

## REBUILDING TUNISIA: AN ANALYSIS OF THE TRANSITIONAL JUSTICE MODEL

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### I. INTRODUCTION

While it is rightly claimed that justice is the hallmark of a triumphant legal order, the road to justice is most often obstructed by a grave history of injustice and oppression. Justice also plays a crucial role in identifying the atrocities of an unjust legal order and attempts to heal the wounds of the past. Transitional Justice is an analogous school of this idea of justice, focusing upon a spectrum of mechanisms and structural changes, to not only account for abuses of social, economic and human rights, but to attain the goals of reconciliation.<sup>1</sup>

Unlike other formalist and positivist schools of law, transitional justice is malleable and can be moulded to meet the needs of a circumstantial context via judicial and non-judicial processes. It accounts for the past and eases the transition to a period of law enforcement and just social order. Transitional justice hence serves the goals of accountability of the past by giving the oppressed a platform to voice their grievances instead of muting any record of previous violations with the goal of establishing reforms in the legal, political and economic arena to enable social reconciliation.<sup>2</sup>

In light of this discourse, it is discernible that transitional justice has not only an active but contextual role to play. The Author attempts to analyze the tools, mechanisms and processes of reaching the goals of transitional justice in the context of the Tunisian Revolution in this paper.

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<sup>1</sup>PADRAIG MCAULLIFE, *TRANSITIONAL JUSTICE AND RULE OF LAW RECONSTRUCTION: A CONTENTIOUS RELATIONSHIP* 108-109 (Routledge, 2013).

<sup>2</sup>Eric Posner & Adrien Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 762 (2003) [hereinafter Posner & Vermeule].

Tunisia saw itself lie in the center of the storm with the emergence of the Arab Spring and has hence vowed to embrace the rule of law. Its gory past, marked by brutal oppression and arbitrary trials and imprisonment only define the gruesome state of human rights of citizens in the country. The Jasmine Revolution united the people of Tunisia to challenge such oppression and embark on a journey towards democracy and the first baby step on the same was taken in December 2013 with the formation of a Transitional Justice law and the establishment of the Truth and Dignity Commission to study human rights violations.<sup>3</sup> What is noteworthy in the Tunisian context is the focus on women rights and corruption and the need to uphold the same as an objective for this law.

This paper traces the history of Tunisia and outlines the nature of violations primarily focusing upon the Rule of Law and Human Rights violations. In tracing this history of oppression, the Author seeks to pin point major challenges to the transitional justice journey in Tunisia. A focus on the status of women's rights has been adopted to stay in consonance with not only the objective of Tunisia's goals of transitional justice but to study the metamorphosis of the rights of women in the region. The Author also seeks to analyze the success and obstacles faced in this context by the adoption of a Truth Commission while comparing it with instances of the past. This paper is divided into the following sections that the Author wishes to focus upon based on the analysis of the model of transitional justice adopted and its impacts.

The first section of the paper focuses on the history and oppression of Tunisian people and the success of the Jasmine Revolution in paving the way forward. The second section of this paper addresses the need for transitional justice while referring to the previous section. This section is further divided to address the issues of institutional reform, criminal justice (this sub section will include reparations) and gender reforms to keep the scope of research limited. The third section will analyze the

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<sup>3</sup>Moataz Elfigiery, *Truth and Reconciliation? - Transitional Justice in Tunisia, Egypt and Libya*, FRIDE POLICY BRIEF (2014), [http://fride.org/download/PB\\_177\\_Truth\\_and\\_reconciliation.pdf](http://fride.org/download/PB_177_Truth_and_reconciliation.pdf) (hereinafter "Elfigiery").

tools of transitional justice adopted in Tunisia and assess their utility. The fourth section will address the challenges and will be followed by a conclusion that highlights the Author's recommendations.

## II. UNDERSTANDING THE TUNISIAN CONTEXT: A GLIMPSE INTO THE HISTORY OF OPPRESSION IN TUNISIA

While it would be unfair to categorize Tunisia into an oppressive nation with low level of socio-economic development, it is essential to recognize the paradox of the Tunisian context of transitional justice. Tunisia has comparatively higher levels of social and economic development while compared to other countries in the Middle East region, but has encountered the absence of a civil society to challenge the injustice in the political system, which imposed socio-economic violations. Political liberalization suffered in an authoritative regime that was characterized by repression of political institutions and reforms.<sup>4</sup>

This paper limits the scope of research to Zine Abedine Ben Ali's authoritative governance and reiterates the relevance of him being termed the "Pinochet of the Mediterranean".<sup>5</sup> Firstly, the revolution to oust an illegitimate ruler was fueled by a peoples' movement beginning from the iconic self-blazing of a fruit seller, Mohamed Bouazizi as a result of the corruption in Tunisia and the lack of judicial grievance redressal mechanisms. The limited opportunities of socio-economic advancement plaguing Tunisia formed the pivotal link for the uprisings that followed.<sup>6</sup>

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<sup>4</sup>Klaus Bachmann, *Paradoxes of Retribution: What Central European Experiences tell about Transitional Justice in Arab Countries*, CENTRE FOR INTERNATIONAL RELATIONS, REPORTS AND ANALYSES(2011), [http://csm.org.pl/fileadmin/files/Biblioteka\\_CSM/Raporty\\_i\\_analizy/2011/CIR\\_Reports\\_and\\_Analyses\\_6](http://csm.org.pl/fileadmin/files/Biblioteka_CSM/Raporty_i_analizy/2011/CIR_Reports_and_Analyses_6).

