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# Transitional Justice in Tunisia

Implementation and Challenges

A Minor Field Study

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# Summary

In the end 2010 uprisings in Tunisia led to the fall of the regime of Ben Ali who had governed Tunisia since 1987. After the fall of the government request regarding how to handle the past in form of a transitional justice process was made, mainly from civil society. In December 2013 a law on transitional justice was adopted that defines the period that the transitional justice process is aiming on from 1955 until 2013. In terms of truth seeking and criminal proceedings the law is regulating the establishment of a Truth and Dignity Commission and specialized chambers.

This study was conducted with the aim of investigating the so far implementation of, and the challenges for, the legal measures Tunisia has been taking focusing on truth seeking and criminal proceedings. This has been done by a field study in Tunis during two months in the spring of 2015. The field study was partly financed by a Minor Field Study scholarship from the Swedish government agency Sida. The field study contained interviews with stakeholders from national civil society organisations, international organisations, commissionaires in the Truth and Dignity Commission as well as observations on events concerning transitional justice. Additional sources have been transitional justice literature, reports, news articles and legal texts.

The process is quite new and so far the Truth and Dignity Commission has been established and it has started to work and to receive files from victims. The specialized chambers have so far not been established and there are still questions regarding the composition and how to elect judges for them.

Furthermore the study found that among stakeholders in the transitional justice process there a lot of disagreements both regarding the law on transitional justice and on the Truth and Dignity Commission. Among the stakeholders there are also a schism between the ones that represents secular organisations and the ones that represent islamistic organisations. This schism expresses itself partly in terms of disagreements on the law, which crimes should be included but also the periodical mandate of the transitional justice process. Certain fractions of the civil society want to redraft the law while others rather see a redrafting as adventuring the entire process. Additionally, the study found a general concern among stakeholders that the new government elected in 2014 would not support the process.

The implementation of the transitional justice measures has begun even though there are still questions to be answered. There are several challenges for the on-going process; apart from the schism within the civil society there are more general problems within the Tunisian society, mainly economic challenges and security problems. Everyone involved in the process is though aware of those challenges and a lot of work is done aiming on overcoming those obstacles.

# Sammanfattning

I slutet av 2010 ledde upplopp i Tunisien till att Ben Ali-regimen som hade styrt Tunisien sedan 1987 föll. Efter regimen fall gjordes efterfrågningar, till stor del från civilsamhället, angående hur man skulle hantera det förflutna i form av en process av övergångsrättvisa (transitional justice). I december 2013 antogs en lag om övergångsrättvisa. Lagen definierade perioden som skulle ingå i processen med början 1955 till 2013. Beträffande sanningssökande mekanismer och rättegångar reglerar lagen upprättande av en Sannings- och värdighets kommission (Truth and Dignity Commission) samt specialiserade kamrar (specialized chambers).

Denna uppsats primära syfte är att undersöka implementeringen av, och framtida utmaningar för, de legala åtgärder tagna av Tunisien med ett fokus på sanningssökande och rättegångar. Detta har gjorts i formen av en fältstudie i Tunisien under två månader under våren 2015. Fältstudien var delvis finansierad av ett Minor Field Study stipendium från SIDA. Fältstudien bestod av intervjuer med intressenter från nationella civilsamhällsorganisationer, internationella organisationer och kommissionärer från Sannings- och värdighetskommissionen men även observationer av evenemang rörande övergångsrättvisa. Andra källor som har använts har varit akademisk litteratur om övergångsrättvisa, rapporter, nyhetsartiklar och lagtexter.

Processen är fortfarande ny i Tunisien och hittills har Sanning- och värdighetskommissionen etablerats. De specialiserade kamrarna har ännu inte etablerats och det återstår frågor angående komponeringen av dessa och hur domare ska välja till dem.

Studien har vidare funnit att bland intressenter i processen av övergångsrättvisa råder oenighet både gällande lagen om övergångsrättvisa och Sannings- och värdighetskommissionen. Bland intressenterna finns en schism mellan de som representerar sekulära organisationer och de som representerar islamistiska organisationer, vilken uttrycks delvis i oenighet om lagen, dels gällande vilka brott som ska ingå i processen men även perioden som processen behandlar. Delar av civilsamhället vill omformulera hela lagen medan andra ser en sådan manöver som ett hot mot hela processen. Vidare har det en generell oro bland intressenter att den nya regeringen som valdes i december 2014 inte kommer att stödja processen.

Implementeringen av åtgärderna av övergångsrättvisa har påbörjats men det finns fortfarande frågor som behöver besvaras. Det finns flera utmaningar för den pågående processen, jämte schismen i civilsamhället finns mer generella problem i det tunisiska samhället, främst ekonomiska- och säkerhetsproblem. Alla involverade i processen är väl medvetna om detta och mycket arbete görs för att klara dessa utmaningar.

# Preface

This thesis would not have been possible without the aid from many people, which have helped and supported me during the entire process. I want to thank all of them collectively.

I would initially like to thank my supervisor Matilda Arvidsson, who has been very supportive and encouraging as well as have given me the most valuable inputs during the whole process.

I also would like to thank Salwa El Gantri who supported my initial idea of writing about transitional justice in Tunisia and who helped me in getting an initial understanding in the process.

Furthermore I would like to thank Naveena Kottoor who apart from being a friend and a valuable discussion partner has aided me with as well practical issues as putting me in contact with people.

I am grateful to Moemen Jlassi and H ela Boujnah for valuable insights in the process as well as in the Tunisian society and not the least always keeping me updated on the process and introducing me to people as well as arranging interviews.

I want to give a special thank you to all the people that I have interviewed, for sharing their knowledge, insights and time. Without them this thesis would not have been possible and I hope I do them justice.

I am also grateful that the Swedish Cooperation Development Agency, SIDA, and the Institution for Cultural Anthropology and Ethnology at Uppsala University for giving me the opportunity to carry out a Minor Field Study.

Malm , 26 May 2015

Linn Leonardsson

# Abbreviations

ATFD	Tunisian Association of Democratic Women (Association Tunisienne des Femmes Democratique)
ECCC	Extraordinary Chambers in the Courts of Cambodia
FTDES	Tunisian Forum for Social and Economic Rights(Forum Tunsien pour les Droits Economiques et Sociaux)
LTDH	Tunisian League for Human Rights (Ligue Tunissienne de Droit de l’Homme)
NCA	National Constituting Assembly
NGO	Non-Governmental Organisation
ICTJ	International Center of Transitional Justice
ICC	International Criminal Court
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
OCTT	Organisation Agains Torture in Tunisia (Organisation Contre la Torture en Tunisie)
OHCHR	United Nations Office of the High Commissioner of Human Rights
UGET	General Union of Tunisia Students (Union générale des étudiants de Tunisie)
UN	United Nations
UNDP	United Nations Development Program

# 1 Introduction

## 1.1 Background

The Arab spring had its starting point on the 17<sup>th</sup> of December, 2010, in Tunisia when Mohammed Bouazizi, a fruit salesman from Sidi Bouzid, a city in the center of Tunisia, burned himself to death as a protest against the situation in the country. This led to an uprising by the Tunisian people and the fall of the Zine El Abidine Ben Ali government, which had been in power since 1987. Those uprisings are within the Tunisian population referred to as the ‘Tunisian Revolution’. It is this term, which I in the following will use when referring to the events taken place in Tunisia.

This revolution led to the fall of the Ben Ali government, in January 2011, and to a new era in Tunisian history, with great support from the international community Tunisia has started a phase of transition towards full democracy.

This transition contains several processes and among those there is the process of transitional justice that this study is focusing on. Transitional justice is a concept closely related to human rights and international criminal law<sup>1</sup> since one of it aims is to deal with past abuses by ensuring the victims as well as the entire society the right to truth and as has been more and more underlined to fight impunity.<sup>2</sup> This can be done in several ways though two of the measures that can be used, and are used in the Tunisian process are criminal proceedings and Truth Commissions.<sup>3</sup>

In this study, if not otherwise indicated, by transitional justice I mean

the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to

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<sup>1</sup> See for example Teitel, Ruti G (2000), *Transitional Justice*, New York, Oxford University Press, Freidman, Andrew B, *Transitional Justice and Local Ownership: A Framework of the Protection of Human Rights*, *Akron Law Review*, Vol 46, no 3, pp 737f.

<sup>2</sup> See for example United Nations, General Assembly, A/HRC/12/18 *Annual report of the united nations high commissioner for human rights and reports of the office of the high commissioner and the secretary general, analytical study in human rights and transitional justice*. 6 august 2009 p. 17, Fisher & Stewart, *Transitional Justice and the Arab Spring* 2014 p. 4, Hayner, Priscilla B., *Unspeakable truths: transitional justice and the challenge of truth commissions*, 2. ed., Routledge, London, 2011 p. 105.

<sup>3</sup> United Nations, Economic and social council E/CN.4/2005/102/Add.1, *Promotion and protection of Human Rights, Impunity, Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentliche, principles 2 and 4, Teitel, Ruti, G 2014, *Human Rights In Transition: Transitional Justice Genealogy*, n.p.: Oxford University Press, Oxford Scholarship Online, 2015 et passim.

ensure accountability, serve justice and achieve reconciliation.<sup>4</sup>

The notion itself is complex and sometimes contradictory to the way of regarding justice and the rule of law in times of peace.<sup>5</sup>

In Tunisia the democratic transition took its start with a general election of a National Constituting Assembly which drafted and adopted a new constitution, adopted a law on Transitional Justice established a Truth and Dignity Committee and held a free democratic election. In many ways Tunisia is the one successful example of a democratic outcome of the Arab-spring.<sup>6</sup> However, the process is still on going and there are still several obstacles to overcome in the work of establishing a fully democratic state.

One of the current processes is the implementation of *the Organic Law on Transitional Justice* (from now on referred to in this thesis as the law on transitional justice) and the work of the Truth and Dignity Commission established the by this law. This is a process that requires time and by the time of the writing of this thesis the process far from finished. Concerns have been raised about the implementation of the law and that the process of transitional justice will not, for example, meet the state obligations regarding impunity.<sup>7</sup>

## 1.2 Purpose and research question

The aim of this thesis is to trace where the transitional justice process in Tunisia is currently at and which challenges lies ahead with a focus on the de facto implementation of the efforts regarding truth finding and prosecution taken by the state. This since the country now is in a time where the legislative measures for the process has been taken, a new constitution has been adopted and likewise a law on transitional justice, *The organic law on establishing and organizing Transitional Justice*<sup>8</sup> and furthermore has a Truth and Dignity Commission been established.

The questions this thesis is aiming to answer are the following:

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<sup>4</sup> Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004/616. This definition is often used in the transitional justice literature.

<sup>5</sup> See: Teitel, Ruti G. (2000). *Transitional justice*. New York: Oxford University Press, Teitel, Ruti G. (2014). *Globalizing Transitional justice, contemporary essays*. New York: Oxford University Press.

<sup>6</sup> Ex. <http://www.ui.se/blog/uibloggen/2014/10/24/tunisien-enda-ljuspunkten-i-mena-regionen.aspx> 2015-01-24 and speech by Navi Pillay upon the establishment of the Truth and dignity Commission, available at <https://www.youtube.com/watch?v=wS2qICbW8o4> 2015-02-27.

<sup>7</sup> <http://www.asf.be/blog/2014/01/14/transitional-justice-in-tunisia-on-the-retreat/> 2015-01-18.

<sup>8</sup> *Loi organique relative à l'instauration de la justice transitionnelle et à son organisation*.



*How is Tunisia implementing the measures set out in the law on transitional justice regarding truth seeking and prosecution? How is the Tunisian process shaped in comparison to other experiences and transitional justice theory? What successful accomplishments can be seen, and which concerns can be pointed out within the Tunisian process?*

It is important to point out that Tunisia's path towards a fully democratic society is faced by other challenges than the legal challenges that this study is focusing on. Tunisia is a country, which faces big problems concerning its economic development, unemployment among its citizens and corruption. Those kinds of issues will not be addressed within this thesis since the thesis will rather focus on the implementation of the measures taken mainly through the law on transitional justice.

Furthermore, the judicial sector is under reform and as well the state as the civil society and international organizations are working with this issue. This work is of course of highest importance for Tunisian transition but falls outside the direct aim of this theses and I will therefore not go any deeper into this.

### **1.3 Method and material**

To get a picture of the situation in Tunisia as well as an overview of the notion of transitional justice a literature review has been made including academic articles, books and law reports. This has been followed by an analysis of the legal measures taken by Tunisia, with a focus on the law on transitional justice. For the analysis of the law a version of the law in French has been used also in conjunction with an unofficial translation of the law which has been made by the International Center for Transitional Justice, which is an international non governmental organisation specialised in providing technical expertise and knowledge on Transitional Justice<sup>9</sup>.

For the main part of the study, which is aiming at answering the question of the implementation of the measures taken, the material used consists of data collected during a field study, which took place in Tunisia during eight weeks in the spring 2015. During the field study sixteen semi-structured interviews<sup>1011</sup> were conducted as well as five observations.<sup>12</sup> I will return to the method of these interviews and observations below, when discussing the method of grounded theory and methodological choices in in chapter 1.4 and 1.5.

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<sup>9</sup> <https://www.ictj.org/about>.

<sup>10</sup> I will in the below develop what I mean with semi-structured interviews.

<sup>11</sup> A list of all the interviews can be found in appendix I. All persons interviewed have agreed on being named and cited in the study.

<sup>12</sup> A list of all observations can be found in appendix II.

The interviews have been held with several different stakeholders<sup>13</sup> including representatives from international organisations: the ICTJ, UNDP and medRight; civil society: Association for Justice and Reconciliation, Organisation Contre Torture en Tunisie, Observatoire Tunisienne pour l'Indépendance de magistrat, Ligue Tunisienne de Droit de l'Homme, Réseau Tunisien pour la Justice Transitionnelle, Association Tunisienne des Femmes Démocratique Jeunes Tunisiennes et Tunisiens Pour la Justice Transitionnelle; as well as from the state: the Ministry of Justice as well as the independent Truth and Dignity Commission. All interviews have been performed either in English or in French.

To get a broader picture of the thoughts on transitional justice among the Tunisian population a group of non-stake holders has been chosen with whom I have held informal conversations. This group of non-stakeholders was chosen amongst law students, this in order to have a group not directly involved in the process but still with some knowledge about the legal aspects of transitional justice. The group contained of in total sixteen law students from the Faculté des Sciences Juridiques, Politiques et Sociales de Tunis. The students were chosen on a random basis in order to have representatives that studied in different years and the conversations was held one on one or in pairs. In order for the students to talk freely I have let them be anonymous.

The observations has contained a four day long training of Tunisian judges provided by the International Bar Association in Garmmath between the 16<sup>th</sup> of February until the 19<sup>th</sup> of February with participating judges from all over the country<sup>14</sup> as well as several events on Transitional Justice mainly for stakeholders in order to present research or to discuss the on-going process. Those events contained a book release for the book *Revolution Tunisienne et défis sécuritaire* (Tunisian Revolution and security challenges) by the Tunisian think-tank le Labo Démocratique which was an open event and contained presentations and panel discussions with among others Mohamed Salah Ben Aissa, minister of justice, Rafik Chelly, secretary of the state of security affairs, Farah Hached president of Labo' Démocratique.<sup>15</sup> An event organized on the 7<sup>th</sup> of March 2015, by the Truth and Dignity Commission in order to promote Womens' participation. This was a closed event and the participators were members of the Truth and Dignity Commission as well as representatives from civil society organisations<sup>16</sup>. An open event organised by the College of Europe together with IRMC on the topic. The challenges in the democratic transition and with several round table discussions with participants such as Shafik Sarsar, from the independent instance for the elections, Fadhel Moussa from the Constituent National assembly, Sihem

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<sup>13</sup> In this study I am using the term stakeholder as an organisation that is a part of, or as a part of its activity is participating in the transitional justice process. Furthermore, I am also using the term civil society. The terms are somewhat overlapping since many stakeholders come from the civil society. While using civil society I am aiming on a wider group of organisations and not only those participating in the transitional justice process.

<sup>14</sup> 16th-19th of February, Remada Plaza Hotel, Garmmath.

<sup>15</sup> 27th of February 2015 3pm-5pm National Library, Tunis.

<sup>16</sup> 7th of March 2015, 9 am – 1 pm, Truth and Dignity Commission, Montplasilir, Tunis.

Bensedrine, president of the Truth and Dignity Committée, Bochra Bel Hadj Hamida from Nidaa Tunis.<sup>17</sup> The study also contains observations from one event on the World Economic Social Forum, which was organised by Comité de Vigilance pour la Démocratie en Tunisie, Enda Ecopop and AFD International under the name ‘What transitional justice for Tunisia?’<sup>18</sup>.

