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Challenging History: The Power of Transitional Justice in Tunisia – by Luca Urech

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On December 15th, 2013, Tunisia's National Constituent Assembly adopted comprehensive Transitional Justice legislation aimed at dealing with the country's past of human rights abuses. The new legislation contrasts with ad-hoc transitional justice measures adopted by the first two caretaker governments that followed the Ben-Ali regime. Drawing upon a legal analysis of the new Transitional Justice law, this article suggests that it embarks the country on to a truth-seeking journey that has the potential to rewrite the modern history of Tunisia.

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1. Introduction

On December 15th, 2013, Tunisia's Assemblée Nationale Constituante (National Constituent Assembly – NCA) adopted comprehensive Transitional Justice legislation aimed at dealing with the country's past of human rights abuses.[2] The "historic passage"[3] of the bill after almost one year of discussions and idling marks another highlights in Tunisia's transition to democracy that started when protests ousted autocrat Zine El Abidine Ben Ali from power in early 2011.

Tunisia's Transitional Justice Law is the result of a systematic, and holistic approach to transitional justice, which has been characteristic of the approach that democratically elected government of October 2011 adopted. This approach contrasts with ad-hoc transitional justice measures adopted by the first two caretaker governments that followed the Ben-Ali regime. While these earlier measures mostly focused on addressing harms suffered by protesters during the weeks of the revolution, the personal, temporal, and material scope of the new legislation is much broader and the objectives pursued more ambitious.

Drawing upon a legal analysis of the new Transitional Justice law, this article suggests that the new Transitional Justice Law embarks the country on to a truth-seeking journey that has the potential to rewrite the modern history of Tunisia. The transitional justice process that the new legislation initiates could thus challenge the narrative of the secular identity, which the authoritarian leaders Habib Bourguiba and Ben Ali depicted as one of the cornerstones of the Tunisian State since its independence in 1956.

The article proceeds as follows: Section two describes how the tensions between secular and Islamist forces have shaped Tunisian politics ever since the independence movement against French colonial rule was consolidated in the 1930s. For the secular forces prevailing in this struggle, Islamist movements – alongside political dissidents – became the main target of governmental repression under the Bourguiba and Ben Ali regimes. While the relationship between the State and Islam continued to be the most contested issue in Tunisian politics,[4] the Jasmine Revolution, however, took place mostly outside of it, having socioeconomic discontent at its heart. Somehow as a side effect, the revolution thus also marked the final point of violent oppression of Islamist movements. Section three then addresses the transitional justice mechanisms that Tunisian governments, following Ben Ali's fall, have implemented. It first outlines the ad-hoc measures that the two caretaker governments took in the immediate aftermath of the revolution. Juxtaposing these ad-hoc measures with the 2013 Transitional Justice Law, it shows that the latter proposes to initiate a much more systematic and powerful transitional justice process. This process will also address the repression against Islamist Movements in Tunisia and thus potentially has important repercussions for the Islamist-secular dichotomy in contemporary Tunisian politics.

2. From Authoritarianism and Repression to the Jasmine Revolution (1956-2011)



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2.1. The Struggle against Colonial Rule and the Victory of Secular Forces

Two strong currents existed within the Tunisian independence movement that formed in the 1930s under the banner of the Neo-Doustour Party. Each one represented different and ultimately incompatible worldviews, united only through the shared aim of ending decades of French rule in the protectorate. Habib Bourguiba, a Sorbonne graduate, spearheaded the secular forces within Neo-Doustur. Drawing upon his Western education, Bourguiba was fascinated by the French ideals of secularism, rationalism and modernism and dreamed of leading Tunisia towards secular modernization.^[5] Ben Yusuf, the party's secretary-general, represented a more Islamist current within the movement, leaning strongly towards the nascent pan-Arabism of Egypt's leader, Gamal AbdelEgyt under Nasser, and instead, was working closely with Islamic religious leaders and schools in the country.

At the peak of the independence campaign in 1955, which culminated in a violent guerilla campaign fought by thousands of fellagha fighters, a definitive break emerged between the two leader figures. Bourguiba prevailed and ousted Ben Yusuf into exile, along with his followers. With French military resources stretched across the entire Maghreb region, in particular in Algeria, the former protectorate obtained its independence on March 20, 1956; Bourguiba was the man of that moment.^[6]

2.2. The Bourguiba Regime (1956-1987)

Even after independence, Pro-Yusufist fellagha groups continued fighting against the new government, pushing the young Republic to the verge of civil war. This powerfully reminded Bourguiba that other, more religious, forces also had an influence in the struggle for independence. Not yet possessing a strong army of his own, Bourguiba called on the French army to help, which defeated the last fellagha fighters in a few weeks.^[7]

