Transitional Justice as a Post-Revolution Constitutional Arrangement

Eman Muhammad Rashwan

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Overgangsjustitie als Constitutionele Regeling na een Revolutie:
Een Rechtseconomische Benadering

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ACAP	The Democratic Constitutional Assembly Party
ACHPR	The African Charter on Human and Peoples' Rights
ARC	The Arbitration and Reconciliation Committee
CBA	Cost-Benefit Analysis
ECHR	The European Court of Human Rights
HRW	Human Rights Watch
ICCPR	The International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
IDEA	International Institute for Democracy and Electoral Assistance
IHRL	International Human Rights Law
IHL	International Humanitarian Law
MENA	Middle East and North Africa
NGO	Non-governmental Organizations
OHCHR	The Office of the United Nations High Commissioner for Human Rights
PAIC	The Dataset of Political Agreements in Internal Conflicts
PAP	Principal-Agent Problem
SCAF	Supreme Council of the Armed Forces
SSR	Security Sector Reform
TC	Truth Commissions
TDC	The Truth and Dignity Commission
TJ	Transitional Justice
TJRC	Transitional Justice Research Collaborative

UDHR	The Universal Declaration of Human Rights
UN	United Nations

Chapter 1: Introduction

I. Motivation

In the aftermath of a crisis involving one group oppressing the other, one of the first questions that society faces is how to deal with the past oppressors and their legacy in a way that achieves justice for the victims and prevents repeating the past. This is a big question that has been the subject of lengthy debates within different social fields. Nowadays, the world has witnessed two waves of revolutions in the Middle East and North Africa (MENA) region,[1] which ended up as wars in many spots. Moreover, the fears of backsliding towards authoritarianism in East Europe are expanding. Furthermore, protests are roaring again – violently sometimes – even in the streets of Latin American countries where one would least expect it, such Chile.[2] These are just examples of crises involving oppressive regimes and human rights' violations around the world.

In a specific context within the comparative cases of political systems in transition, the Arab Spring developed from a euphoric start that succeeded in toppling four of the Arab autocratic regime leaders in 2011 to shaky transitions,[3] followed by a second wave of regime changes. The Arab Spring revolutions went from being a hope of a fourth wave of democratization[4] to a disappointment, then to an invitation to revisit.[5] In 2021, from the first

[1] '"The Arab Spring Did Not Die": A Second Wave of Mideast Protests' (*France 24*, 2020) <https://www.france24.com/en/live-news/20201130-the-arab-spring-did-not-die-a-second-wave-of-mideast-protests> accessed 28 July 2021.

[2] The country was known as one of South America's most stable and prosperous countries that had been relatively free of coups and arbitrary governments which dominated other countries of the continent 'Chile Country Profile' (*BBC News*, 2020) <https://www.bbc.com/news/world-latin-america-19357497> accessed 29 July 2021.

[3] Alison Baily, 'The End of Spring? Democratic Transitions in the Arab World' (*British Council*, 2017) <https://www.britishcouncil.org/research-policy-insight/insight-articles/end-spring-democratic> accessed 29 July 2021; Andrew England, 'The Lost Decade: Voices of the Arab Spring on What Happened Next' (*Financial Times*, 2021) <https://www.ft.com/content/b914d4e6-7b90-411c-a378-8252b3f47797> accessed 29 July 2021.

[4] For more on the waves of democratizations, see Samuel P Huntington, 'Democracy's Third Wave' [1991] Journal of Democracy <https://www.ned.org/docs/Samuel-P-Huntington-Democracy-Third-Wave.pdf>.

wave states, i.e., Tunisia, Egypt, Libya, Syria, Yemen, the first is considered the only democracy in the Arab world.[6] However, the Tunisian transition is currently going through a re-defining moment after the exceptional measures taken unilaterally by President Kais Saied that include suspending the 2014 constitution.[7] Libya has finally come to a transitional government with the cooperation of both Libyan and non-Libyan interested parties.[8] From the second wave, Sudan already started with its delicate and challenging democratic transition.[9] While some countries came as surprises and others still struggle, the Arab Spring case is not closed yet, and the transitions are still going on, including their dealing with the heavy burden of past inheritance.

