

# Fighting Corruption within the Framework of Transitional Justice: The Impact on Democratic Transition in Tunisia<sup>(1)</sup>

Adnen Nouioua<sup>(2)</sup>

This paper attempts to link transitional justice with anti-corruption in Tunisia and examines the impact of this relationship on the process of democratic transition. The paper examines the legal and practical difficulties that have faced the transitional justice process, especially since the promulgation of Law 53/2013 establishing and regulating transitional justice. It demonstrates the evolution of Tunisian state anti-corruption action in the field according to official reports and cases from the Tunisian judiciary, and through the examination of the constitutional provisions tasking the state with combating corruption. It also looks at the parliament's role in fighting corruption. The paper shows failures to combat corruption in the transitional justice process, highlighted by the inability to hold businessmen involved in corruption to account, and the negative repercussions of this on the process of democratic transition. The paper finds that combating corruption in Tunisia requires the state and all parties concerned to accept a range of solutions relative and proportionate to the logic of transitional justice as it differs from traditional justice.

Transitional Justice

Tunisia

Democratic Transition

Corruption

Freedom and Dignity Revolution

Since the Freedom and Dignity Revolution (17 December 2010-14 January 2011), corruption has enjoyed an unprecedented visibility in Tunisia as a major problem facing the post-revolutionary order. This problem is not a new one: resentment of corruption was a major driver of the Revolution, as was clear from revolutionary slogans linking worsening unemployment and underdevelopment with the monopolisation of much of the national wealth by President Zine Abidine Ben Ali, his family and businessmen close to them.<sup>(3)</sup>

There have been two major approaches to corruption since the Revolution. The first is concerned with the past, investigating prior corruption in order to establish the facts and hold the perpetrators accountable. The second looks to the future, hoping to reform state institutions and create the

laws and mechanisms necessary to combat and reduce corruption.<sup>(4)</sup> The Transitional Justice Law (*Qānūn al-'Adāla al-Intiqāliyya*) – drafted through a consultative process and promulgated by the Tunisian state in late 2013 – provides for both these approaches. The provisions of this law are grounded in the flexible concept of democracy adopted after 2011. Its cornerstone is the Ministry for Transitional Justice and Human Rights, which operates alongside specialist local and international civil society organisations.<sup>(5)</sup>

The Law adopts a broad definition of transitional justice based on international standards. It does not limit itself to criminal justice in the sense of holding those involved in major human rights violations to account but seeks to achieve symbolic, historic, cultural, social, economic and political justice as part

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2 Researcher in public law.

3 Slogans referencing corruption included *at-tashghīl istiḥqāq ya 'iṣābat as-surrāq* ('Employment is a right, you gang of thieves'). See: Azmi Bishara, *ath-Thawra at-Tūnisiyya al-Majīda: Bunyat Thawra wa-Ṣayrūrātuhā min Khilāl Yawmiyyātihā* (Doha/Beirut: ACRPS, 2012).

4 In the transitional justice context, corruption refers to those acts categorised as crimes and committed prior to the promulgation of transitional justice laws. It also refers to the phenomenon of corruption that has dogged Tunisia from its independence from France in 1956 through to the fall of the despotic regime. See: Hafez Abdelrahim, *az-Zabūniyya as-Siyāsiyya fi'l-'Ālam al-'Arabiyy: Qirā'a Ijtimā'iyya Siyāsiyya fi Tajribat al-Binā' al-Waṭaniyy bi-Tūnis* (Beirut: Centre for Arab Unity Studies, 2006), p. 17-36.

5 See: Wahid Ferchichi et al., *al-'Adāla al-Intiqāliyya fi Tūnis wa-Ṣadr al-Qānūn* (Tunis: UNDP, 2014) (accessed on 10/03/2019 at <https://bit.ly/2UtlnpR>).

of transitional justice.<sup>(6)</sup> In the Tunisian understanding transitional justice has five main aims: uncovering the truth about human rights violations; holding those responsible to account; addressing the harm to victims; rehabilitating victims; and achieving national reconciliation.<sup>(7)</sup>

The Transitional Justice Law made two major innovations. The first was to link transitional justice to efforts to fight corruption – a holistic approach encouraged by growing international interest in the danger posed by the legacy of corruption to individual and collective freedoms as well as political, economic and social rights.<sup>(8)</sup> In order to address this legacy and the associated violations, the Law uses the terms “cases concerning major human rights violations” and “violations involving electoral fraud, financial corruption and embezzlement of public money.”<sup>(9)</sup> This link produces a particular understanding of what fighting corruption means: the understanding required by the transition period in Tunisia.

The second key innovation was to make the creation of guarantees that Tunisia will “complete the transition from despotism to a democratic system” part and parcel of transitional justice. This move is supported by several studies. One author says that “while for traditional justice furthering peace and democracy are *secondary* goals, for transitional justice they are a *fundamental* goal that must be achieved.”<sup>(10)</sup> The same author goes on to say that “[t]ransitional justice – as a mechanism by which one contends with the legacy

of undemocratic authoritarian practices – must now necessarily be a mechanism by which democracy can be demanded and effected. Democracy is the only dispensation capable of preventing [future] recurrence of the same mistakes that transitional democracy hopes to address by temporary measures.”<sup>(11)</sup>

A number of aspirations lie behind the decision to make fighting corruption part of democratic transition: re-appropriating public money embezzled by officials, furthering reconciliation and social justice, contributing to economic development, and – above all – securing transition to democracy.<sup>(12)</sup> Transitional justice is thus a key part of political reform aiming to build a democratic system based on the rule of law and justice in the holistic sense.<sup>(13)</sup> This leads us to a central question: to what extent has this decision helped to further democratic transition in Tunisia?

In order to answer this question we must examine in depth the two key goals that this decision hoped to achieve: promoting accountability and furthering national reconciliation in such a way as to preclude future corruption. This study will thus be divided into two parts. One will consider the prosecution of pre-existing acts of corruption as a means of furthering democratic transition. The other will discuss how the prevention of future corruption supports democratic transition.

6 See: Moulay Ahmed Moulay Abdelkarim, “al-Usus al-Falsafiyya li-Mafhūm al-‘Adāla al-Intiqāliyya: Muqāraba Awwaliyya,” *Tabayyun*, vol. 11 (Winter 2015), p. 17.