Concerned with the internal fragmentation of the Neo-Doustur party, Bourguiba then proceeded to establish a High Court to try the surviving pro-Yusufist activists. Captured Yusufists "suffered miserable fates in Tunisian jails unless they were shot on the spot or hanged in a public square."^[8] Ben Yusuf himself was assassinated in exile two years later. The quelling of the Yusufist movement resulted in an estimated 900 deaths, double the number of Tunisians killed in the anti-colonial struggle against France.^[9]

Free from any political resistance, both internally and externally, Bourguiba held a position of unchecked power. In the words of the historian Kenneth Perkins, "although the monarchy had been abolished soon after independence, in all but title Bourguiba became the bey [monarch]."^[10] This accumulation of power allowed him to move forward in implementing his vision of a modern Tunisia. Sometimes referred to as the "Arab Atatürk," Bourguiba expedited social and economic reform, relying on modern education as the reform movement's main instrument.^[11] While Tunisia remained close to France and the West, domestically "the president and his party saw themselves as agents of secular modernization and social development."^[12]

In Bourguiba's view, establishing state control over wide aspects of religion was indispensable to modernize the country. To that end, Bourguiba tried to depict himself not only as the country's political leader, but also as a Muslim reformer – without success.^[13] The Islam that Bourguiba envisioned for Tunisia was "an Islam stripped of its institutional basis, challenged in almost the totality of its tradition and deprived by the state of any autonomy in the classroom or even the mosque."^[14]

Consequently, the new secular judiciary absorbed the traditional shari'a courts. The educational system was reformed and secularized, with the Zaituna mosque, a traditional Islamic school and mosque, being relegated to a faculty of the newly founded University of Tunis.^[15] Perhaps most importantly, Bourguiba enacted the Code of Personal Status, described by Perkins as "the most innovative legal reform in the Muslim world since the abolition of the shari'a in Turkey."^[16] The Code outlawed polygamy, established a minimum age for marriage and strengthened women's rights, for example, by granting them the right to divorce.^[17]

Not surprisingly, traditional and religious circles within Tunisia's society were not at ease with the president's secular initiatives. Rashid al-Ghannushi, founder of the Islamist Ennahda movement, recalls: "We used to feel like strangers in our own country. We have been educated as Muslims and as Arabs, while we could see the country totally molded in the French cultural identity."^[18] But Bourguiba went even further. He discouraged the wearing of the veil and traditional dresses and advocated against the Muslim fast during the month of Ramadan, which he deemed incompatible with the economic progress that he sought. Statements such as "if the Prophet were alive, he would not give you what I have given

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you” outraged religious leaders.[19]

Against this backdrop, popular anger increased and riots swelled, but “religious discontent was [still] too diffuse and disorganized to threaten Bourguiba’s political position.”[20] This situation radically changed throughout the 1970s, when the disastrous economic situation and Bourguiba’s increasing authoritarianism—he had declared himself “president for life” in 1974—reinforced popular discontent as well as regime violence.[21] Political opposition at first came mostly from leftist student and labor organizations, but the government largely dissolved that protest through a series of bloody crackdowns in 1971, 1972 and 1978.[22]

Ghannushi’s Islamist movement sought to fill the political power vacuum left by the dismantled groups and he consequently expanded his religious and social organization into a political movement. Coupled with the Iranian Revolution in 1979, this further fueled the regime’s concern with Islamist movements.

[23] By the 1980s, Ghannushi’s movement was so strong that it was confident enough to apply for legal recognition as a political party, now under the name of the Islamic Tendency Movement (MTI).[24]

The confrontational course further escalated in the 1980s. In 1981, violence broke out, with Islamic militants attacking cafés and hotels. Bourguiba immediately reacted by arresting sixty-one MTI members, outlawing Islamic publications, and closely supervising mosques.[25] Although the MTI was “only loosely connected to violence, enduring regime suppression and persecution contributed to the split of some of its members and the creation of more violent splinter groups.”[26]

After new riots broke out in 1984, the regime jailed thousands of Islamists.[27] In 1987, Islamists bombed four hotels in Sousse and Monastir, an attack which secular forces until today attribute to the MTI movement, despite its denial of responsibility.[28] Tunisia was once again on the brink of civil war. The authorities arrested Ghannushi and hundreds of other Ennahda members, trying them for “fomenting a plot to overthrow the government and create an Islamic state.”[29] Ghannushi and other leaders were sentenced to death, and scores of other MTI members received lengthy prison sentences.