The data collected during the field study mainly focus on the debate on transitional justice in the society and the stakeholders. The process of collecting the data as well as the analyses has been based upon grounded theory methodology.

### 1.3.1 Grounded theory

The method of grounded theory is often attributed to two American scholars, Barney Glaser and Anselm Strauss. Grounded theory, as founded by Glaser and Strauss, means that “theory was derived from the data, systematically gathered and analysed through the research process.”<sup>19</sup> As I will come back to below my use of grounded theory will not result in the development of a theory. Instead I have used the methodology in order to analyse the data.

In grounded theory the data collected is what is developing the theory, by analysing the data that the researcher has gathered and by then letting the theory emerge through this data. According to Strauss and Corbin “Grounded theories because they are drawn from data, are likely to offer insight, enhance understanding, and provide a meaningful guide to action.”<sup>20</sup>

The use of grounded theory has in various cases been used to study transitional justice, for example Lydia Apori-Nkasah is using the method in order to study the coexistence of a truth commission and specialised criminal courts in Sierra Leone.<sup>21</sup> The same has been done in “Women and Transitional Justice, the experience of Women as participants” edited by Lisa Yarwood which, as the title indicates, is focusing on the participations of women in transitional justice. In the book several scholars are using grounded theory to study experiences of transitional justice.<sup>22</sup> Furthermore Tricia Olsen, Leigh Payne and Andrew Reiter are using grounded theory in

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<sup>17</sup> 17th of March 2015 10 am – 5 pm, Hotel Les Ambassadeurs, Tunis.

<sup>18</sup> 26th of March, 9 am-11 am, University of Tunis El Manar, Tunis.

<sup>19</sup> Strauss, Anselm L. & Corbin, Juliet M. (1998). Basics of qualitative research: techniques and procedures for developing grounded theory p. 12.

<sup>20</sup> Strauss, Anselm L. & Corbin, Juliet M. (1998). p. 12.

<sup>21</sup> Apori, Nksah, Lydia (2008) Transitional Justice in Post Conflict context, the Case of Sierra Leone's Dual Accountability Mechanisms, Walden University. Et passim.

<sup>22</sup> Yarwood, Lisa. (red.) (2013). Women and transitional justice: the experience of women as participants. London: Routledge p.4.

their book “Transitional Justice in Balance, Comparing processes, Weighing efficacy”.<sup>23</sup>

The later explains the use of grounded theory in the following way: “this book uses results from empirical evidence to build theory around transitional justice. We examine which factors, besides expectations of success, lead countries to adopt certain mechanism rather than others”.<sup>24</sup> And Yarwood expresses that the choice of methodology provides “unique insight into the experiences of women in the context of transitional justice”.<sup>25</sup> This is also a reason to use grounded theory while studying transitional justice, to by letting the data speak for itself find what is actually going on in the processes, which measures that has been successful in a certain context and discover patterns of challenges or accomplishments in transitional justice processes.

When using grounded theory as a research method the means of collection of data is unlimited. This means that grounded theory is generally very open to methods such as field observations, informal conversations, qualitative interviews and the gathering and analysis of documents. Furthermore this indicates that grounded theory has elements both of qualitative and quantitative methods.<sup>26</sup>

Since the approach in grounded theory is very open towards the data the methodology has been described in the following way:

the researcher is required to enter the worlds of those under study in order to observe the subject’s environment and the interactions and interpretations that occur. The researcher engaged in a symbolic interaction is expected to interpret actions, transcend rich description and develop a theory, which incorporates concept of “self, language, social setting and social object.”<sup>27</sup>

For this reasons, in order to obtain my results a field study has been of utter importance. The data has been collected in the field, surrounded by the current debate in Tunisia, involving those who I have identified as stakeholders in the process of transitional justice in Tunisia, as well as ordinary Tunisian citizens.

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<sup>23</sup> Olsen, Tricia D., Payne, Leigh A. & Reiter, Andrew G. (2010). *Transitional justice in balance: comparing processes, weighing efficacy*. Washington, DC: U.S. Institute of Peace. Et passim.

<sup>24</sup> Olsen, Tricia D., Payne, Leigh A. & Reiter, Andrew G. (2010).. p. 12.

<sup>25</sup> Yarwood, Lisa. (red.) (2013) p.3.

<sup>26</sup> Flick, Uwe (red.) (2014). The SAGE handbook of qualitative data analysis [Elektronisk resurs]. P. 155.

<sup>27</sup> Goulding, Christina. (2002). Grounded theory [Elektronisk resurs]: a practical guide for management, business and market researchers. London: SAGEp. 39.

Since the original founding of the method the views on how to implement grounded theory has taken somewhat different directions. The two founders have, in this vein, taken somewhat different approaches to it. For Glaser the core of the method lies in two questions; “What is the chief concern or problem of the people in the substantive area, and what accounts for the most variation in processing the problem. And secondly, what category or what property of what category does this indicate?”. He means that the approach which Strass and Corbin defends, which includes asking the material more questions and make more comparisons, will take the analyst away from what is really going on.<sup>28</sup>

In my analyses of the collected data I have chosen to use an approach corresponding to the one of Glaser, even though I have not the least when it comes to the collection of data also used the methodology supported by Strauss and Corbin. Regarding the data Strauss and Corbin have a very inclusive approach to what can be used, something which the following quotations show:

In speaking about qualitative analyses, we are referring not to the quantifying of qualitative data but rather to a nonmathematical process of interpretation, carried out for the purpose of discovering concepts and relationships in raw data and then organizing these into a theoretical explanatory scheme. Data might consist of interviews and observations but also might include documents, films or videotapes.<sup>29</sup>

In my study I have been focusing on the already mentioned qualitative interviews and observations to discover common concepts as well as different approaches towards the transitional justice process in Tunisia. Strauss and Corbin suggest that one technique for maintaining objectivity towards the topic of research is to “obtain multiple viewpoints of an event”. This can be done either by interviewing different and varied actors or by studying the same event in different ways such as by interviews, observations and written reports.<sup>30</sup> In this thesis the material studied contains all of these techniques.

When using grounded theory during the collection of data the researcher conduct coding of the data in order to explore the data, but also in order to understand what further data might be missing and needs to be collected.<sup>31</sup> The coding of the data contains several steps; the first one mentioned above is called open coding (or initial coding) and is followed by focused coding and theoretical coding. Those steps are focusing on analysing the data and

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<sup>28</sup> Glaser, Barney G. (1992). *Basics of grounded theory analysis: emergence vs forcing*. Mill Valley, Calif.: Sociology Press p. 4.

<sup>29</sup> Strauss, Anselm L. & Corbin, Juliet M. (1998). p. 11.

<sup>30</sup> Strauss, Anselm L. & Corbin, Juliet M. (1998). p. 44.

<sup>31</sup> Flick, Uwe (red.) (2014). p. 156.

find the most frequent “codes” within the data, which are then used to develop the theory, or in the case of this study to arrive in a deeper description of the situation in Tunisia<sup>32</sup>

Glaser describes the core of the analysis of the data in the following way, which is an approach that I have, to the greatest extent possible, employed when analysing the data collected for the study:

The requisite conceptual skills for doing grounded theory are to absorb the data as data to be able to step back and distance oneself from it, and then to abstractly conceptualize the data<sup>33</sup>

The original concept for grounded theory is as previously mentioned the development of a new theory, though Strauss and Corbin do mean that the methodology of grounded theory can be used for different causes, either for the researcher to develop a new theory or rather to use the methodology to make a deeper description. In this thesis the aim of using grounded theory is the later.<sup>34</sup>

This way of using grounded theory, as a methodological tool rather than to develop a theory, can also be seen in previously mentioned studies on transitional justice in Sierra Leone by Lydia Apori-Nkasah and on Women and Transitional Justice by Lisa Yarwood.<sup>35</sup>

The reason for the choice of grounded theory as a method of analysing the data is the possibility to see structures and patterns, which one might not be able to see by an ordinary qualitative analyses.

## **1.4 Definitions, delimitations and methodological choices**

Transitional justice is a broad and complex notion, which contains several both judicial and non-judicial mechanisms.<sup>36</sup> To address all measures that appear under its umbrella would therefore be an impossible task within the format of this study. The introduction to theories on transitional justice is therefore compressed.

Further, the aim of this thesis is the implementation of the measures taken by Tunisia and focus lies on the experience within the country and not on comparison with other transitional justice experiences. It follows that I have

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<sup>32</sup> Flick, Uwe (red.) (2014). p. 156. f.

<sup>33</sup> Glaser, Barney G. (1992). P. 11.

<sup>34</sup> Strauss, Anselm L. & Corbin, Juliet M. (1998). p. 8f.

<sup>35</sup> Apori, Nksah, Lydia (2008). p. 86, Yarwood, Lisa. (red.) (2013). p.3f.

<sup>36</sup> Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010, p. 3.

chosen to carry out my field study in Tunisia, and write specifically on that situation. I will not make an overview of other experiences except when it is beneficiary for understanding the Tunisian process.

This study is focusing upon the criminal proceedings and truth-seeking mechanism, therefore other measures within the notion of transitional justice, which also appears within the law on transitional justice in Tunisia, aiming at for example institutional reforms in order to fight corruption are left out from the thesis.

Furthermore one of the aims with transitional justice is reparation of victims. Since the process in Tunisia is still in an early phase there is still no general regulation concerning the reparation for victims. There is an on-going discussion but since it does not directly concern the truth finding and neither the criminal procedures this will be left out from the study.

The field study has been carried out during 8 weeks in the spring 2015. I have chosen those 8 weeks regarding that the Truth and Dignity Commission, which will be further introduced in the following, had been established and had started to receive complaints from victims who now wants to establish the truth which means that the truth and dignity commission during the field study had been starting its work with its task of finding the truth.

The political landscape in Tunisia is very assorted and even though measures are given to find agreements and collaborate the visions about the future Tunisia differs widely. I will touch upon those differences mainly since those fractions have different views upon the transitional justice process. Since this is not a thesis upon Tunisian politics wherefore I will not go to any deeper depth in that matter and the programs and opinions of the different fractions will be very fragmented.

For the field study a sampling procedure had to be made in order to chose whom to interview, and what observations that needed to be done in order to provide the information needed to address the research question.<sup>37</sup>

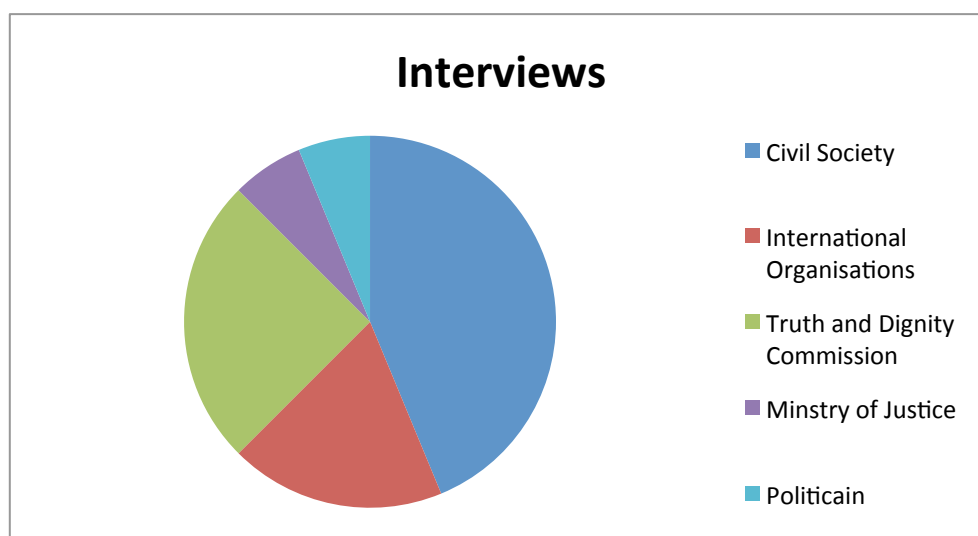
Since the interviews and observations are focusing on the implementation of the law they have been taken out in Tunis, the capital of Tunisia, where so far a majority of the work is being done. There is an on going work by the Truth and Dignity Committee to establish regional offices, a work that still has not been fulfilled wherefore the work from the state actors in this time is to an great extent based in Tunis. Moreover the interviews has been focused on people working with the Transitional Justice process, because of this I have not interviewed anyone in the capacity of being a victim, this since the thesis is not focusing on the victims experiences.

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<sup>37</sup> Creswell, John W (2007) *Designing and Conducting Mixed Method Research*, Sage Publicaitons, London? p. 112.

Furthermore the interviews and observations have been chosen to get a diverse picture of the process by meeting people representing various different organisations with different approaches to transitional justice as well as different ideologies. This selection has been done in order to understand the discussion going on, the different perspectives and different expectations from different groups in the society. The persons interviewed have mainly been people de facto working with the process in different capacities.

A majority of the interviews was held with representatives from the civil society, and the following diagram shows the distribution of the interviews whereof seven interviews with representatives from the Tunisian civil society, three interviews from international organisations, four interviews with commissioners from the Truth, one representative from the Ministry of Justice and one former member of the parliament:



The method for the interviews has been, as already mentioned, semi-structured. According to Russel Bernhard this is the best method of interviewing when the researcher has only one chance to interview someone. This in order to be sure to cover all important themes for the interview by basing the interview on an interview guide but at the same time have the flexibility of an unstructured interview.<sup>38</sup>

Regarding the observations, they have been chosen with the aim of observing events which have different audiences, such as closed events only for civil society organisations working with the process and events open to the public as well as different topics, though all related to the transitional justice process.

<sup>38</sup> Bernard, H. Russell (2006). *Research methods in anthropology: qualitative and quantitative approaches*. 4. ed. Lanham, MD: AltaMira Press p. 211.



Additionally, the official documents used have been limited to those that is available in English or French. Most official documents and all laws that has been of relevance for my study is available in French.

## **1.5 Dispostion**

The thesis begins with an introduction to transitional justice theories, their development and current discussions. This in order to give the reader a short introduction to what transitional justice contains, what the current discussion on transitional justice is, as well as to set up the concept of transitional justice within the framework of Human Rights law. This section aims at giving a theoretical background of the notion on transitional justice that will then be linked to the process in Tunisia.

Secondly, there is an introduction to the situation in Tunisia, putting the revolution and the transitional justice process in a historical and political context. Both the historical and the political introduction to Tunisia are exceedingly compressed.

This is followed by an introduction to the legal measures in the transitional justice process taken so far in Tunisia with a focus on the law on transitional justice, and the parts important for the Tunisian process. This part is also linked to the discussion on transitional justice to put the Tunisian process in a context of transitional justice theory.

To this will follow the main part of this study, the part that is focusing on the implementation of the measures taken by Tunisia and this is the part, that will answer the research question for the thesis. This part is to a great extent based on the field study including the views of different stakeholders upon the on-going process. Since the Tunisian Truth and Dignity Commission has just started its work and the specialised chambers have not yet been elected the focus while lay on the work and the views on the Truth and Dignity Commission. This chapter will also contain a section regarding the views within the civil society regarding the Tunisian law on Transitional Justice.

The last part is a conclusion where will conclude the findings in the study are divided in two chapters; the so far implementation of transitional justice in Tunisia and the challenges ahead.

## 2 Transitional Justice

This chapter will give an introduction to the notion of transitional justice, the on going and historical academic debate, some examples from previous experiences that are of value for understanding the process in Tunisia as well as references to which human rights obligations that are connected to transitional justice.<sup>39</sup>

I have, as mentioned in the introduction chosen to use the term transitional justice in the same way as the Secretary General of the United Nations have done in a report on the rule of law and transitional justice;

the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.<sup>40</sup>

Transitional justice is a concept that contains of several different instruments; judiciary processes, truth commissions, reparation and reforms of the administration and by using the instruments most suitable transitional justice can be applied in all societies.<sup>41</sup> Many of the instrument used have a judicial touch and are closely connected to international law and human rights law while some are entirely judicial such as judiciary processes which can be held in international courts, hybrid courts or national courts. All of this I will come back to in the following.

