committed offenses delineated in the French Penal Code. The TRIs were created by decree in the spring and summer of 1902, "legalized" in March 1904, and finally dissolved in 1931. In that span of time, they issued 16–25,000 convictions each year.[9]

The TRIs were the product of several intersecting historical processes that took shape over the last quarter of the nineteenth century: first, this period witnessed intense settler security panics, sometimes envisioned as an extended state of war, marked by genuine anxiety that Algeria might succumb to uncontrollable banditry and be lost to mass uprisings. As Étienne Dubois, lawyer at the Algiers Court of Appeals and champion of the TRIs, put it in 1904: "No other reform was welcomed with more satisfaction by the population of Algeria, and none has given rise to more intense polemic."[10] "It is an indisputable truth," remarked one of Dubois' colleagues some years previous, that "not since the conquest [of 1830] has the Algerian question [...] interested public opinion in such a passionate way."[11] During this same period, colonial "sciences" couched in burgeoning race theory intersected with juridical knowledge-production to form a new legal discourse on assimilation. The TRIs were advanced using this new grammar of race-bound legal relativism, reimagined as consistent with republican universalism. This ascendant juridical epistème dovetailed with debates over the both indeterminate *and* overdetermined nature of sovereignty in Algeria, whose land was juridically and administratively "Frenchified" after 1848, yet whose "special" laws continued to be issued by edict, and whose Muslim (by definition non-citizen) colonial subjects remained excluded from access to civil

[7] Amy Kaplan, "Where Is Guantanamo?" *American Quarterly* 57, no. 3 (2005): 831–58. Kaplan's magisterial study of the legal infrastructure underpinning the creation and maintenance of the detention complex at Guantánamo Bay provides a crucial spring-board for the present article.

[8] On French-imperial global geographies of exception, see Léopold Lambert, *États d'urgence: Une Histoire Spatiale Du Continuum Colonial Français* (Toulouse: Premiers matins de novembre éditions, 2021).

[9] «La justice en Algérie: repères historiques», *Histoire de la justice* 1, no. 16 (2005): 297–310.

[10] Étienne Dubois, *Les tribunaux répressifs indigènes en Algérie. Thèse pour le doctorat, Faculté de droit de Paris* (Alger: Adolphe Jourdan, 1904), 7. Dubois relied on reports from the delegations financiers to include both natives and settlers in his estimation of general approval.

[11] Francis Eon, *Les Indigènes Devant La Loi Pénale & Les Juridictions Répressives: Discours* (Alger: A. Jourdan, 1892), 7.

rights or protections. French governance of Algeria was thus perennially occupied by a central paradox: Algeria's doubled status as an overseas colony tethered administratively to the hexagon.[12]

I argue that the justice of exception was forged through the combined effect of these processes and discourses. Embedding exceptional criminal procedure and jurisdiction into normal law was a means to resolve the paradox of colonial sovereignty. Indeed, among the colonial juristic class, much intellectual and semantic labor went into arguing that exceptional law for Muslims in Algeria was not exceptional at all, but normal. This juridical and political process of promulgating the TRIs offered a doctrinal prototype for the normalization of exception, to be redeployed at later intervals.[13] Put another way, exceptional law was not a "hypocrisy" that haunted rule-of-law governance; because it was crafted as an instrument of colonial and racialized exclusion, it served to shore up the coherence of liberal legal norms.[14]

The following pages build this argument by charting the unfolding of these transformations. After some further elaboration of the argument and intervention, the subsequent two sections trace the periods—first under military and then civilian rule—leading to the creation of the TRIs, including vociferous debates in the colonial press and publications of the judicial branch, as well as Muslim published responses. The next two sections explore the simultaneous and interwoven crises that erupted at the dawn of the new repressive era. In the fourth section, we enter the everyday world of the TRIs in the early years of their existence. State archives show that at the outset the TRIs barely functioned, largely because Muslim defendants, their French lawyers, and other members of the judicial branch actively rejected many features of the new jurisdiction, to the great chagrin of police, administrative, and executive actors. While the fourth section focuses on critiques and acts of resistance within the TRIs, the fifth section pans out to trace the emergence and then resolution of a major constitutional and juridical challenge to the TRIs: their potential illegality on "French soil." As we will see, legal doctrine was speedily formulated to save the TRIs from imminent demise, through which the normalization of exception as a mode of governance was finally achieved.

[12] Sarah Ghabrial, "Reading Agamben from Algiers," *Comparative Studies of South Asia, Africa and the Middle East* 40, no. 2 (August 2020): 237–42.

[13] Famously, this was the paradox that led to the declaration of the state of emergency in 1955, near the start of the Algerian War of Independence (to formally declare war would have meant acknowledging Algeria as an independent entity, and recognizing Algerian fighters as combatants rather than as criminals or terrorists). However, a historiographic preoccupation with the "Algerian Crisis" tends to obscure the in fact long-standing and ever-evolving nature of this fundamental colonial dilemma.

[14] This article is clearly indebted to the work of Olivier Le Cour Grandmaison, especially his *De l'Indigénat: Anatomie d'une "monstre" juridique* (Paris: La Découverte, 2010). However, it departs from his arguments in several crucial respects; most notably, where Le Cour Grandmaison is centrally concerned with contradictory derogations of republican constitutionalism, I find that the "justice of exception" was rather driven by a preoccupation with reconciling the many tensions of colonial sovereignty in Algeria.

Historiographic Interventions

This study offers empirical and methodological interventions into literatures on the so-called "*régime de l'Indigénat*," in particular, and theoretical work on states of exception, in general. The historiography on the colonial system of repressive rules and procedures, signified by the shorthand "*l'Indigénat*," has been driven by a set of interwoven questions: What was it exactly? How was it made possible in the context of France's republican tradition? Was exceptional justice a product of an excess of law (as argued by Emmanuelle Saada) or was colonial rule sustained by law's absence (as proposed, respectively, by Gregory Mann and Olivier Le Cour Grandmaison, among others)? Answers to these questions have largely been sought in the archive of French juristic and doctrinal discourse, with particular focus on how the rightsless "*indigène*" was elaborated and rationalized as a legal category.[15] By contrast, I approach "exception" as a historical object from a different angle; my answer to these questions is offered in a more granular trajectory of repression's material sites and instruments.

Although contemporaneous jurists regarded the TRIs as the final piece needed to "complete" the *régime de l'Indigénat*, the TRIs have received little scholarly attention from historians of either France or Algeria—and perhaps not surprisingly, since, as courts of summary justice they are necessarily archivally thin. Insofar as Algerian historiography has paid any attention to the TRIs, the discussion has been limited by an over-reliance on the (albeit foundational) investigations of Charles-Robert Ageron, whose exposition of the role of this jurisdiction took the decrees at face value, as just one among many tools of violent domination.[16] Given how little we know about the TRIs, what follows fills a gap in knowledge; but in shifting our focus from status to procedure it also aims to change how we think about both the *Indigénat* and

[15] On the development and implementation of the "Indigenous Code" across the French Empire, see Laure Blévis, "La situation coloniale entre guerre et paix: Enjeux et conséquences d'une controverse de qualification," *Politix* 4, no. 104 (2013): 87–104; Olivier Le Cour Grandmaison, *Coloniser, Exterminer: Sur La Guerre et l'état Colonial* (Paris: Fayard, 2005); Gregory Mann, "What was the *Indigénat*? The 'Empire of Law' in French West Africa," *The Journal of African History* 50, no. 3 (November 2009): 331–53; Isabelle Merle, "De la 'légalisation' de la violence en contexte colonial. Le régime de l'indigénat en question," *Politix* 17, no. 66 (2004): 137–62; Isabelle Merle, "Retour Sur Le Régime De L'Indigénat: Genèse et Contradictions des Principes Répressifs Dans L'Empire Français," *French Politics, Culture & Society* 20, no. 2 (Summer 2002): 77–97; Adrian Muckle, "The Presumption of Indigeneity: Colonial Administration, the 'Community of Race' and the Category of Indigène in New Caledonia, 1887–1946," *The Journal of Pacific History* 47, no. 3 (September 2012): 309–28; Emmanuelle Saada, "'Citoyens et sujets de l'Empire français': Les usages du droit en situation coloniale," *Genèses* 53, no. 4 (2003): 4–24; Emmanuelle Saada, "La loi, le droit et l'indigène," *Droits* 43, no. 1 (2006): 165–90; Sylvie Thénault, "Le 'code de l'indigénat'," in *Histoire de l'Algérie à La Période Coloniale. 1830–1962*, ed. Abderrahmane Bouchène (Paris: La Découverte, 2014), 200–6.