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[5] Larry Diamond, 'A Fourth Wave or False Start?' (*Foreign Affairs*, 2011) <https://www.foreignaffairs.com/articles/middle-east/2011-05-22/fourth-wave-or-false-start> accessed 22 April 2021; Ariel Dunay, 'The Fourth Wave of Democratization: A Comparative Analysis of Tunisia and Egypt' (James Madison University 2017) <https://commons.lib.jmu.edu/honors201019/344> accessed 22 April 2021; Ahmed Ibrahim Abushouk, 'The Arab Spring: A Fourth Wave of Democratization?' (2016) 25 Digest of Middle East Studies 52 <http://doi.wiley.com/10.1111/dome.12080> accessed 22 April 2021; Stephane Lacroix and Jean-Pierre Filiu (eds), *Revisiting the Arab Uprisings: The Politics of a Revolutionary Moment* (Oxford University Press 2018) <https://www.amazon.com/Revisiting-Arab-Uprisings-Politics-Revolutionary/dp/0190876085> accessed 22 April 2021.

[6] Nazifa Alizada and others, 'Democracy Report 2021. Autocratization Turns Viral. University of Gothenburg: V-Dem Institute' (2021) 26 <https://www.v-dem.net/files/25/DR 2021.pdf>; Ellen Laipson, 'Is Democracy Really Dead in the Arab World?' (*World Politics Review (WPR)*, 2018) <https://www.worldpoliticsreview.com/articles/24687/is-democracy-really-dead-in-the-arab-world> accessed 22 April 2021.

[7] For more on the ongoing constitutional crisis in Tunisia, see Erin Claire Brown, 'Tunisia's President Kais Saied Suspends Constitution' (*MENA*, 2021) <https://www.thenationalnews.com/mena/tunisia/2021/09/22/tunisia-president-announces-suspension-of-constitution/> accessed 23 September 2021.

[8] 'Libya: UN Envoy Hails New National Government after Years of 'Paralysis and Internal Divisions'' (*UN News*, 2021) <https://news.un.org/en/story/2021/03/1088192> accessed 22 April 2021; Margaret Basheer, 'Libya Agrees to Transitional Government' (*Voice of America*, 2021) <https://www.voanews.com/middle-east/libya-agrees-transitional-government> accessed 22 April 2021.

[9] Dnyanesh Kamat, 'Sudan's Democratic Transition Hanging by a Thread' (*Arab News*, 2021) <https://www.arabnews.com/node/1809876> accessed 22 April 2021; 'Sudan Faces Staggering Challenges to Democracy Despite Significant Advances on Political Transition, Special Representative Tells Security Council' (*United Nations Meetings Coverage and Press Releases*, 2021) <https://www.un.org/press/en/2021/sc14460.doc.htm> accessed 22 April 2021.

Again, these circumstances attract attention to the questions of post-crisis strategies, to better understanding of these strategies and then suggesting the most promising among them, generally, and especially in the case of the Arab Spring. How should new regimes deal with past regimes' crimes? Should they follow policies of punishment or forgiveness? Restorative or Retributive Justice? What are the most effective mechanisms of Transitional Justice (TJ) for achieving its different goals? Which should prevail, the moral or the practical considerations? How can the new-regime use TJ as a transformative set of policies to promote peace, rule of law, human rights, or democracy as various goals of political transformations? What leads a state to pursue, or might preclude it from seeking or achieving, TJ? Under which law should the past dictators be tried? Who to hold accountable, only the leaders or each individual of the past regime? Should the new regimes include the criminals of the past, or should they be vetted? How to transform the institutions that were responsible for the past policies to prevent their repetition in the future? Are there universal answers to these questions? Do they apply to the Arab Spring case? What can the second wave states learn from the first wave in this regard? The process which addresses the relationship between the new and the past political orders, starting from negotiations until implementing transformative policies, is referred to as Transitional Justice (TJ).