Another definition of what transitional justice is comes from the former secretary general of the United Nations, Kofi Annan, who in a report on The rule of law and transitional justice in conflict and post-conflict societies, (S/2004/616), to the UN Security Council stated the following:

The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a

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<sup>39</sup> The litterature on the notion transitional justice is very rich and among the the most influential works can be mentioned Kritz, Neil J. (red.) (1995). *Transitional justice: how emerging democracies reckon with former regimes. Vol. 1-3* Washington, D.C.: United States Institute of Peace Press and Teitel, Ruti G. (2000). *Transitional justice*. New York: Oxford University Press. Among more recently published literature can be mentioned Roht-Arriaza, Naomi and Mariezcurrena, Javier (red.) (2006). *Transitional justice in the twenty-first century: beyond truth versus justice*. Cambridge: Cambridge University Press and Jeffery, Renée and Kim, Hun Joon (red.) (2014). *Transitional justice in the Asia-Pacific*. New York, NY: Cambridge University Press , furthermore since 2010 there is an International Journal on International Justice which is available here: <http://ijtj.oxfordjournals.org>.

<sup>40</sup> United Nations, Security Council S/2004/616 *The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General*.

<sup>41</sup> Andrieu, Kora, (2012) *La justice transitionnelle*, Gallimard, Paris, p. 28.

society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>42</sup>

The need for transitional justice in a post-despotic society can be explained by the difficulties to transform. The old orders do often remain and the elite does often stay in place when the people want an immediate change in the aftermath of the old regime. In these cases, where the political elite and the intelligentsia is open to a process and admit the needs of a new order the tools of transitional justice has been useful to create a change.<sup>43</sup>

The use of legislation in order to transform a society towards democracy can be seen as contradictory but in the words of Catherine Turner:

Rather than being held hostage to politics, the application of legal form is seen as a mean of transcending existing political conflict and allowing a society to move towards a new form of governance, shielded by the formality of law and legal procedure. The rule of law is represented as providing a new site of contestation, bounded by legality.<sup>44</sup>

Eric Posner and Adrian Vermeule points out that transitional justice is both a backward looking and a forwards looking tool. By truth seeking mechanisms, reparations to victims and efforts to end impunity as backward looking this contributes to a forward looking approach including “depriving former officials of political and economic influence that they could use to frustrate reform; signalling a commitment [...] democratic institutions”<sup>45</sup>

There is, though, a complexity in the use of transitional justice and the focus upon the past in the creation of a new society. Ruti G. Teitel expresses this in the following way: ”There is a complicated relationship between transitional justice, truth, and history. In the transitional justice discourse,

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<sup>42</sup> United Nations, Security Council S/2004/616 *The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General* p. 4.

<sup>43</sup> Mutua, M 2015, 'What Is the Future of Transitional Justice?', *International Journal of Transitional Justice*, vol. 9, no. 1, p. 2.

<sup>44</sup> Turner, Catherine 2013, 'Deconstructing Transitional Justice', *Law and Critique*, vol. 24, no. 2, p 201.

<sup>45</sup> Posner, EA, & Vermeule, A 2004, 'Transitional Justice as Ordinary Justice', *Harvard Law Review*, no. 3, p. 766.

revisiting the past is understood as the way to move forward.”<sup>46</sup> This is so since transitional justice aiming on going back to the past in order to shape the future and to some extent undo history, tries to revile what have happened but also to erase wounds and create a society that is not burden by abuses in the past. This complexity also describes the complexity of the aims of the transitional justice process, which in one way is to understand the past by revealing what has happened and avoiding the same events to happen again and to create a new democratic society.<sup>47</sup>

This is in many ways an important point on how to regard transitional justice as a tool for creating a better and democratic society. In the building of the new society when focus is lying on the building of the future a transitional justice process is aiming on the past to seek the truth and handle the past instead of just forgive and forget.

Transitional justice has been formed, according to the United Nations High Commissioner on Human Rights, mainly on the following rights and obligations within international human rights law:

- (a) the State obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty;
- (b) the right to know the truth about past abuses and the fate of disappeared persons;
- (c) the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law; and
- (d) the State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future.<sup>48</sup>

The right to truth is also stressed by the UN Commission on Human Rights in a report by the independent expert Diane Orentlicher in which she says “every people has the right to now the truth about past events concerning the perpetrations of heinous crimes” and continues with underlining the rights to truth for victims and families of victims.<sup>49</sup>

Transitional justice is closely connected and rooted within criminal justice, though the relationship between those two concepts is not always easy. Teitel expressed the paradoxality between those two notions in the following way:

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<sup>46</sup> Teitel, Ruti, G (2014), *Human Rights In Transition: Transitional Justice Genealogy*, n.p.: Oxford University Press, Oxford Scholarship Online, p. 86.

<sup>47</sup> Teitel, Ruti, G (2014), p. 86.

<sup>48</sup> HR/PUB/13/5 p. 5.

<sup>49</sup> United Nations, Economic and social council E/CN.4/2005/102/Add.1, *Promotion and protection of Human Rights, Impunity, Report of the independent expert to update the Set of principles to combat impunity, Diane Orentliche*, principles 2 and 4.

Criminal Justice is ordinary theorized in starkly dichotomous terms as animated by either backward-looking concern with retribution or forward-looking utilitarian concern with deterrence, considered internal to the justice system. In its transitional variant, however, not only punishment informed by a retro perspective and prospective purposes but also the question of whether to punish or to amnesty, to exercise or restrain criminal justice is rationalized in overtly political terms. Values of mercy and reconciliation commonly considered to be external to criminal justice are an explicit part of the transitional deliberation. The explicit politicization of criminal law in these periods challenges the ideal understanding of justice and turns out to be a persistent feature of the jurisprudence in the transitional context.<sup>50</sup>

Furthermore, since one of the measures in transitional justice is criminal prosecution the right to a fair trial becomes a relevant concern in the interpretation of transitional justice. The mechanism for prosecution, whether it is an institution created for the transitional justice process or if the prosecution takes place in an already existing system, need to fulfil the right to a fair trial.<sup>51</sup>

Teitel is underlining that one of the dilemmas within transitional justice is that law, that usually is used to uphold the stability in a society in a period of transitional justice get a new meaning. The transitional justice law is meant to change a society. This in manners that sometimes even can be regarded as unlawful as in how to handle crimes that were not criminalised when they were committed, the insurance of fair trial and amnesties that might promote impunity in the name of reconciliation.<sup>52</sup> Those are dilemmas that have been discussed in the academic debate<sup>53</sup>, and have gotten actualized in the Tunisian process, and which I will come back to.

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<sup>50</sup> Teitel, Ruti G. (2000), p. 217.

<sup>51</sup> Friedman, AB (2013), 'Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights, *Akron Law Review*, vol. 46, no. 3, pp. 737f.

<sup>52</sup> Teitel, Ruti G. (2000), p. 6.

<sup>53</sup> ex. Teitel, Ruti G. (2000), p. 13.

## 2.1 Historical and contemporary debates on Transitional Justice

The term transitional justice came into use in the mid-80's as a way to refer to a strategy on how to think about justice after large-scale atrocity in societies.<sup>54</sup>

What transitional justice is and how to use it is debated – something which I will return to – and what focus it should have has developed over time. But it does for sure consist of several processes and mechanisms; this is highlighted within the Guidance note of the Secretary-General on the United Nations approach to Transitional Justice:

Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform and appropriate combination thereof.<sup>55</sup>

Many scholars see the Nurnberg trials after the Second World War as the starting point of the notion of transitional justice.<sup>56</sup> At this starting point transitional justice was focusing on criminal proceedings and to a great extent based on international humanitarian law.<sup>57</sup>

Transitional justice is often mentioned in connections with Rule of Law. The relation between the two notions is not completely simple. In times of transition the laws are changing and so does also what is criminalized or prohibited by the law. This became apparent after the second world war when German courts were facing the question whether to accept defences by Nazi collaborators that were relying on Nazi law. A question that gets different answers depending on which perspective one decides to apply. For example one can use a legal positivistic view on the Rule of Law arguing that the law was valid when the crimes were committed is also valid during the trials or one can have a natural law perspective where the Rule of Law in times of transition means a complete break from the former legal regime.<sup>58</sup>

Later on transitional justice came to focus more on reconciliation and with this development the establishment of truth commissions became more common. "A truth commission is an official body, often created by a national government, to investigate, document, and report upon human

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<sup>54</sup> Fisher & Stewart, *Transitional Justice and the Arab Spring* 2014 p. 1.

<sup>55</sup> Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010, p. 3.

<sup>56</sup> Ex. Arbour, Louis (2007), 'Economic and Social Justice for Societies in Transition [comments]', *New York University Journal of International Law and Politics*, no. 1, p 6ff.

<sup>57</sup> Arbour, Louis (2007), p 1 f.

<sup>58</sup> Teitel, Ruti G. (2000), p. 13.

rights abuses within a country over a specified period of time.”<sup>59</sup> One of the advantages of truth commissions in comparison with criminal proceedings is that they can give a wider historical perspective and not only judgement in isolated cases.<sup>60</sup> One of the disadvantages is though that they do not have the same power as a criminal court, for example they cannot give sentences to perpetrators. I will come back to the advantages and disadvantages as well as experiences of Truth Commissions in transitional justice processes below.<sup>61</sup>

Another question regarding the truth commissions and criminal proceedings, as I will get back to, is that a truth commission does not have prosecutorial powers and therefore the named perpetrators do not have the same rights as in criminal proceedings. This dilemma refers to a debate, which often goes under the label Truth vs. Justice.<sup>62</sup>

There are many examples of how the criminal proceedings during a period of transitional justice result in limited sanctions. The original thought of the successors was to continue the prosecutions not only including the higher officials of the Nazi regime, but also those lower in the political hierarchy. In this way all and everyone would be held accountable for the crimes committed and thereby the potential individual criminal liability is expanded.<sup>63</sup> However, as

Punishment dominates our understanding of transitional justice. This harshest form of law is emblematic of accountability and the rule of law; yet its impact far transcends its incidence.<sup>64</sup>

The limited number of people facing trials as a result of a transitional justice process can be seen as problematic, yet, according to Teitel it does not affect the view that justice has been established. She writes: “Despite the absence of full or lasting punishment, the transitional justice criminal sanction appears to constitute a symbol of the rule of law.”<sup>65</sup>

This can perhaps be explained by the circumstances where transitional justice is needed, where crimes and injustices where a part of the former states policy and where “criminal investigation enables a given country to construct a shared past through a collective public ritual”.<sup>66</sup>

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<sup>59</sup> Teitel, Ruti, G (2014), p, 78f.

<sup>60</sup> Teitel, Ruti, G (2014), p. 78f.

<sup>61</sup> Hayner, Priscilla B., *Unspeakable truths: transitional justice and the challenge of truth commissions*, 2. ed., Routledge, London, 2011 p. 13.

<sup>62</sup> Kritz, Neil J. (red.) (1995). *Transitional justice: how emerging democracies reckon with former regimes. Vol. 1, General considerations*. Washington, D.C.: United States Institute of Peace Press p. 7.

<sup>63</sup> Teitel, Ruti G. (2000), p. 36.

<sup>64</sup> Teitel, Ruti G. (2000), p. 27.

<sup>65</sup> Teitel, Ruti G. (2000), p. 49.

<sup>66</sup> Teitel, Ruti G. (2000), p. 49.

Though punishment is conventionally considered largely retributive, in transition, its purpose is corrective, going beyond the individual perpetrator to the broader society.<sup>67</sup>

There has been a development where the granting of amnesties during transitional periods has been commonly used, this has happened in several cases in South America and also in South Africa.<sup>68</sup>

Amnesties can be seen as a mean of reconciliation but can also be seen as a “selling out of justice to transient political interest, to the determinant of democratic prospects”.<sup>69</sup> The debate of whether criminal proceedings is the only way to achieve justice or whether there are other paths such as amnesties to achieve peace goes under the name peace v. justice, or as already mentioned truth vs. justice. In the light of this debate truth commissions has been seen as a compromise.<sup>70</sup>

Samuel Huntington has in regard to the debate on peace vs. justice pointed out the importance of acknowledging that no matter which path one chooses one will face problems though the least satisfactory way to go would be “do not prosecute, do not punish, do not forgive, and, above all, do not forget.”<sup>71</sup>

The importance of justice as a mean for peace has also been pointed out by the United Nations High Commissioner of Human Rights. The current view from international law and United Nations policies in regard to amnesties is formulated as “amnesties are impermissible if they prevent prosecution of individuals who may be the criminal responsible for war crimes, genocide, crimes against humanity, gross violation of human rights”. The High Commissioner furthermore states, “states have the duty to combat impunity and to ensure effective investigation and prosecution of those responsible for serious violations of international law”.<sup>72</sup>

This development in international law has of course had effects on how countries are handling the processes of transitional justice after the Arab spring. Kirsten Fisher and Robert Stewart highlights how the development of transitional justice has an intense focus upon fighting impunity:

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<sup>67</sup> Teitel, Ruti G. (2000), p. 67.

<sup>68</sup> Teitel, Ruti, G (2014), et passim.

<sup>69</sup> Teitel, Ruti G. (2000), p. 54.

<sup>70</sup> Anders, Gerhard and Zenker, Olaf (2014), 'Transition and Justice: An Introduction', *Development & Change*, vol. 45, no. 3, p 399.

<sup>71</sup> Huntington, Samuel, *The Third Wave; Democratization in the Late Twentieth Century*, in Kritz, Neil J. (red.) (1995). *Transitional justice: how emerging democracies reckon with former regimes. Vol. 1, General considerations*. Washington, D.C.: United States Institute of Peace Press p. 81.

<sup>72</sup> United Nations, General Assembly, A/HRC/12/18 *Annual report of the united nations high commissioner for human rights and reports of the office of the high commissioner and the secretary general, analytical study in human rights and transitional justice*. 6 august 2009 p. 17.



Arguably, despite the continued use of amnesty laws and restorative measures that do not promote or satisfy retributive pursuits, international law is moving towards a prohibition of the use of amnesty in transitional justice. This may account for part of the retributive focus in Arab-spring countries – an attempt to satisfy international obligations promoted primarily by advocates in the ICC, of which no Arab-spring country besides Tunisia is a member state.<sup>73</sup>

This shift towards the high importance of fighting impunity is expressed by the fact that the United Nations, as well as other international organisations, has prohibited its representative's from backing amnesties for serious international crimes. One of the arguments for doing so is based upon the Rome Statute of the International Criminal Court (ICC).<sup>74</sup>

The approach of the ICC towards the issue on amnesties has though been criticised, since amnesties can be a mean for peace and there are procedures in which it might be beneficial for the transitional justice process to use this measure in order to achieve reconciliation. However, international courts do not in general recognise amnesties by domestic courts.<sup>75</sup>

The creation of the International Criminal Court (ICC) has had impact upon criminal proceedings in transitional justice processes, this I will get back to in chapter 2.2.2 about criminal proceedings.

An aspect that needs to be reflected upon regarding prosecutions versus impunity, is what the aim of the prosecution is: “is punishment a backward-looking exercise in retribution, or an expression of the restoration of the rule of law?” and further who is *de facto* responsible for the acts, is it the individual, the regime or the entire society?<sup>76</sup>

Another dimension of transitional justice, which is debated, is how much focus to put on criminal proceedings towards certain perpetrators verses on institutional reforms. Pablo de Greiff, UN special rapporteur on the promotion of truth justice and reparation, points out the quite absurd fact that in the process within Rwanda that the budget for the International Criminal Tribunal for Rwanda (ICTR) was five times the budget for the domestic justice sector during the relevant years.<sup>77</sup>

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<sup>73</sup> Fisher & Stewart, (2014) p. 4.

<sup>74</sup> Hayner, Priscilla B. (2011) p. 105.

<sup>75</sup> Ambos, Kai, Large, Judith, & Wierda, Marieke 2009, Building a Future on Peace and Justice. [Elektronisk resurs] : *Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice*, Berlin, Heidelberg : Springer Berlin Heidelberg, 2009. p. 305.

<sup>76</sup> Teitel, Ruti G. (2014). *Globalizing Transitional justice, contemporary essays*. New York: Oxford University Press p. 97.

<sup>77</sup> Pablo de Greiff, ‘Articulating the Links between Transitional Justice and Development: Justice and Social Integration,’ in *Transitional Justice and Development: Making*

Also, several scholars have pointed out the importance of including economic, cultural and social rights in the process, not the least in relation to the Arab spring. The uprising was in much a reaction to social and economic injustice, and the *de facto* starting point of the movement was that Mohammed Bouazizi sat himself on fire as a protest against the authorities taking away his means of supply.<sup>78</sup> de Grieff, points out:

a common feature of these recent transitions is the prominent role that claims relating to economic rights occupy in these transitions; claims against corruption and in favour of economic opportunities have been raised to a par in the regions with claims for the redress of violations of civil and political rights.<sup>79</sup>

The need to include economic, social and cultural rights can also be framed as an opportunity to create a society that respect all types of rights which Arbour is expressing in the following way:

Societies in transition present unique opportunities for countries to equip themselves appropriately to ensure respect for human rights and human dignity. Transitional justice, as a dynamic and cutting-edge field, could serve as a springboard for the systematic anchoring of economic, social, and cultural rights in the political, legal, and social structures of societies in transition<sup>80</sup>

The development of transitional justice has as seen gone from a focus upon criminal proceedings towards a wider spectrum stressing other mechanism such as the right to truth in order to achieve reconciliation. In later years the importance, as well as the international obligations, towards fighting impunity has gotten higher importance. At the same time many scholars are arguing for an extension of the crimes adressed in a transitional justice process.