[16] Charles-Robert Ageron, *Les Algériens musulmans et la France, 1871–1919* (Saint-Denis: Bouchène, 2005). By contrast, one French historian has claimed, based on a single colonial-apologist source, that the TRIs were "less heavy" and "more indulgent" than detractors believe. Bernard Durand, "Originalité et exemplarité de la justice en Algérie (de la conquête à la Seconde Guerre mondiale)," *Histoire de la justice* 16, no. 1 (2005): 45–74.

exception. The juristic and political theory of exception, I hope to show, was formed in dialectic relation with its often chaotic and contested practice. The perspective offered here is from the ground-floor of colonial practices, from which the violence of exception can be viewed in its Arendtian banality.

One of the main analytic cognates this study insists on is race. In approaching the genealogies and logics of exception from the standpoint of Algerian colonial history, the link between race and exception—the latter's historical and residual dependence on the former—is ineluctable, even as the Anglo-American concept of "race" is itself juridically unspeakable in the French universalist model.[17] As Bancel, Blanchard, and Vergès have written—from a position of critique—acknowledging difference of any kind is seen to risk exposing fissures and weaknesses in French civic nationalism's formal promise of equality, fraternity, liberty (and implied uniformity) to all.[18] And it was, theoretically, this very universalism that shaped the French *mission civilisatrice*, a "humanitarian" empire whose goal was the "liberation" of so-called backward peoples through their assimilation into French language and culture. This contemporary political discourse of civic nationalism echoes that of liberal politicians at the turn of the twentieth century, discovering slowly and to their horror the "excesses," abuses of power, antisemitism, and anti-Muslim discrimination of the Algerian settler population.[19] Stalwart republicans, then and now, may take comfort in the interventions of the National Assembly and civil rights organizations like the *Ligue des droits de l'homme*—their fact-finding missions, reports, and legislation—to reign in a corrupt and racist colonial government during the first decades of the twentieth century. This period culminated in the first serious attempt (though later abandoned) to extend the franchise to all Muslim Algerian men, in 1919. Yet, as others have noted, the notorious Code de l'Indigénat remained in place, repeatedly ratified by the National Assembly since 1881.[20] And, of course, this was the very period during which the TRIs came into existence—unchecked from above, though resisted from below.

How could this be? How could the TRIs have been promulgated precisely as the Algerian territories came under heightened metropolitan scrutiny? As this article details, this was due to the diffusion and normalization of regimes of exception during this time. Permanent "legalized" exception, a vestige of martial law, was domesticated into the civil constitutional order. At the same time, legalized exception took up the task of encoding racialized difference. Exception, in other words, did implicitly the work that race explicitly could

[17] History—especially colonial history—does not always bear out this normative ideal. See Emmanuelle Saada and Arthur Goldhammer, *Empire's Children: Race, Filiation, and Citizenship in the French Colonies* (Chicago: University of Chicago Press, 2012).

[18] For more on reasons for the rejection of what is regarded in France as "American-style" interculturalism and "affirmative action," including a republican reading of modern French colonial history, see Jean-Loup Amselle and Jane Marie Todd, *Affirmative Exclusion: Cultural Pluralism and the Rule of Custom in France* (Ithaca: Cornell University Press, 2003).

[19] Didier Guignard, *L'abus de pouvoir dans l'Algérie coloniale (1880–1914): Visibilité et singularité* (Nanterre: Presses universitaires de Paris Ouest, 2014).

[20] Blévis, "La situation coloniale entre guerre et paix."

not. In this circular logic, Muslims/Arabs/natives were deemed racially and culturally unfit for rule-of-law governance because rule-of-law governance was not fit for irrational, inherently "lawless" subjects. Indeed, as we will see later, doctrinal arguments favoring separate jurisdictions and expedited correctional procedures for "natives" were formulated in assimilationist language and couched in universalist logics. In this way, exception was—and remains—precisely what sustained a "race-blind" republican mythology.

Disproportionate attention to doctrine and legal status, coupled with inadequate attention to the operation of race-thinking, means that the unfolding of these processes has been unduly mystified. Approaches to the "state of exception" as an enigmatic paradox also typify a Eurocentric (and, incidentally, race-blind) tendency within much of the politico-philosophical literature on emergency law and normalized exception, which takes its inspiration from the political and legal theory of Carl Schmitt.[21] By contrast, this article maintains that the "state of exception" does not manifest inexorably as if by the *demos*'s doomed fate. To the contrary, it has a social and material history, which reflects conditions at local, imperial, and global scales, and which cannot be analytically disappeared from legal and intellectual histories. It is produced and reproduced, contested, reconfigured, and revitalized through utterances and actions of historical agents, including both state actors and those being cast out of law.

1858–72: From Military Tribunals to Disciplinary Commissions

Early phases of experimentation with quasi-legal forms and procedures during the period of military rule in most of French-occupied Algeria (1830–71) generated many of the infrastructural and semantic materials inherited by the civilian regime that eventually succeeded it. In 1842, the jurisdiction of qadis in criminal matters involving Muslim subjects officially ended in the civil territories along Algeria's north coast; infractions and petty offenses were shifted to newly empowered magistrates while three centralized assize courts (in Algiers, Oran, and Bône) gained purview over capital crimes and appeals. From 1854 onward, justices in Algeria enjoyed "extended powers" that surpassed those of their metropolitan counterparts.[22] Meanwhile, military tribunals maintained and expanded their jurisdiction over criminal matters in the territories under military jurisdiction until two ministerial decrees of 1858 introduced a new venue for correctional matters—the *commissions disciplinaires*. The decrees were issued by the newly appointed Minister of Algeria and the Colonies, Prince Napoléon-Jérôme Bonaparte, in response to the growing crisis of the military tribunals: their ballooning caseloads as territory under French control grew, and their ill-defined relationship with the correctional courts operating awkwardly alongside them over the previous 16 years.

[21] Most notably: Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005). See also Blévis, ibid., for an important examination of why Agamben's theorization of exception fails to capture the "colonial situation." For further discussion on this, specific to the notable absence of race in Abambenian thought on exception, see Ghabrial, ibid.

[22] Eon, *Les Indigènes Devant La Loi Pénale*, 42.

The first of these decrees included lengthy meditations on the haphazard judicial situation in Algeria, which offended "our elegant sense of justice,"[23] while the subsequent decree stipulated which infractions fell under the purview of the new disciplinary commissions. While the military tribunals would maintain their jurisdiction to judge "ordinary crimes and offenses," the *commissions disciplinaires* were meant to deal with "political prisoners … whose presence in the tribes might endanger public peace."[24] In these texts, Jérôme Bonaparte laid out reasons for maintaining a selection of wartime measures specific to Muslim subjects. In language that would resonate even a century later, he confessed that "it has become impossible to discern between rights of conquest and legal repression, to distinguish between criminals and insurgents."[25] To further explain the maintenance of partial war measures under peacetime conditions, he reasoned:

> [T]here is a whole series of infractions resulting from the still incomplete organization of the Arab people [...] Those infractions result from the complex character of the tribal Arab [and have] no analogue except military offenses committed against discipline. [T]hey cannot thus be anything but defendants before war tribunals and I maintain for their repression the direct competence of the authorities in charge of native administration.[26]

The disciplinary commissions were indeed run as courts-martial by military staff, though with some adaptations ostensibly meant to limit officers' prerogatives: "Muslim jurisconsults" could be brought in if needed to help adjudicate cases, mainly in instances where "custom" was involved. Yet, military judges were instructed to pay closer heed to the spirit than the letter of French laws, "which were not made for the natives." Otherwise, they were subject to minimal regulation, particularly in terms of punishments, which were dispensed according to the adjudicator's discretion, such that "the same offense could be punished with very different penalties."[27]

The disciplinary commissions were presented as a compromise solution to a situation that was particularly delicate and, in some ways, unprecedented. The gradual extension of metropolitan civil laws and rights to colonial territories signaled that Algeria was "pacified" and safe for settlers; yet, paradoxically, this could only be achieved by smuggling martial law into the legal landscape via a permanent institution of summary justice. Although taking the form of war tribunals in terms of process and personnel, they would supposedly also "define the extra-judicial power of the military authority regarding the Arabs, to end arbitrary [justice], and offer guarantees to the natives."[28]

[23] Gouvernement général de l'Algérie, *Recueil des textes relatifs à l'internement des indigènes et l'application de la loi du 15 juillet 1914 sur la Mise en Surveillance Spéciale* (Alger: A. Jourdan, 1916), 14–18.
[24] Dubois, *Les tribunaux répressifs*, 16.
[25] Quoted in Eon, *Les Indigènes Devant La Loi Pénale*, 42, and Dubois, *Les tribunaux répressifs*, 15.
[26] Dubois, *Les tribunaux répressifs*, 17.
[27] Dubois, *Les tribunaux répressifs*, 17–18.
[28] Jérôme Napoléon, Decree of 21 Sept 1858, quoted in Eon, *Les Indigènes Devant La Loi Pénale*, 50.