<sup>5</sup>L. Chomiak, *The Making of a Revolution in Tunisia*, 3 MIDDLE EAST LAW AND GOVERNANCE JOURNAL 68-83, (2011) [hereinafter Chomiak].

<sup>6</sup>Ivan Watson & Jomana Karadsheh, *The Tunisian Fruitseller who started the Arab Uprising*, CNN, <http://edition.cnn.com/2011/WORLD/meast/03/22/tunisia.bouazizi.arab.unrest/index.html>.

In a regime of limited political opportunities for the people to participate in and the absence of an alternative government regime, conversations of dissatisfaction with the social, economic and political state of affairs began taking a public voice. The alienation of people and the lack of a due process in the judiciary further strengthened this dissent. Unfortunately, Ben Ali's government always maintained that Tunisia had a healthy democracy characterized by free and fair elections and the right of people to criticize the government.<sup>7</sup>

The first wave of peaceful protests began the transition by openly criticizing the oppression of this double standard. This led to non-elite political actors gaining relevance along with the emergence of potential to change the political demography of Tunisia.<sup>8</sup> Filling the abeyance of Ben Ali's government saw the emergence of two major other political factions, En-Nahda and the Democratic Progressive Party (PDP). Unfortunately, they have failed to attain a consensus and the fear of political instability continues to threaten the process of transitional justice.<sup>9</sup>

Secondly, the status of women in Tunisia has always been disappointing with religious ideas clashing with International Protective regimes like instruments of the United Nations. While the former remain mute on their discourse with religious rights, few nations have attempted to ratify instruments to meet religious obligations and provide women basic protective rights.<sup>10</sup> The Committee on the Elimination of Discrimination against Women endeavours to protect women both in the private and

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<sup>7</sup>Amel Boubekeur, *The Tunisian Elections: International Community must insist on moving beyond façade democracy*, (2009), [http://carnegieendowment.org/publications/index.cfm?fa=view&id=24065&zoom\\_highight=ave](http://carnegieendowment.org/publications/index.cfm?fa=view&id=24065&zoom_highight=ave).

<sup>8</sup>Chomiak, *supra* note 5.

<sup>9</sup>Mohammed Hachemaoui, *Tunisia at Crossroads: Which rule for which transition?*, SWP RESEARCH PAPER, [http://www.swp-berlin.org/fileadmin/contents/products/research\\_papers/2013\\_RP06\\_hmu.pdf](http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2013_RP06_hmu.pdf).

<sup>10</sup>Michele Brandt & Jeffrey A. Kaplan, *The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 JOURNAL OF LAW AND RELIGION 105,142 (1996).

public sphere and Tunisia has taken the baby steps toward incorporating the same within its Sharia Law structure.

This is a commendable step which furthers the goals for transitional justice vis a vis women's rights as Tunisia has followed the "Takkhayur", which is an Islamic school of interpretative jurisprudence, enabling greater protection.<sup>11</sup> Regrettably, this has failed to attain its goals, as women in Tunisia remain uneducated or mute about securing their rights. This has been dealt with in greater detail in the latter chapters of this paper.

To summarize the Tunisian context, John Locke's theory of punishment, which states that men can only be punished for the breach of law in place at the time, gains significance. However, Locke's theory of the law of nature and natural rights which must not be breached in any circumstance extends to regimes like Tunisia, as injuring or offending a person without a cause forms the very breach of this natural law attributing to punishment.<sup>12</sup> However, Transitional justice attempts to move beyond mere punishment or the prosecution model of transitional justice as seen in the Nuremberg Trials by adopting non-judicial processes like Truth Commissions that facilitate reconciliation in society.<sup>13</sup> Tunisia has rightly identified the need for the same and is in the right direction towards healing its troubled past.

### III. THE PRESSING NEED FOR TRANSITIONAL JUSTICE

In light of the international pressure surrounding Tunisia, especially after the success of transitional justice in South Africa and Northern Ireland it becomes crucial to identify the pros and cons of adopting transitional

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<sup>11</sup>Kevin Davis & Michael Trebilcock, *What role do legal institutions play in development?*, INTERNATIONAL MONETARY FUND'S CONFERENCE ON SECOND GENERATION REFORMS, <https://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf>.

<sup>12</sup>Simon Stacey, *A Lockean Approach to Transitional Justice*, 66 THE REVIEW OF POLITICS 55 (2004).