The different opinions upon how a process of transitional justice should be created are partly reflecting the development in transitional justice. It does reflect the question of the fight against impunity versus amnesties as well as the inclusion of economic, social and cultural rights.

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Connections, ed. Pablo de Greiff and Roger Duthie (New York: Social Sciences Research Council, 2009). p. 30.

<sup>78</sup> Schmid, E, & Nolan, A 2014, 'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice', *International Journal of Transitional Justice*, vol. 8, no. 3 p 363.

<sup>79</sup> United Nations, General Assembly, A/HRC/21/46 *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff para 17.

<sup>80</sup> Arbour, Louise, (2007). p. 26.

de Greiff has as mentioned pointed out the importance of including economic, cultural and social rights in the process, not the least in relation to the Arab spring since the upraise was in much a reaction to social and economic injustice.<sup>81</sup>

This view is nothing unique from de Greiff, several scholars' points<sup>82</sup> out the same problem and in the United Nations High Commissioner for Human Rights In the annual report to the general assembly can the following be read:

Transitional Justice strives not only to deliver justice to victims of mass atrocities, but to assist societies devastated by conflict achieve sustainable peace and reconciliation. Peace and reconciliation demand comprehensive societal transformation that must embrace a broad notion of justice, addressing the root causes of conflict and the related violations of all rights. Nether less, the international community has yet to embrace a transitional justice approach that comprehensively addresses violations of economic, social and cultural rights.<sup>83</sup>

There are also arguments against addressing economic social and cultural rights within a transitional justice process, based on the idea that a transitional justice is not the right tool to address those kinds of rights. Lars Waldorf argues in the following way:

”[...] transitional justice is inherently short-term, legalistic and corrective. As such, it should focus on accountability for gross violations of civil and political rights. This is not to deny the importance of addressing past and present socio-economic inequalities as a matter of both justice and potential conflict prevention. But that should be done through democratic politics and distributive justice – not through elite bargains and transitional justice”<sup>84</sup>

The High Commissioner of Human Rights in the report previously mentioned express that a transitional justice process, and in particular truth commissions are suitable institutions to address breaches of economic,

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<sup>81</sup> Schmid, Evelyne and Nolan, Aoife (2014), p 363.

<sup>82</sup> Ex Arbour, Louise, (2007), p 6f.

<sup>83</sup> United Nations, General Assembly, A/HRC/12/18 *Annual report of the united nations high commissioner for human rights and reports of the office of the high commissioner and the secretary general, analytical study in human rights and transitional justice*. 6 august 2009 p. 18.

<sup>84</sup> Waldorf, Lars (2012), 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', *Social and Legal Studies*, vol. 21, no. 2, p. 179.

cultural and social rights.<sup>85</sup>

Connected to these argumentations is the question whether corruption should be addressed within transitional justice. It can easily be argued, and proven, that corruption leads to the breach of several, both civil and political rights and that economic, social and cultural rights therefore depending on the context and the formulation of the transitional justice process a work of anti-corruption might be of benefit for the process. Even if the anti-corruption can be seen as a part of transitional justice in theory this has rarely been the case in practice and Ruben Carranza means: the predominant approach in the transitional justice field tends to view human rights as narrower than the range of human rights violations that actually occur<sup>86</sup>

Carranza argues further;

Transitional justice institutions invariably need experts in areas other than law or human rights. In fact, transitional justice should already have moved beyond its legalistic origins given that the varied contexts in which the field operates requires it to transcend a reliance on law as an instrument of justice. A transitional justice-based truth-seeking process that addresses economic crimes might be a sounder approach than the predominantly litigation-based process utilized<sup>87</sup>

A concern to be pointed out regarding inclusion of anticorruption within the process would be that to broaden the process might take focus away from grave violations of human rights. In light of this Kora Andrieu is arguing that to address anti-corruption within a transitional justice process might not be a good solution, even though its goals are closely linked with the ones of a transitional justice. However, in Andrieu's opinion anti-corruption might be better addressed by other processes in order not to risk transitional justice losing its efficiency and create unrealistic promises. Andrieu further argues that in cases of a transition from a post-authoritarian society one of the main tools of oppression is a form of corruption wherefore the reasons of include anticorruption in those kinds of transitional justice processes would be beneficial for the process.<sup>88</sup>

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<sup>85</sup> United Nations, General Assembly, A/HRC/12/18 *Annual report of the united nations high commissioner for human rights and reports of the office of the high commissioner and the secretary general, analytical study in human rights and transitional justice*. 6 August 2009 p. 18.

<sup>86</sup> Carranza, Ruben (2008), 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?', *International Journal of Transitional Justice*, vol. 2, no. 3, p. 314.

<sup>87</sup> Carranza, Ruben (2008), p. 323.

<sup>88</sup> Andrieu, Kora (2012), 'Dealing With a "New" Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?', *Journal of Human Rights*, vol. 11, no. 4, pp. 537-554.

Several scholars as well as the United Nations Office of the High Commissioner of Human Rights, OHCHR, have pointed out the necessity of including a gender perspective in the transitional justice processes. This in order to fight inequality, particularly concerning economic, social and cultural rights, as well as combatting violence against women.<sup>89</sup>

Furthermore, since one of the aims with transitional justice is reconciliation the mechanisms adopted will need to fulfil this request. There have been arguments that the persons who have been facing prosecution as well as other mechanisms always are representatives of the old regime, or after war from the losing side, and that transitional justice in this way is creating a history of the winner. But on the other hand amnesties can have the opposite effect where the side of the winner would be bitter since no justice has been created. Both of those dilemmas show upon the difficulties in creating a transitional justice process that will promote reconciliation.<sup>90</sup>

This dilemma has also been stressed by Neil Kritz in the following way:

In countries undergoing the radical shift from repression to democracy this question of transitional justice presents in a very conspicuous manner, the first test for the establishment of real democracy and the rule of law – the very principles which will hopefully distinguish the new regime from the old. Strong political pressure for victors’ justice in dealing with those who served in the repressive regime and the need to demonstrate a separation between the old and the new governments might call for immediate and harsh retribution against a large number of officials.<sup>91</sup>

Several scholars have as already mentioned, stressed that a process of transitional justice needs to be addressing the particular context of the country. In accordance with this OHCHR has pointed out the importance of national consultations within transitional justice processes. This in order to by the participation of the people allow the state to find an approach suitable for the situation within the country.<sup>92</sup>

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<sup>89</sup> United Nations, General Assembly, A/HRC/12/18, *Annual Report of the United Nations High Commissioner for Human Rights and reports of the High Commissioner and the Secretary-General, Analytic study on human rights and transitional justice* p. 19.

<sup>90</sup> Friedman, Andrew B (2013), "Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights, *Akron Law Review*, vol. 46, no. 3, pp. 738f.

<sup>91</sup> Kritz, Neil J. (red.) (1995). *Transitional justice: how emerging democracies reckon with former regimes. Vol. 3, Laws, rulings and reports*. Washington, D.C.: United States Institute of Peace Press p. xxiii.

<sup>92</sup> United Nations, General Assembly, A/HRC/12/18, *Annual Report of the United Nations High Commissioner for Human Rights and reports of the High Commissioner and the Secretary-General, Analytic study on human rights and transitional justice* p. 14.

## 2.2 Transitional Justice mechanism

This chapter will give a short introduction to the measures connected to transitional justice, with a focus upon Truth commissions and criminal proceedings since those are the measures that this study concerns. Since the debate of peace vs. justice or truth vs. justice has already been discussed, this chapter will be a short introduction to the definitions of those mechanisms as well as some examples of experiences in previous processes of transitional justice.

### 2.2.1 Truth commissions

There are several definitions of Truth Commissions, one of those, used by several scholars and developed by Mark Freeman, is:

An *ad hoc*, autonomous, and victim-centered commission of inquiry set up and authorized by a state for the primary purposes of (1) investigating and reporting of the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.<sup>93</sup>

And another also used by several scholars, developed by Priscilla Hayner, is that a truth commission

is focused on past events; investigates a pattern of events over a period of time; engage directly and broadly with the affected population; is a temporary body that aims to conclude with a final report; and is authorized by the state under review.<sup>94</sup>

In many ways it is easy to confuse the aims and powers of truth commissions with those of criminal courts, not the least since they have a close relationship to criminal justice. Though they do have more limited powers than a criminal court, Priscilla B. Hayer points out that they “cannot put anyone in jail, they cannot independently enforce their

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<sup>93</sup> Freeman, Mark, *Truth commissions and procedural fairness*, Cambridge, New York, 2006, p. 18, Wiebelhaus-Brahm, Eric, *Truth commissions and transitional societies: the impact on human rights and democracy*, Routledge, New York, 2010 p. 3f.

<sup>94</sup> Hayner, Priscilla B.(2011), p. 11, Bisset, Alison., *Truth commissions and criminal courts*, Cambridge University Press, Cambridge, 2012 p, 26.

recommendations, and most have not had the power even to compel anyone to appear for questioning”<sup>95</sup>.

Truth commissions might also be given the mandate to promote reconciliation, a mandate that they often do struggle with how to fulfil. At the same time as truth finding can be a way for reconciliation it can also increase tensions between different groups within the society.<sup>96</sup>

The mandate and the composition of Truth Commissions has varied widely, and so has also the time of their operation. Alison Bisset points on that for previous commissions it has taken between nine months to nine years to complete their work.<sup>97</sup>

There is often in the Truth Commissions mandate to make recommendations based on the work of the Truth Commission in where they might have found institutional failures that has allowed crimes to occur. With this forward-looking approach Truth Commissions can help to prevent abuses from reoccurring.<sup>98</sup>

## 2.2.2 Criminal proceedings

Since transitional justice has its roots from trials and criminal proceedings it has been underlined by several scholars that the use of this measures in a process also put an obligation on the state to respect international standards related to trials, treatment of offenders and penalties.<sup>99</sup>

The experiences of using criminal proceedings has also been many, and in varied forms. In certain transitional justice experiences the trials have taken place within the national system whether in others, such as in Rwanda, former Yugoslavia, special tribunals has been established and in other cases such as Cambodia, East Timor and Serra Leone hybrid courts has been the scene for the prosecutions.<sup>100</sup>

The international court of former Yugoslavia (ICTY) and the international court in Rwanda (ICTR) have both been criticised for being to expensive and also for not having achieved their goal as forward looking institutions.<sup>101</sup>

The hybrid tribunals in Cambodia and Sierra Leone have been seen as more successful models ensuring more of local ownership within the process as

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<sup>95</sup> Hayner, Priscilla B. (2011) p. 13.

<sup>96</sup> Hayner, Priscilla B. (2011), p. 23.

<sup>97</sup> Bisset, Alison. (2012), p. 29.

<sup>98</sup> Wiebelhaus-Brahm, Eric, (2010), p. 11.

<sup>99</sup> Kritz, Neil J. (red.) (1995). *Transitional justice: how emerging democracies reckon with former regimes. Vol. 1, General considerations*. Washington, D.C.: United States Institute of Peace Press p. 9.

<sup>100</sup> Bisset, Alison. (2012), p. 19f.

<sup>101</sup> Stensrud, Ellen Emelie 2009, 'New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia', *Journal of Peace Research*, no. 1, p. 7.

well as keeping the criminal proceedings within the country. Those procedures do also ensure international standards with involvement from the UN.<sup>102</sup>

The establishment of hybrid courts has though also faced difficulties. The question of the composition of the courts has been actualized both in Sierra Leone and in Cambodia. In Sierra Leone there has been concern of a too small national involvement within the court with a large extent of non-nationals in the higher positions. While in Cambodia concerns about the contrary have been expressed with both national NGOs and the international society expressing doubt on whether the Cambodian part of the tribunal will meet international standards.<sup>103</sup>

The creation of the International Criminal Court (ICC) and the adoption of the Rome-statute have been giving a greater focus upon fighting impunity. It has also given an international body the mandate to investigate and prosecute if not already done so on national level in correspondence with the principle of complementarity.<sup>104</sup>

Exactly when the ICC can decide to intervene, and how to handle amnesties while they have been granted after an investigation is not yet clear. According to the Rome statute the primary responsibility to investigate and prosecute should be upon the state and the ICC has the mandate to prosecute when the state is unwilling or incapable of doing so. How to estimate whether a state is capable of investigating and prosecuting might be difficult.<sup>105</sup>

One of the arguments against trials as a tool for transitional justice is its limitations on finding a wider truth. Those limitations were seen in South Africa where focus was upon finding the truth. Even though the focus of trials is not to find a global truth their investigations often result in a broad documentation of events that can tell a much broader story than the one told in trials. Though, a court could never take the role of a Truth Commission with tasks including recommendations to the governments or designing reparations systems it has been argued that the prosecutor could submit reforms of the findings in order to reveal the broader truth.<sup>106</sup>

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<sup>102</sup> Stensrud, Ellen Emelie (2009), p. 7.

<sup>103</sup> Stensrud, Ellen Emelie (2009), p. 10f.

<sup>104</sup> McEvoy, K 2007, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice [article]', *Journal of Law and Society*, no. 4, p. 436.

<sup>105</sup> Ludwig King, Elisabeth, "Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures", *George Washington International Law Review*, vol. 45, no. 1, pp. 88ff.

<sup>106</sup> Hayner, Priscilla B. (2011), p. 107ff.



# 3 Tunisia

## 3.1 Historical context

This chapter aims to give a brief introduction to the historical context that has led to the recent revolution and the historical periods, which the transitional justice process in Tunisia concerns.

From 1881, Tunisia had the status as a French protectorate, meaning that Tunisia was under French administration.<sup>107</sup> This is a heritage, which of course left marks in today's Tunisia, and there are still strong ties between the countries. The second language in the country is French, a big percentage of the Tunisian elite have been studying in France, and many people who went in exile during the Ben Ali regime, 1987-2011, ended up in France.

During the first half of the 20<sup>th</sup> century, a nationalist movement grew stronger. Tunisia gained its independency from France on the 20<sup>th</sup> February 1956. After the independence Habib Bourguiba, who had been dedicated in the nationalist struggle and which gave him a lot of support from the Tunisian population, ruled the country.<sup>108</sup>

Bourguiba established, under his authorial rule, Tunisia as a modern secular state and did among other things support women's emancipation by adopting a Personal Status Code which did promote the rights of women by outlawing polygamy, establishing a minimum age for marriage and a minimum wage for women.<sup>109</sup> During the 1970s and onwards the Islamist movement which had become more and more assertive came under the attention of Tunisia's secret service. One of the movements mostly exposed to the eyes of the secret services was the Islamic Tendency Movement, a precursor to Ennahda, an Islamist party that after the first democratic elections in Tunisia in 2011 became the biggest party and was also the biggest party at the time for the adoption of the law on transitional justice.<sup>110</sup>

In 1987 Ben Ali seized power in a non-violent coup. He had been a minister of interior affairs and also for a short time prime minister in the previous regime. Initially after he had seized power he moved towards liberalising Tunisian politics. He freed thousands of old regime's prisoners, ratified the

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<sup>107</sup> Perkins, Kenneth J. (2014). A history of modern Tunisia. Second edition. New York, Cambridge University Press p. 44f.

<sup>108</sup> Perkins, Kenneth J. (2014). p, 135.

<sup>109</sup> Watts, Susuan, The impact on women of changes in personal status law in Tunisia available at [http://www.who.int/social\\_determinants/resources/changes\\_personal\\_status\\_tunisia\\_wgkn\\_2007.pdf](http://www.who.int/social_determinants/resources/changes_personal_status_tunisia_wgkn_2007.pdf).

<sup>110</sup> Lamont, Christoffer K, & Boujne, Hela (2012), 'Transitional Justice in Tunisia: Negotiating Justice during Transition', *Politicka Misao: Croatian Political Science Review*, vol. 49, no. 5, pp. 35ff.

