

Transitional Justice: Lessons from Tunisia's Aborted Transition

by Akram Ezzamouri



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Eleven years ago, a sweeping mobilisation of Tunisians clamouring for work, freedom and dignity morphed into country-wide demonstrations against Ben Ali's nepotistic and repressive regime, triggering promising momentum for democratic reform in Tunisia and other neighbouring countries. After the ouster of Ben Ali and his flight to Saudi Arabia on 14 January 2011, the country embarked on an intricate transitional process marked by the 2011 Constituent Assembly election, the 2014 adoption of a new Constitution and the first free legislative elections held in October of the same year.

In light of these achievements and particularly if compared to the hampered and often tragic

developments in other uprising states, the steady pace of the Tunisian transition led many to label the country the only "success story" of the uprisings that shook the Middle East and North Africa (MENA) beginning in late 2010. Nevertheless, for close to a year now, Tunisia's democratic transition has ground to an abrupt halt. This is the result of an incremental power grab carried forth by Tunisian president Kais Saied, whose election in October 2019 paved the way for successive moves that have all but wrecked the fragile institutional architecture of checks and balances and the rule of law in the country.

How did Tunisia's political transition end up in this state and what lessons can be drawn from the country's recent

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past with regards to transitional justice in Tunisia and the broader region?

Fragmented politics and stagnant economy

One explanation lies in political fragmentation and economic stagnation. These trends are still fuelling socio-political tensions in Tunisia more than a decade after the self-immolation of Mohamed Bouazizi, a street vendor in the central rural town of Sidi Bouzid, set off the 2010–2011 Jasmine revolution.¹

The immediate post-revolutionary setting was generally dominated by the ideological juxtaposition of secularists versus Islamists. Yet, persistent practices of consensus politics and the failure of successive governments to implement key economic and security reforms have in the long term weakened the legitimacy of political institutions, undermining popular trust in the party system as well. This inclination for consensus, or *tawafuq*, allowed for the formation of the 2015 government, supported by a coalition including the secular party Nidaa Tounes and its Islamist contender Ennahda.² In 2019, the leader of the major Tunisian Islamist party, Rashid Ghannouchi, continued the coalition with Nidaa Tounes' new splinters, Tahya Tounes

and Machrouu Tounes.³

While the spirit of consensus was initially praised as a measure to enhance reconciliation, thereby favouring the democratic transition, its persistence has effectively blocked the enactment of concrete reforms, revealing the frail grounds on which Tunisia's democratic transition was progressing. The dark side of this approach led to increased political polarisation, as it postponed rather than resolved the secular-Islamist cleavage, thereby hampering the government's ability to deliver on crucial reforms or agree on the establishment of a Constitutional Court.

One result is that distrust and disillusionment towards politics in general has become widespread in Tunisia, not least in light of a deeply fragmented and deadlocked parliament. This partially explains the dramatic decline in Tunisians' still majoritarian support for democracy registered by the Afrobarometer in 2020,⁴ as well as the narrow and multifaceted component of disillusioned Tunisians backing the autocratic moves carried out by president Saied.⁵ The actions

¹ Ameni Mehrez, "Is Democracy in Tunisia Threatened or Is It on the Way to Consolidation?", in *RevDem*, 2 October 2021, <https://wp.me/pcPelL-IG>.

² Sharan Grewal and Shadi Hamid, "The Dark Side of Consensus in Tunisia: Lessons from 2015–2019", in *Brookings Reports*, January 2020, p. 19, <https://brook.gs/2S3brbd>.

³ *Ibid.*, p. 6.

⁴ As recorded by the Afrobarometer, in 2020, 58 per cent of Tunisian respondents said they prefer democracy over any other form of government – a 13-percentage-point decline since 2013 (71 per cent). See, *Summary of results: Afrobarometer Round 8 Survey in Tunisia in 2020*, October 2021, <https://www.afrobarometer.org/?p=8327>; Youssef Meddeb, "Support for Democracy Dwindles in Tunisia Amid Negative Perceptions of Economic Conditions", in *Afrobarometer Dispatch*, No. 232 (3 September 2018), <https://www.afrobarometer.org/?p=6746>.