Ben Ali, a security and intelligence officer “with little vision,” whom Bourguiba promoted to be his prime minister, was at the time orchestrating the crackdown on the Islamist movement.[30] Ben Ali feared, however, that implementing capital punishment against Ghannushi and others would fuel the conflict, but he failed to convince Bourguiba, whose “physical deterioration and erratic behavior” increasingly worsened.[31] To stop Bourguiba, Ben Ali invoked a constitutional provision, according to which the prime minister succeeds the president in case of the latter’s incapacity. In doing so, Ben Ali staged a bloodless coup d’état against his former mentor.[32]

2.3. The Ben Ali Regime (1987 to 2011)

Seeking to ease the tensions with the Islamist opposition, Ben Ali freed political prisoners, including Ghannushi, to incorporate parts of the opposition into what he designated pluralisme contrôlé (controlled pluralism).[33] Ben Ali initially enjoyed broad support and was even welcomed as “Tunisia’s savior.”[34] The MTI, in another bid to obtain legal recognition as a party, changed its name to Ennahda (Renaissance), the name it continues to hold today, but was once again refused official recognition.[35] Ennahda members nevertheless participated as independent candidates in the election and received the most votes of any opposition party. Their victory marked the end of Ben Ali’s brief honeymoon period with Ennahda.[36] An incident in which Islamists burned an office of the ruling party in Tunis provided the regime with a pretext to launch a full-scale assault on the movement.[37]

Arbitrary arrests, passport seizures and incidents of torture steadily increased throughout this decade, as “Tunisia became a police state in the 1990s.”[38] The regime now treated Ennahda as a threat to national security and the terms “Islamists” and “terrorists” became interchangeable within regime circles.[39] In 1992, the regime again staged trials against Ennahda members, many of the whom were already convicted in the 1987 processes. Human Rights Watch at the time reported that despite the new regime’s public commitment to human rights standards, “the rights of the defendants were violated in numerous and sometimes flagrant ways, and accusations of systematic torture in police custody hung over the proceedings.”[40] Some of the detainees died in custody.[41]

The persecution of human rights activists and members of the secular political opposition rapidly followed the crackdown on Islamist forces, but “the overwhelming majority of persons convicted for politically motivated offenses in Tunisia” were suspected Islamists.[42] Crushing the Ennahda movement, however, also propelled the “emergence of more radical interpretations of Islam in Tunisia.”[43] It was thus in Ben Ali’s prison, where the first Tunisian jihadist groups were born.[44]

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In addition, with the appearance of Islamic extremist groups in the Maghreb region, Tunisia after September 11, 2001 became an arena of the so-called “global war on terror.” In 2002, a bomb blast at a historic synagogue on the tourist island of Djerba killed 22 people, among them many German tourists.

[45] In late 2006 and early 2007, government forces clashed with Tunisian Salafist Jihadists, leading to the death of 12 jihadists and “the arrests of hundreds of persons.”[46]

The regime reacted by enacting comprehensive counterterrorism legislation, which from 2003 on became the legal tool for the regime’s oppression of Islamist movements as well as other dissidents. The shift in the global security environment after 2001 allowed Ben Ali to frame the crackdown on political dissidents as a fight against terrorists, shielding him from international criticism and granting him access to military aid, especially from the US. He was also granted the status of a privileged ally in the war on terror. A 2009 Amnesty International report stated “the authorities continue to use their ‘security and counter-terrorism’ concerns to justify arrests and other repression of Islamists, and political dissent in general [...] and arrests and harassment of alleged Islamist youth are common.”[47] The report describes further abuses, including “arbitrary arrests, incommunicado detention and enforced disappearances; torture and other ill-treatment; unfair trials, including before military courts; and abuses in prisons as well as abuses against Tunisian nationals forcibly returned from abroad.”[48]

2.4. Tunisia’s Jasmine Revolution and the End of the Ancien Régime

While the relationship between the State and Islam had been the most contested political issue in Tunisia, accounting for the bulk of the political violence that haunted the North African nation since its independence, it was other forces that surprisingly triggered the Jasmine Revolution’s sudden eruption in late 2010. On 17 December 2010, Mohammed Bouazizi, a 26-year old unemployed fruit vendor set himself on fire in Sidi Bouzid. Earlier, authorities had arbitrarily confiscated his goods and harassed him after he filed a complaint at a local police station.[49] By the time of Mr. Bouazizi’s death on January 4, protests that had started over his treatment by the authorities in Sidi Bouzid “had spread to cities throughout the country.”[50]

The young street vendor’s fate and his act of desperation became a symbol for the protests, directed against poor living standards, corruption, and the lack of political freedom and basic human rights. After all, the ancien régime, (which is how Tunisians today sometimes refer to the regimes of Bourguiba and Ben Ali), had not only shown all “the features of a suffocating dictatorship, but also the characteristics of a mafia-controlled society riddled with massive corruption and human rights abuses.”[51] Accordingly, the protesters “drew upon a wide range of grievances,”[52] but economic and social rights were at the core of the revolutionary demands.[53]

What made the protests that toppled Ben Ali so unpredictable, and at the same time powerful, was that they were the result of “self-mobilization of ordinary people,” outside of any partisan or social structure. [54] The revolution was a popular movement in the proper sense of the term, involving “new networks ... among the youth and the working people.”[55] Importantly, the Islamist Ennahda movement “did not play an important role in the December 2010 rebellion that drove Ben Ali from power.”[56]