United Nations convention on Torture and even entered into dialogue with Ennhada. This did not last. Shortly after rising to power Ben Ali's regime became more and more autocratic, Ennhada was banned and its members persecuted. Tens of thousands of Ennhada members were imprisoned.<sup>111</sup>

During the 1990s Tunisia developed into a police state and one of the most authoritarian states in the world. Grave human rights violations were committed including the use of torture and arbitrary execution. During the same period the right to expression was strictly limited.<sup>112</sup>

Amnesty International did in 2008 release a report where Tunisia was highly critiqued for the use of torture within the detention centres, a terrorist law adopted in 2003 the absence of fair trials and the lack of independence of the judiciary.<sup>113</sup>

During the same period the violation of economic cultural and social rights became structuralised, the corruption increased and the interior regions became more and more marginalised.<sup>114</sup>

## 3.2 The Tunisian Revolution

The Tunisian path to democracy started with the already mentioned uprising of the Tunisian populations, which led to the Tunisian revolution. Even if the uprising had spread around the region many countries managed to avoid the kind of mass protests that took place in Tunisia. In three other countries than Tunisia, Egypt, Libya and Yemen protests took place, which resulted in the leave of their current dictators. Compared to those countries the situation in Tunisia is exceptional regarding the in many way successful path towards democracy.<sup>115</sup>

During the protest in the autumn of 2010, which in January 2011 led to the fall of the Ben Ali regime, the population was mainly manifesting against the corruption, lack of democracy, the high prices on grocery products and the high rate of unemployment, also highlighted by the main slogans from the revolution; jobs, freedom and human dignity.<sup>116</sup>

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<sup>111</sup> Lamont, Christopher K, & Boujneh, Hela (2012), p. 35ff.

<sup>112</sup> Andrieu, Kora, Confronter le passé de la dictatur en tunisie : la lois de "justice transtionelle" en question" available at [http://www.iris-france.org/docs/kfm\\_docs/docs/obs-monde-arabe/tunisie-justice-transitionnelle-mai-2014.pdf](http://www.iris-france.org/docs/kfm_docs/docs/obs-monde-arabe/tunisie-justice-transitionnelle-mai-2014.pdf) p. 7.

<sup>113</sup> Report by Amnesty International "Tunisia: In the Name of Security: Routine Abuses in Tunisia" 23 of June 2008 available at <https://www.amnesty.org/en/documents/mde30/007/2008/en/>.

<sup>114</sup> Andrieu, Kora, Confronter le passé de la dictatur en tunisie : la lois de "justice transtionelle" en question" p. 7.

<sup>115</sup> Eva Bellin . (September 2013). ' A Modest Transformation ' in The Arab Spring pp.33–49. [Online] Available at: <http://www.palgraveconnect.com.ludwig.lub.lu.se/pc/doi/finder/10.1057/9781137344045.0006>. (Accessed: 24 April 2015). p. 36.

<sup>116</sup> <http://www.globalis.se/Laender/Tunisien> 2015-01-24; Kirsten J. Fisher, Robert Stewart (editor), (2014), p 59.

During this uprising, security forces killed 132 people and injured hundreds more across the country.<sup>117</sup>

The demonstrations were widely spread among the population, although four categories of people can be pointed out as having played a more visible role during the revolution as well as during the transitional period; the cyber-activists, the unemployed graduates, the basic trade union activists, and the lawyers.<sup>118</sup>

The revolution started as mentioned in Sidi-Bouzaid, a city in the interior of Tunisia that has been disadvantaged by the uneven regional development, which has resulted in huge social injustice between the regions, a situation with very poor living conditions within the regions that still have not improved.<sup>119</sup>

Already before leaving the country Ben Ali opened the debate on transitional justice on the 13<sup>th</sup> of January 2011 promising to establish three commissions; one commission for investigating human rights violations committed during the revolution, one commission for investigating corruption and one commission for political reforms.<sup>120</sup> An establishment that then was announced by the Prime minister's office three days after Ben Ali had fled the country on the 14<sup>th</sup> of January 2011.<sup>121</sup>

### **3.3 Tunisia after the revolution**

This chapter is focusing upon how Tunisia after the revolutions took measures towards a transitional justice process; therefore have several important events that do not directly concern the process that has been left out.

The revolution was followed by a number of legal reforms such as the passage of decrees on “access to administrative documents from public authorities (Decree 41 2011; decree 54 2011), the amending the Code of Military Justice and the Penal Code (decree 69 2011; decree 106 2011)” and

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<sup>117</sup> Report of Human Rights Watch ”Flawed Accountability, Shortcomings of Tunisia’s Trials for Killings during the Uprising” p. 1.

<sup>118</sup> Kerrou Mohamed. (2013). ' New Actors of the Revolution and the Political Transition in Tunisia ' in *The Arab Spring* pp.79–100. [Online] Available at: <http://www.palgraveconnect.com.ludwig.lub.lu.se/pc/doi/10.1057/9781137344045.0010>, p. 82.

<sup>119</sup> Kerrou Mohamed . (2013), p. 89.

<sup>120</sup> Andrieu, Kora, Confronter le passé de la dictatur en tunisie : la lois de ”justice transtionelle” en question” p. 8.

<sup>121</sup> Fisher, Kirsten & Stewart, Robert (red.) (2014). p. 36.

the party of Ben Ali, the Constitutional Democratic Rally, was dissolved by a Tunisian court decision.<sup>122</sup>

On the 23 of October 2011, Tunisia held its first democratic elections. In this election Ennhada, the Islamist party became the winner and formed a government with two other parties and together they were called the troika. President in this government was a secular human rights activist, Moncef Marzouki, and prime minister was Hamadi Jebali from Ennhada.<sup>123</sup>

A National Constituting Assembly (NCA) was elected with the purpose of drafting and adopting a new constitution. This process was long, intense and accompanied by difficulties and negotiations that were about to be abandoned. The following citations gives a picture, quite critical towards the then ruling party Ennhada, about the disagreements between the different factions within the NCA:

Tunisia's ruling troika failed to replace the all-inclusive process that defined the democratic transition phase. The transitional period bridging the democratic transition phase with that of democratic consolidation was consequently marred by crises. The drafting of the new constitution emerged as a battleground between, on the one hand the proponents of the sanctity of personal liberties and freedoms and, on the other hand, Islamist parties and Salafi groups who sought to include in its text a set of basic religious stipulations that could pave the way for future censorship and discrimination. The former group insists on enshrining the constitution's prelude with clauses underscoring the universality of human rights, while the latter demands clear references to the role of Islamic law (sharia) as the principal source of legislation in the country.<sup>124</sup>

This diversity in Tunisian politics does of course have a great impact upon the formation of the transitional justice process and the forming of the history written by this process, something I will come back to below.<sup>125</sup>

The shaping of the transitional justice process started by request of the civil society and it has been closely involved in the shaping of the transitional justice process in Tunisia. As already mentioned Ben Ali took the first

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<sup>122</sup> Fisher, Kirsten & Stewart, Robert (red.) (2014), p. 37, Gray, Doris (2012), 'Tunisia after the Uprising: Islamist and Secular Quests for Women's Rights', *Mediterranean politics*, vol. 17, no. 3, p 289.

<sup>123</sup> United Nations, General Assembly, A/HRC/24/42/Add.1, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, p. 4.

<sup>124</sup> Fisher, Kirsten & Stewart, Robert (red.) (2014). *Transitional justice and the Arab spring*. p. 26.

<sup>125</sup> Lamont, Christoffer K, & Boujnef, Hela (2012), p. 34f.

initiatives to transitional justice measures, those, as several measures taken shortly after the revolution can be distinguished from the *de facto* process which took place on basis of great involvement of civil society and victims.<sup>126</sup>

After the creation of a ministry of Human Rights and Transitional Justice a National Dialogue supported by United Nations Development Program (UNDP), United Nations Office of High Commissioner of Human Rights (OHCHR) and International Center of Transitional Justice (ICTJ) took place. It focused on ensuring the participation of civil society and political parties as well as giving those affected by human rights violation the possibility to express their views upon a transitional justice process.<sup>127</sup> A technical committee was also created with represents from the civil society that was in charge of the national dialogue with victims as well as the drafting of the law. This in order to meet the claims from the victims who had been subjected to various types of abuses during the dictatorships as well as during the revolution.<sup>128</sup>

The National Dialogue gave recommendations on how to shape the transitional justice process and pointed out important aspects that need to be considered. Among the recommendations was that; a transitional justice process is necessary to fulfil the objectives of the revolution, the importance of a the participation of victims as well as civil society within the process, the importance of the independence of transitional justice mechanisms from central authorities and political and electoral debates.<sup>129</sup>

Furthermore regarding reconciliation the National Dialogue gave the following recommendation:

reconciliation is a moment that comes at the end of all of the phases of transitional justice, for there can be no reconciliation without accountability, truth, public acknowledgement, official apology, reparation, and institutional reform. Repetition is a requirement of reconstruction, a mechanism that is meant to preserve society from a repetition of past violations, and in no way does it equal impunity;<sup>130</sup>

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<sup>126</sup> Andrieu, Kora (2014), ‘Confronter le passé de la dictatur en tunisie : la lois de ”justice transtionelle” en question” p. 8ff

<sup>127</sup> Report of the Dialouge on Transitional Justice by the Ministry of Human Rights and Transitional Justice, UNDP and OHCHR availaibe at [http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport\\_dialogue\\_JT\\_Version\\_FR.pdf](http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport_dialogue_JT_Version_FR.pdf) p. 3

<sup>128</sup> <https://www.youtube.com/watch?v=VVH380BulMU&feature=youtu.be>.

<sup>129</sup> Report of the Dialouge on Transitional Justice by the Ministry of Human Rights and Transitional Justice, UNDP and OHCHR availaibe at [http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport\\_dialogue\\_JT\\_Version\\_FR.pdf](http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport_dialogue_JT_Version_FR.pdf) p. 15.

<sup>130</sup> Report of the Dialouge on Transitional Justice by the Ministry of Human Rights and Transitional Justice, UNDP and OHCHR availaibe at [http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport\\_dialogue\\_JT\\_Version\\_FR.pdf](http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport_dialogue_JT_Version_FR.pdf) p. 20.

The National Dialogue became the foundation to the drafting of the law on transitional justice, which was adopted in December 2013.<sup>131</sup> However already before the law on transitional justice was drafted and adopted measures aiming on transitional justice were taken. I will hereby portray this before getting back to the law on transitional justice in chapter 4.2.

A decree law on reparation for the families of the “martyrs” of the revolution was promulgated in October 2011. The decree defined “martyrs” as persons who risked their lives for the revolution, died or were victims of physical harm causing them an infirmity, during the period extending from 17<sup>th</sup> of December 2010 to 19<sup>th</sup> of February 2011 and created a Commission for the Martyrs and Injured of the Revolution. This decree provided for compensatory measures for the families and the commission was responsible for the coordination of the compensation.<sup>132</sup> The decree has been criticised for several reasons, among them that to be able to receive reparations a medical certificate was needed which cost 80 dinars (around 40 euros) to get<sup>133</sup> Further, a decree law for general amnesties of former political prisoners was promulgated.<sup>134</sup>

The same month a National Commission to Investigate Human Rights abuses during the period from the 17<sup>th</sup> of December 2010 until the end of its mandate was created.<sup>135</sup> This commission received almost 2 500 complaints but because of its timely limited mandate as well as limited resources this investigation was not sufficient for a transitional justice process.<sup>136</sup>

In November 2011 The National Commission to Investigate Corruption and Embezzlement (NCICE) was created by a law decree as a temporary instance to investigate cases of corruption since 1987. The commission received more than 10 000 complaints of which 400 referred to public prosecution.<sup>137</sup>

The revolution and the transition process did not in one move solve the problems with breaches of human rights that the former regime committed. It has been stressed that the practice of torture continued after the fall of the

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<sup>131</sup> <https://www.ictj.org/news/ictj-welcomes-tunisia's-historic-transitional-justice-law>

<sup>132</sup> United Nations, General Assembly, A/HRC/24/42/Add.1, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, p.7.

<sup>133</sup> Andrieu, Kora, *Confronter le passé de la dictatur en tunisie : la lois de "justice transtionelle" en question* p. 9.

<sup>134</sup> Décret-loi n° 2011-1 du 19 février 2011 portant amnistie available at: <http://www.legislation-securite.tn/fr/node/29086>.

<sup>135</sup> Décret-loi n° 2011-8 du 18 Février 2011 portant création de la commission nationale d'investigation sur les abus enregistrés au cours de la période allant du 17 décembre 2010 jusqu'à l'accomplissement de son objet available at <http://www.legislation-securite.tn/fr/node/30896>.

<sup>136</sup> Andrieu, Kora, *Confronter le passé de la dictatur en tunisie : la lois de "justice transtionelle" en question* p. 9.

<sup>137</sup> <http://www.anticor.tn/acteurs/instance-nationale-de-lutte-contre-la-corruption/> 2015-04-29, Décret-loi cadre n° 2011-120 du 14 Novembre 2011 relatif à la lutte contre la corruption available at: <http://www.legislation-securite.tn/fr/node/30469> .

Ben Ali-regime and in 2012 the minister on Human Rights and Transitional Justice stated that ‘The former regime fell, yet torture remains on-going; practices of torture continue even after the revolution.’<sup>138</sup>

### 3.4 Political system

During the Ben Ali regime the party, Ennhada, which after the revolution became the biggest party in the elections for a Constituent Assembly, was forbidden and members of this party were imprisoned by the regime.<sup>139</sup>

Within the Tunisian society, not the least within the women’s movement, there is a strong tension between secularists’ movements and Islamist movements. Within the women’s movement one of the reasons of tension is that secular women, for example members of the Tunisian Democratic Women’s Association, saw the Islamic women as a threat to their view of women’s rights and therefore did not defend the Islamic women that got imprisoned or persecuted.<sup>140</sup>

The Tunisian politics is to a great extent formed by the tensions between the former banned Islamist party Ennhada and secular parties. As previously mentioned Ennhada became the biggest party in the first election after the revolution. As a respond to the success of Ennhada a former minister in the Habib Bourgiba government, Beji Caid Essebsi, created the party Nidaa Tounes that translates to Call for Tunisia.<sup>141</sup>

In December 2014 Tunisia had its first democratic ordinary election since its independence. The biggest party in that election was the rather recently created Nidaa Tounes and the founder Beji Caid Essebsi was elected president. The new president was though a part of the old system and he has said that he would rather focus on the future and development of Tunisia and leave the past behind instead of opening old files.<sup>142</sup>

### 3.5 Judicial system

Tunisia is, at the moment, working on a reformation of the justice system, a work closely connected with the transitional justice process without being part of it.

There are several problems that need to be addressed within the Tunisian judicial system. Avocat Sans Frontières has in a report pointed out the lack

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<sup>138</sup> Cairo Institute of Human Rights Annual report p. 166.

<sup>139</sup> Gray, Doris H, & Coonan, Terry (2013), 'Notes from the Field: Silence Kills! Women and the Transitional Justice Process in Post-Revolutionary Tunisia', *International Journal of Transitional Justice*, vol. 7, no. 2, p 349 f.

<sup>140</sup> Gray, Doris H, & Coonan, Terry (2013), p. 349.

<sup>141</sup> Lamont, Cristoffer K, & Boujneh, Héla (2012), p. 35.

<sup>142</sup> [http://www.letemps.ch/Page/Uuid/86b39baa-9b62-11e4-aa73-0eb920ec942b/Les\\_victimes\\_de\\_la\\_dictature\\_en\\_quête\\_de\\_justice](http://www.letemps.ch/Page/Uuid/86b39baa-9b62-11e4-aa73-0eb920ec942b/Les_victimes_de_la_dictature_en_quête_de_justice) 2015-02-24.

of confidence in the judicial system among the Tunisian population as well as the poor working conditions for the judges, which are not securing an efficient judicial system.<sup>143</sup>

The criminal proceedings in the Tunisian transitional justice process will take place within the existing judicial system, though some trials addressing crimes committed under the revolution have already been held in Tunisian military courts, which I will come back to in the following chapter.

### 3.5.1 The military justice system

The military justice system in Tunisia is composed of three military first instances tribunals and one military appeals court, a Military Chamber of Indictment before the Permanent Military Tribunals and the Military Court of Cassation (which is a section of the ordinary court of Cassation).<sup>144</sup> These military courts have jurisdiction over military offences, offences committed against the army and offences against other military personnel either in service or when off-duty.<sup>145</sup>

During both the regime of Habib Bourgiba and the regime of Ben Ali the military courts were used as repressive mechanisms by the state, convicting people in unfair trials for political crimes.<sup>146</sup>

There is still critique against the military courts. For example Amnesty International have been expressing concern after a Tunisian blogger has been sentenced to one year in jail for criticising the Tunisian military.<sup>147</sup>

In the transitional justice period the military tribunals have played a quite important role. Several cases have been transferred to the military courts and for example the Tunis Permanent Military Court has convicted Ben Ali *in absentia* –this was the only case tried *in absentia*. He was found guilty of murder in accordance to article 32 of the Penal Code and sentenced to lifetime imprisonment, a conviction that was confirmed by the Military Appeals Court, although, according to Human Rights Watch, this trial did not live up to the minimum requirements regarding fair trial in absentia.<sup>148</sup>

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<sup>143</sup> Rapport Avocat sans frontières; L'état de l'aide legal en Tunisie available at <http://www.asf.be/fr/blog/publications/letat-de-laide-legale-en-tunisie/>.