Lawyers describing them years later were at pains to emphasize that, while the *commissions disciplinaires* represented a shift away from full legal/penal assimilation, they were never a "real jurisdiction," but rather functioned as a kind of safety valve, punishing infractions swiftly to ostensibly leave more serious criminal matters to magistrates.[29] Their purpose, one colonial lawyer later insisted, was only to convey through "firm decisions [...] our political authority, which acquittals, even if justified, might weaken."[30] Jérôme Bonaparte made one unsuccessful attempt to have them formalized as a permanent jurisdiction. However, widely regarded as a failure in practical terms (i.e., to subdue "native" crime), they only helped precipitate his removal from his ministerial position.[31]

1872–1902: Colonial Security Panics Meet European Race Theory

The disciplinary commissions were abruptly brought to an end in December of 1870, with the transition to "civilian" government in the newly-expanded northern territories (they were maintained in the *territoires du sud*, which remained under military authority). Yet the legacy of the *commission disciplinaires*, which treated all ordinary Muslims as if they were prisoners of war, would endure in the continued framing of the settler–indigenous relationship in military terms, even as the imperative shifted from "pacification" to "security."

It was in 1873—as the leaders of the Moqrani Revolt that had spread out of Kabylia were being tried, exiled to penal colonies, or executed—that the first "civilian" governor-general of Algeria, vice-admiral de Gueydon, set the tone for racialized separate justice as part of his argument for re-establishing and expanding the disciplinary commissions: "The non-naturalized natives, wherever they may be, must be subject to the regime that our security commands. They constitute a category apart [for whom] there are special jurisdictions and penalties."[32] The vice-admiral further advocated for a "code of offenses which [are] criminal in Algeria [but] not in France, a code analogous to military and maritime codes," which the disciplinary commissions would then be charged with applying.[33] Although the *projet de loi* thus modifying the disciplinary commissions came to nothing, de Gueydon's proposal set in motion the series of judicial provisions, including catalogs of "native" offenses and expanded administrative powers, that would culminate in the 1881 Code de l'Indigénat.

Governor-General Chanzy, who succeeded de Gueydon, declared his intention to turn the needle of colonial judicial policy back in a universalist direction, defining assimilationist "progress" as "the introduction of the regime of common law, applied to diverse populations of the same territory."[34] It was Chanzy's six-year tenure as governor-general, as well as the 1870 introduction

[29] Dubois, *Les tribunaux répressifs*, 17; Eon, *Les Indigènes Devant La Loi Pénale*, 50.

[30] Eon, *Les Indigènes Devant La Loi Pénale*, 51–52.

[31] Dubois, *Les tribunaux répressifs*, 18.

[32] Quoted in Louis Rinn, *Régime pénal de l'indigénat en Algérie. Les commissions disciplinaires* (Algiers: A. Jourdan, 1885), 61.

[33] Dubois, *Les tribunaux répressifs*, 19.

[34] Dubois, *Les tribunaux répressifs*, 21.

of jury trials for Muslim subjects, which colonial lawyers and elected representatives later writing in defense of the TRIs blamed for the insecurity of the interceding period. Yet, this widely held belief that the benevolent extension of French penal law was to blame seems, at best, illusory. In the flurry of administrative reorganizing over the three decades that separated the 1870 dissolution of the disciplinary commissions from the 1902 creation of the TRIs, the governor-general's office gained *increasing* powers over a number of areas previously governed by the military regime, including over native prisons, collective punishment, land sequestration, pilgrimages, *cafés maures*, surveillance of religious brotherhoods (*tariqas*), the purchase of arms, the pass system, and the internment regime.[35] Rule by decree remained in place, despite the augmentation of the judicial branch. Historian Olivier Le Cour Grandmaison points out that repeated delegation of a host of "special powers" vis-à-vis the Muslim population helped naturalize these colonial state prerogatives, even as their origins and initial purpose were thereby obscured.[36]

Nonetheless, backlash to the judicial assimilation of the early 1870s, as well as the *rattachement* reforms (1881–1896) that had curtailed Algeria's governmental autonomy from the metropole, was widespread among settlers and their advocates, claiming that even the tepid attempts to superficially unify penal law had unleashed chaos, leaving them at the mercy of a tidal wave of "native crime." From the mid-1870s and into the 1890s, settlers complained of being constantly imperiled by epidemic criminality among Muslim Algerians. Pro-colonial republican statesman Jules Ferry, as Minister of Public Instruction, likened the theft and destruction of settler property to "Barbary piracy" revived as "a type of agricultural piracy (*piraterie agricole*)."[37] Hard-working settlers risked their lives daily tilling their soil for the glory of France. Colonial newspapers warned of another mass insurrection on the horizon. Nothing less than "the rise of civilization" was at stake.[38]

The next effort to construct a new jurisdiction for Muslims was launched by prosecutor-general Étienne Flandin in the early 1890s. At the opening session of the Algiers Court of Appeals in 1892, advocate general Francis Eon defended Flandin's proposal before the judicial personnel of the colonial capital.[39] He presented a supposed "return" to more separate and swift justice as in the best interest of Muslim subjects. As a result of the introduction of jury trials, he argued, Muslim Algerians languished in jails under "preventative detention"

[35] On the native internment regime, see Sarah Ghabrial, "'Muslims have no Borders, only Horizons': A Genealogy of Border Criminality in Algeria and France, 1848–Present," in *Decolonising the Criminal Question: Colonial Legacies, Contemporary Problems*, eds. Ana Aliverti, Henrique Carvalho, Anastasia Chamberlen, and Máximo Sozzo (Oxford: Oxford University Press, 2023), 145–61.

[36] Le Cour Grandmaison, *Coloniser, Exterminer*, 207.

[37] Quoted by Émile Begey in *Revue algérienne et tunisienne de législation et de jurisprudence (publiée par l'École de droit d'Alger)* (hereafter RATLJ) (1904): II. Doctrine et Législation: "27 mars, 3 et 4 avril—Discussion à la Chambre d'interpellations relatives aux tribunaux répressifs indigènes": 7.

[38] Dubois, *Les tribunaux répressifs*, 5.

[39] Louis-August Eyssautier, *Cours criminelles musulmanes et tribunaux répressifs indigènes* (Algiers: Adolphe Jourdan, 1903), 12.

for an average of 5–8 months awaiting trial. "Is this not a frightening abuse that we must urgently remedy?" he asked his audience.[40] Yet more concerning, pre-trial detentions had led to a high rate of acquittals (one-fifth of all outcomes, by his calculation), "ending in impunity" for native offenders.[41] His proposed remedy was twofold: first, decentralize the penal system so as to "organize vis-à-vis the Arabs a jurisdiction that would fortify repressive action while according to the accused natives guaranteed protections of their right"; and second, in this process, create a jury system limited to capital crimes to which only settlers are called. This way "the natives may know that [...] the settlers inhabiting their isolated farms [...] whose existence is threatened by Arab banditry, will be their sole judge."[42]

Flandin's was the first of not less than four laws proposed over the next 10 years to create a new penal jurisdiction specific to Muslims, each of which adopted the same basic premise but varied mainly in whether and how many Muslim jurists (eventually demoted to "assessors") would sit on the adjudication panel. In his much-cited report of 1895, the result of a senatorial commission surveying judicial and security conditions in the colony, Senator Alexandre Isaac considered each of these proposals, ultimately rejecting the exclusive jurisdiction of magistrates of common law: "It is good," the Isaac Report agreed with Eon, "that the native knows the settler can judge them, and will thus respect them."[43] Conveniently, Flandin, who had since left his post in the colonial judiciary, participated in the commission as rapporteur and deputy representing the metropolitan department of l'Yonne, affording him the opportunity to advance policies he had himself introduced. The authors of the Isaac report attempted to strike an "intermediary" position between legal unity and "diversity," which, they acknowledged, "negated the very idea of sovereignty."[44] They proposed to do this by embracing a unified criminal process "without distinction of race or religion" of victims, but accepted different jurisdictions "when the accused was Muslim, whether native or foreign."[45] For critics, this was not a compromise but an infuriating contradiction: "And how shall we know the defendant's religion?" mused honorary councilor at the Court of Algiers, Louis-August Eyssautier, "By his declaration? His outfit? The report is mute on this point."[46] As for the claim that the jury system was unfairly onerous for Muslims: "No, no, this was not the real preoccupation; above all, the goal was a stronger and more prompt repression."[47]

Indeed, over the course of these parliamentary inquisitions and debates, the temporality of justice emerged as one of the defining racial-religious

[40] Eon, *Les Indigènes Devant La Loi Pénale*, 69.