The regime reacted violently, but the crackdown on the protests only fueled the protests. On January 14, 2011, Ben Ali saw no other option than to flee the country with his entourage. His prime minister, Mohamed Ghannouchi, who initially declared himself president, also had to step down after less than two weeks in power. To appease the outraged people, the president of parliament, Beji Caid el Sebsi, formed an interim government constituted mostly of technocrats.[57]

The interim government was in charge of guiding the country towards its first free elections in October 2011. In this electoral process the Tunisian people appointed the members of the NCA to draft the new Constitution.[58] Ennahda, leveraging its organizational and financial structures as well as its credibility, captured over 40 percent of the votes and thus leadership of the government. Ennahda subsequently formed a “troika” coalition with two secular parties.[59]

Prior to his fall, Ben Ali’s crackdown on the peaceful protesters had resulted in over 300 deaths and 2000 injured persons.[60] Moreover, decades of authoritarian rule by Bourguiba and Ben Ali left behind scores of victims of arbitrary arrest, torture and, in some cases, enforced disappearance. This legacy of human rights abuses called for the establishment of transitional justice mechanisms that shed light on the dark periods of Tunisia’s history while fostering reconciliation in the Post-Ben Ali Tunisia.

3. Transitional Justice in Tunisia

The political context at different stages of the Tunisian transition towards democracy shaped the type and

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characteristics of transitional justice mechanisms adopted by the post-Ben Ali governments. Accordingly, the various measures taken can broadly be categorized into two phases. In the first wave, the Tunisian caretaker government responded to the loudest cries of the revolution—i.e. social and economic rights and compensation for the revolution’s victims—by creating various, often improvised ad-hoc bodies. A second period, following the first free election in October 2011 and lasting until today, is characterized by a much more structured and comprehensive transitional justice approach, culminating in the adoption of the Transitional Justice Law at the end of 2013. The Law’s scope also embraces repression against Islamist movements since Tunisia’s independence and thereby touches upon the controversial relationship between Islam and the State.

3.1. Ad-hoc Transitional Justice

After Ben Ali’s flight from the country, popular political demands chiefly asked the authorities to tackle what was perceived as the “most pressing transitional justice dilemmas.”^[61] This included, on the one hand, creating economic and social rights and fighting corruption, two of the main popular grievances during the Revolution.^[62] On the other hand, there were claims for compensations for the many victims among the protesters and their families. Thus, initial efforts focused on the recovery and security of the state’s financial assets, kick starting the political reform process, including purging former regime figures from administration and political life, as well as criminal accountability and reparation for the abuses committed against protesters during the 28 days of the revolution.^[63] The question of religious violence and the relationship between the State and Islam, therefore, gave way to demands reuniting all discontented sectors of society.

Purging the Administration and the Judiciary in the Aftermath of the Revolution

Following the measures aimed at safeguarding the nation’s financial assets, the government quickly started a campaign to purge individuals associated with the Ben Ali regime from the administration and the judiciary.^[64] Large numbers of civil servants and political appointees, as well as a number of high-level attorney generals and judges, were dismissed. These proceedings provoked some criticism, revealing that those measures were probably taken in a hasty and uncoordinated manner. Notably, the critique included the lack of due process and the fact that the independence of the judiciary was circumvented.^[65]

In the political arena, a court decision dissolved the former ruling party, the Rassemblement Constitutionnel Démocratique (Democratic Constitutional Rally – DCR). The participation of former DCR members and office holders under the Bourguiba and Ben Ali in politics continues to constitute a divisive issue in post-revolution Tunisia.^[66]

The creation of the three ad-hoc commissions

Soon after these prominent dismissals, the government established three commissions; two of them were charged with conducting fact-finding investigations into corruption and the abuses committed against protesters during the revolution, and the third was tasked with guiding the political reform process. Ironically, it was Ben Ali himself who had proposed the creation of those commissions before he was ousted, in an unsuccessful move to appease the protesters. The commissions immediately commenced their work on January 20, 2011, “despite an absence of any legislation to regulate them or define their remit, frames of reference and working methods, or indeed to define their relationships with the Government and the judiciary.”^[67] Similar to the vetting process, the improvised nature of the commissions resulted in complications for their work.

The first commission, the “National Investigation Commission on Bribery and Corruption,” was charged with investigating corruption within the Ben-Ali regime.^[68] The commission proved very efficient at the outset. For example, in the month of its creation it confiscated \$27 million and two kilograms of narcotics from Ben Ali’s residence.^[69] However, the commission also quickly clashed with the judiciary that concurrently initiated investigations into major corruption cases. The commission was subsequently accused of interfering in the work of the judiciary, of disregarding evidential procedures, and ultimately jeopardizing the court trials.^[70] Due to its clash with the judiciary, the work of the commission was suspended for several weeks. Later, the death of the commission’s president again paralyzed the work of the commission for months.^[71] Despite all the difficulties, the commission ultimately accomplished “the transfer of more than four hundred cases to the public prosecutor after review of more than five thousand.”^[72]

The second commission, the “National Investigation Commission on the Abuses Committed from the

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Period Starting on December 17, 2011,” was charged with the investigation of human rights abuses committed from December 17, 2010, the beginning of the revolution.[73] To this end, it was empowered to establish individual responsibility for abuses committed and to recommend financial compensation for the victims of these abuses or other reparations. The commission issued its final report in April 2012, identifying 132 deaths and 1,452 injured up to January 14, 2011, the day Ben Ali left the country.[74] Building upon to the work of the commission, the government enacted legislation providing for financial compensation as well as free health care and public transportation for the victims of the uprising.