<sup>144</sup> Report by Human Rights Watch "Flawed Accountability, Shortcomings of Tunisia's Trials for Killings during the Uprising" p. 13.

<sup>145</sup> Décret n° 57-9 du 10 Janvier 1957 portant promulgation du code de justice militaire art 5.

<sup>146</sup> Report by Human Rights Watch "Flawed Accountability, Shortcomings of Tunisia's Trials for Killings during the Uprising" p. 14.

<sup>147</sup> <https://www.amnesty.org/articles/news/2015/01/tunisia-blogger-sentenced-one-year-jail-criticizing-army/>.

<sup>148</sup> Report by Human Rights Watch "Flawed Accountability, Shortcomings of Tunisia's Trials for Killings during the Uprising" p. 18f.



Regarding the cases tried in military courts after the revolution concerns have been raised on several aspects. This include delaying of the trials as a result of the transference of cases to the military courts, the problem of trials including civilians being tried by criminal courts and the fact that the victims, since they were civil parties were not allowed to participate in the investigation phase and could therefore not ask for crosschecking testimonies or present their own evidence.<sup>149</sup>

As a result of this critique the question of the possibility to try those cases again has been raised. This would be done within the transitional justice process by the specialized chambers, which I will come back to below. This is still an open question regarding that new trials could be a violation of *non bis in idem*.<sup>150</sup>

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<sup>149</sup> Report by Human Rights Watch "Flawed Accountability, Shortcomings of Tunisia's Trials for Killings during the Uprising" p. 21f.

<sup>150</sup> Andrieu, Kora, Confronter le passé de la dictatur en tunisie : la lois de "justice transtionelle" en question" p. 16.

## 4 Legal Transitional Justice measures taken by Tunisia

This chapter will give an overview of the legal measures taken in Tunisia in order to establish and regulate the transitional justice process. The chapter contains the adoption of a new constitution, the adoption of a law on transitional justice, and the, by previous mentioned law establishment of a Truth and Dignity Commission. Some aspect of the Truth and Dignity Commission will be mentioned already during the section about the law but since the Truth and Dignity Commission is such a great part of the transitional justice process there is also a section focusing only on this.

### 4.1 The constitution

The National Constituting Assembly did on the 26<sup>th</sup> of January 2014, after long and hard negotiations, adopt a new constitution.<sup>151</sup>

The new constitution does within art 148, point 9 refer to the transitional justice process:

The State commits to implementing the transitional justice system in all its domains within the timeline set by related legislation, and in this regard, no claim of retroactivity of laws or the existence of a previous pardon or the binding force of double jeopardy or statute of limitations or prescription of the crime or punishment, may be admitted.

This reference has been included in the constitution in order to protect the process of transitional justice and stress its legal status by actually mentioning it directly. The inclusion of transitional justice in the constitution was also one of the recommendations from the National Dialogue, a recommendation that has been taken into account and been fulfilled.<sup>152</sup>

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<sup>151</sup> The time after the revolution and the obstacles within the process has been excellently described in the book "Det här är vår tid", by Fanny Hägerstam.

<sup>152</sup> Report of the Dialogue on Transitional Justice by the Ministry of Human Rights and Transitional Justice, UNDP and OHCHR available at [http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport\\_dialogue\\_JT\\_Version\\_FR.pdf](http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport_dialogue_JT_Version_FR.pdf) p. 8

## 4.2 The law on establishing and organizing transitional justice

Tunisia has adopted a law on transitional justice that is called “The organic law on establishing and organizing transitional justice” or, in the French official transcription, “*Loi organique relative à l’instauration de la justice transitionnelle et à son organisation*”. This law is, as is pointed out by its name, an organic law. An organic law differs in the Tunisian judiciary’s system from ordinary laws by requiring a majority of two thirds of the parliament to be opened for amendments, which gives it a special constitutional status.<sup>153</sup>

The law establishes mechanisms for reparations to victims, institutional reforms, vetting civil servants, and national reconciliation, as well as specialized chambers within the court system with the mandate to try grave abuses committed between July 1955 and December 2013.

The transitional justice law also establish, within its article 10, the definition of the victim under the law and who can seek truth and reparation. This article reads as follow:

In this law, a victim shall mean any individual, group or legal entity having suffered harm as a result of violation.

Under public Law, shall also be considered as victims family members who were harmed as a result of their kinship to the victim as well as any person who was harmed by intervening to help the victim or prevent the violation.

This definition shall include every region which was marginalized or which suffered systematic exclusion.

This definition is very important for the process and it includes not only direct victims but also indirect victims. Furthermore the law is also classifying the regions as a victim, this in order to ensure economic and social rights since several regions, mainly in the interior of Tunisia, during the both regimes after the independence where neglected and the people in those regions where deprived, for example, their right to education and basic health services.<sup>154</sup>

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<sup>153</sup> Interview with Salwa El Gantri, ICTJ, 2015-02-20. art 64 of the constitutions regulates the status of organic laws and how to amend them.

<sup>154</sup> Interview with Salwa El Gantri, ICTJ, 2015-02-20. Organic Law on establishing and organizing Transitional Justice, art 10.

This goes hand in hand with what many scholars' underlines regarding the importance of preparing policies for transitional justice that works within the context of the country in question.<sup>155</sup>

As previous mentioned economic, social and cultural rights are not always regarded as rights that should be addressed within a transitional justice process but which have been regarded as important with the process in Tunisia.

A big part of the law is focusing of the establishment of a Truth and Dignity Commission, which is working with crimes committed and events taken place after the 1<sup>st</sup> of July 1955.<sup>156</sup> This means that the transitional justice process is not only dealing with the crimes committed during the Ben Ali regime but also the processor Habib Bourguiba who gained power in the country after the liberation from the French and from whom Ben Ali took power by a non-violent coup, in total this means that the committee is working with a period of 68 years. As mentioned in the chapter on transitional justice the ways Truth Commissions works varies a lot, what can be said about the Tunisian Truth and Dignity Commission is though that it has a very long mandate, and in the views upon the law on Transitional Justice this will be further discussed.<sup>157</sup>

The creation of the Truth and Dignity Commission is the most detailed part within the law. Pablo de Grieff, the UN special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, has expressed concerns that the law is rather a law on establishing a Truth and Dignity Commission than transitional justice. He has further criticised that there is no truly comprehensive approach to transitional justice. In his opinion the law is not sufficiently addressing criminal proceedings and institutional reforms.<sup>158</sup>

One of the aims associated with transitional justice in general is, reconciliation as I have mentioned in the background on the notion of transitional justice in chapter 2.1, Historical and contemporary debates on Transitional Justice. The Tunisian law on transitional justice treats this in the following way:

Reconciliation aims at consolidating national unity, achieving justice and social peace, building a State of Law and restoring the citizens confidence in State institutions.

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<sup>155</sup> Ex. Kritz, Neil, Policy Implication of Empirical Research on Transitional Justice in Baxter, Victoria, van der Merwe, Hugo, Victoria Baxter and Chapman Audrey R (eds), (2009) *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* Washington, DC: USIP Press p. 13.f.

<sup>156</sup> Organic Law on establishing and organizing Transitional Justice, art 15.

<sup>157</sup> Lamon, Christopher K, & Boujnef, Hela (2012), p. 32-49.

<sup>158</sup> United Nations, General Assembly, A/HRC/24/42/Add.1, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Grieff p. 10.

Reconciliation shall not mean impunity and lack of accountability for those responsible for violations.<sup>159</sup>

This part highly differs from the South African experience of transitional justice where truth was exchanged for amnesties in order to promote truth finding and reconciliation and it is furthermore consistent with the recommendations from the national dialogue concerning reconciliation.<sup>160</sup>

By this wording Tunisia has chosen its path in the choice of fighting impunity rather than accepting amnesties as a tool for reconciliation. The reasons for this can be explained by the development in international law towards a non-acceptance of impunity, which I have mentioned above in chapter 2.1, Historical and contemporary debates on Transitional Justice. But it can also be explained by the fact that many Tunisian stakeholders who have studied previous transitional justice experiences view the South African example as a failure.<sup>161</sup>

The law on transitional justice creates specialized chambers in order to deal with grave violations of human rights, in particular murder, rape and other forms of sexual violence, torture, enforced disappearance, and capital punishment without the guarantee of a fair trial.<sup>162</sup> It further deals with falsification of elections, economic crimes and financial corruption, misuse of public money and force migration for political reasons. The judges for the specialized chambers should be chosen among those who have not been part of political processes and they will be provided special training on transitional justice.<sup>163</sup>

Regarding the crimes included in the mandate of the specialized chambers and in the Tunisian justice process, a remark can be made towards the inclusion of economic crimes and financial corruption. Crimes of which, as discussed in chapter 2.1 there is an on going debate on whether they should be included in a transitional justice process or not.

The law does not give any detailed instruction regarding the composition of the chambers, on their relationship towards the Truth and Dignity Commission. Nor does it say anything about, as for the Truth and Dignity Commission, how long it will have a mandate.<sup>164</sup>

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<sup>159</sup> Organic Law on Transitional Justice art. 15.

<sup>160</sup> Friedman, Andrew B (2013) , p 739 f, Report of the Dialogue on Transitional Justice by the Ministry of Human Rights and Transitional Justice, UNDP and OHCHR available at [http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport\\_dialogue\\_JT\\_Version\\_FR.pdf](http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport_dialogue_JT_Version_FR.pdf) p. 20.

<sup>161</sup> Ex. Fisher & Stewart, (2014), p. 4.

<sup>162</sup> Organic Law on Transitional Justice art 8.

<sup>163</sup> Organic Law on Transitional Justice art 8.

<sup>164</sup> Interview with Salwa El Gantri ICTJ 2015-02-20.

The judges for the specialized judicial chambers have, at the time of writing this thesis, not yet been elected and concerns about the election of them have been expressed.<sup>165</sup> The transitional justice law stipulates that the judges in the specialized judicial chambers should, as just mentioned, be chosen among those who have not taken part in any political proceedings and questions about the categorisation of this have been raised.<sup>166</sup>

### 4.3 The Truth and Dignity Commission

The law on transitional justice does set the frame for the establishment on a Truth and Dignity Commission, which has been *de facto* established and begun its work. These frames are rather detailed and regulate the mandate, which is a four-year mandate that can be extended by one extra year and the number of members of the Committee, which should be fifteen.<sup>167</sup> The law also regulates the composition of the Truth and Dignity Commission and states that the committee members should be represented by at least one third of each gender.<sup>168</sup>

The timely mandate of the Truth and Dignity Commission is rather long in comparison to other transitional justice processes. For example in Peru the Truth Commission had a mandate of two years to complete its work as well as submitting its final report and the Truth Commission in Timor Leste finished its work within three years<sup>169</sup>

The period which the Truth and Dignity Commission is set out to investigate is very long, starting from the 1<sup>st</sup> of July 1955 until the revolution. This in order to uncover the truth about all the past violations but also to understand how the dictatorship could stay in power for so long.<sup>170</sup>

Even if the period is long, there have been other examples of transitional justice experiences aiming on investigate long periods of time in other countries. For example in Morocco the Truth Commission was set out to investigate crimes between the independence in 1956 until 1999, a period of 43 years and in South Africa the Truth Commission was set out to investigate 45 years of apartheid.<sup>171</sup>

The law contains details about the procedures, on how to elect the commissioners and who can be elected as a commissioner, on how to organize their work with the establishment of a technical committee for arbitration and reconciliation, the establishment of regional offices but also

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<sup>165</sup> Ex. interview with Salwa El Gantri ICTJ 2015-02-20.

<sup>166</sup> Organic Law on Transitional Justice art 8.

<sup>167</sup> Organic Law on Transitional Justice art 19.

<sup>168</sup> Organic Law on Transitional Justice art 19.

<sup>169</sup> Hayner, Priscilla B. (2011), p 36, 40.

<sup>170</sup> Interview with Oula Ben Nejma Commissionaire, Truth and Dignity Commission 2015-03-03.

<sup>171</sup> Hayner, Priscilla B. (2011), p.27, 43.

the mandate of the Truth and Dignity Commission to establish its own inertial regulation.<sup>172</sup>

According to article 42 of the law the Truth and Dignity Commission shall refer cases of gross human right violation to the Public Prosecution.<sup>173</sup> This is something that has not always been the case for Truth Commissions, for example the Truth Commissions in Morocco and Chile was prohibited from naming perpetrators or play any role in their prosecution.<sup>174</sup>

The law is also giving the commission several prerogatives in order to complete its tasks; among those can be found: to have access to public and private archives, regardless of all restrictions contained in the applicable legislation; receiving complaints and petitions related to the violations which may be accepted for one year as of the beginning of the Commission's activity, renewable for a period of six months maximum; resorting to the public authority staff to execute its tasks related to inspection, investigation and protection; requesting the administrative and judicial authorities, the public commission as well as any other natural person or legal entity to provide it with the documents or information they have in their possession; as well as requesting information from the official foreign authorities and non-governmental organizations in accordance with the relevant international conventions and treaties and gathering any information from the victims, witnesses, civil servants and other parties from the countries in coordination with concerned authorities.<sup>175</sup>

While operational the Truth and Dignity Commission shall release annual reports and at the end of its mandate the Commission shall submit a final report.<sup>176</sup> The submission of final reports is often one of the tasks of Truth Commission, and can also be one of the measurements of the success of a Truth Commission.<sup>177</sup>

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<sup>172</sup> Organic Law on Transitional Justice art. 45.

<sup>173</sup> Organic Law on Transitional Justice art. 42.

<sup>174</sup> Hayner, Priscilla B. (2011), p. 93.

<sup>175</sup> Organic Law on Transitional Justice art 40.

<sup>176</sup> Organic Law on Transitional Justice art. 67.

<sup>177</sup> Wiebelhaus-Brahm, Eric, (2010), p 40 f.

# 5 The current state of Transitional Justice in Tunisia

This section of the study is focusing on the current state of the implementation of the Law on Transitional Justice as well as the on-going discussions of the transitional justice process in Tunisia. There will be a higher focus upon the Truth and Dignity Commission who is in the beginning of its work and who is widely discussed in the Tunisian civil society. Regarding the criminal proceedings within the process, those have not yet started why there are still a lot of questions to be answered. Furthermore there will be an overview of the more general status of process within the Tunisian society.

## 5.1 The views on the Law on Transitional Justice

The opinions about the law on transitional justice are diverse within the Tunisian civil society. For some stakeholders the law is well drafted while others want to redraft it.<sup>178</sup>

The determination of the period that should be investigated by the Truth and Dignity Commission was one of the most debated questions before adopting the law. While many Islamist wanted to have a period starting from the independence many secular groups wanted to have investigations only during the Ben Ali regime.<sup>179</sup>

Still many representatives from civil society as well as from the Truth and Dignity Commission regard the long period as a challenge for the process.<sup>180</sup>

The general view within the civil society of the law is that the law is full of flaws, but that many of those flaws are unavoidable since the law is a compromise. Though some civil society representatives are harsher in their critique and they want to redraft the law.<sup>181</sup>

Some stakeholders praise that the law includes economic social and cultural rights, something that is not always the case within transitional justice processes, which has previously been described, and underlines the fact that

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<sup>178</sup> For example Karim Abdel Salem, Association Association Justice et Réhabilitation, wants to redraft the law while Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle, is against a redrafting of the law.

<sup>179</sup> Fisher, Kirsten & Stewart, Robert (red.) (2014), p. 58.

<sup>180</sup> Lilla Bouguira and Hayet Ouatrani, Commissionaires, Truth and Dignity Commission 2015-03-03.