II. Transitional Justice

The United Nations (UN) guidelines on TJ, which are part of its *Rule of Law Initiative,* define TJ as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[10] This definition is in alliance with the other available definitions for TJ in literature, for example, by R. G. Teitel (2003), Kritz (1995), Olsen et al. (2010), Stan & Nedelsky (2013), Sriam & García-Godos (2013), Kassem (2013), and Anderlini, Conaway, & Kays (2005).[11] There are two main domains for TJ within

[10] United Nations, 'Guidance Note of the Secretary-General: United Nations Approaches to Transitional Justice' (2010) 2 <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf>.

[11] Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69, 69; Neil J Kritz, 'The Dilemmas of Transitional Justice', *Transitional justice: How emerging democracies reckon with former regimes (Vol. 1.)* (US Institute of Peace Press 1995) <https://books.google.com.eg/books?id=EvD6oBQZdGEC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false>; Tricia D Olsen, Leigh A Payne and Andrew G Reiter, *Transitional Justice In*

this definition. The first aims at achieving peace in the aftermath of an armed conflict, while the second focuses on achieving political transformation after oppressive regimes.[12] This thesis falls under the scholarship discussing the second category.[13]

These three benchmarks – Accountability, Justice, and Reconciliation – are, therefore, the three main goals of TJ. These goals are to be achieved through the mechanisms designed by these UN guidelines up to specific standards. These mechanisms include: 1) prosecution initiatives, 2) facilitating initiatives in respect of the right to truth, 3) delivering reparations, 4) institutional reforms, and 5) national consultations.[14]

Although these goals seem to be difficult to measure or even to define conclusively, giving the impression that they may be difficult to be adopted as benchmarks, there is some empirical work to the contrary. The studies which tried to measure the effectiveness of the

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Balance: Comparing Processes, Weighing Efficacy (United States Institute Of Peace Press 2010) 9–10; Lavinia Stan and Nadya Nedelsky (eds), *International Encyclopedia of Transitional Justice Volume I* (Cambridge University Press 2013) 2 <https://www.cambridge.org/core/books/encyclopedia-of-transitional-justice/3B29452FCC780067A352DFBE6CC4C2CB>; Chandra Lekha Sriam and Jemima García-Godos, *Transitional Justice and Peacebuilding on the Ground; Victims and Ex-Combatants* (Chandra Lekha Sriam, Jemima García-Godos and Olga Martin-Ortega eds, Routledge, Taylor and Francis Group 2013) 2 <https://www.routledge.com/Transitional-Justice-and-Peacebuilding-on-the-Ground-Victims-and-Ex-Combatants/Sriram-Garcia-Godos-Herman-Martin-Ortega/p/book/9780415637596>; Sanam Naraghi Anderlini, Camille Pampell Conaway and Lisa Kays, 'Justice, Governance, and Civil Society', *Inclusive Security Sustainable Peace A Toolkit for Advocacy and Action* (International Alert and Women Waging Peace 2005) 1 <https://www.inclusivesecurity.org/wp-content/uploads/2013/05/101864251-Toolkit-for-Advocacy-and-Action.pdf>; Taha Kassem, 'Transitional Justice in Post Revolution Egypt, A Reality or an Illusion' (2013) 2 International Journal of Humanities and Social Sciences (IJHSS) 47, 47–48 <http://www.iaset.us/view_archives.php?year=2013_67_2&id=73&jtype=2&page=3>.

[12] Kirsten J Fisher, 'Defining a Relationship between Transitional Justice and Jus Post Bellum: A Call and an Opportunity for Post-Conflict Justice' (2020) 16 Journal of International Political Theory 287, 291 <https://doi.org/10.1177/1755088218814038>.

[13] For more on the necessity and implications of differentiating between TJ in the context of peace-building and democratization, see Fionnuala Ni Aolain and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 Human Rights Quarterly 172 <http://muse.jhu.edu/content/crossref/journals/human_rights_quarterly/v027/27.1aolain.html>.

[14] United Nations (n 10) 7–9.

different mechanisms of TJ in achieving their goals used more specified components such as democracy, trust, human rights, and social effects to test their impact.[15]

This research adopts the UN guidelines on TJ as the base for its analysis not only due to its legal and political weight but also because the guidelines provide for five specific mechanisms to apply TJ. Each of these mechanisms is explained in the guidelines in terms of its rationale and application. This approach constitutes a solid focal point to analyze the foundations of TJ as presented by both the UN and the classic legal literature, the costs and benefits of each mechanism, and to track their application in any given case study.