7 Law 53 of 2013 (dated 24 December 2013) on the Establishment and Regulation of Transitional Justice as amended by the Transitional Justice Law under Basic Law 17 of 2014 (dated 12 June 2014) on Judgements Concerning Transitional Justice and Related Cases During the Period 17 December 2010-30 February 2011, published in the Official Gazette of the Republic of Tunisia (*ar-Rā'id ar-Rasmiyy*, Issue 48, 17 June 2014, p. 1619).

8 See: UN General Assembly, Human Rights Council, *Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights (A/HRC/28/73)*, 5 January 2015 (accessed on 26/01/2018 at <https://bit.ly/2HIL7FH>).

9 Transitional Justice Law, Section 8.

10 Moulay Abdelkarim, *ibid*, p. 18. See also: Noha Abouldahab, “Transitional Justice Policy in Authoritarian Contexts: The Case of Egypt,” *Policy Briefing*, Brookings Doha, October 2017, (accessed on 24/03/2020 at <https://brook.gs/2YS5cvW>).

11 *Ibid*.

12 *Ibid*. See also: Hamadi Redissi, “Tūnis bayna Tad'īm ad-Dimuqrāṭiyya wa-Tafakkuk ad-Dawla,” *Siyasat Arabiyya*, vol. 18 (January 2016), p. 5; Rawia Tawfik, “Hal ad-Dawla wa'l-Mujtama' Musta'iddān fi Miṣr li'l-'Adāla al-Intiqāliyya wa'l-Muṣālahā al-Waṭaniyya? Durūs min Janūb Afrīqiyya,” *Siyasat Arabiyya*, vol. 6 (January 2014), p. 90; Kamal Abdellatif, “al-'Adāla al-Intiqāliyya wa't-Taḥawwulāt as-Siyāsiyya fi'l-Maghrib: Tajribat Hay' at al-Inṣāf wa'l-Muṣālahā,” *Siyasat Arabiyya*, vol. 5 (November 2013), p. 92; El Habib Belkouch, “al-'Adāla al-Intiqāliyya wa'l-Intiqāl ad-Dimuqrāṭiyy fi Siyāq 'Arabiyy,” *Siyasat Arabiyya*, vol. 18 (January 2016), p. 77; Idriss Lekrini, “al-'Adāla al-Intiqāliyya wa-Atharuhā fi't-Taḥawwul ad-Dimuqrāṭiyy: Muqāraba l-Namādhij 'Ālamiyya fi Ḍaw' al-Ḥirāk al-'Arabiyy,” in: *Aṭwār at-Tārīkh al-Intiqāliyy: Māāl ath-Thawrāt al-'Arabiyya* (Beirut: ACRPS, 2015); *Various authors, ath-Thawrāt al-'Arabiyya: 'Uṣr at-Taḥawwul ad-Dimuqrāṭiyy wa-Māālāuḥu* (Doha/Beirut: ACRPS, 2018).

13 Omar Boubakri, “Masār al-'Adāla al-Intiqāliyya: Taqyīm at-Tajriba wa-Āfāquhā,” *aṣ-Sabāḥ*, 8 May 2016.

## I: Prosecution of Past Corruption: A Means of Furthering Democratic Transition

Traditional justice pursues criminals in order to prosecute and sentence them as appropriate regardless of the consequences of these sentences. In transitional justice, however, consequences are a major consideration, influencing the mechanisms adopted in implementing justice. Transitional justice thus steers a middle course between two poles: holding people to account in order to establish responsibility through judicial proceedings, and reconciliation in order to put to rest the corruption of the past.

After Ben Ali fled the country on 14 January 2011, administrative overlap between different bodies was rampant: the 1959 Constitution was suspended, and for a time revolutionary logic won out over formalities and legal procedures.<sup>(14)</sup> A wave of popular attempts to hold those suspected of corruption accountable targeted numerous ministers and senior officials in both state and local bodies and institutions with the slogans “leave!” (*dégage!*) or “out!” (*irhal!*).<sup>(15)</sup> Slowly but surely, however, new regulations established a semblance of order. A series of decrees was issued aiming to bring to book those involved in corruption, including a decree confiscating all movable and immovable property and entitlements acquired after 7 November 1987 from a number of people – most prominently Ben Ali and his wife.<sup>(16)</sup>

The first official body to be founded after the creation of the Investigative Committee for Violence and Killing during the Revolution was the Investigative Committee for Acts of Corruption and Bribery Committed Under the Former President.<sup>(17)</sup> In its summary report issued in 2012, this Committee concluded that under Ben Ali Tunisia had been “the

victim of a system of bribery and corruption”, a system that according to Committee Chair Abdelfattah Omar “took shape gradually, gaining strength bit by bit before taking over state and society. Its constituent parts manifested in particular within various of the state’s political, administrative and judicial institutions and likewise various public groups and organisations. It also extended to political organisations, above all the Democratic Constitutional Rally [the ruling Destour Party], social organisations, and various media outlets and communications entities.”<sup>(18)</sup> The report provided examples of corrupt practices throughout the economy, including in property, taxes, agricultural land, broadcasting and finance. It also highlighted corruption in public contracting, licencing and official decisions issued by state bodies of all kinds.<sup>(19)</sup>

The activities of the Investigative Committee represent a remarkable step forward in the fight against corruption, unprecedented in the official sphere. This is demonstrated by the more than ten thousand files submitted by citizens, some three hundred of which were passed on to the judiciary (with fully half concerning the president, his family, and the close circle of businessmen surrounding them).<sup>(20)</sup> But the Committee’s work had several shortcomings which cannot be ignored: it was selective in choosing who and what to investigate, and focused primarily on corruption at the centre, neglecting the provinces – despite the fact that the Revolution began in the country’s interior because of locals’ experiences of marginalisation and underdevelopment due to the intensity of corruption

14 See: Yadh Ben Achour, *Tunisie : une révolution en pays d’islam* (Geneva: Labor et Fides, 2018).

15 International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* (accessed on 25/03/2020 at <https://bit.ly/3fDE7T3>); Ferhichi et al, *al-‘Adāla al-Intiqāliyya*.