<sup>181</sup> Interview with Karim Abdel Salem Association Justice et Réhabilitation 2015-03-04.



the regions has been categorized as victim, which I will come back to in the following. At the same time other stakeholders express concerns for the law not including sufficient of economic, social and cultural rights.<sup>182</sup>

Furthermore, for some stakeholders a redrafting of the law is regarded as counterproductive and they believe that the time for discussing the law has passed and that focus now should be on completing the process. Those stakeholders also see a danger in a redrafting of the law on transitional justice since the composition in the National Assembly is not the same as it was in the National Constituent Assembly and a redrafting might lead to changes in an undesirable direction.<sup>183</sup>

A question that still needs to be solved regarding the transitional justice law is the fact that there are two crimes, falsification of election and forced migration, within the law, that does not exist in the Tunisian Penal Code. How to handle this is an on going struggle and there are two factions promoting different solutions: one to amend the penal code and the other one to amend the law on transitional justice.<sup>184</sup>

Also the commissioners of the Truth and Dignity Commission does express concerns regarding how to address the crimes of falsification of election and forced migration. This also in the level of what those crimes actually mean since they are not regulated in detail in the law on transitional justice nor are they regulated in other laws.<sup>185</sup>

The law itself was adopted by the National Constituting Assembly that had a majority of the parliamentarians who was party members of Ennhada. This law is also to a greater extent accepted by stakeholders who identify themselves in the same political spectra as Ennhada. This view is very well confirmed by Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle, who, expressed concerns regarding a new drafting on the law since it will delay the process and also since the majority of the national assembly of today is different from the one adopting the law on transitional justice.

The same can be seen, as Salwa El Gantri, International Center for Transitional Justice, ICTJ, pointed out, regarding how to handle the discrepancy between the penal code and the transitional justice law. Also here there is two factions, one that wants to include forced migration and falsification of elections within the penal code and one that wants to erase those crimes from the law on transitional justice.<sup>186</sup>

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<sup>182</sup> ex. Interview with Salwa El Gantri, ICTJ, 2015-02-20., Karim Abdel Salem, President of Association Justice et Réhabilitation, Tunis, 2015-03-04

<sup>183</sup> Interview with Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle.

<sup>184</sup> Interview with Salwa El Gantri, ICTJ, 2015-02-20.

<sup>185</sup> Interview Slaheddine Rached, Truth and Dignity Commission, 2015-03-03.

<sup>186</sup> ex. Interview with Salwa El Gantri, ICTJ, 2015-02-20.

It has been pointed out by several scholars on transitional justice that there is a dilemma within transitional justice: how to make a process and avoid making it the justice of the winner.<sup>187</sup> In Tunisia the current situation is not just limited to a fraction of winner and loser, but there are several factions which all have their view upon how the process should be shaped and would say that the process has not succeeded in its current shape.<sup>188</sup>

One concern that has been raised is that the law does not address economic, social and cultural rights and does not take into account the context of Tunisia, with its economic problems and the marginalisation of certain regions.<sup>189</sup> In regard to this some stakeholders express, as mentioned, concern that economic social and cultural rights have not been addressed others do, as mentioned, praise the law for including those rights.<sup>190</sup>

As discussed in chapter 2.1 the inclusion of economic social and cultural rights within transitional justice processes is a discussed issue, with one faction meaning that the inclusion of economic social and cultural rights is necessary in order to achieve reconciliation and the other faction means that the inclusion would make the notion of transitional justice too wide.<sup>191</sup>

Within the Tunisian experience, there is a consensus regarding that economic, social and cultural rights should be included; the disagreement does rather refer to whether this law does sufficiently address those rights.<sup>192</sup>

The law on transitional justice does underline that reconciliation should not mean impunity, a wording that many stakeholders agree with as important and people both from civil society and the Truth and Dignity Commission do highlight that they do not want a transitional justice experience like the one in South Africa where a lot of perpetrators got amnesties in exchange for truth.<sup>193</sup>

As for now, there are factions within the civil society that are fighting to change the law, though a majority would, even though they see weak points in the law, stay with the law as it is and rather adopt amendments, either out

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<sup>187</sup> ex. Friedman, Andrew B (2013), pp. 738f and Kritz, Neil J. (red.) (1995). *Transitional justice: how emerging democracies reckon with former regimes. Vol. 3, Laws, rulings and reports*. Washington, D.C.: United States Institute of Peace Press p. xxiii.

<sup>188</sup> Ex Interview Karim Abdel Salem Association Justice et Réhabilitation 2015-03-04

<sup>189</sup> Interview Karim Abdel Salem Association Justice et Réhabilitation 2015-03-04

<sup>190</sup> Interview Salwa El Gantri ICTJ, 2015-02-20, Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle 2015-04-01.

<sup>191</sup> See for example: Arbour, Louise (2007), p 6f, United Nations, General Assembly, *A/HRC/12/18 Annual report of the united nations high commissioner for human rights and reports of the office of the high commissioner and the secretary general, analytical study in human rights and transitional justice*. 6 august 2009 p. 18., Waldorf, Lars (2012), p. 179

<sup>192</sup> Ex. Interview Karim Abdel Salem Association Justice et Réhabilitation 2015-03-04, Interview Salwa El Gantri, ICTJ, 2015-02-20.

<sup>193</sup> Ex. Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle 2015-04-01.

of fear of getting unwanted changes or out of concerns of delaying the process.

While talking to stakeholders the opinions upon details could, as I have outlined, been quite harsh. While comparing this to the views of non-stakeholders the difference is miles wide.

It is true that many Tunisians do not follow the transitional justice process closely, though there is, at least in Tunis, awareness that it is going on and there is also a support for the process, even though the knowledge of exactly what is happening is very low.

For a transitional justice process to succeed it needs to have support from the new regime, even though as in Tunisia the Truth and Dignity Commission is an independent body it cannot carry out its work without support from the government. Concerns were raised from some stakeholders already during the incident with the archives, something that has been very much discussed within the country. After the Independence Day, when the president in his speech asked for reconciliation<sup>194</sup> further concerns were raised. Even though certain stakeholders have expressed their concern about this statement it has not been much debated in the Tunisian society.

## 5.2 Establishment of the Truth and Dignity Commission and their work

The Truth and Dignity Commission has been established and the fifteen members of the commission have been elected. However two of those members have resigned. In December 2014 the commission opened for receiving files. In March 2015 the commission had received 8 000 files from victims (which in April had raised to 10 000). Of those files only 11 % come from women. The low percentage has been pointed out as a problem both by the Truth and Dignity Commission and stakeholders within the civil society.<sup>195</sup>

The *de facto* creation of the Truth and Dignity Commission has taken time and members of the commission have described the establishing as a quite challenging period where the first months have mainly been focusing on finding practical solutions to enable the committee's further work.<sup>196</sup>

The transitional justice law regulates the proceedings of nomination and elections of commissioners to the Truth and Dignity Commission. According to the law a special committee within the National Constituting

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<sup>194</sup> Which I will get back to in chapter 5.4.

<sup>195</sup> Ex. Observation event by the Truth and Dignity Commission 2015-03-07, <http://www.ivd.tn/?p=581&lang=fr>.

<sup>196</sup> Interview Oula Ben Nejma, Truth and Dignity Commission 2015-03-03, Interview Lilla Bouguira and Hayet Ouatrani, Truth and Dignity Commission, 2015-03-03.

Assembly should nominate the commissioners, which then will be elected by the deputies.<sup>197</sup>

The elections of the commissioners have been done in the way stipulated by the law. A lot of critique has though been raised from civil society organisations that regard the commissioners as biased, that they have been elected upon political grounds and that the entire creation of the Truth and Dignity Commission has been strongly politicised.<sup>198</sup>

The critique towards the election of the commissioners has also addressed the procedure of the elections. Concerns have been raised that those elections have not been transparent.<sup>199</sup>

The strongest critique is aimed at the president of the Truth and Dignity Commission, Sihem Bensidrine, and a lot of this criticism points towards her person, both regarding her political belonging as well as her competence.<sup>200</sup>

There are different ways to look upon this criticism and how much the political affiliation of the commissioners will really have an effect on the work of the commission. At the moment the Truth and Dignity Commission has been established and is in the process of hiring staff, and the competence of the persons hired as well as the quite detailed frame of the Truth and Dignity Commission's work within the law will guarantee sufficient achievement of the processes.<sup>201</sup>

There is also a division within the civil society upon how to handle these concerns regarding the Truth and Dignity Commission. While some are expressing that the process is already delayed and now the aim has to be the fulfilment of the process others express a need to redo the election of the members of the Truth and Dignity Commission in order to succeed with the process.<sup>202</sup>

Furthermore, there have been concerns raised from several stakeholders that the new government, led by Nidaa Tounes, does not have any interest in the process and will not support the commission, since there are people in the

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<sup>197</sup> Organic Law on Transitional Justice art 23.

<sup>198</sup> Omar Weslati, Observatoire Tunisienne pour l'Indépendance de magistrat 2015-03-10.

<sup>199</sup> Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle 2015-04-01.

<sup>200</sup> Ex Interview Sélim Ben Abdesslem, former member of parliament , 2015-03-19

Interview with Hafida Chekir, one of the fondateurs de ATFD, professor in law and member the High Commission for the Fulfillment of the Revolutionary Goals, Political Reform and Democratic Transition 2015-04-02 and interview with Héra Boujnah, PhD Candidate and youth activist, 2015-04-08.

<sup>201</sup> Interview Filippo Di-Carpenga, UNDP, 2015-03-06.

<sup>202</sup> Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle 2015-04-01, Karim Abdel Salem, Association Justice et Réhabilitation 2015-03-04.

government including the new president that were part of the previous regimes.<sup>203</sup>

A problem that has been raised so far includes not giving the Truth and Dignity Commission full access to, and to take documents from, the presidential archives which it, according to article 40 of the law, has a right to. However, there is a dilemma regarding the formulation of the law, which stipulates that the Truth and Dignity Commission should have full access to the archives. This formulation triggered a crisis when Sihem Bensedrine after the election wanted to take documents from the archives in order to secure the Truth and Dignity Commissions access to them but was stopped with the argument that the law only entitles the Truth and Dignity Commission access to the archives but not to collect any documents.<sup>204</sup>

This happening does divide the civil society. While some see it as an indication of the lack of support from the regime others rather mean that this shows the lack of competence of Sihem Bensedrine. This critique towards Sihem Bensedrine regarding the archives is utterly harsh from some actors that mean that she is damaging the credibility of the entire instance by trying to extend the mandate given by the law.<sup>205</sup>

Some optimism regarding the motivation of the government to cooperate has though been expressed from the commissioners in the Truth and Dignity Commission after the release of the commission's budget.<sup>206</sup>

Overall the members of the Truth and Dignity Commission give a hopeful picture of the work to come and do say that they have faith in that they will be able to finish its work with support from the government although one of the members, Oula Ben Nejma, expressed that if there should arrive any obstacles that would prevent the commission from fulfil its work they will make sure that the world will know it, and particularly, the victims.<sup>207</sup>

The establishment of the Truth and Dignity Commission has taken time, and the commissioners have pointed out that the first months had to mainly focus on the practical challenges as well as the internal regulation. These internal regulations have involved the establishment of the following working committees in conformity with the law on transitional justice: a

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<sup>203</sup> Ex. interview Omar Weslati, Observatoire Tunisienne pour l'Indépendance de magistrat 2015-03-10.

<sup>204</sup> Interview Camille Henry, MedRight, 2015-03-05.

<sup>205</sup> Ex. interview with Salwa El Gantri ICTJ 2015-02-20, interview with Sélim Ben Abdesslem, former member of the parliament, 2015-03-19, Interview Hafida Chekir, one of the fondateurs de ATFD, professor in law and member the High Commission for the Fulfilment of the Revolutionary Goals, Political Reform and Democratic Transition 2015-04-02.

<sup>206</sup> Interview Oula Ben Nejma, Truth and Dignity Commission. 2015-03-03.

<sup>207</sup> Interview Oula Ben Nejma, Truth and Dignity Commission. 2015-03-03.

committee on arbitrage and reconciliation a committee on reparations, a women's committee and a committee on institutional reforms.<sup>208</sup>

The establishment of a women's committee is one way to ensure the participation of women within the transitional justice process, something that has been pointed out by several sources to be of utter importance within such a process.<sup>209</sup>

There have been concerns raised of the transitional justice process in Tunisia in how to address the crimes against women and in particular Islamist<sup>210</sup> women as those crimes were for a long time not spoken about since the risk of stigmatisation for the women. Furthermore, it has been pointed out a lack of support from secular women's organisations towards these Islamist women, which after the revolution has led to tensions between those groups.<sup>211</sup>

According to Piscilla B Hayner a Truth Commission can both search for the truth and recognize the truth and that this distinction between knowledge and acknowledgement is important. In the case of Tunisia the Truth and Dignity Commission will have both these roles, to search for the truth but also acknowledge crimes that there have been awareness about but that has not been addressed.<sup>212</sup>

This aspect is discussed by civil society as well as international organizations. Several ways on how to ensure the participation of women have been aiming at on the one hand the spreading of information to women so ensure that women actually will file complaints and on the other hand on trust building, making sure that women will have the possibility to tell their story to someone that they trusts.<sup>213</sup>

The importance of trust, and respect has been underlined by Ibtihel Abdellatif, the president of the women's committee in the Truth and Dignity Commission, stressing the importance that a woman coming to leave a testimony needs to be treated with respect.<sup>214</sup>

Still, even though efforts are made for including women in the process only, as previously mentioned, 11% of the received complaints (in march 2015) to

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<sup>208</sup> Interview with Salwa El Ganrti ICTJ, 2015-02-20, Interview Oula Ben Nejma, Truth and Dignity Commission, 2015-03-03

<sup>209</sup> United Nations, General Assembly, A/HRC/12/18, *Annual Report of the United Nations High Commissioner for Human Rights and reports of the High Commissioner and the Secretary-General, Analytic study on human rights and transitional justice* p. 14, Gray, Doris H, & Coonan, Terry (2013), p. 348-357.

<sup>210</sup> I am using the term Islamist women for women who is directly or indirectly linked to the Islamist party and movement.

<sup>211</sup> Gray, Doris H, & Coonan, Terry (2013), p. 348-357.

<sup>212</sup> Hayner, Priscilla B. (2011), p. 21.

<sup>213</sup> Salwa El Ganrti ICTJ 2015-02-20, Ibtihel Abdellatif, Truth and dignity Commission 2015-03-03

<sup>214</sup> Interview Ibtihel Abdellatif, Truth and dignity Commission, 2015-03-03.

the Truth and Dignity Committee were from women. This is a very small number and commissionaires as well as representatives from the civil society has underlined the problem of the lack of testimonies from women and discussions on how to address it are on-going.<sup>215</sup>

Additionally, according to the law on transitional justice the Truth and Dignity Commission should establish regional offices, a work which has begun but not been fulfilled, and some activists have pointed out that by not fulfilling all the requirements in time the commission is breaching the law in a serious manner.<sup>216</sup>

The delay on establishing regional offices has also been pointed out as a great obstacle towards the possibility to reach out to all victims in order to fulfil the objectives of the process and it is the responsibility of the Truth and Dignity Commission to reach out to all victims.<sup>217</sup>

Furthermore concerns have been pointed out from several stakeholders that the timely mandate for the Truth and Dignity Commission to fulfil its mandate is too short especially in correlation with the huge mandate of its investigation.<sup>218</sup>

One critique that has been pointed out against the law on transitional justice is that it is focusing too much upon the victims leaving out the perpetrators. It can also be seen within the discussions about transitional justice in the Tunisian society that the focus is on the rights of the victims, which can be an obstacle towards reconciliation.<sup>219</sup>

Furthermore, the previously mentioned report by the Secretary General to the UN defined justice in the following way: “Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.”<sup>220</sup>

This approach was also stressed within the national dialogue concerning uncovering the truth where the recommendations summarised by the technical committee included “the importance of listening to both victims and perpetrators, as well as security and military officials, in order to

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<sup>215</sup> Interview Salwa El Gantri ICTJ, 2015-02-20, Observation event hosted by the Truth and Dignity Commission, 2015-03-07.

<sup>216</sup> Interview Héla Boujnah, PhD Candidate and youth activist, 2015-04-08.

<sup>217</sup> Interview Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle, 2015-04-01

<sup>218</sup> Interview Messaud Romdhani, LTDH and FTDES 2015-03-20, Interview Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle, 2015-04-01.

<sup>219</sup> Interview Héla Boujnah, PhD Candidate and youth activist, 2015-04-08.