<sup>13</sup>Posner & Vermeule, *supra* note 2.

justice tools as the state continues to face volatility. In the face of political polarization, the fear of long-term justice goals remains threatened. This becomes crucial while analyzing the pressing need for adopting a transitional justice model in Tunisia.<sup>14</sup> After Ben Ali's exit the newly elected Ennahada movement formed the Ministry of Human Rights and Transitional Justice to identify and collaborate with the multiple stakeholders of the justice process. Victims of past abuses, political and military figures along with the sprouting political parties separated by the Islamists and Secularists ideas were identified as major stakeholders, whom the process would target.<sup>15</sup>

At this point, it is essential to note that unlike other countries in this region like Libya, that faced a military oppression, Tunisia did not see an armed conflict but saw decades of oppression by the governmental structure, most often through the channels of corruption and human rights abuses.<sup>16</sup> To address this form of violation, Tunisia adopted the Truth and Dignity Commission tool primarily, accompanied by a series of Reparation programs for collective and individual recognition of victims and accompanying compensation.<sup>17</sup> Justice reforms in line with constitutional and human rights safeguards have been introduced with a focus on increasing transparency in judicial appointment. Lastly, an essence of the prosecution method of transitional justice has also been adopted.

#### A. *Modus Operandi of Transitional Justice in Tunisia*

The Ministry of Human Rights and Transitional Justice and the new Constitution of Tunisia together enabled the enacting of a Transitional Justice law, which was ratified in December 2013. This clearly lays out

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<sup>14</sup>Elfigiery, *supra* note 3.

<sup>15</sup>As Tunisia finalizes Transitional Justice Law, ICTJ advocates for victims' rights and participation, INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (Aug. 7, 2013), <https://www.ictj.org/news/tunisia-finalizes-transitional-justice-law>.

<sup>16</sup>K. Christopher, *Transitional Justice in Tunisia: Negotiating Justice during Transition*, 49 CROATIAN POLITICAL SCIENCE REVIEW, 32-33 (2012) [hereinafter Christopher].

<sup>17</sup>Luca Urech, *Challenging History: The power of transitional justice in Tunisia*, AL NAKHLAH (Jun. 10, 2014), <http://alnakhlah.org/2014/06/10/challenging-history-the-power-of-transitional-justice-in-tunisia-by-luca-urech/>.

the structure of attaining the justice of transitional justice using reparations, rehabilitation, accountability for past crimes and criminal prosecutions for the same, Truth and Dignity Commissions, political and institutional structural reforms and other forms of social reconciliation to enable greater peace in Tunisia in the long run.<sup>18</sup> Islamic law also has the potential to compliment this positivist law, as national, international and Islamic legal principles place reliance on truth finding and compensation for victims of oppression. A post conflict society like Tunisia has a lot to gain from Islamic laws accentuation of both social and criminal justice, showing Tunisia a ray of light along the path of transitional justice.<sup>19</sup>

This relationship of transitional justice with Islamic law has proved to be a success in the past, as is evident by the post conflict situation in Aceh (Indonesia).<sup>20</sup> Following the Islamic principle of “Diyat” which mandates compensation for victims of murder enables a system of accountability that not only identifies the oppressors but also compensates the victims and their families. However, this practice has been criticized by Western literature for ignoring the greater goals of transitional justice, such as reconciliation and lack of respect for other tools of transitional justice.<sup>21</sup> The Author however argues that the similarities must be focused upon at this point of the transition, as it would grant greater acceptance and legitimacy from the Islamic influence and belief system in Tunisia.

Apart from gaining significance in the Islamic jurisprudence context, Tunisia has placed great reliance on Truth Commissions. Truth Commissions focus upon the abuses in the past (limited context in Tunisia as only pre revolution abuses are being studied) and the pattern

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<sup>18</sup>Emily C. Perish et al., *Transitional Justice in the Wake of the Arab Spring*, PAPER PREPARED FOR PRESENTATION AT THE ANNUAL MEETING OF THE INTERNATIONAL STUDIES ASSOCIATION (2012).

<sup>19</sup>Robert Stewart, *Incorporating cultural and religious practices*, MIDDLE EAST INSTITUTE (Aug. 16, 2014), <http://www.mei.edu/content/map/incorporating-cultural-and-religious-practices-transitional-justice-lessons-related-islam-tunisia>.

<sup>20</sup>Ross Clarke & Galuh Wandita, *Considering Victims: The Aceh Peace Process from a Transitional Justice Perspective*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/sites/default/files/ICTJ-Indonesia-Aceh-Process-2008-English.pdf>.

<sup>21</sup>TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC 87-89 (Renee Jeffery and Hun Joo Kim (eds.), Cambridge University Press, 2013).

of the same for gathering information to draft a report that is recognized by the State.<sup>22</sup> Truth Commissions work at grass root levels enabling direct participation and recognizing the grievances of the victims. However, the success of such Truth Commissions is directly proportional to political stability, which has posed a problem in the Tunisian context. Changing governments and clashes between the Secularists and Islamists leaves Truth Commissions precarious.