16 Decree 13/2011 (dated 17 March 2011) on the confiscation of movable and immovable assets and property as amended by Decree 47/11 (dated 31 May 2011), published in the Official Gazette of the Republic of Tunisia (*ar-Rā’id ar-Rasmiyy*, Issue 18, 18 March 2011).

17 See: Neila Chaabane, “Mukāfāhat al-Fasād wa’r-Rashwa wa-Masār al-Intiqāl ad-Dimuqrāṭiyy fi Tūnis min khilāl Tajribat al-Lajna al-Waṭaniyya li-Taqaṣṣī’l-Ḥaqā’iq ḥawl ar-Rashwa wa’l-Fasād,” in: *Taqyīm al-Intiqāl ad-Dimuqrāṭiyy fi Tūnis ba’d 3 Sanawāt* (Tunis: Al Kawakibi Centre for Democratic Transformations, Konrad-Adenauer-Stiftung, 2014), p. 74.

18 Republic of Tunisia, *Taqrīr al-Lajna al-Waṭaniyya li-Taqaṣṣī’l-Ḥaqā’iq ḥawl ar-Rashwa wa’l-Fasād* (Tunis: 2012), p. 1.

19 Ibid.

20 Ibid, pp. 5-9.

there.<sup>(21)</sup> The extent to which its powers overlap with those of judicial bodies continues to be one of the most important difficulties facing the Committee's work, complicating its mission and holding up efforts to achieve accountability.

The work of judicial bodies has in turn been characterised by confusion because of a number of interrelated problems. The judiciary has generally suffered from a loss of confidence and credibility because of how it was used by the old regime. It has also faced extensive interference of various kinds in its functioning since the Revolution: intemperate media debate and commentary on court proceedings, refusal to obey judicial orders, attacks on judges and their offices and attempts to disrupt trials in order to stop investigations or force the release of suspects.<sup>(22)</sup>

This confusion has dogged both the administrative and regular judiciaries.<sup>(23)</sup> The regular judiciary – which holds jurisdiction over criminal cases involving those accused of corruption – has moved very slowly because of the sheer volume of files submitted, and its judges' inexperience with cases of this kind has produced procedural errors affecting international cooperation to re-appropriate stolen money.<sup>(24)</sup>

The administrative judiciary is likewise responsible for hearing many corruption cases, such as appeals against government tendering and tax decisions as well as property confiscation rulings issued under Decree 13/2011. It also has jurisdiction in appeals lodged against dismissals of public officials on suspicion of corruption, including judges pardoned by the executive after the Revolution. But it is worth noting that while the administrative judiciary

generally enjoyed litigants' confidence prior to the Revolution, its approach to cases submitted to it since then has been somewhat confused because of a lack of coherence in its position. On the one hand it has tried to comply with the new revolutionary idea of legality (*shar'iyya*),<sup>(25)</sup> recognising the suspension of the 1959 Constitution and relying instead on the series of presidential decrees that have helped to usher in the era of political transition. On the other, it has tried to maintain the traditional idea of legality, based on a hierarchy of legal texts beginning with the Constitution and ending with government bodies' decisions.<sup>(26)</sup> Yadh Ben Achour notes that some judgements issued by administrative judges have paid insufficient attention to the general post-revolutionary context in which these decrees were issued. He argues that the rule-of-law thinking that prevails in normal circumstances cannot be applied to revolutionary conditions: during a revolution, it is possible to rely on a more pragmatic idea of legality supporting the aims of the revolution and advancing democratic transition.<sup>(27)</sup>

Trials have proven an inefficient mechanism for achieving accountability in corruption-related crimes because of the disruption that has dogged both administrative and regular (civil and criminal) courts. This has led public authorities to search for more efficient alternatives, with the Transitional Justice Law signalling a move towards a more disciplined accountability process characterised by more closely regulated aims and mechanisms. This Law sought to place the process firmly and exclusively in the hands of the Truth and Dignity Commission – a non-judicial body – and specialist transitional justice courts.

21 International Crisis Group, "Blocked Transition: Corruption and Regionalism in Tunisia," *Report No. 177: Middle East & North Africa*, 10 May 2017 (accessed on 25/03/2020 at <https://bit.ly/3cpDIBE>); Larbi Sadiki, "Regional development in Tunisia: The consequences of multiple marginalization," Policy Briefing, Brookings Doha, January 2019 (accessed on 25/03/2020 at <https://brook.gs/3fGXSZU>).

22 Ferchichi *et al*, *al-'Adāla al-Intiqāliyya*.

23 TN: Like other Arab legal systems (and civil law systems in general), Tunisia has two parallel sets of courts, one of which – the administrative courts – has jurisdiction over the actions of the state. Administrative law is a separate field of law, with no direct equivalent in most anglophone legal systems.

24 In 2012, Tunisia was able – exceptionally and with help from Qatar – to re-appropriate some 28 million US dollars deposited in a Lebanese bank account belonging to Ben Ali's wife. See: Nadia Haddaoui, « Le bilan pathétique de la restitution des biens mal acquis du clan Ben Ali », *Nawat*, 5 février 2015, sur : <https://bit.ly/2TiLuXX>

25 TN: The central question of administrative cases is whether an official decision taken by a government body enjoys *shar'iyya or mashrū'iyya* ('legality' or 'legitimacy'), i.e. whether it complies in both content and form with the law.

26 See: Marwan al-Dimasi, "al-Marāsīm al-Muttakhadha fī'l-Marḥala al-Intiqāliyya: Qirā'a 'alā Daw' Qawā'id ash-Shar'iyya ad-Dastūriyya wa-Muqtaḍayāt al-Mashrū'iyya ath-Thawriyya," in: Ahmed Soussi *et al*, *Fī'l-Intiqāl ad-Dimuqrāṭiyy wa'l-Isḥāḥ ad-Dastūriyy fī'l-Buldān al-Maghāribiyya* (Tunis: Mujamma El Atrach, 2015), p. 167.

27 Yadh Ben Achour, "Taṣḍīr," in: Nourah Alkredees *et al*, *al-Maḥkama al-Idāriyya fī'l-Fatra al-Intiqāliyya: al-Juz' all-Awwal 14 Jānvī 2011 – 27 Jānvī 2014* (Tunis: Dar al-Kitab, 2015).