<sup>220</sup> United Nations, Security Council S/2004/616 *The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General* para 7.

uncover the truth, and obtain a formal apology from the State”.<sup>221</sup>

The importance of addressing both the victims and the perpetrators has been underlined within the transitional justice literature. To be able to succeed in the process it is necessary to find a balance between on the one hand the victims’ rights and on the other hand the need for reconciliation which will not be possible in the cases where perpetrators believe that a history of the winner had been written.<sup>222</sup>

During the so far process of transitional justice the civil society has been very active and have had a great influence. The continuation of this and the need for cooperation between the civil society and the Truth and Dignity Commission has been underlined as essential for a succeeding in the process and concern that not all members of the commission is ready to cooperate have been identified as one of the greatest obstacles towards the process.<sup>223</sup>

### 5.3 Criminal proceedings

As previously mentioned some proceedings have already taken place aiming on the crimes committed during the revolution based on the decree concerning the martyrs and hurts during the revolution. The proceedings that took place as a result of this law has been strongly criticised for not giving justice to the victims.<sup>224</sup>

One of the problems with the adoption of the transitional justice law is the laws unconformity with the Tunisian Penal Code. The main problem is two crimes, which has been established, upon request of victims during the national dialogue that do not exist within the penal code.<sup>225</sup> Neither of those two crimes exists under international criminal law, which has been pointed out as a problem by Human Rights Watch. They mean that the law on transitional justice needs to be amended in order to protect people from being prosecuted for actions that at the time was not criminalized neither in national law nor in international law.<sup>226</sup>

Furthermore, concerns have been expressed since there is still a question mark regarding the specialized chambers and their composition. The establishment of the specialized chambers is regulated in article 8 in the law

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<sup>221</sup> Report on the Dialouge on Transitional Justice by the Ministry of Human Rights and Transitional Justice, UNDP and OHCHR availaibe at [http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport\\_dialogue\\_JT\\_Version\\_FR.pdf](http://www.justice-transitionnelle.tn/fileadmin/medias/jort/Rapport_dialogue_JT_Version_FR.pdf) p. 16.

<sup>222</sup> Friedman, Andrew B (2013), p. 738f.

<sup>223</sup> Interview Kamel Gharbi, President of Reseau Tunisien pour la Justice Transitionnelle, 2015-04-01.

<sup>224</sup> Décret-loi n° 2011-97 du 24 Octobre 2011 portant indemnisation des martyrs et blessés de la révolution du 14 janvier 2011 available at <http://www.legislation-securite.tn/fr/node/30917>, Kamel Gharbi, President of Reseau Tunisien pour la Justice Transitionnelle.

<sup>225</sup> Interview with Salwa El Gantri, ICTJ, 2015-02-20.

<sup>226</sup> <http://www.hrw.org/news/2014/05/22/tunisia-hope-justice-past-abuses> 2015-03-10



on transitional justice but this law does not regulate how to elect the judges neither what training they should be provided with. A question, which also attends to be solved since those chambers will face other challenges than ordinary chambers and handle cases on basis of transitional justice aiming on a long amount of time.<sup>227</sup>

As can be pointed out, the criminal proceedings in Tunisia will be carried out within the Tunisian judiciary system although in specialized chambers. This choice of organising the criminal proceedings seems widely accepted among stakeholders and even though some raises concerns on the details of the specialised chambers, as I soon will get back to, none has questioned that the criminal proceedings should take place in the Tunisian judiciary.<sup>228</sup>

Moreover, another issue which will need to be addressed: how to handle violations of human rights which already had been handled by the justice system but by courts or judges that has been biased in a way which has resulted in perpetrators getting punishments, but very limited ones? These are cases when proceedings have already been held. New and fair proceedings would therefor violate the principle of *non bis in idem*.<sup>229</sup>

## 5.4 The current state of Transitional Justice in the Tunisian society

Tunisia is a country struggling with various challenges of which two of the greatest are economy and security. For many persons the security issues got even more in focus after the attack upon the Bardo museum on the 18<sup>th</sup> of March 2015, and concerns have been raised that the government might put transitional justice lower on its agenda.<sup>230</sup>

Concerns have also been raised that the transitional justice process is advancing so slowly, and that the interest from the population is so weak, that the support from the government is too small, all resulting at a point at which the government will say “let the past be the past: it is time for reconciliation”.<sup>231</sup>

For many people transitional justice is not a priority, something that is regarded as a big problem in the Truth and Dignity Commission as well as among the civil society. Several times representatives from the civil society as well as from the Truth and Dignity Commission have expressed concerns of the non-interest from media for the process, except when there is a

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<sup>227</sup> Interview Omar Weslati, Observatoire Tunisienne pour l’Independance de magistrat, 2015-03-10

<sup>228</sup> See list of interviews in appendix I.

<sup>229</sup> Training of juges by IBA 2015-02-16 – 2015-02-19.

<sup>230</sup> Interview with Sélim Ben Abdeselem, former member of the parliament, 2015-03-19, interview with Messaud Romdhani, LTDH and FTDES 2015-03-20.

<sup>231</sup> Interview with Messaud Romdhani, LTDH and FTDES 2015-03-20.

conflict between the government and the Truth and Dignity Commission such as with the archives.<sup>232</sup>

Criticism has also been raised from several stakeholders regarding the media strategy from the Truth and Dignity Commission as well as from the commission itself, which has underlined the importance of having an effective strategy of communication.<sup>233</sup>

For many people, even though they would not label the process of transitional justice as unimportant there are other questions of much higher importance, mainly the economy and the security.<sup>234</sup>

Furthermore, certain groups, who also participated in the uprising, for example the General Union of Tunisian Students (UGET) expresses disappointment with the process as well as the development in Tunisia since they cannot see any change in their situation and feel excluded from the process.<sup>235</sup>

As previously mentioned concerns have been raised from the civil society that the government is not entirely supporting the transitional justice process, a concern that got fuelled on the independence day on the 20 March 2015, when the president in his speech towards the nation launched the proposal of amnesties towards businessmen aiming at promoting the economic development within the country.<sup>236</sup>

Towards this there has not yet been seen any concrete action, but the opinions from the civil society is a consistent critique. Concerns about rush towards the reconciliation part of the transitional justice process has been predicted by Messaud Romdhani who says “we gonna reach a day, when we say [...] now were going to have reconciliation and forget about the past.”<sup>237</sup>

The general opinion is that reconciliation is the last step in a transitional justice process. Kamel Gharbi describes this in the following way: “We think that reconciliation is the ultimate objective of transitional justice one can not hurry towards reconciliation. Some want that transitional justice walk on its head. We, we want it to walk on its feet. The head is reconciliation, the feet is investigations, reparations[...] it is institutional

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<sup>232</sup> Interview Lilla Bouguira and Hayet Ouatrani, Truth and Dignity Commission Truth and Dignity Commission 2015-03-03, Observation 2015-03-07, Interview Omar Weslati, Observatoire Tunisienne pour l’Indépendance de magistrat 2015-03-10.

<sup>233</sup> Interview Lilla Bouguira and Hayet Ouatrani, Truth and Dignity Commission, HÉla Boujnah, PhD Candidate and youth activist, 2015-04-08. Observations 2015-03-07.

<sup>234</sup> ex, Interview Messaud Romdhani, LTDH and FTDES 2015-03-20.

<sup>235</sup> What transitional justice for Tunisia? event on World Economic Social Forum which was organised by Comité de Vigilance pour la Démocratie en Tunisie, Enda Ecopop and AFD International, 26th of March, 9 am-11 am, University of Tunis.

<sup>236</sup> ex. <http://www.leaders.com.tn/article/16633-terrorisme-et-reformes-caid-essebsi-en-psychotherapeute> and <http://www.espacemanager.com/beji-caid-essebsi-appelle-la-reconciliation-avec-les-hommes-daffaires.html>

<sup>237</sup> Interview Messaud Romdhani, LTDH, 2015-03-20.

reforms and in the end one might achieve this reconciliation.”<sup>238</sup> A standpoint that goes hand in hand with the formulation in the recommendations from the National Dialogue which says “reconciliation is a moment that comes at the end of all the phases of transitional justice [...] and in no way does it equal impunity.”<sup>239</sup>

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<sup>238</sup> Interview Kamel Gharbi 2015-04-01:” Nous pensez que la réconciliation c’est l’objectif ultime de la justice transitionnelle mais il faut pas sorte vers la réconciliation, certain veut que la justice transitionnelle marche sur la tête. Nous, nous voulons qu’elle marche sur les pieds, La tête c’est la réconciliation, les pieds c’est l’investigation, la réparation [...] c’est la réforme d’institution et enfin on peut arriver a cette réconciliation”.

<sup>239</sup> Report on the Dialogue on Transitional Justice by the Ministry of Human Rights and Transitional Justice, UNDP and OHCHR p. 20.

## 6 Conclusion

To begin with, let us recall the aim of this thesis, the so far implementation of transitional justice in Tunisia with the following research questions:

*How is Tunisia implementing the measures set out in the law on transitional justice regarding truth seeking and prosecution? How is the Tunisian process shaped in comparison to other processes and transitional justice theory? Which successful accomplishments can be seen, and which concerns can be pointed out?*

Those questions have been answered mainly, and especially the second part of the question by the field study in Tunisia. Thanks to the field study and the method used I could follow the discussions in Tunisia and discovers certain patterns and themes. I will in the section of challenges ahead present the two main themes found; the political division and the risk for the process to get overshadowed by other challenges in the Tunisian society.

The first part of the conclusion will answer the question with an aim on the current situation for the transitional justice process while the second part will look upon the future for the process based upon the current situation, and concerns that has been pointed out.

### 6.1 The so far implementation of Transitional Justice in Tunisia

Tunisia is at this point, as has been pointed out several times, still in the beginning of the process of transitional justice, several measures have been taken but there are still several steps to take towards an accomplished process.

The law on transitional justice is the core of the transitional justice process in Tunisia. This law is in many ways extensive in regard to the academic debate for example the law includes economic, social and cultural rights. However, the law is still not generally accepted among stakeholders and some parts of the civil society want to redraft the entire law.

Furthermore with the law Tunisia has taken an approach to transitional justice underlining the importance of that reconciliation should not mean impunity. An approach that goes hand in hand with how the academic debate on transitional justice has developed.

Before it was drafted, and before the *de facto* process of transitional justice was initiated some measures were taken by the interim government including prosecution for crimes committed during the revolution. Those

proceedings have been criticized and there is still no solution on how to handle the same crimes without a violation of *non bis in idem*.

There are also some additional legal issues that will need to be solved, the most discussed of those is how to handle the non compliance between the law on transitional justice and the penal code regarding falsification of election and forced migrations; crimes that exists within the law on transitional justice but not within the penal code.

This discussion very much reveals the disagreement that exists within the Tunisian society, with the Islamist at one side and secularist at the other side.

In 2014 the Truth and Dignity Commission was established and since then the commission has started its work which had a long start up period since many practical questions needed to get solved. The commission has since December 2014 started to receive complaints and has so far received more than 10 000 files. And even though, as mentioned, the Truth and Dignity Commission is criticized by many stakeholders, they have begun their work and are progressing and developing which has to be seen as an accomplishment.

Furthermore the law on transitional justice stipulates that specialized chambers should be created within the Tunisian judicially system, regarding those there are still several questions that need to be answered before they can be established and the criminal proceedings within the process can start.

It is in many ways apparent that Tunisia is still in the beginning of the implementation why the next years of work of the Truth and Dignity Commission as well as the criminal proceedings will be of utter importance for the outcome of the process.

## **6.2 Challenges ahead**

While studying the transitional justice process in Tunisia two themes of main challenges for the process got apparent. The first challenge is the political division and the second the risk of the process to getting overshadowed by other challenges in the Tunisian society.

Talking about the political division there are two great lines, first of all between the secular and the Islamisist; the sympathisers of Ennahda and secondly the great mistrust from many stakeholders towards Nidaa Tounes.

The division between the different factions of the Tunisian society did affect the drafting of the law on transitional justice and does still effect the views upon the law and the approach upon how the process should continue. While representatives from the Islamist fraction express resistance towards a redrafting there are representatives from other factions who argue that the process cannot succeed with the current law as a base.

This is a debate that gets similar to the challenges in transitional justice regimes that has been pointed out by several scholars of the danger of making the process the process of the winner.

The bias also expresses in a lack of faith from stakeholders towards the Truth and Dignity Commission. A criticism that in some cases might be unnecessarily harsh, taken into account, as Filippo Di-Carpenga puts it, that most important for the process is not the commissionaires *per se*, it is rather the people that they will hire and who will carry out the process.<sup>240</sup>

The second theme is the risk of the transitional justice process getting overshadowed by other challenges in the Tunisian society. The country is struggling with various problems, those mainly pointed out refers to the economy and the security. Problems that does not *per se* threaten the process but can be used as argument for other prioritisations both from a government or from the population if they would lose their faith in the process.

This theme has been underlined both by stakeholders and by non-stakeholders. Stakeholders are concerned that the process gets overshadowed while Tunisian citizens can not see a change in their everyday life, specially concerning economic, social an cultural rights and means that the objective of the revolution has not been fulfilled.

As de Greiff has pointed out, it can be absurd when a transitional justice process is getting to expensive, in relation to other institutions and other needs,<sup>241</sup> and with the current situation in Tunisia the need for continuously explaining the importance of a transitional justice process and making it transparent has to be met.<sup>242</sup>

This might, in many ways be one of the greatest challenges for the Truth and Dignity Commission as well as stakeholders. To communicate the importance and show results of the transitional justice process, avoiding that it gets overshadowed by other urgent needs.

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<sup>240</sup> Filippo Di-Carpenga, UNDP, 2015-03-06.

<sup>241</sup> de Greiff, Pablo (2009), p. 30.

<sup>242</sup> Lilla Bouguira and Hayet Ouatrani, Commissionaires, Truth and Dignity Commission, 2015-03-03, Héla Boujnah, PhD Candidate and youth activist, 2015-04-08.

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Speech by Navi Pillay for the establishment of the Truth and Dignity Commission available at:

<https://www.youtube.com/watch?v=wS2qICbW8o4> 2015-02-27

Documentary on the National Dialogue created by the Ministry of Human Rights and Transitional Justice, available at:

<https://www.youtube.com/watch?v=VVH380BulMU&feature=youtu.be>

# Appendix I Interviews

## **International organisations**

Salwa El-Ganti, Program associate, International Center of Transitional Justice (ICTJ), 2015-02-20

Camille Henry, Project assistant, MedRight, 2015-03-05

Filippo Di-Carpenga, principal technical adviser, UNDP, 2015-03-06

## **Civil Society**

Jlassi Moemen och Ben Taler Ibrahim working with complaints from victims of torture at OCTT, Organisation Contre la Torture en Tunisie, Tunis, 2015-03-02

Karim Abdel Salem, President of Association Justice et Réhabilitation, Tunis, 2015-03-04

Omar Weslati, Judge and Secretary General for Observatoire Tunisienne pour l'Indépendance de Magistrat, Tunis, 2015-03-10

Messaud Romdhani, Vice president of Ligue Tunissienne de Droit de l'Homme (LTDH) and member of Le Forum Tunsien pour les Droits Economiques et Sociaux (FTDES), Tunis, 2015-03-20

Kamel Gharbi, President of Réseau Tunisien pour la Justice Transitionnelle, Tunis, 2015-04-01

Hafida Chekir, one of the fondateurs de ATFD, professor in law and member the High Commission for the Fulfilment of the Revolutionary Goals, Political Reform and Democratic Transition, Tunis, 2015-04-02

Héla Boujnah, PhD Candidate and youth activist, Tunis, 2015-04-08

## **Truth and Dignity Commission**

Oula Ben Nejma, Commissionaire, Truth and Dignity Commission, Also member of the Technical Committee for the National Dialouge, Tunis, 2015-03-03.

Slaheddine Rached, Commissionaire, Truth and Dignity Commission, Tunis, 2015-03-03.

Lilla Bouguira and Hayet Ouatrani, Commissionaires, Truth and Dignity Commission, Tunis, 2015-03-03.

Ibtihel Abdellatif, Head of the women's committee, Truth and dignity Commission, Tunis, 2015-03-03.

**Others**

Samia Doula, Ministry of Justice, Tunis, 2015-03-04.

Sélim Ben Abdesselem, lawyer and former member of national constituting assembly for Ettakol, from 2012 member of Nidaa Tounes which he now has left. Interview by Skype Tunis-Paris, 2015-03-19.

## Appendix II Observations

Training of Tunisian judges provided by the International Bar Association 16th-19th of February, Remada Plaza Hotel, Garmmath.

Book release for the book *Revolution Tunisienne et défis securitarie* (Tunisian Revolution and security challenges) by the Tunisian think-tank le Labo Democratique 27th of February 2015 3pm-5pm National Library, Tunis.

Meeting organised by Truth and Dignity Commission in order to promote Womens' participation. 7th of March 2015, 9 am – 1 pm, Truth and Dignity Commission, Montplasilir, Tunis.

Round table discussions organised College of Europe together with IRMC on the topic the challenges in the democratic transition 17th of March 2015 10 am – 5 pm, Hotel Les Ambassadeurs, Tunis.

What transitional justice for Tunisia? event on World Economic Social Forum which was organised by Comité de Vigilance pour la Démocratie en Tunisie, Enda Ecopop and AFD International, 26th of March, 9 am-11 am, Univerisity of Tunis.