Further, security concerns like the loss of evidence and confidence in people to speak about their grievances have proved a problem in Tunisia.<sup>23</sup> Tunisia has attempted to strengthen security reforms via greater transparency and accountability, yet a lot more is left to desire.<sup>24</sup> The vicious cycle of economic injustice, namely corruption and its causal nexus with social injustice extends even too Truth Commissions that often find themselves understaffed or underfunded. This cycles also extends to a great mistrust between the victims, who see the Truth Commission as yet another oppressive organ of the State and refuse to cooperate with this powerful tool of transitional justice.<sup>25</sup>

### *B. Tools Of Transitional Justice*

The previous section of this paper has thrown light upon the goals and processes adopted by the process of enabling justice. This section elaborates upon the methods undertaken to implement the same. The fundamental tool of compensation gains the limelight in situations of mass oppression. Financial compensations of 20,000 Dinars were given

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<sup>22</sup>JOHN LANNON, HUMAN RIGHTS AND INFORMATION COMMUNICATION TECHNOLOGIES 74-75 (IGI Global, 2012).

<sup>23</sup>Gilles Bertrand, *Can the Tunisian Revolution be reversed?*, EUROPEAN INSTITUTE OF SECURITY STUDIES, [http://www.iss.europa.eu/uploads/media/Alert\\_Tunisia.pdf](http://www.iss.europa.eu/uploads/media/Alert_Tunisia.pdf).

<sup>24</sup>*Addressing the Past, Building the Future: Justice in Times of Transition*, INTERNATIONAL CENTER FOR TRANSNATIONAL JUSTICE(May 17, 2011), <https://www.ictj.org/sites/default/files/ICTJ-Tunis-Conference-Report-2011-English.pdf>.

<sup>25</sup>Eric Weibelhau, *All Retributive Justice, no Restorative Justice post-Arab Spring*, MIDDLE EAST INSTITUTE (Mar. 14, 2014), <http://www.mei.edu/content/all-retributive-justice-no-restorative-justice-post-arab-spring-middle-east>.



to victims of the deceased and those injured. This however has been taken with a pinch of salt as families often moot that no form of financial aid can heal their loss and there have been questions regarding the parameters on which such compensation has been calculated.<sup>26</sup>

Compensation has also been viewed as an alternative to judicial remedies and while it is a crucial aid factor it could dampen the spirit of transitional justice, which centers on account finding and reconciliation via judicial and non-judicial methods.<sup>27</sup> However, in the present context compensation to Tunisian victims has been a mere initial grant and a higher compensation amount along with judicial accountability is expected. This is in accordance with Article 20 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation and accounts for not only physical harm but also lost opportunities in employment, social benefits and education. Further transitional justice has a lot to gain from this Principle as compensation can be accorded for moral damage, which has emerged as a common violation in Tunisia.<sup>28</sup>

Article 21 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation supplements the above by providing for medical treatment and psychological care to enable rehabilitation of people. Further it mandates legal and social services to ensure justice prevails and the society is equipped to deal with the ghosts of the past. This however does not account for long-term medical treatment and specialized care in complicated medical illnesses as primary medical care in Tunisia is unequipped to handle both the quantum and complications of medical cases.<sup>29</sup>

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<sup>26</sup>*One Step Forward, Two Steps Back? One Year since Tunisia's Landmark Elections*, AMNESTY INTERNATIONAL (Oct. 23, 2012), <https://www.amnesty.org/download/Documents/.../mde300102012en.pdf>.

<sup>27</sup>Marek M. Kaminski et al., *Normative and Strategic Aspects of Transitional Justice*, 50 THE JOURNAL OF CONFLICT RESOLUTION, 295-302 (2006).

<sup>28</sup>M. Cheriff Bassiouni, *Editorial*, 8 THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE, 325-338 (2014).

<sup>29</sup>*Supra* note 26.

### C. *The Right to a Remedy*

With the manifest need for transitional justice to play an active role in Tunisia, comes the International law obligation of states in upholding the right of victims who have faced human rights violations with a remedy. This consists of the three elements, Truth, Justice and Reparations.<sup>30</sup> Transitional Justice seeks to unravel the same by discovering the nature of violations that took place and enabling justice by prosecuting the perpetrators on the basis of available evidence. Lastly, reparations ensure compensation for the victims and their families and are viewed as the first step towards social reconciliation as they enable victims to rehabilitation and guarantees of protection to prevent such violations in the future.

