

Transitional justice in Tunisia: perspectives, limits, and challenges of a politicized process

Since January 2011, after the fall of the authoritarian regime of ex-Tunisian President Ben Ali, the Tunisian governments took steps toward transitioning to a democratic process. One such step has been a transitional justice program that started with the launching of the National Dialogue in April 2012 and later progressed with the creation of the Truth and Dignity Commission whose mandate was constitutionally endorsed in 2014. The aim of the transitional justice program was to lay the foundation of a democratic process using a range of measures, from conflict resolution mechanisms to legal principles. Truth seeking, reparations, guarantees of non-recurrence, and ultimately reconciliation, are believed to put the State on the path toward the Rule of Law. However, long debates regarding the democratic transition have challenged the Tunisian transitional justice establishment, revealing the program's social justice perspectives as well as its limits. Since its creation, political parties and members of the civil society – including NGO's, victims associations and feminists – have denounced the politicization of the process. Externally, a few national and international experts, including UN members, lawyers, and social and political scientists have also highlighted this issue. These national and international critics have framed the potential politicization of the program, understood as the appropriation or exploitation of the program to promote an ideology or political group, as a challenge to transitional justice, and hence, to the democratic process. In an attempt to avoid this challenge, which puts the legitimacy of the program in question, the upholders of transitional justice have reinforced the institutional dimension of the program. Below, I will discuss the way in which the efforts to undercut politicization constitute a challenge to the democratic process. I will do so by highlighting how the transitional justice program's perspectives, its limits, and the political cases it addresses affect the recognition of political agency and access to justice for Tunisians.

Broad categories of victims and violations

After long discussions and three drafts of a legal framework for Tunisia's transitional justice process, the Tunisian Constituent Assembly finally ratified the fourth draft in December 2013. The law adopted describes the Commission mandate and powers as well as defines the status of victim and the goals of the transitional justice program. The Commission was required to include leaders from associations representing the interests of victims and legal professionals. Its members are in charge of evaluating the bases and conditions of a victim's compensation and charged with “[g]ather[ing] the data as well as track[ing], count[ing], verify[ing] and

document[ing] the violations to create the needed database, and establish[ing] a unified record of victims of violations”.¹

In order not to favor any political group, the definitions of victims and violations are broad. The law gives the Commission the important power of substantiating the categories of victims and violations and, in doing so, allows the Commission to widen the notion of human rights. Notably, Tunisian transitional justice specifically takes into account violations of economic and social rights in reference to economic crimes and financial corruption.² In line with the widening of this notion, regions which have been marginalized or suffered from systematic exclusion found a possibility to endorse the status of victim and seek reparations.³ Some 24 percent of the 50,775 files that the Commission accepted were related to violations of economic and social rights, with a large majority involving work impeachment.⁴

Another particularity of the Tunisian transitional justice, which also allows the extension of human rights, is the specific attention to integration of women in the process. To ensure woman victims are included in the program, a Women’s Commission operating transversally across other commissions was created.⁵ Furthermore, an awareness campaign was conducted from 2014 to 2015 to increase submissions of victim files by women. Even though women are still outnumbered with less than 23% of total files submitted, their narratives brought to light specific forms of violations made against them. Many of the files related to cases of violence, rape, and impeachment to study or work, linked with the application of the 1984 circular 108 that prohibited veiling. Their testimonies showed that numerous female relatives of male victims suffered violations such as harassment, income deprivation, or “forced divorce”—a type of violation that has only been noticed and recognized in Tunisia. Indeed, the large majority of woman victims who submitted a file and/or testified through public auditions, broadcasted live on national television reported story, related narratives of violations committed against their husbands or sons. These women are referred to as “indirect victims.” However, although classifying women as “indirect victim” brings to light specific violations committed

¹ Organic Law on Establishing and Organizing Transitional Justice 2013-53 of December 24, 2013 art. 39, Tunisian Ministry of Human Rights and Transitional Justice 2013.

² *Id.* at A\art.

³ Kasserine, Sidi Bouzid and Ain Drahem Governorates made this request.

⁴ The victim’s participation to the process is made through the submission of a file describing the exactions committed against them to the Truth commission; *See* Monia Ben Hamadi, *Au cœur de l’IVD : 60 ans d’histoire à reconstituer*, INKYFADA (Nov. 17, 2016), <https://inkyfada.com/2016/11/ivd-auditions-data-histoire-tunisie/>.

⁵ Six other sub-commissions have been established and are in charge, among others, of rehabilitation and arbitration.

against women, this classification also defines these women's experiences only through those of their male relatives, considered the "direct victims." This results in the framing of women's experience in terms of passive victimhood rather than lending their experiences active political value as direct victims.