The third commission was the “Superior Commission for Political Reform, “which eventually merged into the “High Instance for the Realization of the Objectives of the Revolution, the Political Reform and the Democratic Transition.” Its mandate was to make recommendations to the government “with the aim of reforming the basic legislation which governs and regulates public life.”[75] Importantly, this commission established a set of criteria, establishing which persons should be barred from participating in the NCA elections in October 2011. The three categories of persons excluded from the elections were ultimately integrated into the new Electoral Law and encompassed: (1) DCR members with responsibilities within the Ben Ali government; (2) individuals holding responsibilities within the DCR; and (3) individuals who publicly called for Ben Ali to seek an additional term in office.[76] The commission then established a list of persons allegedly falling under the scope of this provision, but “the Commission failed to notify individuals whose name appeared on this list or establish a process through which an individual could challenge their exclusion.”[77] Again, this raises important questions with regard to due process and the rights of the accused persons, who were deprived of any remedy to challenge their inclusion in the list. The elections held in October 2011 marked the end of the High Instance’s work.

Amnesty Law

Concurrently with the creation of the commissions, the interim government adopted an amnesty law aimed at freeing all political prisoners.[78] Again, this measure was taken barely one month after Ben Ali’s flight. The law granted amnesty to all prisoners sentenced for a list of crimes before 14 January 2011. The crimes falling under the scope of the law were notorious for being used by the regime to jail political dissidents. This was particularly true for the counterterrorism legislation mentioned earlier.[79] As a result of the amnesty law, more than 500 prisoners were freed.[80]

The amnesty was a fast and efficient response to one of the key demands of protesters, which was to release political prisoners and prisoners of conscious. However, the law was criticized later for two important reasons. First, the temporal scope of the amnesty excluded political prisoners who were sentenced in the turmoil following the crackdown of Ben Ali and until the adoption of the law, from January 14 to February 19, 2011. Second, the law was also criticized for a material scope that was too broad and encompassed crimes that tribunals usually applied to convict common criminals.[81] Salafist leaders also benefited from the amnesty, propelling the recent emergence of Salafi movements in Tunisia. [82] In sum, similar to the commissions, the amnesty law seems to have been conceptualized with little diligence, leading to undesirable outcomes.

Trials

Rapidly after the revolution, the judiciary started investigating higher officials of the former regime, initially on corruption charges and, later, for the abuses committed against protesters. The list of indicted persons included leading figures of the regime. Military courts were put in charge of the trials, which in some instances took place in absentia of the accused. This led to the convictions of Ben Ali and his wife, among others. Ben Ali was sentenced first in 2011 for embezzlement of public funds (resulting in a 35-year prison sentence) and later in 2012, when he was additionally held responsible for deaths during the protests (resulting in a sentence for life imprisonment). The military courts also convicted the former minister of interior, who was in office during the uprising, as well as 20 other senior officers, for intentional homicide committed during the protests.[83]

While the trials seemed to have respected basic fair trial rights, conducting trials in absentia is not ideal in a transitional justice context. The prohibition of in absentia trials is not “considered a fundamental human right in the criminal context”, but such provisions nevertheless exist in more than 20 nations.[84] Due process concerns are not the only reasons that make the accused’s presence at the trial desirable. For justice to be done and perceived locally, it would have been important to try Ben Ali on Tunisian soil. The lack of cooperation from the Saudi Arabian authorities, where Ben Ali and his entourage found political asylum, is particularly regrettable in this regard.

Several other factors also hampered the impact of the trials. First, questions should be raised as to why

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the military judiciary conducted the trials. It seems plausible that this institution was perceived as less entangled with Ben Ali's system of corruption and nepotism and, therefore, better suited to conduct an impartial trial. Indeed, Ben Ali's repression apparatus relied on police security forces, rather than the army. However, had the trial been successfully concluded by a reformed civil judiciary, this would have contributed to establishing trust in the post-revolutionary institutions. Furthermore, human rights groups criticized the trials for their "failure to identify the direct perpetrators of the killings [and] an inadequate legal framework for prosecuting senior officers for command responsibility for crimes that their subordinates committed."^[85] In sum, the trials at this early stage of the transition did not meet international standards, probably due to a lack of capacity and time. Also, they did not aim at addressing the more