Principle VII of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law further manoeuvre the transitional justice process by stating the available remedies, ranging from reparation to access to justice along with information about the mechanism and structures that imposed such violence. This enables victims to overcome their trauma and does away with oppression being a subject of taboo.<sup>31</sup>

### D. *Establishment And Role Of Specialized Chambers*

Adopting a comprehensive approach to Transitional Justice, the Truth and Dignity Commission was formed to unravel the truth of violence in Tunisia. This is coupled with a system to enable criminal accountability for the same. Institutional reform, vetting of the judiciary and civil

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<sup>30</sup>*Id.*

<sup>31</sup>Theo Van Boven, *The United Nations Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (Dec. 16, 2005), [http://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf).

servants gain prominence in this process of national reintegration that transitional justice seeks to enable.<sup>32</sup> Under Article 8 of the Constitution, Specialized Chambers have been formed and only such judges may be appointed who have not been involved in any prior trials that are political in nature. This is to ensure the Chambers are not biased towards a political ideology and follow due process.<sup>33</sup>

These Chambers have been given the duty of hearing cases of human rights violations ranging from sexual abuse to enforced disappearances and other cases that are forwarded by the Truth commission. This allows cases of political exile, corruption, electoral fraud and misuse of power to be within the Chambers jurisdiction, making it the most powerful judicial tool in the process of transitional Justice. Unfortunately, Tunisia's laws do not criminalize forced political exile and electoral fraud and could be challenged for being retrospective in nature as neither domestic law nor international law provides regulations for the same.<sup>34</sup>

The fear of double jeopardy (restricted by Article 14 (7) of the ICCPR) follows as the Chambers can try a person again for the same crime, thereby disrespecting due process. Article 14 of the ICCPR endorses a fair and impartial hearing and the Commentary of the section specifies that the creation of specific jurisdictions such as the Special Chambers in Tunisia is allowed only upon the satisfaction of certain standards and conditions under International law.<sup>35</sup> The status of the same and its interaction with domestic courts hence remains ambiguous.

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<sup>32</sup>*Tunisia: Hope for justice past abuses*, HUMAN RIGHTS WATCH (May 24, 2014), <http://www.hrw.org/news/2014/05/22/tunisia-hope-justice-past-abuses>.

<sup>33</sup>Ministry of Human Rights and Transitional Justice: Republic of Tunisia, *Organic Law on Establishing and Organizing Transitional Justice*, available at: <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>.

<sup>34</sup>*Supra* note 32.

<sup>35</sup>*The Independence and Accountability of the Tunisian Judicial System*, INTERNATIONAL COMMISSION OF JURISTS (May 10, 2014), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

#### IV. FACES OF INJUSTICE

##### A. *Corruption as a Catalyzing Factor of the Jasmine Revolution and Primary Target of Transitional Justice*

Corruption played a central role in embarking on this journey, as Tunisia is speculated to have lost almost a billion US Dollars to corruption annually. This form of corruption is often analogous to the infamous Papa Doc Duvalier in Haiti.<sup>36</sup> Corruption not only prevented a wholesome economic development of the Tunisian economy, but also prevented deserving market players from entering the economic structure as permits and licenses were only granted to those trusted and often related to personnel in the government, leaving the populous of the country hopeless. This in turn led to the vicious cycle of unemployment and poverty for the rest, causing dissatisfaction amongst the common man.<sup>37</sup>

Corruption not only erodes the structural makings of the society but also enables the consolidation of power in the hands of a few, leaving the others at their mercy and this power enables further violations of human rights such as lack of shelter or food, forced displacement without adequate compensation and unfair use of natural resources.<sup>38</sup>

Unfortunately, the authoritarian government dealt harshly with any form of criticism regarding the same, often torturing or imprisoning people without a trial. This cycle of corruption hence lead to an unfortunate chain of human rights violations.<sup>39</sup> It is in this context that it becomes

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<sup>36</sup>Christopher, *supra* note 16.

<sup>37</sup>Maria Cristina Paciello, *Tunisia: Changes and Challenges of Political Transition*, CEPS, 7-8 (2011), [http://aei.pitt.edu/59195/1/MEDPRO\\_TR\\_No\\_3\\_Paciello\\_on\\_Tunisia\\_\(1\).pdf](http://aei.pitt.edu/59195/1/MEDPRO_TR_No_3_Paciello_on_Tunisia_(1).pdf).

<sup>38</sup>C. Albin-Lackey, *Corruption, Human Rights and Activism: Useful Connections and Their Limits*, in *JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION*, 143-144 (D. Sharp (ed.), Springer: New York, 2014).

<sup>39</sup>Robinson Isabel, *Truth Commissions and Corruption: Towards a Complementary Framework*, GENEVA TRANSITIONAL JUSTICE WORKING PAPER NO. 1 (2014), <http://www.geneva->

important for transitional justice to not only address mere human rights violations but also nurse the causal linkages beyond a mere recognition of the existence of economic, social and cultural rights. The International Council on Human Rights Policy (ICHRP) states corruption can cause a “*direct, indirect or remote*” violence and it is essential to fight this in order to enable victims to access basic human rights. This also extends to broader mandates such as the right to economic self-determination, which is often a cause for concern amongst the youth in Tunisia and the right to development in the long term.<sup>40</sup> Societies like Tunisia, where public trust hits ground zero find an optimum panacea in curbing corruption in order to encourage the rule of law.