⁵ Reuters, "Thousands Rally in Support of Tunisian President Kais Saied", in *The Guardian*,

taken are indeed impressive and reflect the essence of Saied's populist brand of politics.⁶

Since 25 July 2021, the president has suspended the 2014 Constitution (with exception of its preamble and first two titles); dissolved parliament; replaced the Supreme Judicial Council with a loyalist interim council with fewer powers; made increased use of military courts to trial civilians who, in some cases, had condemned the president's expanding powers;⁷ and dismissed 57 judges, accusing them of obstructing terrorism investigations and committing financial and "moral" corruption.⁸

Exploiting frustration over a deeply fragmented parliament, mounting socio-economic challenges and the continuation of political-ideological divides hampering the reform process, president Saied effectively decided to wind back the clock. Having implemented the above power grab, the president justified his moves on the basis that the presidency alone should be entrusted to decide the pace and direction of Tunisia's transition.

³ October 2021, <https://www.theguardian.com/p/j5xpg>.

⁶ Malek Lakhal, "The Ghost People and Populism from Above: The Kais Saied Case", in *Bawader*, 23 March 2022, <https://www.arab-reform.net/?p=21842>.

⁷ Amnesty International, *Tunisia: Alarming Increase in Number of Civilians Facing Military Courts*, 10 November 2021, <https://www.amnesty.org/en/?p=142870>.

⁸ Mohamed Ali Ltifi, "Tunisian President Targets Judiciary, Dismisses Dozens of Judges", in *Al-Monitor*, 13 June 2022, <https://www.al-monitor.com/node/49495>.

Transitional justice and the Tunisian flop

A further dimension of Tunisia's democratic backsliding is evidenced by a halt to the implementation of transitional justice in the country and the poor results achieved thus far in ensuring truth and accountability for gross human rights violations and in vetting administrative institutions.⁹ While the approval of a transitional justice programme generally contributed to consolidate the idea of Tunisia being a *sui generis* case in the post-uprisings regional scenario, given the historically dismal record of transitional justice efforts across the MENA region, revanchist authoritarianism is jeopardising its successful implementation.

The relevance of implementing transitional justice in Tunisia's post-authoritarian context lays in the country's urge to actively address its repressive legacy by shedding light on past abuses perpetrated during the former regimes led by Bourguiba and Ben Ali, thereby restoring a modicum of dignity to victims and their relatives while helping to promote social cohesion. With these objectives in mind, in December 2013 the Tunisian National Constituent Assembly passed Organic Law No. 53 on Establishing and Organising Transitional Justice.¹⁰

⁹ Naomi Roht-Arriaza, "Tunisia's Democratic Backsliding and Economic Woes Illustrate the Limits of Transition", in *Just Security*, 28 April 2022, <https://www.justsecurity.org/81289>.

¹⁰ Tunisia, Law No. 2013-53 of 24 December 2013: *Organic Law on Establishing and Organizing Transitional Justice*, <https://www.ohchr.org/sites/default/files/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>.

The law appointed the Tunisian Truth and Dignity Commission (TDC) – in force from 2014 to 2018 – with the task of investigating abuses that occurred from 1 July 1955 up to 24 December 2013, providing accountability, recommending a scheme for reparations and proposing institutional reforms for democratic consolidation. While the TDC sought truth and reconciliation via non-judicial procedures, it parallelly referred 200 cases of gross human rights violations and serious financial wrongdoings to *ad hoc* Specialised Judicial Chambers.¹¹ At the end of its mandate, after having scrutinised 62,720 files, the TDC handed its final report to the Presidency in 2019.¹²

This process, the operationalisation of which has been strongly backed by UNDP and the EU,¹³ did not escape detrimental dynamics related to the above-mentioned inclination for consensus characterising post-revolutionary politics in Tunisia. Since 2014, when Ennahda agreed to join forces with Essebsi in a coalition, the Tunisian transitional justice programme became a prime target for political horse-trading, polarisation and outright sabotage by members of the old political guard.