3.2. The Transitional Justice Law: A Systematic Approach to Transitional Justice

Ennahda's triumph in the first free and democratic elections held in the country, in October 2011, further boosted the importance of transitional justice in the political agenda of Tunisia. According to transitional justice scholar Lamont and Boujneh, this is because "Ennahdha embraced transitional justice as a means to symbolically break with the past" and as a tool to "eradicate the roots of dictatorship."^[86] During the dictatorship, MTI, Ennahda's predecessor, members believed:

that their movement's exclusion from the political process represented only the most recent manifestation of a systematic campaign, dating from before independence, to push Tunisian Islam to the sidelines. In their view, the rejection of Islamic values in favor of imported ideologies, all of which had failed to create a just society, had been a grave error. Restoring hope to the Tunisian people required a state committed to encouraging and assisting them to cultivate their deep, but long neglected, Islamic roots.^[87]

The nation's founding myth framed the nation's modern history exclusively in terms of Bourguiba and the Neo-Dustur party, downplaying and ignoring other forces and events, such as the more Islamist orientated Yussufist current. School history books commonly linked the name Bourguiba to the term "the Nation."^[88] Given Ennahda's own history of repression and fight for political Islam, the transitional justice process on which Tunisia embarked constitutes an opportunity for the party to "challenge the modernist founding myth of the Tunisian state."^[89]

The election thus marked the start of a second phase of transitional justice, which resulted in the elaboration of a comprehensive Transitional Justice Law at the beginning of 2013 and was not adopted until December 2013, when a political deadlock opposing Ennahda and the opposition party was resolved. The mechanisms that the law proposes, this section argues, are powerful enough to set the country on a path of truth seeking that has the potential to challenge mainstream Tunisian historical narratives and collective memory.

The process leading to the Transitional Justice Law's elaboration

After the elections and the establishment of the NCA, Tunisia adopted an interim constitution that explicitly charged the NCA with the adoption of legislation on transitional justice.^[90] Soon after, the new government created the Ministry of Human Rights and Transitional Justice, the first of this kind to this author's knowledge. The Ministry then kicked off a broad consultation process, seeing its role, according to Ennahda Minister Samir Dilou, as "coordinating and facilitating communication between the different stakeholders."^[91] After the Ministry organized a large conference in Tunis with the participation of important international actors, it created a Technical Commission charged with supervising the national dialogue leading to a draft version of the proposed bill.^[92]

The Ministry did so, Lamont and Boujneh suggest, "in order to allay concerns that the Ennahdha-led coalition government, or the Troika, was agenda-setting transitional justice debates."^[93] These authors also praised the Technical Commission as an "independent body outside the Ministry."^[94] In reality, however, the relevant decree established the Commission "au sein du ministère" (within the Ministry) and the commission members are appointed by the Ministry.^[95] While there is significant civil society representation within the commission, both the Chairperson and the Rapporteur of the Commission are representatives of the Ministry.^[96] Accused of politicizing transitional justice process, the responsible Ministry felt compelled to release a statement, in which he asserted that the Ministry's role in the process did not go "beyond logistical support."^[97] Establishing the Technical Commission outside of the Ministry as a genuinely independent institution would have avoided these problems and added to the credibility of the process.

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The Technical Commission soon started a national consultation process, which it implemented through six regional consultative commissions. The consultations covered the totality of the Tunisian territory, and the commissions engaged in a broad consultation process with victims, civil society representatives and other stakeholders. The Technical Commission was also responsible for the drafting process leading to the draft law, and to this end, engaged with over 20 NGOs.^[98]

The draft legislation was submitted to the NCA in January 2013 but became a victim of the political conflict between Ennahda and the opposition that Tunisia faced since July 2013.^[99] The political stalemate also delayed the adoption of the Transitional Justice Law. However, a political compromise reached in December 2013,^[100] paved the way for the bill's final adoption on December 15th, 2013. The comprehensive legislation comprises 70 provisions that provide for the establishment of a series of mechanisms aimed at tackling Tunisia's past of human rights violations.

The mechanisms proposed by the Transitional Justice Law

The first article of the Transitional Law outlines the ambitious goal of the Tunisian transitional justice process. This process, the law states, shall identify and remedy past human rights abuses in order to foster national reconciliation, preserve and archive the collective memory, install guarantees of non-repetition and "allow the transition from a dictatorship to a democratic system based on human rights". The provision also outlines the four instruments that the legislation employs in order to achieve these objectives. These are broadly: truth-seeking, holding perpetrators accountable, and reparations for the victims of past human rights abuses.^[101]

Chapter II of the Law makes clear that the right to truth is guaranteed.^[102] During the truth-seeking process, the law stipulates, particular attention should be given to the fate of the killed and disappeared persons; as well as to the adverse impact that human rights violations had on the elderly, women, children, disabled, sick people, and other vulnerable groups.^[103]

The law then turns to the question of criminal accountability, which Chapter III assigns to the Judiciary.^[104] This Chapter provides for the establishment of special chambers composed of judges that are considered politically independent and received specific training in the field of transitional justice.^[105] These chambers have jurisdiction over "serious human rights violations," including inter alia intentional homicide, rape and any other forms of sexual violence, torture, enforced disappearance, and capital punishment judgments not rendered in accordance with recognized fair trial standards.^[106] No statute of limitations applies to serious human rights violations.^[107]

Interestingly, the Law also grants the chambers jurisdictions over a number of crimes that traditional justice frameworks do not usually address. These crimes are electoral fraud, corruption, the embezzlement of public funds and forced migration for political mistakes.^[108] They chambers have competence to adjudicate cases relating to these crimes that it receives by the Truth Commission, which the Law creates.