When institutional violence fueled by corruption reduces, the faith of the people in the same civic society exponentially increases. This further augments to the judiciary and ensures a system of checks and balance. The ICHRП attacks “*indirect violations*” and “*remote violations*” to cover indirect and linking events within its ambit. This premise can be extended to corruption being an indirect violation of a basic right such as the right to food.<sup>41</sup>

To relieve this reality, three Truth and Dignity Commission set up by the Transitional Justice law in Tunisia mandates recognition of not only the multiple forms of corruption but also the roots of the same.<sup>42</sup> This process of recognizing and attacking corruption helps achieve a bottom up mechanism of transitional justice, as it identifies corruption to be the primary culprit of other injustices, while regaining public confidence.<sup>43</sup> The Truth and Dignity Commission has also established an Arbitration Committee for corruption cases, reflecting the seriousness of economic transformation and curing social injustice linked to corruption.

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academy.ch/docs/Transitional%20Justice%20Working%20papers/TJWP\_260814%20(2)(2).pdf [hereinafter Isabel].

<sup>40</sup>*Id.*

<sup>41</sup>J. T. Gathi, *Defining the Relationship between Human Rights and Corruption*, 31 JOURNAL OF INTERNATIONAL LAW (2010).

<sup>42</sup>Heather McRobie, *Will Tunisia's Truth and Dignity Commission Heal the Wounds of the Authoritarian Past?*, OXHRH BLOG (Feb. 20, 2015), <http://ohrh.law.ox.ac.uk/will-tunisia-truth-and-dignity-commission-heal-the-wounds-of-the-authoritarian-past>.

<sup>43</sup>Isabel, *supra* note 39.

### B. *Gender Dynamics of the Transition in Tunisia*

Tunisia's Constitution grants equal protection of all citizens under Article 6. Unfortunately, the engrained structural violence enforced by the patriarchy coupled with gender stereotypes in an Islamic setting countervails Constitutional mandates.<sup>44</sup> Acts of sexual and gender violence, lack of socio-economic development and minimal representation in the political arena plague women's rights in Tunisia. The first wave of transition in this position was witnessed in the active participation of women in the Tunisian Revolution. Women took to the streets and protests along with running independent movements to overthrow the authoritative regime by means of online communication.<sup>45</sup> While this must be caroused for being a baby step towards treating the fairer gender in par, it is shadowed by the lurking threat of the rise of the Ennahda party. Ennahda is an Islamic political party and is symbolic for its antiquated views on women's rights.<sup>46</sup>

The focus on Islam not only threatens the status of women but does away with any possibilities of capability building to ensure that the goals of transitional justice with respect to women succeed. Capability building is the method of providing women with basic requirements such as education and awareness of their rights in order to give them the capacity to reform their lives and status.<sup>47</sup> Ennahda's Islamic centric approach threatens the same by limiting the role of women to the domestic sphere.

Further, despite having higher rates of education women in Tunisia remain under represented in all spheres of life and their grievances remain unaccounted for. This in turn ensures women's rights always take the backstage in this period of transformation. Transitional justice holds

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<sup>44</sup>Rosa Ana Alija Fernández & Olga Martín Ortega, *Women's Rights in the Arab Spring: a Chance to Flourish, a Risk of Hibernation*, 11 REVISTA DE ESTUDIOS JURÍDICOS (2011).

<sup>45</sup>Borovsky, G. & Ben Yahia, A., *Women's Political Participation in Tunisia After the Revolution* (2012), <https://www.ndi.org/files/womens-political-participation-Tunisia-FG-2012-ENG.pdf>.

<sup>46</sup> Doris Gray & Terry Coonan, *Silence Kills! Women and the Transitional Justice Process in Post-Revolutionary Tunisia*, 7 INTERNATIONAL JOURNAL OF TRANSNATIONAL JUSTICE, 348-349 (2013) [hereinafter Gray & Coonan].

<sup>47</sup>*Id.*

the key to reforming this cloak of gender violence as investigation committees, the Truth and Dignity Commission are equipped to analyze sexual and gender violence and enable women to voice their opinions and grievances. The fruits of the same have been seen in 2011, when Tunisia withdrew its reservations to the CEDAW and adopted parity principles in electoral regulations.<sup>48</sup>

Regrettably, this joy was dampened when Tunisia declared that it would not make any legislative changes to national statutes if they violate Chapter 1 of the Constitution. This Chapter refers to conflicts with the Constitution and has the provision for Islam being Tunisia's national religion.<sup>49</sup> Hence, what can be clearly deciphered is that the mere end of a regime does not do away with embedded gender inequalities. Instead, this period often leaves women more vulnerable.<sup>50</sup> Inscribing this difficulty, transitional justice processes in Tunisia lead to "gender parity" elections in 2011, giving women a higher position in public life and reconciling societal norms. The transitional government also mandates an equal number of men and women to be on electoral lists along with endeavoring to reach the goal of 50 percent seats in the Parliament being held by women.<sup>51</sup> In conclusion, the law and policies have been amended for the better, yet the implementation holds the key to transforming women's rights in Tunisia. The political future of Tunisia will continue to impact this metamorphosing status of Tunisian women and the need to stress upon International norms of protection prevail.