The Truth and Dignity Committee is empowered to investigate financial corruption and embezzlement of public money in order to identify and bring to trial those involved: those who gave or received bribes; those who were directly involved and those who served as accomplices; those who exploited public office or stole public money; those who wrongfully granted public tenders or concessions to others; and those who profited personally or ensured that their relatives, parties or organisations profited.<sup>(28)</sup> The Transitional Justice Law grants the Committee a key discretionary power to determine which cases involve violations, to conduct or rule out financial settlements, and to refer cases to the judiciary as it sees fit, reducing the Public Prosecutor's Office to a liaison between the Committee and the special courts. These courts play a decisive role in the process because they guarantee that it will continue even after the Commission ceases to operate.<sup>(29)</sup>

The special courts themselves have as yet achieved little in fighting corruption due to the limited number of judgements they have handed down. This is because of cases not being ready for adjudication: conclusively proving allegations of corruption typically faces numerous difficulties, particularly given the Commission's inability to conduct investigations as effectively as it might because of some state bodies' failure to cooperate, which has had a clear negative effect on reconciliation efforts.

Reconciliation is one of the central aims of transitional justice as it concerns corruption. According to the standard definition, reconciliation means "efforts to lay the foundations for peace and trust between citizens and between old enemies."<sup>(30)</sup> Modern anti-corruption laws typically use negotiated settlements as a means of achieving reconciliation in crimes of this kind because such crimes have an economic dimension, confronting which requires a different

approach from other crimes.<sup>(31)</sup> It is worth noting that the philosophy behind modern anti-corruption settlements has pragmatic purposes: those involved in corruption pay up and in exchange their file is closed permanently.<sup>(32)</sup>

One point that comes out clearly from the work of the Arbitration and Reconciliation Committee (part of the Truth and Dignity Commission) – which oversaw the implementation of a mechanism for negotiated settlements in cases of embezzlement of public money – is how important it is to try and get back assets acquired illegitimately. The Committee has negotiated several settlement and arbitration agreements that have allowed the state to re-appropriate a significant portion of an estimated 745 million TND disbursed in this way.<sup>(33)</sup>

But these efforts do not negate the fact that the Commission's work has been very slow, to the point that negotiated settlements cannot be said to work in a manner that would produce economic reconciliation. Regardless of the external factors that have impinged on the Commission's work, the warnings surrounding the negotiated settlement mechanism in the Transitional Justice Law have directly contributed to this slowness: negotiating and implementing a settlement in a corruption case may lead to "expiry of a public case, termination of trial proceedings or non-implementation of penalties". But the Law also permits the Commission to quash a settlement even after implementation has begun, for example if it is proven that "the perpetrator has deliberately concealed the truth or deliberately neglected to declare all unrightfully acquired property".<sup>(34)</sup> This sends the message to anyone interested in reconciliation that even if they come to a settlement with the Commission they may then find themselves facing judicial proceedings in the same case: settlements only have a bearing on specific acts,

28 This group includes many businessmen prominent before the Revolution who received illegal concessions under Ben Ali and benefited indirectly from the ostensible "economic miracle" promoted by the despotic regime. See: International Crisis Group, *Tunisia: Transitional Justice*, p. 19.

29 Basic Law 17/2014, *ibid.*

30 Moulay Abdelkarim, *ibid.*, p. 30.

31 Akila Taleb, « Les procédures de Guilty Plea : plaidoyer pour le développement des formes de justice négociée au sein des procédures pénales modernes », *Revue internationale de droit pénal*, vol. 83, no.1 (2012), p. 89.

32 *Ibid.*

33 See: Republic of Tunisia (Truth and Dignity Commission), *at-Taqrīr al-Khitāmiyy ash-Shāmil* (Tunis: December 2018), (accessed on 25/04/2019 at <https://bit.ly/2RMXk9G>).

34 A decision to produce a negotiated settlement in cases of major human rights violations does not prevent further judicial proceedings against the perpetrator or mean that he cannot be found guilty so long as the settlement is taken into account for sentencing purposes. See: Transitional Justice Law, Section 45.

and not on all acts committed, meaning that they are only a partial and circumstantial solution which does not result in the final closure of the file.

In order to overcome the obstacles that have dogged reconciliation, the office of the President looked for an alternative framework, and began to prepare a draft bill that would remove jurisdiction in corruption cases from the Commission and would cover both officials and businessmen.<sup>(35)</sup> The bill faced opposition and was targeted by the protest campaign *Manich Msame7* (“I haven’t forgiven you” or “I won’t forgive you”).<sup>(36)</sup> It also came in for sharp criticism from experts, who say that it violates the Constitution’s stipulation that the state is to be bound by the transitional justice process and must respect the powers of the Truth and Dignity Commission.<sup>(37)</sup> The bill was ultimately dropped and replaced by another, the Law on Reconciliation in the Administrative Sphere, which limited itself to exempting state officials involved in corruption from criminal responsibility in order to “create an appropriate atmosphere which will encourage, in particular, a spirit of initiative in government, strengthen the national economy, and promote trust in state institutions – all in the interest of national reconciliation”.<sup>(38)</sup> This bill was ratified in late 2017, meaning that many former officials have been pardoned. Settlements with businessmen involved in corruption through the State Litigation Office, meanwhile, have been suspended – which in practice has meant circumventing the Transitional Justice Law and allowing many to escape being held to account as well as failing to get back stolen public money.<sup>(39)</sup>

In corruption cases reconciliation has oscillated between the desire to hold perpetrators accountable and get back the money that they embezzled and the desire to put the past to rest without achieving either

of these things. Those who support accountability argue that without it reconciliation simply means allowing perpetrators to escape punishment, which hardly contributes to public confidence in state institutions, promotes the rule of law or furthers just development. Its opponents, on the other hand, say that negotiated settlements can simply serve as a means of blackmailing businessmen, making accountability an obstacle to economic recovery and attempts to find much-needed solutions to citizens’ economic and social problems.<sup>(40)</sup>

Anti-corruption transitional justice is associated in Tunisia with the revolutionary proceedings begun against businessmen suspected of corruption after the Revolution. This produces the impression that the process has a distinctly retributive character rather than seeking to turn a new page and move forward. The failure of reconciliation has allowed huge sums of money acquired through corruption to continue circulating in public life: the threat of political blackmail hanging over businessmen drives them to seek protection or immunity by providing financial support to politicians who can help them achieve this.