I look into TJ as one of the constitutional arrangements that systems transitioning from autocracy to democracy after a revolution, follow in order to complete this transition. According to the earlier definition and mechanisms, TJ regulates topics including state authorities, constitutional texts, fundamental human rights and freedoms, and, if needed, compromising some of the due process constitutional guarantees to punish past crimes.

However, unlike other constitutional arrangements, TJ has two faces: *ex post* and *ex ante* rules. On the one hand, it deals with policies and violations which have already happened in the past, trying to make the relevant parties internalize their negative externalities. On the other hand, it regulates many future and transitional arrangements to prevent the repetition of this past. On top of these arrangements are the new constitutions.

In more detail, although TJ deals with past violations, the bargaining over TJ arrangements is over the future. First, the TJ approach will decide who will be involved in the transitional and post-transitional phases, how they will be involved, and to what extent. For example, if this approach adopts mass lustrations, the past-regime members will be eliminated from the post-revolution system, although this does not necessarily eliminate their influence. Second, TJ

[15] See for example, Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11); Genevieve Bates, Ipek Cinar and Monika Nalepa, 'Accountability by Numbers: A New Global Transitional Justice Dataset (1946-2016)' 161 </core/journals/perspectives-on-politics/article/accountability-by-numbers-a-new-global-transitional-justice-dataset-19462016/E11C0335090B49B73060A181B68E4E4B/core-reader> accessed 13 November 2020; Roman David, 'What We Know About Transitional Justice: Survey and Experimental Evidence' (2017) 38 Political Psychology 151; Susanne YP Choi and Roman David, 'Lustration Systems and Trust: Evidence from Survey Experiments in the Czech Republic, Hungary, and Poland' (2012) 117 American Journal of Sociology 1172 <http://www.jstor.org/stable/10.1086/662648>; Geoff Dancy and others, 'Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies' (2019) 63 International Studies Quarterly 99.

strategies show how far the new regime is committed to the rule of law, democracy, and human rights and what interpretations of these values the new regime adopts. Third, some TJ mechanisms, as will be explained later, are by nature future arrangements. The primary mechanism of this nature is institutional reform, which includes constitutional change. This means that although TJ constitutes *ex post* policies, it adopts *ex ante* strategies.

TJ has been the subject of lengthy debates in political and legal jurisprudence since it started to assume an essential role in the post-conflict transitions after the third wave of democratization around 1970.[16] In its revised geneaology of TJ in 2014, Teitel argues that after fifteen years since the end of the cold war, the world started witnessing the normalization of TJ becoming a paradigm of rule of law.[17] However, it is surprising that it is still deprived of an economic analysis both as a constitutional arrangement and a punitory measure. As I will explain in detail under the scientific and social relevance section of this chapter, the TJ multidisciplinary literature has mostly started from a set of assumptions regarding all the parties of the process, i.e., the policymakers, the victims, and the past-regime members. However, putting on the lenses of rational choice theory and behavioural analysis may lead us to a new understanding of TJ after revolutions, which may be more problematic but more realistic. In addition, it can guide us to strategies that are more self-enforcing, meaning that committing to their application is more enhancing for the parties' self-welfare than deviating from them.

III. The Goal and Focus of the Study

This study aims at two primary goals. First, it seeks to provide a novel perspective to TJ after revolutions over autocratic regimes as a constitutional arrangement, depending on various tools of law and economics. Second, it uses the results from law and economics analysis to evaluate the de jure and de facto TJ constitutional regulation in a case that is

[16] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 30.