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<sup>48</sup>Saida Fatiha, *Women's rights and prospects for Euro-Mediterranean co-operation*, REPORT OF COMMITTEE ON EQUALITY AND NON-DISCRIMINATION, COUNCIL OF EUROPE, 11-12(2014), <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=21133&Language=EN>.

<sup>49</sup>Bridget C. McCullough, *Designing Democracy: Women's constitutional rights after the Arab Spring*, 4 IMPUNITY WATCH LAW JOURNAL (2014).

<sup>50</sup>*Supra* note 24.

<sup>51</sup>*Women in democratic transitions in the MENA Region*, WILSON CENTER (Mar. 2013), [http://www.wilsoncenter.org/sites/default/files/Women\\_in\\_democratic\\_transitions\\_in\\_the\\_MENA\\_region\\_compilation.pdf](http://www.wilsoncenter.org/sites/default/files/Women_in_democratic_transitions_in_the_MENA_region_compilation.pdf).

## V. OBSTACLES IN THE PATH TO JUSTICE

### A. *Tunisia's Judiciary in Rambles*

The most critical tool for opening a new book in the Tunisian context lies in the accountability of the oppression, spearheaded by Ben Ali. Firstly, slow and inefficient criminal investigations coupled with the absence of trial for offences committed before 2011 have allowed authoritative rulers like Ben Ali to abscond. This not only slows down the legal process but also is also descriptive of the lack of political will in Tunisia to identify perpetrators of oppression.<sup>52</sup> Secondly, the judicial system in Tunisia remains in rambles in account of decades of encroachment by Ben Ali. The judiciary is unequipped to deal with the quantum of cases and lacks the technical ability to deal with questions of human rights violations, which are the primary distress of the Tunisian populace.<sup>53</sup> Most important, is the question regarding the independence of the judiciary and its ability to allow justice to prevail and earn public trust. The lack of vetting reforms has not been addressed as yet as this transitional justice process is presently addressing political and institutional reforms.<sup>54</sup>

### B. *Jurisdiction of Military Courts*

Tunisian law allows Military Courts to hear cases concerning security forces. In the aftermath of the Revolution, such Military Courts found their gates flooded with cases. Unfortunately, due to their previous link with the authoritative government and the non-transparent appointment of the judiciary, accountability of such Courts was challenged. Procedural delays such as evidence gathering and witness hearings were delayed by Civil Courts before transferring cases to the military Court on establishment of security personnel being involved in the crime,

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<sup>52</sup>Elfigiery, *supra* note 3.

<sup>53</sup>*Human Rights and Transitional Justice in Asia*, AMNESTY INTERNATIONAL (2013), [https://www.amnesty.nl/sites/default/files/public/geuzenpaper\\_def.pdf](https://www.amnesty.nl/sites/default/files/public/geuzenpaper_def.pdf).

<sup>54</sup>*Supra* note 35.



aggravating to a growing mistrust.<sup>55</sup> Further Military Courts only heard cases transferred to it by the civil Prosecutor. This process was long, leading to a loss of time in which forensic evidence was either lost or tapered with weakening evidence gathering. The Legal reasoning of judgments passed by military Courts also poses another problem as the responsibility for crimes committed by such authorities is most often under the command of superiors. Tunisian law is not endowed to anticipate such scenarios associated with command responsibility and merely states criminal liability is imposed on those directly linked to the commission of crimes under Article 32 of the Penal Code.<sup>56</sup> These contentions lead to another wave of outcries leading to a new law being formulated in June 2014, to address human rights abuses during the uprising by classifying them as “gross violation of human rights” under the framework of transitional justice. This in turn enabled civil courts to transfer such cases to Specialized Tribunals under the direction of the Truth Commission. To strengthen the position of the specialized Tribunals, the law specified that Res Judicata would not be applicable in such cases.<sup>57</sup>

### *C. Problems of Unemployment*

In a country encumbered by high rates of unemployment, economic reforms remain in jeopardy. Protests and violent conflicts between the government and workers unions are catalyzed the dwindling investment in Tunisia and fall in tourism due to security threats. Such unemployed members of society do not have faith in the process of transitional justice and believe economic issues must be dealt with on a priority basis, leaving transitional justice goals to take the back seat. This also poses a threat to transitional justice as factions are forced to compete for limited natural resources in times of an account deficit, magnifying differences

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<sup>55</sup>*Flawed Accountability*, HUMAN RIGHTS WATCH (Jan. 12, 2015), [http://www.hrw.org/sites/default/files/reports/tunisia0115\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/tunisia0115_ForUpload.pdf).

<sup>56</sup>*Tunisia reform legal framework- try crimes of the past*, HUMAN RIGHTS WATCH (May 3, 2012), <http://www.hrw.org/news/2012/05/03/tunisia-reform-legal-framework-try-crimes-past>.