Reconciliation today is crucial in order to scour public life of dirty money and advance democratic transition. But this will be difficult so long as transitional justice and reconciliation – and the mechanisms by which each is to be achieved – are not redefined, drawing on international experiences and taking into account the national context. Experiences of democratic transition, although they may be numerous, each have their own specificity – a point confirmed by many studies.<sup>(41)</sup> Perhaps most importantly, transitional justice, unlike formal justice, is not much bound by fixed principles or firm precedents. Its starting point is “the situation as it is, with all its legal, political

35 The full text of this law is available on the parliament’s website at: <https://bit.ly/2TrzX9u>

36 Pablo de Greiff, « Analyse du Projet de loi organique relative aux procédures spéciales concernant la réconciliation dans les domaines économique et financier », sur : <https://bit.ly/2tUKdb1>

Henda Chennaoui, « Manich Msamah appelle à reprendre la rue », Nawat, le 13 juillet 2016, sur : <https://bit.ly/2Hp4IKr>

37 See: Commission de Venise, Avis intérimaire sur les aspects institutionnels du projet de loi sur les procédures spéciales concernant la réconciliation dans les domaines économique et financier de la Tunisie, Avis no.818/2015, sur : <https://bit.ly/2XOtUur>

38 Section 1 of Basic Law 62/2017 (dated 24 October 2017) on Reconciliation in the Administrative Sphere, published in the Official Gazette of the Republic of Tunisia (Issue 85, 24 October 2017), p. 3625.

39 Wahid Ferchichi, “Hal Taltazim ad-Dawla bi-Tanfīdh Niẓām al-‘Adāla al-Intiqāliyya?” paper presented at a conference titled ad-Dastūr at-Tūnisiyya fī Maḥakk as-Siyāsa, Society for Democratic Transition Studies, Tunis, 25-26/01/2019.

40 International Crisis Group, *Tunisia: Transitional Justice*.

41 Moulay Ahmed Moulay Abdelkarim, *ibid*, p. 18; Hamadi Redissi, *ibid*; Marwa Fekri, “Muṣālahāt Ghayr Muktamila, Qirā’a Naqdiyya fī Kitāb Thawrāt Lam Tantahi: al-Yaman wa-Lībiyā wa-Tūnis Ba’d ar-Rabī’ al-‘Arabiyy,” *Siyasat Arabiyya*, vol. 38 (May 2019), p. 128.

and human aspects, in which all know what their standing was and is and work to create a new situation by means of a compromise charting a middle course between different and competing interests.”<sup>(42)</sup>

Given all this it would be a mistake to hide behind particular reasons for the failure of reconciliation and insist that solutions must necessarily be linked to those reasons. The issue will only be solved by discussion and debate of a kind that produces new ideas and projects recognising the shortcomings of the process so far and supplementing transitional justice with economic reconciliation. It is possible to draw on the experiences of the Truth and Dignity Commission as well as all the other bodies established since 2011 to investigate corruption, but the process must end with reconciliation, putting the past to rest.<sup>(43)</sup> And while the Reconciliation Law proposed in 2015 was deemed an assault on the transitional justice process, a “reward to those who funded the electoral campaign that brought Nidaa Tounes to power”, the time seems ripe for an economic reconciliation that will finally end the equivocation of recent years.

The government’s recent proposal of a law including suggestions on how to “complete the transitional justice process, achieve comprehensive reconciliation and strengthen national unity” suggests that we are moving in this direction.<sup>(44)</sup>

Economic reconciliation may appear, superficially, to expose the weakness of the state and its inability to hold those involved in corruption to account. And this might well be true: unstable political, economic and social conditions in Tunisia have indeed weakened the state, including the Truth and Dignity Commission, meaning that it has been unable to stamp out corruption with carrot or stick. Reconciliation has thus not been as successful as might have been hoped for in corruption cases. But economic reconciliation might help reinvigorate the state. It will allow it to put the legacy of despotism to rest and move confidently towards the future. And it will also improve its capacity to carry out its functions, particularly as regards economic recovery, allowing a strong state to emerge combining democracy with security, freedom and prosperity – the precondition of any future anti-corruption efforts.<sup>(45)</sup>

## II: Preventing Future Corruption – Supporting Democratic Transition

Anti-corruption efforts within the framework of transitional justice have a fundamentally preventive aim manifesting in a series of measures. Some of these measures are part of overall reform, while others target corruption directly.

Studies and reports evaluating the extent of corruption in Tunisia agree almost unanimously that before the 2010-2011 Revolution the country was dogged by a particularly serious kind of corruption – “major”, “institutional” or “systematic” corruption, as opposed to “low-level” or “administrative” corruption.<sup>(46)</sup> This type of corruption is serious enough that it has an effect on the whole state: it permeates political, social and economic life and entangles large numbers of officials, bureaucrats and businessmen. This is

what happened in Tunisia: “over the course of 23 years of misgovernment under former President Zine Abidine Ben Ali and his party, the Democratic Constitutionalist Rally, corruption became endemic.”<sup>(47)</sup>

Given how deeply embedded corruption is in state and society, technical measures like signing international treaties on fighting corruption or passing laws to encourage transparency (those facilitating reporting of corruption, for example, or obliging officials to declare income and property) are of little effect unless they are bolstered by measures intended to drive political and economic development in such a way as to effect social justice. This raises an important question concerning political development in particular and

42 Moulay Ahmed Moulay Abdelkarim, *ibid*, p. 23.

43 International Crisis Group, *ibid*, p. 16.

44 <https://bit.ly/2LiWvm7>

45 Hamadi Redissi, *ibid*, p. 11.

46 See the UN Human Rights Council report, *ibid*.

47 *Mukāfāhat al-Fasād – Uṭur Dastūriyya*, *ibid*, p. 14.

the extent to which it is possible to talk about fighting corruption in an undemocratic context.<sup>(48)</sup>

It would be difficult to find a state or political regime today that would admit to not fighting corruption. On the contrary, states take great pains to highlight their efforts to fight corruption and use public money effectively. But taking these claims at face value does not serve the fight against corruption, because it means conceding various contradictions bound to undermine any attempt to check its spread.