[41] Eon, *Les Indigènes Devant La Loi Pénale*, 71.

[42] Archives nationales d'outremer (ANOM), Aix-en-Provence, France. F80/1725: Alexandre Isaac (Sénateur), *Rapport fait au nom de la Commission chargé d'examiner les modifications à introduire dans la législation et dans l'organisation des diverse service de l'Algérie (Justice française et musulmane)* (Paris: Mouillot, 1895), 260.

[43] Eyssautier, *Cours criminelles musulmanes*, 13.

[44] ANOM-F80/1725: Isaac, *Rapport*, 2.

[45] Eyssautier, *Cours criminelles musulmanes*, 15.

[46] Eyssautier, ibid.

[47] Eyssautier, *Cours criminelles musulmanes*, 18.

characteristics that separated Europeans from Muslims/natives. Juristic literature and parliamentary speeches on this topic were peppered with physical references to "speed" and "force"—the type of rapid, exemplary, and spectacular law Algeria's colonized subjects understood and even preferred. For instance, sometime deputy, sometime Algerian Governor-General, Charles Jonnart claimed that

> the error committed by the extension of the civil territory, was to apply to the Muslim tribes who had been used to military rule the better part of our rules, codes, and procedures. We substituted the disciplinary commissions for a form of justice that was modern, but too slow.[48]

As another jurist later argued:

> Too often, the effect of our judicial apparatus appeared like a terrible and mysterious machine to the natives... we needed special institutions, functioning rapidly and giving the impression of force [that is] indispensable for striking souls that respect only brutal authority. [...] Among peaceable and well-policed populations, it is the individual that must be protected. But among the natives, it is public order that must preoccupy us.[49]

Although successive proposals came to nothing, momentum toward a new penal regime was building. In 1899, Algerian settler-deputy Émile Begey brought before the Chamber of Deputies a decisive document: a proposal drafted by his constituents represented by the *délégations financiers* laying out exactly the attributes that would characterize the TRIs. The key features that distinguished this proposal from its predecessors was the recommendation that the repressive tribunals be presided over not by judicial but administrative personnel, and that they should be created by decree rather than law.[50]

By the turn of the century, political and judicial actors mounting their case for a new repressive jurisdiction had found moral support among metropolitan partisans of the new "colonial sciences," which explicitly saw race as determinant of legal aptitude and thus legal status. In particular, settler jurists leaned on the heavily cited address of Arthur Girault, law professor at the University of Poitiers, before the International Congress of Colonial Sociology in Paris in 1900 (held adjacent to the Paris World's Fair of that year).[51] As Le Cour Grandmaison and Emmanuelle Saada have each shown, respectively, Girault

[48] Émile Larcher, "Les Tribunaux répressifs indigènes en Algérie," *Revue Pénitentiaire* 26 (1902): 537.

[49] Fernand Cécile, *Essai sur la politique à suivre à l'égard des indigènes musulmans de l'Algérie* (Algiers: Vielfaure, 1913), 191.

[50] Eyssautier, *Cours criminelles musulmanes*, 22. While elected members consisted of settler, Arab, and Kabyle delegations, Eyssautier strongly suspected that the views of the latter two groups were subsumed within that of the former in the articulation of these demands.

[51] Arthur Girault, "Voeux presentés par au Congrès international de Sociologue coloniale," in *Congrès international de sociologie coloniale, Procès-verbaux sommaires* (Paris: Imprimerie nationale, 1900).

was at the forefront of a school of legal doctrine and scholarship specific to colonial law based on a belief in "the congruence between race and legal systems."[52] At the 1900 Paris Congress, Girault presented a list of recommendations, which would gain the status of secular scripture among colonial jurists, for the legal management of colonial populations, described as "large children [that] one cannot simply beat continuously."[53] He famously contended, without much distinction between the "animists" of Indochine and the Muslims of "our new African colonies," that "an act forbidden among Europeans might be permitted among natives, and vice versa. The gravity of an infraction can vary according to the race of the author or that of the victim."[54] Yet, he added (echoing Eon), "the care for rendering justice to natives in repressive matters must be accorded only to European authority, even when the victim of the infraction is a native."[55]

Although writing in the most general terms and citing no specific legal opinion, Girault's works supplied indispensable rhetorical ammunition for proponents of the new repressive jurisdiction in Algeria. Indeed, reference to "tribunaux répressifs indigènes" in his 1900 lecture in Paris may be the first time that phrase appeared in print.[56] What is especially remarkable, however, about Girault's influential writings is that he asserted that such measures not only befit the "mores" of natives but simultaneously upheld republican principles of legal equality. "The rule of law is paramount" he insisted, referring repeatedly and in agreement to Montesquieu's *Spirit of Laws*. The importance of Girault's ideas was not only for having made law explicitly a matter of race, but also having *at the same time* reconciled norm and exception.

Indeed, it would be wrong to simplistically describe those in favor of the new penal jurisdictions as purely anti-assimilationist, as if the divide were so stark. Rather, these proponents framed legal relativism as perfectly compatible with a universalist program. To advance this position, jurists articulated a concept of cultural "race" as a pretext for the absorption (and eventual disappearance) of inferior races into superior ones, and repressive laws of summary justice as the pathway to this common goal. This argument was made most explicitly by law professor Émile Larcher, Algeria's most prominent spokesperson for the *Ligue des droits de l'homme* (and critic of the TRIs in practice if not in principle). Larcher drew upon the work of François Charvériat, professor at the École de Droit d'Alger (Algiers University Faculty of Law) and amateur ethnographer particularly fascinated by Kabylia. Charvériat was best known as a pessimist of juridical assimilation, on the grounds that "the natives can never become real Frenchmen [since] a people for whom the basis of life is the Mohammetan religion cannot become French except by becoming Christian."[57] Charvériat likened the relationship between Europeans and (especially) Arabs to that of the feudal domination of the Franks over the Gauls, two

[52] Saada, "La loi, le droit et l'indigène." Le Cour Grandmaison, *De l'Indigénat*, 7–10; 67–74.
[53] Girault, "Voeux presentés par au Congrès," 67.
[54] Quoted, e.g., in Dubois, *Les tribunaux répressifs*, 22, and Cécile, *Essai sur la politique*, 194.
[55] Girault, "Voeux presentés par au Congrès," 69.
[56] Ibid., 74.
[57] François Charvériat, *Huit jours en Kabylie: À travers la Kabylie et les questions Kabyles* (Paris: Plon, Nourrit, et Cie, 1889), viii.

"races" stratified as classes whose eventual comingling laid the basis for the French nation.[58] Larcher's interpretations and extensions of Charvériat's conclusions are worth quoting at length:

> The French, being citizens, can be compared to the nobles and lords; only they are judged by their peers; only they, at least in principle, can carry arms. And the natives, simply subjects, are in a situation similar to serfs: they are attached to the soil since they cannot travel without a passport; they owe certain services [...] singularly reminiscent of the old feudal ones. This situation is hardly surprising when one observes that the conditions today in Algeria are the same as the Franks and the Gauls, one victorious race imposing its will and its domination upon a conquered race. There is, however, a notable difference: if inequality was quickly attenuated in medieval France, it will take more time to disappear in Algeria; ... the oppositions of religion and race are of a nature to perpetuate the distance between the two classes, citizens and subjects. One is thus not shocked by inequality of treatment and the diversity of jurisdictions, administration, and laws; this inequality, this diversity corresponds exactly to the present situation of the [distinct] classes.[59]

Four years later, Étienne Dubois devoted a page and a half to a direct quotation of Larcher in his thesis supporting the TRIs.[60] The theories of Émile Larcher, drawing upon François Charvériat, recall the warnings of Francis Eon ten years prior:

> Muslim society, forged over the centuries in the mold of a ferocious fanaticism, cannot be transformed in several years. We cannot leave this effort to dreamers who, ignorant of native mores, long for immediate assimilation: It will take ages before this assimilation, which is desirable and which we do well to prepare for, can be realized.[61]

These were the luminaries of the École de Droit d'Alger, leading figures of colonial legal "science." They leave behind a formidable archive of the knowledge structures of legal race theory that permeated and informed the creation of the TRIs.[62]

How did Muslim Algerians respond to these settler moral panics and the fervent public debate surrounding law and security? With limited literacy and access to colonial print culture—a direct result of deliberate education-

[58] On the class-based origins of race in France as a matter of "blood," see Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975–76* (New York: Picador, 2003).