<sup>57</sup>*Supra* note 32.

instead of unifying them towards the goals of reconciliation of society.<sup>58</sup>

#### *D. Political Division*

The number of political groups that sprouted after the fall of Ben Ali are impetuous to establish a new political order after an era of repression. Political groups and ideologies have seized the moment to push forth their agendas and gain acceptance further dividing Tunisian society. Islamists, Secularists and Salafists in Tunisia therefore take away from the goals of transitions and polarize the population making policy reform accepted by a majority an onerous task. This is especially in the context of women's rights.<sup>59</sup>

#### *E. Impact of International Attention*

Tunisia's transitional justice path holds the key to a transformation in society in the Middle East and this potential faces the peril of drawing international attention that could threaten the security and sovereignty of Tunisia as it seeks donations and aid from many Western nations. The power dynamics between the State, its people and international players such as countries and banks, including the World Bank could impose further instability towards transitional justice goals.<sup>60</sup>

## **VI. RECOMMENDATIONS AND CONCLUSION**

Tunisia lies at the crossroads of change today. The transition from an authoritative regime with no deference for Economic, Social and Cultural rights to the hopeful state where the Rule of law is paramount comes with

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<sup>58</sup>Shelley Deane, *Transforming Tunisia: The Role of civil society in Tunisia's transition*, INTERNATIONAL ALERT (Feb. 2013), <http://www.international-alert.org/sites/default/files/publications/Tunisia2013EN.pdf>.

<sup>59</sup>Hardin Lang, *Tunisia's Struggle for Political Pluralism After Ennahda*, AMERICAN PROGRESS (Apr. 2014), <https://www.americanprogress.org/wp-content/uploads/2014/04/Tunisia-report.pdf>.

<sup>60</sup>Elfigiery, *supra* note 3.

challenges ranging from accountability, social and civic mistrust to a macabre past watermarked by human rights violation. In light of this era of violation, transitional justice attempts to metamorphose Tunisian society to enable protection of Human Rights, political obligations and reform institutions and structures.

While this process does not work wonders overnight, it ensures Tunisia channels its potential to enable a brighter tomorrow. The Author has laid out crucial and controversial aspects of the same and critically argues that the adoption of the recommendations below could catalyze this process and achieve the sacrosanct goals of transitional justice –

1. Acceptance of International Standards of Protection and their consequent ratification or withdrawals of reservations would initiate a stricter regime of human rights protection. The ratification of a spectrum of human rights treaties such as Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the International Convention for the Protection of All Persons from Enforced Disappearance (CED), the Convention against Torture and the Rome Statute are evidence of the seriousness of the transitional justice goals in Tunisia and this must be encouraged by the International community. Despite this celebration, Tunisia is yet to sign Torture Conventions and must do away with its law of limitations regarding the same in the domestic sphere.<sup>61</sup>
2. Identifying institutions and violence imposing structures – Decades of oppression of the people have left different forms of violence entrenched in Tunisian institutions and structures. This can be cured by focusing primarily on the watch dogs of the law. The Judiciary must be made a completely independent body, not dependent on the Government's appointment of judges to ensure a checks and balance system is maintained. Further, police violence must be controlled by stricter legislation. Any officials accused of undertaking acts of violence must be suspended or terminated, along with being slapped with a hefty fine to begin fragmenting institutionalized forms of

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<sup>61</sup>*Supra* note 56.

imposing violence. Military Court's jurisdiction must be made limited only to cases of military professionals engaging in oppression.<sup>62</sup>

3. Proper and timely communication of details of investigations must be made public along with the criteria used in determining the compensation or reparation awarded. The pain and oppression of the people must retain center stage and the transitional justice process should focus primarily upon this principle in chalking out plans of implementation.<sup>63</sup>
4. Freedom of Speech and Expression must be guaranteed to ensure the voice of the people is heard and to provide for a platform of criticism towards the Government and its policies to ensure the rise of another Ben Ali is stalled. The criminalization on "attacks on religious sanctities" must be repealed to ensure circulation of ideas without the fear of penalties.<sup>64</sup>
5. Tunisia's transitional justice law must focus on the status of women's rights. This should move beyond purely positivistic formulation of statutes to a system of implementation to ensure the protection of women's rights. The Parliament must mandate a minimum number of women contesting seats and enable women to move beyond the domestic domain by implementing the Capability model. Specific legislations protecting women and giving them equal status are a priority.<sup>65</sup>
6. The Command Responsibility definition under International law must be replicated into domestic statutes to ensure that Specialized Tribunals can sieve cases accordingly.<sup>66</sup>

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<sup>62</sup>*Supra* note 35.

<sup>63</sup>*Supra* note 26.

<sup>64</sup>*Supra* note 56.

<sup>65</sup>Gray & Coonan, *supra* note 46.

<sup>66</sup>*Supra* note 56.

Hence the Author concludes by congratulating Tunisia on its efforts in transformation via transitional justice and believes the implementation is key to the success of this process.