According to the French jurist Georges Vedel, democracy is a governmental framework drawing its legitimacy from the people, pluralism, the division of power, guarantees of rights and freedoms and a state in which all are subject to the law.<sup>(49)</sup> This modern concept of democracy helps us to feel out the role that democracy might play in fighting corruption. It helps to root out from political life those politicians suspected of corruption, and gives voters an opportunity to flush out – or the hope of flushing out – perpetrators by denying them votes in regular elections, rather than by violent means. Democracy likewise provides a margin of freedom allowing citizens to keep an eye on their rulers and hold them to account whenever there is a whiff of corruption.<sup>(50)</sup> Anti-corruption policies in turn work to support and strengthen democracy by ensuring elections are free and fair and checking the control of the financially influential minority over government, preventing them from influencing public policy in their own private economic and political interest.<sup>(51)</sup>

This brings us to a practical problem rooted in the idea that corruption worsens or stabilises during

times of democratic transition. In Tunisia some studies suggest that there was a veritable explosion of corruption in the aftermath of the Revolution, an explosion which the state proved incapable of finding efficient solutions for.<sup>(52)</sup> If we look at the Arab Opinion Index for 2017/2018, for example, we find that 79% of Tunisian respondents stated that corruption had worsened dramatically.<sup>(53)</sup>

In order to understand what is really going on such generalisations must be qualified. The Revolution rid state and society of the rule of a minority monopolising power and wealth, and insofar as that minority has not returned to power it is only logical to say that there has been a fall in corruption. The apparent increase in corruption can be attributed to two main factors. The first is a conceptual imprecision that lumps together any and all mistakes and misdeeds under the heading of corruption. The second is the newfound space for free expression allowing day-to-day discussion of corruption, encouraging the belief that it has got worse when in fact it is simply out in the open.

The real problem then lies with the difficulties facing state efforts to fight corruption during transitional periods. There are many possible reasons for these difficulties. The heavy legacy left behind by the dictatorial regime may not allow for rapid change, forcing state and society to coexist temporarily with some instances of corruption. Likewise, weak institutions inherited from the past do not help the state to operate efficiently and may require a period of reform during which corruption can thrive unchecked.<sup>(54)</sup> But consolidation of democratic traditions and expansion of freedoms can also act as

48 See: Michael Johnston, « Corruption et démocratie : menaces pour le développement, possibilités de réforme », *Tiers-Monde*, tome 41, no.161 (2000), p.116.

49 Vedel says that “based on events experienced by a number of countries in the world, we have a definition of democracy that is less scientifically rigorous and more experimental, drawn from the idea that if we cannot define democracy precisely, then we can at least bring together all its constituent parts. Intuitively, it is a form of government drawing its legitimacy from the people, specifically by means of elections, plurality of opinions and political parties, a division of powers that we sometimes call ‘separation’, guarantees for rights and freedoms, and complementing everything else a ‘law-state’ in the sense of a system in which no state entity or individual avoids accountability to the law.” Georges Vedel, « Introduction à la justice constitutionnelle », in : *Table ronde sur la justice constitutionnelle*, (Tunis : CERP, 1995), p. 21.

50 Philippe Bezes, Pierre Lascoumes, « Percevoir et juger la corruption politique. Enjeux et usages des enquêtes sur les représentations des atteintes à la probité », *Revue Française de Science Politique*, vol. 55, (2005), p.757.

51 Ibid.

52 See: International Crisis Group, *Blocked Transition*, *ibid.*

53 As well as “don’t know” and “refuse to answer”, some respondents chose “not at all widespread” and “a little widespread”; all of these answers taken together accounted for only 21%, while “has got much worse” accounted for 79%. *Arab Opinion Index 2017/2018*, ACRPS (Doha: May 2018), p. 98. <https://bit.ly/2LadHMF>

54 See for example: Steven Heydemann, « Après le séisme. Gouvernement économique et politique de masse dans le monde arabe », *Critique internationale*, vol.4, no.61, (2013), p. 69 ; Michel Dobry, « Les voies incertaines de la transitologie : choix stratégiques, séquences historiques, bifurcations et processus de path-dependence », *Revue Française de science politique*, vol. 50, no.4-5 (2000), p. 585.



a countervailing force, ultimately allowing the state to contend with corruption and limit its influence on public life. During the period of democratic transformation the aspiration is thus not to root out corruption entirely but to put in place policies aiming to limit it. These policies can be evaluated on the basis of political and judicial orders proving beyond the shadow of a doubt that the state is vigilant against corruption and will be unswerving in dealing with the phenomenon – a phenomenon that Delmas-Marty has described as “the most serious attempt to sabotage the law state and democratic society”.<sup>(55)</sup>

As far as economic development is concerned, meanwhile, it is crucial not to reduce the various political and economic crises experienced by different countries to corruption or treat it as the “root of all evil”, since this can mean turning a blind eye to other factors. Adopting anti-corruption policies has not prevented many countries facing serious crises – and nor has failing to fight corruption prevented other countries from achieving high rates of development.<sup>(56)</sup> It is thus more sensible to see anti-corruption policies as one of many factors that help to mitigate or overcome crises. They also help prevent a small group of influential politicians or financiers from monopolising the fruits of development.

Preventing corruption requires comprehensive policies taking into account the different priorities in different countries. Take for example the Tunisian and Egyptian cases. In Tunisia, human rights violations and the absence of basic freedoms were a key element in the transformation of the presidential system into a system in which the president monopolised executive power, bent the legislature to his will and controlled the judiciary, undermining any equilibrium that might have limited his influence and stopped him

from embezzling public money.<sup>(57)</sup> It was thus logical that priority should be given to political reforms laying the foundations of a more balanced system in which different government bodies would keep one another in check, a system that would guarantee basic freedoms, allowing society to mobilise against any impropriety in the political system.<sup>(58)</sup> Economically and socially, meanwhile, it was necessary to focus on those groups most badly affected by corruption using the metric of how far corruption had impacted economic and social rights – thereby helping to produce a clearer understanding of the reasons for disparities in development between the coast and the interior. In this light, giving priority to and employing positive discrimination in the interior can be understood as anti-corruption measures.<sup>(59)</sup> Anti-corruption measures thus become more effective, in the sense that every advancement in economic development will lead to a drop in the level of corruption and limit its negative effects. This may be why the most economically developed countries are also those with the lowest levels of corruption.