The issue of politicization

One major characteristic of the Tunisian transitional justice program is the rejection and criticism it faces on the part of civil actors as well as political parties. The latter fear the program can be exploited for electoral gain or foster impunity vis-à-vis the pre-2011 regime. The question of unveiling the truth regarding the extortions imposed by Ben Ali's dictatorship has created debates that have intensified since the Islamic party of Ennahdha came to office in October 2011. They have further escalated under Beji Caïd Essebsi, of the Nidaa Tounes Party, elected President in 2014.⁶ Many have questioned the neutrality of the process. First, the creation of a Ministry of Human Rights and Transitional Justice in January 2012, which was led by Samir Dilou, a member of the Ennahdha government, fuelled accusations of manipulation from opponents of the Islamic party and parts of civil society. In this vein, a decree-law established in June 2012 rehabilitating ex-prisoners as public officers also raised questions regarding how victims deserving reparations are chosen.⁷ Later on, the impartiality of the Truth and Dignity Commission—whose members were nominated by an Assembly mainly composed of MPs from the Islamic party of Ennahdha—was questioned. Indeed, since its creation, the Commission has been the target of a smear campaign led by political parties such as Nidaa Tounes and its neutrality has been questioned by numerous activists, including feminist associations and victims themselves.

In addition to these accusations of favouritism and manipulation of the transitional process, important questions about the issue of impunity appeared in public debate. First, before the transitional law was adopted, military courts conducted the trials of Ben Ali and other prominent figures of the past regime such as ex-Minister of the Interior, Abdallah Kallel. The lack of legitimacy for these courts to conduct such trials, the light sentences pronounced, and trial *in absentia* of Ben Ali and four of his officers, left the country with a sense of impunity

⁶ The Nidaa Tounes Party is a liberal party claiming to be close to Bourguiba's political legacy. Bourguiba was the first President of the Tunisian Republic from 1956 to 1987. Many members of Nidaa Tounes held political positions under Bourguiba, and then Ben Ali's presidency.

⁷ Kora Andrieu, *Confronter le passé de la dictature en Tunisie : la loi de « Justice Transitionnelle » en question* (interview), *Observatoires des mutations politiques dans le monde arabe*, IRIS (2014).

that called into doubt both the symbolic value of the process and the guarantees of non-recurrence.⁸ The issue of impunity has also been addressed with the so-called "economic reconciliation" bill initiated by Nidaa Tounes in 2015 and adopted by Parliament in 2017. This law aims to provide amnesty for public officers and state employees for acts related to financial abuses or misuse of public funds. Although President Beji Caïd Essebsi uses the trope of reconciliation to justify the law's adoption, proponents of transitional justice consider this bill to be an affront to the process since it directly interferes with the Truth and Dignity Commission's prerogatives. A campaign called "Maneesh Msemeh" ("*I will not forgive*") led by members of Tunisian civil society was initiated in 2015 to oppose the reconciliation bill and make sure that reconciliation happens under the transitional justice framework as mentioned in the Tunisian constitution⁹.

Democratizing through legal exceptionality?

The Truth and Dignity Commission's wide understanding of the categories of victims and violations also work to undermine allegations of manipulation of the transitional justice process. While these attempts to contain the politicisation of the program give more credibility to the Truth and Dignity Commission, they are also work against democratization because they do not always consider victims and, more broadly, citizens as agents and actors of democracy.¹⁰ This paradox is all the more important considering the fact that it intervenes in the post-revolutionary moment in which citizen participation is both a framework as well as an objective. We can thus address transitional justice antagonisms by asking how a process of legal exception can help lay the foundation of a democratic Rule of Law. Indeed, the originality of transitional justice is that its process combines measures of justice, democratization, and peace-making that are more related to the standards of conflict resolution than criminal law.¹¹ Truth commissions are indeed not only « non-legal » since they lack condemnatory powers, but also « anti-legal »

⁸ See *Pour la vérité et la justice* (Apr. 25, 2014), <http://lady-justy.blogspot.fr/2014/04/pour-la-verite-et-la-justice.html> (online petition created by Tunisian advocates in 2014); *Tunisie : pour juger les crimes du passé, il faut réformer le cadre juridique*, HUMANS RIGHTS WATCH (May 3, 2012), <https://www.hrw.org/fr/news/2012/05/03/tunisie-pour-juger-les-crimes-du-passe-il-faut-reformer-le-cadre-juridique>.

⁹ Larissa Chomiak and Lana Salman, Refusing to Forgive, Tunisia's Maneesh M'semeh campaign, *in* Middle East Report 281- ACTIVISM, Vol. 46, Winter 2016, online in Middle East Research and Information Website : <http://www.merip.org/mer/mer281/refusing-forgive>

¹⁰ Kora Andrieu, Un nouveau contrat social ? La justice transitionnelle à l'épreuve des processus révolutionnaires : le cas de la Tunisie, *in* Kora Andrieu, Geoffroy Lavau, QUELLE JUSTICE POUR LES PEUPLES EN TRANSITION : DEMOCRATISER, RECONCILIER, PACIFIER 175 (Kora Andrieu & Geoffroy Lavau ed., 2014).