[59] Émile Larcher, *Trois années d'études algériennes législatives, sociales, pénitentiaires et pénales (1899–1901)* (Algiers: Adolphe Jourdan, 1902), 200.

[60] Dubois, *Les tribunaux répressifs*, 25.

[61] Eon, *Les Indigènes Devant La Loi Pénale*, 19.

[62] A full bibliographical list on the topic of "banditry" can be found in Antonin Plarier, *Le Banditisme rural en Algérie à la période coloniale (1871-années 1920)*, thèse, Histoire (Université Panthéon-Sorbonne—Paris I, 2019), 270.

deprivation and censorship policies—their French textual archive does not compare in volume to that of European writers.[63] But they too were affected by the theft of goods and animals, and random deaths as a result, in addition to colonial violence. It is quite possible that some of the solutions proposed by French government officials were inspired by an 1875 text, published simultaneously in Arabic and French, by the Constantinois mufti El Mekki Ben Badis (father of the illustrious anti-colonial *'alim* Abdelhamid Ben Badis), which argued that bandits running rampant in the countryside were emboldened by the French laws that now applied to them, yet to which they felt no obligation. In a manner reflexive of classic *fiqh* (Islamic legal theory), Ben Badis the elder quoted and commented on a series of authoritative texts from the Maliki *madhhab* (jurisprudential tradition) to argue for a "special" and more severe law with respect to rural theft. Ben Badis accepted the possibility that "guilt may not always be perfectly established." He proposed that the convict's fellow villagers may be held liable for compensation and that recidivism should be punished with deportation.[64] Although Ben Badis campaigned for colonial "respect" for Islamic jurisdiction and methods, he advanced this cause as a paid and privileged intermediary of the colonial state. From this position, he had issued opinions providing a seal of 'Islamic clerical approval' to numerous colonial policies.[65]

Ben Badis was not, however, the only lettered Muslim to raise his voice publicly on this subject. In 1893, a text appeared under the name of an author known only as "A. Tounsi," supplemented by the title "an old Algerian," though later in the text he identifies as having been an interpreter for the French military. Tounsi's open letter to the colonial government bore the title *Insecurity in Algeria: Its causes and the means to restore the security of the past*.[66] His treatise included a reproduction of his 1883 address to Chamber of Deputies, transmitted by *the Société française pour la protection des indigènes*, which foresaw how mass land expropriation would cause the starvation and immiseration, "worse than a massacre," of the Muslim population. Calling it a policy of "extermination," he wondered, "My God, must assimilation be achieved through the *refoulement* and disappearance of the Arabs?" Returning to these warnings ten years later, he observed:

> I place in the first line [of blame] the considerable expropriation of land for colonization, sequestration, and collective war indemnities inflicted after the insurrection of 1871. Starting at that moment, and by a sort of

[63] This article focuses on Muslim written responses in French, to which settler and metropolitan actors would have had access. There is almost certainly dialogue on repression within the prolific Arabic language journals that began to emerge both in *maghreb* and *mashreq* toward the end of the nineteenth century, which future scholars pursuing this topic are encouraged to explore.

[64] El Mekki Ben Badis, *Exposé des lois répressives pouvant s'appliquer aux voleurs de la campagne en Algérie* (Constantine: Marle, 1875), 4–5.

[65] For a full discussion of Ben Badis's participation in the colonial government, see Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985).

[66] A. Tounsi, *L'Insécurité en Algérie: Ses causes et les moyens de rétablir la sécurité d'autrefois* (Alger: Remordet, 1893).

> fatalism, the years that followed became worse and worse. Pests and droughts came with a lamentable monotony, each harvest compounding the miseries of the preceding one. [...] Menaced by famine, without protection against thieves, the Arab population is materially obliged to struggle for its very life. The infirm, widows, and orphans wander our cities to beg; honest men join bandits in the brush, preferring to howl with the wolves, but share in their larceny, than to be devoured by them.

In the final pages, Tounsi describes the 40 years he had spent as a functionary, including during the period of severe drought, cholera, and famine (1865–67), when he observed first-hand the misery which created the conditions for the Moqrani Revolt.[67] Tounsi's writing—nearly contemporaneous with Émile Durkheim's theses on the social (rather than genetic) roots of crime and deviance—may very well be considered a pioneering work in the sociology of crime. Although it would be an exaggeration to describe Tounsi as anti-colonial, he revealed the relationship between French land policy, dispossession, increasingly severe repressive measures, and correlated petty theft as a mode of survival. He also did something simple yet, in that moment, radical: decenter, if not totally ignore, settlers and their complaints. His text stands in stark contrast to the numerous French-colonial criminological texts cited in the preceding pages, even those of a "liberal" opinion, that attributed criminality to indigenous culture and religion, blaming colonial policy only for its excessive benevolence.[68] Tounsi's plea to the colonial government to end land sequestrations and restore the authority of Muslim judicial and administrative offices that had been eradicated after 1870 gestures toward a path not taken.

The final years of the nineteenth century were thus marked by a confluence of factors that set the stage for a new era of state terror—a frenzied settler population; strident and emboldened anti-Muslim public opinion; a metropolitan government acquiescing to settler demands for self-management; and juristic theory inflected by burgeoning race pseudoscience. When in April 1901, a group of Muslims attacked the town of Margueritte (Aïn Torki), killing a handful of settlers and forcibly "converting" others to Islam, this was nothing but the spark in a tinderbox needed to push demands for repression into terrifying action.[69] Within a year of the "Margueritte Affair," and as the defendants stood trial in Montpellier, in the south of France, the first decrees promulgating the TRIs were issued.

[67] Tounsi, *L'Insécurité en Algérie*, 18.

[68] Tounsi also singled out the assimilationist policies of Algerian Governor-General Louis Tirman, not for their soft-hearted "indigenophilia," but because they brought to an end the state's cooperation with *caïds*—locally elected officials who reported to prefects and commandants on matters including security—that had existed in some form since the Ottoman *makhzen* and into the French military period. This raises the possibility that "A. Tounsi" may have been Ali ben el-Tounsi, a *caïd* convicted of having led members of the Ouled Ali ben Daoud to join the Moqrani revolt (or else a relative, Aissa ben el Tounsi, who joined the former in armed uprising). If this is the case, Tounsi may have been speaking not only as a former French functionary and military officer but also as someone with direct experience with the repression regime.

[69] On the Margueritte Affair, see: Jennifer Session, "A Delocalized Colonial Archive. Finding Algeria in French Court Records." *Quaderni Storici* 2 (2021): 407–38.