In Egypt, on the other hand, the involvement of the military in all aspects of political and economic life was an obstacle to the creation of a democratic state that might have liberated the popular will and allowed political institutions to address the challenges impeding development.<sup>(60)</sup> Under such conditions there is not much value to anti-corruption laws so long as the army remains heavily involved in politics and the economy and in the civilian sphere more broadly.<sup>(61)</sup> It does not take an expert to realise that anti-corruption laws are only meaningful when they are part of an emancipatory democratic environment where there are set parameters within which political and economic actors operate, with as much vigilance against corruption and as little unaccountability

55 Mireille Delmas-Marty, Stéfano Manacorda, « La corruption, un défi pour l'État de droit et la société démocratique », *Revue de science criminelle*, no.3 (1997), p. 69.

56 Pascal Boniface, « La lutte contre la corruption, nouveau paradigme des relations internationales », *Revue internationale et stratégique*, no.101 (2016), p. 75.

57 Lotfi Tarchouna, “Manzūmat at-Tasalluṭ fī n-Niẓām as-Siyāsiyy at-Tūnisiyy qabl Thawrat 14 Jānfi 2011,” *al-Majalla at-Tūnisiyya li'd-Dirāsāt al-Qānūniyya wa š-Siyāsiyya*, vol. 1 (2012), p. 7.

58 Mehdi Mabrouk, “ath-Thawra at-Tūnisiyya al-Mulhima,” *Alaraby Aljadeed*, 30 January 2019.

59 International Crisis Group, *Blocked Transition*.

60 See: Azmi Bishara, “al-Jaysh wa'l-Ḥukm 'Arabiyyan: Ishkāliyyāt Naẓariyya,” *Siyasat Arabiyya*, vol. 22 (September 2016), p. 7.; Zoltan Barany, “al-Quwwāt al-Musallaḥa wa-'Amaliyyāt al-Intiqāl as-Siyāsiyy,” *Siyasat Arabiyya*, vol. 24 (January 2017), p. 81.

61 See for example Abdel Khaleq Farouk, *Iqtisādāt al-Fasād fī Miṣr: Kayfa Jarā Iḥsād Miṣr wa'l-Miṣriyyīn (1974-2010)* (Cairo: El Shorouk International Booksellers, 2011). See also Hisham Genena's report on corruption in various sectors of the Egyptian economy prepared while he was at the Egyptian Central Auditing Organisation (2017). Genena was later imprisoned because of public statements he made regarding corruption in Egypt.

as possible. Advocating anti-corruption under a dictatorship or a regime uninterested in democracy or basic freedoms is no more than pointless sloganeering so long as it is not put into practice through specific laws and government actions.<sup>(62)</sup> There thus seemed to be a clear need to pass a transitional justice law concerned with rights, politics, the economy and society – and this was provided for by the 2014 Egyptian Constitution. But the current regime's preference for opacity has led to reconsideration of this option.<sup>(63)</sup>

Given all this we can conclude that tying anti-corruption efforts to democracy and the rule of law supports the former. Transitional justice in anti-corruption cases can thus be understood as part of the process of creating conditions conducive to democracy, the rule of law and anti-corruption efforts. It is worth noting that there is no automatic connection between doing away with the legacy of the past and adopting policies directed towards the future: it is quite possible for us to imagine a state that adopts and implements anti-corruption policies while paying little attention to a past that might be no more than a burden. But this connection acquires great importance in states transitioning to democracy because of the sheer weight of the legacy and the danger of backsliding into corruption and despotism in a difficult period when democratic traditions – and likewise the rules and principles underlying the fight against corruption – have not yet taken root.

Today countries all over the world are working hard to keep up with the development of this complex phenomenon. These developments are linked, on the one hand, to institutional and structural changes within states and the attendant changes in function. On the other hand, they are tied to global economic transformations – transformations which have made borders unprecedentedly porous for capital, making it possible to invest, own property and move money around freely on an international scale either via

traditional banks or using modern technology – and the globalisation of crime that has followed this globalisation of the economy.<sup>(64)</sup>

Fighting corruption is thus no longer a simple matter of stamping out the giving and taking of bribes. Countries now tend to try and clamp down on it by criminalising a range of acts ranging from bribing local bureaucrats to bribing international public servants or NGO workers, misappropriating, misusing or squandering public money, abusing influence, illegal enrichment and money laundering. They also make efforts to hunt down bribes in the private sector involving government institutions or companies or multinational corporations that negatively affect free and open competition.<sup>(65)</sup>

After the Revolution there was an obvious need for legislation designed specifically to combat corruption; events had allowed for a much deeper understanding of the phenomenon. One of the first measures to be taken was active implementation of the UN Convention Against Corruption, which Tunisia had signed in 2004 and ratified in 2008. This was done in order to assess the extent to which the existing legal system conformed with the terms of the Convention and allow for the drafting of the necessary statutes.

The new Constitution issued on 27 January 2014 likewise includes anti-corruption and good governance provisions modelled on the modern constitutions of other post-transition countries in Eastern Europe and Africa.<sup>(66)</sup> Its first section sets forth some general principles, commitments and aspirations of relevance; Article 10, for example, stipulates that “the state shall take pains to manage public money judiciously [*ḥusn at-taṣarruf fī l-māl al-‘umūmiyy*] and take the necessary measures in order to spend it in accordance with the priorities of the Tunisian economy, and shall work to prevent corruption and anything that might infringe on

62 See for example: Mustafa al-Azab, “al-Āthār al-Ijtīmā’iyya li’l-Qarārāt al-Iqtisādiyya fī Miṣr: Ilā Ayy Wijha Tākhdunā’l-Intikhābāt al-Barlamāniyya al-Muqabila?” *Siyasat Arabiyya*, vol. 13 (March 2015), p. 49.