¹¹ Truth and Dignity Commission, *The Final Comprehensive Report. Executive Report*, May 2019, p. 87-107, http://www.ivd.tn/rapport/doc/TDC_executive_summary_report.pdf.

¹² *Ibid.* It is only on 24 July 2020 that the Commission's final report has been issued in the Official Gazette of the Tunisian Republic.

¹³ International Crisis Group, "Tunisia: Transitional Justice and the Fight Against Corruption", in *Crisis Group Middle East and North Africa Reports*, No.168 (3 May 2016), p. 16, <https://www.crisisgroup.org/node/359>.

In 2015, soon after Beji Caid Essebsi of the Nidaa Tounes party took office as president, the latter proposed an economic reconciliation law withdrawing the TDC's competence in economic matters and ensuring impunity for both public and private individuals accused of corruption during former regimes. Following firm opposition from the grassroots movement Manich Msamah, a remodelled version of the act exempting only civil servants from judicial prosecutions also gathered Ennahda's pragmatic support and was finally passed by parliament in 2017,¹⁴ amid criticism from transitional justice experts and human rights defenders.¹⁵

Moreover, while Essebsi failed to pass his draft law providing amnesty for both private and public actors accused of embezzlement, president Saïed recently enacted decree-law No. 13-2022, which quashes prosecutions and sentences for private actors guilty of financial crimes, in return for investments in regional development projects.¹⁶ Civil society organisations firmly condemned this measure, as it puts aside the Specialised Judicial Chambers, promotes a logic of impunity and ultimately obscures the truth.¹⁷

¹⁴ Jennifer Lincoln, "Manich Msamah and the Face of Continued Protest in Tunisia", in *Jadaliyya*, 24 August 2017, <https://www.jadaliyya.com/Details/34515>.

¹⁵ Amna Guellali, "New Reconciliation Law Threatens Tunisia's Democracy", in *World Policy Blog*, 2 October 2017, <https://www.hrw.org/node/309268>.

¹⁶ Olfa Belhassine, "Tunisia: A 'Reconciliation' Law That Goes Against Transitional Justice", in *JusticeInfo*, 8 April 2022, <https://www.justiceinfo.net/en?p=90313>.

¹⁷ Avocats Sans Frontières, "The Decree-Law

As the Tunisian case attests, transitional justice processes can be hampered by the distinctive power volatility of transitional environments.¹⁸ Its failure may then trigger further socio-political deterioration, distrust in public bodies and the reiteration of past wrongdoings.

At present, reconciliation and justice for the victims of past breaches is jeopardised by a presidency intent on undermining the country's existing checks and balances. This situation is furtherly exacerbated by the failure to implement recommendations proposed by the TDC and the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,¹⁹ as well as the inability to ensure the issuing and implementation of verdicts by the Specialised Judicial Chambers.²⁰

No. 13-2022 for Penal Reconciliation", in *ASF Press Releases*, 28 March 2022, <https://asf.be/blog/publications/press-release-28-03-2022>.

¹⁸ Mariam Salehi, "Designing Transitional Justice: Problems of Planning Political & Institutional Change in Volatile Political Contexts", in *POMEPS Studies*, No. 37 (February 2020), p. 41-45, <https://pomeps.org/?p=11613>.

¹⁹ UN Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. Addendum: Mission to Tunisia (11–16 November 2012)* (A/HRC/24/42/Add.1), 30 July 2013, <https://undocs.org/A/HRC/24/42/Add.1>. For an assessment of the status of implementation of recommendations see, UN Human Rights Council, *Follow-up on the Visits to Tunisia, Uruguay and Spain* (A/HRC/48/60/Add.1), 5 August 2021, p. 3-11, <https://www.undocs.org/A/HRC/48/60/Add.1>.

²⁰ Amnesty International, *Tunisia: 10 Years On, Victims Are Still Awaiting Justice*, 14 January 2021, <https://www.amnesty.org/en/documents/mde30/3525/2021/en>.