The financially and administratively autonomous Truth Commission is called "Instance de la vérité et de la dignité" (Truth and Dignity Commission, hereinafter "the Commission").^[109] The Commission will be composed of 15 members, appointed by the NCA.^[110] The Law establishes a host of criteria that candidates to the Commission have to fulfill, aimed at ensuring the integrity and impartiality of the commissioners.^[111] It notably excludes persons that have held political office or officials that have held positions within the administration.^[112]

The Commission's mandate is manifold, and it goes beyond the traditional functions of a truth commission, according to truth commission expert Priscilla Hayner's definition.^[113] The mandate includes tasks as broad as establishing the fate of the disappeared, establishing a comprehensive list of victims, establishing the institutions and persons responsible for the violations that have been committed, and establishing a victim reparations program.^[114] The Commission is also charged with running an Arbitration Chamber that can be seized by victims and the accused.^[115]

To exercise its broad mandate, the Law equips the Commission with extensive powers. The Commission is notably empowered to hold public and private auditions, to subpoena witnesses, access the files of the Judiciary, search private and public premises, and take measures to protect witnesses and victims.^[116]

The Commission is also mandated to transfer all files concerning serious human rights violations to the Public Ministry for prosecution.^[117] As mentioned above, the Commission can also transmit files related to a number of other crimes, including corruption and electoral fraud. Indeed, the Commission might be best equipped to identify these crimes, even if they are not traditionally addressed in transitional justice

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processes.

However, the codified relationship between the Commission and the Judiciary might negatively impact the Commission's work. If the Commission will transfer self-incriminating evidence gained from testimonies to the judiciary, this might have a chilling effect on the participation of witnesses before the Commission, due to fear of being involved in subsequent criminal proceedings.^[118]

As mentioned, the Law further establishes an arbitration mechanism within the Commission.^[119] This is an innovative mechanism, which has the potential to disburden the judiciary and prevent courts from being overloaded with relatively minor cases, including corruption cases. Underlying the integration of the corruption issue is also the more recent argument that truth commissions are more apt to reveal the structural aspects of corruption than courtroom trials.^[120] However, considering the already broad mandate, this function risks overloading the Commission with an arbitration cases that risk subtracting much of the scarce resources available. Being one of first countries to cope with issues of corruption within a transitional justice framework, it remains to be seen whether the Commission will be able to strike a balance between its various tasks.

The activities of the Commission are limited to four years, beginning from the moment it takes up its work.^[121] This period can be extended to five years by decision of the legislature.^[122] Compared to other truth commissions, this is a rather long period. According to Hayner, every truth commission in operation for longer than three years "risks losing momentum, focus, and political and public attention."^[123] On the other hand, the Commission has a very broad and challenging mandate, certainly requiring more time than traditional Truth Commissions in other contexts. It is also commendable that the Law accords the Commission a six-month period to implement its preparatory program and begin operations.^[124]

Temporal, personal and material scope of the Commission

The Commission's temporal scope comprises the period from July 1st, 1955 until the publication of the Law, which occurred on December 24, 2013.^[125] This time scope does not apply to the prosecutorial activities within the judiciary, which take place independent from the Commission's work. The definition of the time scope is of fundamental importance in the political context of Tunisia. By empowering the Commission to look back at past events dating from the last years of the independence struggle, the Technical Commission opted for a broad temporal scope, encompassing both the Bourguiba and the Ali regime.

Interestingly, the starting date has been pushed back almost one year from an earlier draft of the Law, which set March 20, 1956 as the limit of the Commission's temporal scope. Analyzed through the lenses of the Islamist vs. secular dichotomy, this means that the Commission will also be able to address some of the harm that the nationalist movement under Bourguiba suffered during the independence struggle. On the other hand, the Commission will be able to investigate the repression of Islam and Islamist movement from the birth of the Tunisian state. This means that the Commission could look at the way in which Bourguiba relegated the role of Islam in the Tunisian state and built up the repression apparatus, which he used against many of the individuals who today are in power as members of the Ennahda party. The Law thus presents a framework that potentially allows for a truth-seeking exercise that challenges the modernist founding myth of the Tunisian state.^[126]