1902: Enter the Tribunaux Répressifs Indigènes

After several failed legislative attempts to construct new repressive jurisdictions, the colonial government-general promulgated the new penal apparatus exactly according to Begey's formula, through the two decrees of March 29 and May 28, 1902, thus bypassing parliamentary debate. The decrees distinguished the TRIs by three features of what critics quickly identified as "exceptional" justice, as it was tested out in Algeria. First, they were presided over by administrative functionaries with no legal training, who spoke little or no Arabic or Tamazight (and were for that reason assisted by two assessors, one settler and one indigenous). Their second key feature was an expedited process: normal procedural rules and safeguards were eliminated. Adjudicators were expressly ordered *not* to take careful records; the process of "*instruction*" (i.e., the court's preliminary investigation into the alleged offense) was to be kept at a bare minimum, as in cases of *flagrante delicto* (crimes "caught in the act"). Court summons could be delivered not in writing, but orally—yet the punishment for failing to appear was harsh. Access to legal counsel was initially curtailed. The third feature of the TRIs was expedited punishment: sentences of less than 6 months or indemnities of less than 500 francs could not be appealed (though this was regularly circumvented, as discussed later). The first decree also created—likely on the basis of Senator Isaac's recommendation[70]—the option to convert prison terms into hard labor.[71] Lastly, of course, the only defendants who came before the TRIs were Muslims—indeed, not only Algerian subjects, but eventually also Tunisians and Moroccans.[72] In response to criticisms, an extra-parliamentary commission was struck which sought to "temper the exceptional procedure" of the TRIs and "accord to the accused some guarantees."[73] Although the subsequent decree of August 9, 1903 brought some modest improvements, it also further restricted appeals, which had to be filed within two days and did not suspend punishment.[74]

The "too hasty and too secret" mode in which the TRIs came to life caused immediate alarm.[75] The new jurisdiction found vocal opposition among a set of liberal jurists and metropolitan deputies. Larcher wrote biting critiques eviscerating the tribunals, "one of the most remarkable abuses of power [...] despite

[70] ANOM-F80/1725. Isaac, *Rapport*, 345.

[71] The new system of forced labor introduced with the TRIs regime was in addition to the earlier practices of converting fines imposed under the Indigénat into *prestations*, but differed in that convicts could now be transported anywhere in Algeria. Thanks to Jennifer Sessions for noting this.

[72] In a circular issued in May 1902, the procureur-général made a special exception to this whenever a Muslim subject was the accomplice of a citizen, in which case they would be tried together before a court of normal law, "since it would be contrary to the principles of Algerian legislation and good justice to have a European, and especially a Frenchman, judged by a tribunal with a native element." Dubois, *Les tribunaux répressifs*, 84.

[73] Gilbert Massonié, "Les Tribunaux répressifs indigènes—Les décrets de 29 mars et 28 mai, 9 aout 1903," RATLJ, 1904: 7.

[74] Massonié, "Les Tribunaux répressifs," 7. The notes of these meetings are in ANOM 12H45.

[75] Massonié, ibid., 6.

the chorus of praise sung by some elected bodies."[76] Liberal French-Algerian lawyer Gilbert Massonié fumed that the composition of the new tribunals was "as singular as it was hateful," resembling administrative rather than judicial institutions.[77] Likewise, "*indigénophile*" deputy Albin Rozet, among others, argued before the National Assembly that the repressive tribunals were just poor copies of the former disciplinary commissions—a hang-over military apparatus masquerading as a vehicle of civil justice.[78] Perhaps the most caustic retorts came from Eyssautier, who scoffed at "how bizarre, how anti-juridical, how contrary to [...] the Civil Code, national law, and the rights of man, [was] this concept of a special jurisdiction for defendants belonging to a certain religion, above all the Muslim religion, under French sovereignty."[79] Yet, Eyssautier's opinions were not typical; most liberal commentary expressed little concern that Muslims were being unjustly differentiated according to race or religion.[80] Many of these critics, most notably Larcher, either implicitly or explicitly agreed with their opponents that a more severe repressive regime was justified. Rather, the most salient debates erupted over questions of legality—indeed, over what "law" really meant in Algeria. In essence, for opponents of the new tribunals, if Algeria was France, it logically followed that TRIs were illegal. Rule by decree had its limits: decrees could not override existing laws or modify the Civil Code. As the final section will detail, below, these weaknesses of the TRIs nearly proved their undoing, in turn forcing proponents to defend—that is, invent—a harmony between racialized exceptional justice and Algeria's juridical unity with the metropole.

Despite controversy, support for the TRIs was sustained by a widespread belief in their efficacy. Within mere weeks, it was claimed, the crime wave had subsided. Triumphantly, Émile Begey asserted that

> [t]he functioning of the repressive tribunals has produced surprising results. The malfeasants have been terrified by the bearing of justice upon the arena of their exploits, by the investigation of their offenses and instant repression on the spot, and insecurity has disappeared as if by enchantment.[81]

Was this the case? In reality, the TRIs may have produced "surprising results," but not all of these can be said to confirm the deputy's optimism. Effectively, the actors who populated the new tribunals—from defendants to administrators—did not know exactly how *do* exceptional justice. And perhaps little wonder, given the economy of the decrees that instantiated them. They struggled to translate the paradox of a peacetime republican justice of racialized exception from theory into practice, and the TRIs quickly cracked under the weight of these contradictions.

[76] Émile Larcher, "La nouvelle organisation de la justice répressive indigène en Algérie," *Revue pénitentiaire* (1903): 993.

[77] Massonié, "Les Tribunaux répressifs," 7.

[78] RATLJ 1904.II: "Discussion Chambre d'interpellations—tribunaux répressifs": 5.

[79] Eyssautier, *Cours criminelles musulmanes*, 17.

[80] Ghabrial, "Reading Agamben," 240.

[81] RATLJ 1904.II: " Discussion Chambre d'interpellations—tribunaux répressifs": 9.

Whenever it was reported that a tribunal tried to function too much like a regular court, circulars were issued by the central government reminding personnel in the prefectures not to keep detailed records nor waste time on investigations. Yet, at the same time, it was important that administrative actors and their judiciary counterparts dutifully perform a pantomime of law. In 1904, the offices of the prosecutor-general and governor-general exchanged correspondence about reports that in certain cantons, "the members dress negligently, sit anywhere, and don't treat the court with any solemnity. Such practices are of a nature to diminish the prestige that the repressive tribunals must have in the eyes of the natives."[82] Magistrates had to be reminded to reserve a chamber in their courthouse for repressive hearings and mind their assessors dress properly. For their part, many magistrates refused to cede jurisdiction, creating simmering hostility and ongoing squabbles with TRI functionaries. One particular judge, Raymond Cura, presiding over the first-instance court at Blida (Alger Department), posed a continuous challenge. For years, the frustrated TRI administrator at one of Blida's subsidiary courts, a certain H. de Beaumais, wrote regularly to his prefect, claiming that since the inauguration of the TRIs, "I have been extremely surprised to receive aggressive notes from [Cura] written in the most disrespectful manner."[83] Worse, according to de Beaumais, the court at Blida continuously failed to direct cases to the TRIs, entertaining the "false testimony and alibis" of Muslim defendants and their witnesses, and allowing appeals and conditional releases.[84] Among other things, Cura had indeed cheerfully threatened de Beaumais: "You would be wise to follow [my] instructions, having greater experience than you in criminal matters, than to try to test out new theories that are barely juridical."[85]

De Beaumais was not alone in his travails administering the TRIs. Indeed, despite the express truncations restricting appeals, numerous indigenous subjects did so regardless. In September 1902, a lawyer in the town of Mascara (Oran Department) sent an urgent telegram to the governor-general alerting him that his clients, two brothers named Kada ben Ali and Hachemi Kerbouche, had been "arbitrarily arrested," charged with assaulting a European, and sentenced to 200 francs each as well as 6 months in prison. Although this was below the threshold of revisable penalties, the brothers appealed their sentence anyway: on their behalf, their lawyer had invoked a ruling of the Court of Cassation (April 10, 1898) suspending penalties for cases under review, and so the brothers were currently free. The sub-prefect of Mascara wrote the governor-general in horror, fearing that "[i]f this is allowed to set a precedent, it will suppress the particular and exceptional character of the decree of March 29, 1902, and revert us to the rules of common law from which we hoped to be freed."[86] Obligingly, the governor-general's office issued

[82] ANOM-12H45. GG to PG, January 1904.

[83] ANOM-12H45: De Beaumais to Prefect, December 22, 1903. De Beaumais to JP of Blida, January 19, 1907.

[84] De Beaumais was particularly piqued by the case against a Muslim woman, Rhati Zohra bent Mohammed, acquitted in September 1904, bemoaning her conditional release by the correctional court at Blida due to her advanced pregnancy.

[85] ANOM-12H45: PG to GG, February 2, 1904.

[86] ANOM-12H45: Prefect Oran to GG, September 18, 1902.

the administrative "remedy" requested: following a "verbal agreement with the Parquet," he "addressed a telegram to the prefects recommending to officers of the repressive tribunals to always issue an imprisonment order pre-emptively against natives being tried."[87] We do not know what became of the Kerbouche brothers or their earnest lawyer. In any case, this did little to stop appeals from being filed, sending a series of test cases (detailed in the next section) up to higher courts.