What role for the EU?

While Tunisia's democratic consolidation continues to erode, policy responses from the European Union are too cautious and slow.²¹ Josep Borrell, the EU's High Representative for Foreign Affairs and Security Policy, visited Tunis one month and a half after Saied's first autocratic moves. Then, in October, Europe's top diplomat called for a "clearly-defined timeline for Tunisia's return to a constitutional order based on the separation of powers, respect for the rule of law and parliamentary democracy".²²

On 25 July, Tunisians are expected to express their vote on a new draft constitution proposed by Saied, which seeks to consolidate a centralised one-man system.²³ The president publicly reacted to the urgent opinion of the Venice Commission²⁴ by declaring the body as *persona non grata* and refusing to allow foreign electoral observers.²⁵ In

²¹ Youssef Cherif, "Has the EU Failed Democratic Tunisia?", in *Carnegie Articles*, 16 December 2021, <https://carnegieendowment.org/publications/85946>.

²² European External Action Service (EEAS), *Tunisia: High Representative/Vice-President Josep Borrell Speaks with President Kaïs Saïed*, 10 October 2021, <https://www.eeas.europa.eu/node/105746>.

²³ Zaid Al-Ali, "Tunisia's Draft Constitution Solidifies One-Man Rule", in *The Washington Post*, 8 July 2022, <https://www.washingtonpost.com/politics/2022/07/08/tunisia-saied-coup-constitution-backsliding-democracy>.

²⁴ Venice Commission, *Opinion No. 1085/2022: Tunisia - Urgent Opinion on the Constitutional and Legislative Framework on the Referendum and Elections Announcements by the President of the Republic...*, 27 May 2022, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2022\)026-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)026-e).

²⁵ Tarek Amara, "Tunisian President Hints

the run-up to the referendum, the EU took note of the widespread concerns raised over the draft constitution and stresses the relevance of an inclusive national dialogue in ensuring a valid constitutional process and long-term stability.²⁶

In this setting of democratic backsliding, European institutions need to overcome their cautiousness and press for the restoration of the rule of law and independence of the judiciary by exploiting their diplomatic and economic leverage.

With European energies currently directed at the war in Ukraine and the urgent need to diversify oil and gas supplies from Moscow, maintaining a careful and critical eye on Mediterranean Basin states will be important for European interests. Further trends of authoritarian consolidation in the MENA can easily backfire on Europe, not least in light of the increasingly likely outbreak of new popular uprisings given the continued erosion of socio-economic and political rights across the region.

Rebalancing Europe's political approach towards Tunisia by prioritising the restoration of the rule of law, social cohesion and a return to the aborted process of transitional justice, rather than simply pursuing narrow interests

He Will Not Accept Foreign Observers in Next Elections", in *Reuters*, 13 May 2022, <https://www.reuters.com/world/africa/tunisian-president-hints-he-will-not-accept-foreign-observers-next-elections-2022-05-12>.

²⁶ Council of the European Union, *Tunisia: Declaration by the High Representative on behalf of the European Union*, 11 July 2022, <https://europa.eu/!PYRQVT>.

such as migration management,²⁷ would help EU credibility, advance EU interests and help restore some of Tunisia's positive momentum towards reform.

A strong stance vis-à-vis Tunisia would also help send a message to other neighbouring states which are similarly witnessing significant political and socio-economic backslidings. Any revival of Tunisia's delicate transition, accompanied by increased engagement by Europe, could similarly inspire renewed efforts by civil society and interested stakeholders in other post-conflict or post-authoritarian transitional contexts. Finally, a more consistent engagement with Tunisia's leadership would also help protect Europe from the mounting accusations of double standards when it comes to its dealings with MENA states and societies, in turn helping to strengthen EU credibility and the overarching cohesion and long-term stability of the enlarged Mediterranean.

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²⁷ Haïfa Mzalouat, "Comment l'Europe contrôle ses frontières en Tunisie?", in *Inkyfada*, 20 March 2020, <https://inkyfada.com/?p=36706>.

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