¹¹ Sandrine Lefranc, *La justice transitionnelle n'est pas un concept*, 53 MOUVEMENTS, 61 (2008).

since they sometimes combine the potentially contradictory principles of peace and justice.¹² Hence, the symbolic dimension of the Truth Commission's existence is in contradiction with its extended prerogatives that allow it to categorize grave violations and decide which victims' files to transfer to Public Prosecution.¹³

Furthermore, these extended powers put in question the victims' access to criminal law.¹⁴ As the number of registered victims increases, the proportion of those who are likely to receive reparations or see criminal prosecution of their cases decreases in favor of reconciliation. This issue is even more important since the Truth and Dignity Commission has accepted more than 50,000 files, some three times more than the Moroccan Truth Commission, created in 2004, which was in charge of collecting victims' testimonies after the Years of Lead (1970-1998). As Kora Andrieu explains, if this large number of files selected is considered proof of impartiality, the tendency to dissociate the types of violations from political motivations also questions the legitimate recognition of victims as political agents.¹⁵ In this perspective, the institutionalization of transitional justice has also affected civil society's contribution to the process. Indeed, even though civil society is particularly involved in supporting and accompanying victims through the process and was actively present during the national dialogue on transitional justice in 2012, it nonetheless has neither any decisional powers nor any rights of access and inspection.

Conclusion and perspectives

The Tunisian transitional justice process allows for an extension of the realm of humans rights, such as for instance with the recognition of economic and social violations. Still, its value cannot only be based on its symbolic dimension. The post-revolutionary moment is not only characterized by the competition of political legitimacies, but by the construction of political subjectivities. In this context law and Justice are being regimented in the struggles for recognition¹⁶. This moment thus requires a direct participation in democracy as well as the acceptance of the political, and sometimes ideologically targeted nature of the exactions

¹² *Id.*

¹³ Organic Law on Establishing and Organizing Transitional Justice 2013-53 of December 24, 2013 art. 42, Tunisian Ministry of Human Rights and Transitional Justice 2013.

¹⁴ Interview with Emna Sammari, lawyer and law professor at the Faculty of Juridical, Political and Social Sciences of Tunis, in Tunis, Tunisia (02-10, 2017).

¹⁵ *supra* note 13, at 213.

¹⁶ Liora Israël, *L'arme du droit*, PRESSE DE SCIENCESPO : Paris, 2004.

committed under the authoritarian regime.¹⁷ If politicization, which is inherent in the revolutionary moment, is challenging the transitional justice process in Tunisia, the process also poses questions regarding its compatibility with the construction of political and post-revolutionary subjectivities. As Jocelyne Dakhlija explains, the political injunction of the transition makes it impossible for a society to think itself as a political community in the present.¹⁸ The antagonism between risks of process exploitation, construction of political subjectivities, and the principles of applying transitional justice should force us to rethink the notion of transition by questioning the effects of its suspensive and exceptional character.

BIBLIOGRAPHIE

Andrieu Kora, « Un nouveau contrat social ? La justice transitionnelle à l'épreuve des processus révolutionnaires : le cas de la Tunisie », in Kora Andrieu, Geoffroy Lavau, *Quelle justice pour les peuples en transition*, PUPS : Paris, 2014, pp. 175-223

Andrieu Kora, « Confronter le passé de la dictature en Tunisie : la loi de Justice Transitionnelle » (interview), *Observatoires des mutations politiques dans le monde arabe*, IRIS : Paris, 2014.

Ben Hamadi Monia, « Au cœur de l'IVD : 60 d'histoire à reconstituer », *Inkyfada*, 11-07-2016, Online : <https://inkyfada.com/2016/11/ivd-auditions-data-histoire-tunisie/>

Dakhlija Jocelyne, *Peut-on penser dans la transition ?*, NACHAZ DISSONANCE, <http://nachaz.org/blog/peut-on-penser-dans-la-transition-jocelyne-dakhlija/>. (Originally from Symposium, *La Transition dans l'économie politique de la Tunisie*, University of Jendouba (Apr. 27-28, 2016)

Human Right Watch, « Tunisie : pour juger les crimes du passé, il faut réformer le cadre juridique », 3/05/2012 <https://www.hrw.org/fr/news/2012/05/03/tunisie-pour-juger-les-crimes-du-passe-il-faut-reformer-le-cadre-juridique>

Israël Liora, *L'arme du droit*, PRESSE DE SCIENCES PO : Paris, 2004

Lefranc Sandrine, « La justice transitionnelle n'est pas un concept », *Mouvements*, 1/2008 (n° 53), p. 61-69

Organic Law on Establishing and Organizing Transitional Justice of December 24 (2013-53) (Unofficial translation by the International Center for Transitional Justice)

¹⁷ Jocelyne Dakhlija, *Peut-on penser dans la transition ?*, NACHAZ DISSONANCE, <http://nachaz.org/blog/peut-on-penser-dans-la-transition-jocelyne-dakhlija/>. (Originally from Symposium, *La Transition dans l'économie politique de la Tunisie*, University of Jendouba (Apr. 27-28, 2016).)

¹⁸ *Id.*