If there was any truth to Begey's claims about the "enchanting" effects of the TRIs, it might be found in the fact that Algerians were now being incarcerated with spectacular speed and in numbers never before seen. What the TRIs really did for security was authorize mass round-ups and indiscriminate arrests. As repressive tribunals processed convictions with mechanical efficiency, the Muslim-designated penitentiaries became inundated with prisoners to beyond capacity. Wardens wrote to the chiefs of police who wrote to the governor-general, complaining that they had no room left for the influx of inmates.[88] In his response of June 1902, Governor-General Révoil encouraged prefects to make greater use of Article 13 of the March 29 decree, which had created the new punishment, alongside imprisonment, of employment in "public works," on the premise that prison constituted a "rest" rather than a punishment for many of the incarcerated.[89] "Public works," he noted, should be interpreted broadly, including, among others, irrigation of canals and digging of wells and fountains, as well as agricultural labor on plantations, seed nurseries, and in public gardens.

The use of this form of punishment was consonant with the pedagogical effects that racialized exception was meant to produce. As one colonial proponent of hard labor wrote, "We must raise their moral level, teach them to respect property, and inculcate in them the idea that labor does not debase but rather ennobles them."[90] Similarly, Fernand Cécile, advocate at the court of Algiers, justified this development in hindsight: "[W]e wanted to make of [imprisonment] the most useful and moralizing [*moralisatrice*] effect: their punishment is accomplished in the sun and fresh air, on the construction sites of public works or in private enterprises."[91] Yet, functionaries evidently also needed a gentle reminder that this did not include labor that advantaged them personally. It seems this prohibition was loosened or else routinely ignored, as inmates were eventually sent to work on privately owned properties, especially vineyards,[92] and were even seen tending the gardens of local prefects.[93] When they were paid, it was typically in cigarettes.[94]

[87] ANOM-12H45: Parquet, September 20, 1902.

[88] ANOM-12H45: Commissaire de Police d'Affreville to GG, June 6, 1902; Barrouaghia Prison to Prefect, June 20, 1902.

[89] ANOM-12H45. GG to Prefects, June 24, 1902, "Exécution des peines."

[90] RATLJ 1904.II: "Discussion Chambre d'interpellations—tribunaux répressifs": 6.

[91] Cécile, *Essai sur la politique*, 194.

[92] Archives nationales de l'Algérie (ANA), Algiers, Algeria: IBA-JUS.1274—Mains d'œuvre pénitentiaire.

[93] Larcher, "Les Tribunaux répressifs," 545. Municipalities were blunt in their refusals to pay prisoners. For example, 12H45, Régistre de déliberations du conseil municipal, February 29, 1904.

[94] ANA: IBA-JUS.1274—Mains d'œuvre pénitentiaire.

1902–4: The Relegation Crisis and the "Legalization" of Exception

As the above case of the Kerbouche brothers shows, Muslim Algerians were routinely appealing convictions that fell below the allowed threshold. And they were hiring professional lawyers, though technically they were only allowed representation by a relative. Despite the exertions of executive and administrative actors, the judicial branch did not always cooperate, and appeals found their way to higher courts. On its very first public audience, on June 24, 1902, the TRI of North Algiers declared itself incompetent to rule in the case against the defendant named "Ain Zergua" Djerbi ben Abdallah, based on the argument presented by his lawyer, one Mr. Probst, that the TRIs were illegal.[95] The same tribunal was forced to declare itself incompetent to rule in any matter for which a repeat offender might be sentenced to transportation to a penal colony (*relegation*). Indeed, both such arguments—illegality and conflict with prior law—were heard in TRIs across various cantons, and sent the new jurisdiction into immediate crisis. Larcher described one such "epic-comedic" scene that unfolded in the Algiers correctional tribunal: a Muslim defendant demanded a full trial, but before his lawyer could deliver arguments on his behalf, the presiding administrators declared that the original summons had been destroyed and the dossier already transferred to another tribunal. The audience was then abruptly adjourned and the chamber vacated "so as to avoid making a ruling on the illegality of the decrees."[96]

Despite such chicanery, arguments on the illegality of the TRIs were eventually heard and upheld by the Court of Appeals in Algiers. In reviewing the case against the defendant Djelali Mohammed ben Arezgi, on December 2, 1902, the Appeals Court determined that the repressive tribunal in which he was convicted had no authority in his case. The reasoning was as follows: the decrees instituting the TRIs came into direct conflict with the 1885 Law Authorizing the Relegation of Recidivists. Of particular contention was a set of articles including: Article 2, which specified that relegation could only be pronounced by "ordinary" tribunals, to the express exclusion of "special and exceptional jurisdictions"; Article 4, which listed the offenses that could be punished with relegation, including theft, abuse of trust, outrage against public morals (sexual assault falling short of rape), habitual corruption of minors, vagrancy (having no regular employment), and the prostitution of others; and Article 20, which applied the Recidivism law to "Algeria and the colonies," in which case war tribunals were authorized to pronounce relegation.

It was in the devil of these details, and in heated conflict over their meaning, that a colonial doctrine of legal exception would be slowly worked out. In Djelali Arezgi's and a succession of other appeals, the Appeals Court ruled that the TRIs could neither pronounce relegation nor convict anyone of any of the above-mentioned crimes that may eventually lead to relegation. This was specifically due to the TRIs' exceptional nature, delineated in Article 2 of the 1885 law. Notably, although Article 20 gave war councils such authority in Algeria,

[95] ANOM-12H45: Prefect Alger to GG, July 1, 1902.
[96] Larcher, "La nouvelle organisation," 999.

the Appeals Court held that the TRIs occupied a different category, still to be defined. This is because the *conseils de guerre* had one important quality that the TRIs did not: a built-in expiration date. Although exception is by definition temporary, the repressive tribunals were clearly not, and thus they inaugurated a regime of *permanent exception*. This very contradiction was all but unfathomable to the Appeals Court, and enough in its view to nullify the TRIs' authority. The court also took the opportunity to lambast the TRIs for other affronts, including over-extension of executive power, and violation of the principles of the separation of powers and equality under the law "without distinction of origin, nation, or religion."[97]

Less than a month earlier, on November 15, 1902, the Court of Cassation in Paris had come to the same determination regarding the TRIs' conflict with the 1885 law, but the superior court chose to only partially nullify the TRIs' authority. Instead, the Cassation Court ruled that the TRIs could indeed convict individuals charged with crimes listed in Article 4 of the Recidivism law, but were prohibited from issuing sentences of relegation themselves. Indeed, the first two years of the TRIs' existence saw these two courts locked in protracted hostility over the legality of the new jurisdiction, each pointedly decrying the faulty reasoning of the other. This followed from a previous ruling, on August 28 of that year, in which the Court of Cassation had already affirmed, in general terms, the right of the colonial government of Algeria to create the TRIs by decree. As a result, judicial review of TRI appeals followed four markedly divergent doctrines: sometimes rejecting any sentencing for offenses outlined in Article 4 of the 1885 law; sometimes only rejecting relegation; sometimes allowing courts to rule in relegation-eligible cases but not allowing them to count toward eventual relegation; and sometimes allowing all of the above.

With the nature and jurisdiction of the TRIs in flux, administrative panic over their efficacy set in. Even as the prosecutor-general of Algeria was in the midst of validating the appeals decisions as circulars to be disseminated throughout the judicial system, prefects wrote urgently to the governor-general, begging for intervention and proclaiming the already perceptible success of the TRIs for ensuring the security of settlers and their property.[98] The prefect of Constantine, for instance, claimed that, should the opinion of the Court of Appeals stand, the number of cases tried before the TRIs of his communes would be reduced by 70%. "It is hoped," he wrote, that judicial review "will confirm conclusions of the Court of Cassation, rather than accept the Appeals Court's rulings." He finished by underlining his recommendation "that urgent decisions be taken to render this exceptional justice uniform and sheltered from such discussions."[99]

On cue, judicial and administrative actors hurried to the rescue of the TRIs in their moment of need, offering doctrinal interventions on the nature of exception that would, per the wishes of the prefects and their European constituents, "shelter" the TRIs from judicial incapacitation. In a sequence of

[97] ANOM-12H45: Extrait des Minutes du Greffe, Cour d'Appel d'Alger, December 18, 1902.
[98] ANOM-12H45. Prefect Constantine to GG, January 23, 1903.
[99] Ibid.

notes, the Ministère public près du simple Police d'Alger provided its recommendations for salvaging the TRIs. Like the Court of Appeals in Algiers, the writer of these notes agreed that the analogy between the TRIs and the *conseils de guerre* was "inexact," but this incongruity of purpose, if not form, justified rather than undermined the function of the TRIs. For this writer, the war tribunals were exceptional *only for Europeans*; for Muslims they were ordinary courts: "[T]o say that the repressive tribunals constitute for natives a jurisdiction of exception is to suppose that the Muslims are still litigants of another jurisdiction that constitutes for them the tribunal of common law. [...] The repressive tribunals are in matters of delinquency the *ordinary tribunals* for the Muslim natives."[100] To restate and emphasize this point: exception is fundamentally impossible for the indigène because *for the indigène there is no rule*. Legal exception, in other words, is the essential, normal condition of the racialized, colonized other.