The personal scope of the Commission's mandate encompasses, on the perpetrator side, state as well as non-state agents. State actors include both official organs of the state and groups or individuals acting on behalf of the states, even *ultra vires*.^[127] Organized non-state groups also fall under the scope of the law,^[128] which means that the Commission can potentially look into cases of terrorism, for example, the 1987 Sousse and Monastir bombings, the 2002 Djerba bombing, the 2002 attack on the US Embassy^[129] or even the more recent political assassinations of leftist politicians Chokri Belaid and Mohamed Brahmi in 2013.^[130]

On the victim's side, the personal scope includes anyone who suffered damage resulting from a violation as defined above, be it a physical person, a group, or a legal entity.^[131] This explicitly also includes family members, as well as anyone who incurred damage while helping a victim or preventing an assault on a victim.^[132] The latter category holds the potential to also embrace human rights defenders or victims' associations, who were oppressed under the ancien régime. Interestingly, the Law even includes entire regions that suffered marginalization in its definition of victims.^[133] This feature without doubt aims at taking account the systematic neglect that the regime showed in regard to many regions, which as a consequence suffered economic underdevelopment.

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The material scope of the Commission's work covers "serious or organized human rights abuses."^[134] Interestingly, the threshold for human rights abuses committed by non-state organized groups is a higher, as it requires the abuse to be both serious and organized.^[135] Consequently, the violations committed by a non-state group must be somehow systematic to fall under the scope of the Law and sporadic acts would not reach the required threshold.

The material scope of the Law is limited to violations of human rights law and does not include international humanitarian law. Lamont and Boujneh observe that Tunisia "did not experience a state of armed conflict, as observed in Libya and Syria." This is certainly true when looking at the uprising leading to the end of the regime, which was largely non-violent. Taking into account that the Law's temporal scope includes events going back as early as March 1956, it is, however, at least plausible that during the time of independence, there existed an internal armed conflict between the state and the French troop acting upon invitation by Bourguiba on the one hand and the Yousuffist fellagha guerillas on the other hand. ^[136] Should the Commission or the Special Chambers seek to address these events, it could find itself in a position where the application of international human rights law is challenged on non-retroactivity grounds. In such a scenario, the application of the 1947 Geneva Conventions could have potentially filled the legal void.

4. Conclusions

The history of repression in modern Tunisia is in large parts a history of clashing interests between secular and Islamist forces. For decades, Islamist movements – alongside labor unions, human right defenders and student organizations – were the main targets of violent governmental repression, first under Bourguiba and later under Ben Ali. The notorious security forces arbitrarily arrested thousands of Islamists, perceived or real, and many of them were subjected to torture and long-term solitary confinement. In 2011, however, the Jasmine Revolution toppled Ben Ali from power, and with more than 130 deaths and scores of injured protesters, constituted a last peak in the history of violence committed by the ancien régime.

The post-revolution Tunisian governments reacted with a series of transitional justice measures that were aimed at addressing the various political demands expressed by the masses. In the first phase, most of the mechanisms were directed to deal with abuses committed during the period of the revolution and corruption. As such, they addressed only the tip of the iceberg of the Ben Ali system, and did not address the much more profound political, historical, and legal systems of repression that underpinned the ancien régime. Furthermore, the measures implemented lacked coherence and planning. As a Tunisian legal scholar put it at the time: "What is missing at this stage is the pursuit of a clear path which would effectively and systematically establish a system of transitional justice: a clear strategy in this respect has thus far been lacking."^[137]

The ad-hoc measures nevertheless reassured protesters that January 14, 2011 constituted a clear rupture with authoritarian rule and demonstrated the interim government's willingness to take firm action in order to hold the former regime figures accountable. Maybe most importantly, through these ad-hoc measures, transitional justice became an important part of political discourse, thereby paving the way for a more comprehensive transitional justice strategy.

The first free and democratic elections in October 2011 propelled the country into a second phase of transitional justice. For the victorious Ennahda party, transitional justice constitutes an instrument to not only break with Tunisia's authoritarian past, but to also challenge the nation's secular identity and founding myth.

The recently adopted Transitional Justice Law leads to the establishment of a Truth Commission with broad powers and provides criminal accountability for past abuses through trials in domestic courts. With the temporal scope of the Law encompassing events since 1955, the transitional justice framework outlined by the Law is indeed conducive to a reexamination of the Tunisian historical narrative as it relates to secular independence and the state's identity.

Ultimately, decades of violent oppression of Islamic tradition and political organizing achieved nothing resembling an end to the tension between Islamist and secular forces in Tunisia. The truth-seeking process, upon which the Commission of Truth and Dignity will hopefully soon embark, provides an ideal opportunity to strike a better balance between the two ends of the spectrum. However, increasing polarization within Tunisian politics and recent accusations of politicization of the transitional justice process also highlight the dangers of such a process, namely that it could further aggravate the secular-religious polarization in Tunisia. The responsibility on the commissioners who will soon be appointed to

the Truth Commission is therefore significant. It is in their hand to make the transitional justice process a unifying, rather than divisive enterprise that will positively contribute to Tunisia's democratic transition.

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