63 See for example Abdelfattah Mady, “Miṣr wa’l-Ḥāja ilā ‘Adāla Intiqāliyya Shāmila”, *Al Jazeera.net* (accessed on 05/03/2019 at: <https://bit.ly/2J0x7DN>).

64 See: Mireille Delmas-Marty, *Le relatif et l’universel. Les forces imaginantes du droit*, (Editions du Seuil, 2004).

65 Philippe Janot, « Firms Transnationales, Corruptions, États », *Annuaire Français de Droit International*, (2005), p. 426.

66 See: André Cabanis, Michel Louis Martin, « De la dénonciation de la corruption à la recherche de la transparence dans le constitutionnalisme d’Afrique francophone », in : Mohamed Naceur Loued et al. (eds.), *Transparence financière et réformes institutionnelles*, (Tunisie : Faculté des sciences juridiques, économiques et de gestion de Jendouba, 2008), p. 69-77.

national sovereignty”.<sup>(67)</sup> The decision to enshrine anti-corruption efforts in the Constitution is perhaps one of the most important steps taken in this regard: not only does the Constitution have primacy over all other laws, it also acts as a contract binding all parties to fight corruption regardless of their intellectual or political differences.

Alongside the Constitution, Tunisia’s statute-book now features a number of other laws bolstering anti-corruption efforts. These include the Financial and Economic Crime Tribunal (*al-Quṭb al-Qaḍā’iyy al-Iqtisādiyy wa’l-Māliyy*) Law, the Good Governance and Anti-Corruption Commission Law, the Freedom of Information Law, the Whistleblower Law and the Law on Declaration of Profits and Interests.<sup>(68)</sup>

Institutionally, Section 6 of the Constitution is given over to independent constitutional bodies – bodies with a range of functions, including overseeing elections, protecting human rights, acting as a media watchdog or preserving the environment. All of these bodies necessarily contribute to the fight against corruption within their own fields.<sup>(69)</sup> Article 130 also provides for a specific ‘Good Governance and Anti-Corruption Commission’ charged with ‘helping produce and overseeing implementation of good governance and anti-corruption policy, promoting a culture thereof, and advancing the principles of transparency, integrity and accountability’. The Commission is also responsible for ‘identifying, investigating and confirming cases of corruption in the public and private sectors and referring them to the relevant authorities.’<sup>(70)</sup>

The Truth and Dignity Commission likewise took responsibility for looking into former areas of weakness in the functioning of the state and “drafting recommendations pertaining to political, economic, administrative, security, judicial, media, educational and cultural reform and purging the state bureaucracy,

as well as any other recommendations it deems necessary in order to avoid a return to oppression, despotism, human rights violations and abuse of public money”.<sup>(71)</sup> Its 2019 report featured a battery of recommendations on how to develop property legislation and create a climate of transparency in finance, banking, taxation and protection of natural resources.<sup>(72)</sup>

Another measure targeting corruption directly is the National Anti-Corruption Commission established in 2012 under Framing Decree 120/2012 (dated 14 November 2012),<sup>(73)</sup> which took responsibility for transitional justice cases concerning corruption when the Investigative Committee for Acts of Corruption and Bribery wound up its activities.<sup>(74)</sup> In its normal role the Commission enjoys both investigative powers – receiving corruption complaints and referring cases to the relevant judicial or administrative authorities – and preventative powers, collecting data and statistics on corruption, raising social awareness of the attendant dangers and producing reports.<sup>(75)</sup> In this particular context it has done important work putting in place legislative, institutional and community infrastructure to help fight corruption. But it would have been able to operate more efficiently if it had full criminal investigative powers (*ṣifa ḍabṭiyya*) like those enjoyed by the Malaysian Anti-Corruption Commission, for example.

67 Constitution of the Republic of Tunisia, Article 10.

68 See: *Majmū’at an-Nuṣūṣ al-Qānūniyya al-Muta’alliqa bi-Mukāfaḥat al-Fasād* (Tunis: National Anti-Corruption Commission, 2017).

69 Constitution of the Republic of Tunisia, Articles 125-130.

70 Constitution of the Republic of Tunisia, Article 130.

71 Transitional Justice Law, Article 43.

72 Truth and Dignity Commission, *at-Taqrīr al-Khitāmiyy*, *ibid*.

73 Framing Decree 120/2012 (14 November 2012) on Anti-Corruption, published in Official Gazette 88 (18 November 2011), p. 2746.

74 *Ibid*.

75 See for example: National Anti-Corruption Commission, *at-Taqrīr as-Sanawīyy li-Sanat 2017* (Tunis, 2018). See: Nizar Barkouti, “Mukāfaḥat al-Fasād fī l-Qiṭā’ al-’Āmm: Muqāraba fī Taṭbīq Qawā’id al-Ḥawkama ar-Rashīda,” PhD. Dissertation, College of Law and Political Science, Tunis, 2016.

## Conclusion

The decision to make the fight against corruption a key part of transitional justice in Tunisia is part of a necessary move away from revolutionary solutions towards reformist solutions. This means the state presenting proportional solutions concordant with transitional justice as it differs from traditional or 'formal' justice: giving priority to redressing harm to victims and de-emphasising punishment in favour of forgiveness in order to pursue future gains such as the return of embezzled money, reconciliation, social justice, economic development and above all else transition to democracy. Working from this premise, efforts should have been directed towards truth, accountability and reconciliation (the central goals of transitional justice), but this did not happen. Transitional justice has thus oscillated in cases of corruption between the flexible demands of transitional justice and the rigid demands of formal justice, particularly as regards economic reconciliation – the animating force of transitional justice. The failure to achieve economic reconciliation has helped a great deal of dirty money remain in circulation in public life as corrupt businessmen seek immunity by throwing their support behind particular politicians. A renewed effort to achieve economic reconciliation is thus urgently needed in order to free public life of the fruits of corruption and thus support democratic transition.

It is also clear how important the democratic state is as the ideal framework within which an environment inhospitable to corruption can be created. A democratic state is not a state free of corruption but a state incorporating strong procedural mechanisms, a broad range of freedoms and a clear separation of powers, guaranteeing accountability and helping to clamp down on corruption. Dictatorship, meanwhile, leads to violent shifts which support neither democratic transition nor the fight against corruption.



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