It is worth underlining the significance of this reasoning, which typified the juridical defense of the TRIs leading to their eventual normalization. If the Court of Appeals of Algiers, as well as lawyers representing Muslim defendants in the TRIs, mounted objections both in principle and on technicality, they were out-maneuvered by a succession of decrees, rulings, and eventual legislation that, rather than attempting to bring the TRIs in line with normal law, recognized the TRIs as exceptional, ratified them as such, and extended to them some of the prerogatives of normal courts (most notably, sentencing in relegation-eligible offenses). In 1904, the reports of a parliamentary reform commission held that "the Court of Appeal of Algiers had gone too far" and had granted "inadmissable privileges to Muslim recidivists of the African race."[101] The proposed law was moved quickly through both chambers on the basis of urgency, and on March 31, 1904, the National Assembly approved a speedy modification of the 1885 Recidivism law to formally recognize and codify the exceptional jurisdiction of the TRIs. The effect was to stabilize the repressive tribunals and enable their endurance for another 27 years.[102] Dubois praised this parliamentary intervention:

> The legislator, in simply acknowledging the existence of this jurisdiction has ratified, has "made his own," the work of the executive, and the same form of argumentation that has been used to demonstrate the illegality of the native repressive tribunals may serve here to establish that they must henceforth be taken as legal. [...] *Ratihabitio mandato aequiparatur* [ratification is equal to command], as our ancestors put it. The native repressive tribunals now seem as legitimate as if they had been instituted by the legislature itself. They have recognized a *fait accompli*.[103]

In this way, the paradox of permanent exception that the Algiers Appeals Court had raised was legislatively settled by making exception into law.

[100] ANOM-12H45: Note sur l'Arret du December 18, 1902.
[101] Gilbert Massonié, *Commentaire de la loi du 31 mars 1904* (Paris: Bureaux de lois nouvelles), 18–20.
[102] ANOM-12H45: PG to GG, June 3, 1904.
[103] Dubois, *Les tribunaux répressifs*, 65–66.

The normalization of exception, which also granted authority to deport convicts, was well-timed to meet the needs of law enforcement. A report issued on May 17, 1904, by the Algiers Central Police Commission presented the case that "a strong recrudescent criminality has emerged in the native world of Algiers," prompting the reader of the report to add in the margins that "our forces have been paralyzed and our efforts annihilated by something of the occult."[104] In their view, accused "natives" were being released almost as quickly as they were apprehended, due to confusion surrounding the prerogatives of the TRIs. The prefect of Algiers wrote the governor-general confirming that these reports were "not exaggerated." The underclass of jobless colonial subjects who populated the Qasbah lived "by gambling, theft, and prostitution; [they] terrorize their coreligionists and have even begun to harass Europeans and the police."[105] He recommended the application of more severe punishments in general; but "above all, the penalty that must dominate, must be facilitated and extended, as the most effective means of repression, is the principle of relegation. [...] Nothing strikes the imagination of the native," he concluded, "like expatriation or banishment."[106]

Algiers began exporting inmates to the infamous native prison at Berrouaghia and beyond. Eventually, this system of punitive relocation was replicated across Algeria. Prisoners were shipped beyond their own cantons to perform hard labor in whatever municipalities they might be needed—in other words, mobile labor camps. In this way, the TRIs prompted the introduction in Algeria of a system akin to convict leasing in the post-Reconstruction US South[107]—in this case, making a steady supply of unfree indigenous labor available to private industry and large land-holders via the apparatus of indiscriminate arrests and mass racialized incarceration.

Conclusion

This article has explored the birth of a novel colonial instrument of exception at the turn of the twentieth century: the so-called Native Repressive Tribunals (TRIs). The TRIs were the culmination of years of colonial obsession with and knowledge-production on counterinsurgency and securitization. They carried the genetic material of the earlier Algerian military regime into the post-1870 era of both republican resurgence in France and the expansion of "normal" law under civilian rule in much of Algeria. Apologists and critics of exception at every level of government locked horns over a central dilemma: how to both structurally categorize and constitutionally justify the "special" procedures and institutions being proposed specifically for Muslim subjects under French sovereignty. The absorption of race theory into the field of colonial legal "science" enabled a reconciliation of legal universalism

[104] ANOM-12H45: Commissaire centrale, "La criminalité indigène," May 17, 1904.
[105] ANOM-12H45: Prefect Algiers to GG, "La criminalité indigène," June 8, 1904.
[106] ANOM-12H45: Ibid.
[107] Douglas Blackmon, *Slavery by another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (Duxford: Icon Books, 2012).

with legal relativism, thus providing needed epistemological support for the new penal apparatus. Legal and political opinion on the *legality* of the repressive regime was as heated as it was divided, sustaining years of acrimonious debate. A doctrine of racialized exception was invented in the unfolding of this impassioned juristic and public conversation, and achieved codified legitimacy during a period of ascendant republican ideology. The TRIs were saved—and endured—thanks to a juristic rationale applied retroactively: that for Muslim colonized subjects, exception was the rule.

This sequence of events corroborates the theses of both Foucault and later Agamben that "[t]he modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one."[108] Yet, this article has also presented the methodological case for archivally grounded analysis rooted in "dense contextualization," in Ania Loomba's words.[109] The approach here has privileged a social- and legal-historical reframing of these processes—restoring to view the colonial actors, discourses, and events through which emergency doctrines and martial law were transformed into regimes of permanent exception lodged comfortably within civil constitutional orders. In this way, this study bears greater resonance with Anthony Angie's observation that "sovereignty was constituted through colonialism," than with bodies of scholarship whose frames of reference stop at Europe's national and conceptual borders.[110] As others have argued, overcoming false dichotomies between European and colonial history serves a more intellectually honest appraisal of and reckoning with violent pasts (and presents).[111] Much as the TRIs did not work by "enchantment," the state of exception does not materialize out of the liberal-philosophical ether. Rather, they functioned only through laborious efforts to achieve the terrifying effect of arbitrary law deployed through the organs of rule-of-law governance and in the register of universal law. This approach also complicates Agamben's formulation in which, "[t]he state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept."[112] As this essay has attempted to demonstrate, exception is the "threshold or limit concept" of juridical order precisely because it at once authorizes, materializes, and confirms racial difference. Race-thinking, in other words, is what consolidates and legitimizes permanent exception as a mode of governance.

Among the many reasons to work toward what may be tentatively (and not without some irony) described as a "decolonial" history of exception, there is one more: to do otherwise erases colonized subjects, inscribing them as either passive or non-existent in these histories. Abstracted, "black-letter" constitutional histories of exception are white-washed histories. In attending to the

[108] Agamben, *State of Exception*, 5.

[109] Ania Loomba, *Colonialism/Postcolonialism* (London: Routledge, 2005).

[110] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge; Cambridge University Press, 2005).

[111] For an overview of that literature, see Ghabrial, "Introduction."

[112] Agamben, *State of Exception*, 4.

material histories of the state of exception, we discover that they were crafted in no small part by contingency and in dialectical response to colonized subjects' collective and individual acts of resistance. In contemplating the incarcerated Algerians who defiantly used the colonial apparatus against itself, one might call up the image of British citizen and former Guantánamo detainee Moazzam Begg, struggling to put pencil to paper to write out demands for access to a normal legal procedure that would eventually result in the hearing of his *habeas corpus* case by a US Federal Court.[113] In this spirit, and in insisting on exceptional law as a field of struggle, I hope this study has contributed to its demystification.

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[113] Moazzam Begg and Victoria Brittain, *Enemy Combatant: My Imprisonment at Guantanamo, Bagram, and Kandahar* (New York: The New Press, 2011).

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