[17] Ruti G Teitel, 'Human Rights in Transition', *Globalizing Transitional Justice* (Oxford University Press 2014) 51,67 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780195394948.001.0001/acprof-9780195394948-chapter-4>.

usually presented as the sole success story in the Arab Spring so far and one of the rare cases of democratization in a world that suffers backsliding into autocracy, i.e., Tunisia.[18]

To achieve these goals, the thesis first presents in chapter 2 the incentive structure of TJ for different parties after a revolution to explain the determinants of resorting to TJ in the first place and how these incentives change from one scenario to another in reality. Afterward, the analysis starts to operate under the assumption of the unity of preferences between the policymakers and victims, which is the assumption that the UN and classic legal jurisprudence was built upon. The following part of the analysis explains how even under this assumption, resorting to TJ firstly, and applying it secondly, constitutes a dilemma due to asymmetric information between the policymakers (the agents) and the victims (the principals), behavioural biases, and the constitutional momentum nature of TJ. Chapter 3 continues this part of the analysis by taking it a step further and explaining the rationale, trade-off, and specific challenges of each TJ mechanism by running a cost-benefit analysis. The second part of the thesis, starting from the CBA results, chapter 4 introduces the economic rationale of the TJ justice-balance approach. That approach was suggested to promote human rights and democracy by the only available study in the TJ literature that runs a large N cross-country empirical analysis including all TJ mechanisms in all sorts of conflicts, i.e., Olsen et al. (2010). It entails combining trials and amnesties, with adding truth commissions proven equally effective. The thesis concludes by using this approach as a benchmark to analyze the Tunisian case in chapter 5, after providing the first index of its kind of the de jure and the de facto constitutional regulation of TJ in Tunisia after the 2011 revolution. The concluding remarks of each part of the analysis and the thesis as a whole in chapter 6 show how the civil-society organizations, although not sufficient alone, can be vital to achieving the most effective TJ process to overcome the TJ dilemmas after a revolution.

IV. Methodology

Since this research focuses solely on the democratic transitions after revolutions over autocratic regimes, I limit my analysis to this setup, which excludes other situations that may involve TJ like civil or international wars or any other forms of conflict. Highlighting this limitation is vital for three reasons. First, Democratization is one of the aspirations of TJ

[18] Varieties of Democracy (V-DEM) 2021 Report finds Tunisia to be the greatest democratizer over the past decade, Alizada and others (n 6).

according to the UN's vision as can be noticed through the reports of the General Secretary on the rule of law and transitional justice in conflict and post-conflict societies.[19] However, democracy as a TJ goal is uncontested in the TJ literature. This analysis is limited to articulating a post-revolution against an autocratic regime set-up, where democratization is a major goal of the transition process. Consequently, the conceptual debate over considering democracy as a core component of TJ is beyond this article's scope.[20] Second, the TJ dilemmas can distinctively differ depending on which domain of TJ is discussed, i.e., conflict to peace or authoritarianism to democracy. Not only because the mechanisms of focus differ as some scholars and practitioners point out,[21] but also because transforming abusive state authorities to be democratic institutions that respect human rights alters the calculus of the relevant actors in a way that creates its own dilemmas. This way will be the starting point of this thesis's analysis. Sharp (2014) draws attention to the danger of mixing the analysis and dilemmas of these two aspects that might lead to autocrats abusing the peacebuilding mechanisms to consolidate their powers in the name of peace just like victors have often done in the name of justice.[22] Finally, although the thesis refers to the international standards of TJ mechanisms, the dilemmas of TJ as a post-revolution constitutional arrangement is the main

[19] United Nations (Security Council), 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General', vol 616 (2004) <https://digitallibrary.un.org/record/527647>; United Nations (Security Council), 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General', vol 634 (2011) 6 <https://www.un.org/ruleoflaw/files/S_2011_634EN.pdf>.

[20] For more on this debate, see Larry May and Elizabeth Edenberg (eds), *Jus Post Bellum and Transitional Justice* (Cambridge University Press 2013) <http://ebooks.cambridge.org/ref/id/CBO9781139628594>; Kirsten J Fisher and Robert Stewart, 'After the Arab Spring: A New Wave of Transitional Justice?' in Kirsten J Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014) 5–7 <https://books.google.de/books?hl=en&lr=&id=sdwABAAAQBAJ&oi=fnd&pg=PP1&ots=sMx8QqltDY&sig=AEENzXuX4NArKQUduKsCkT2ley4&redir_esc=y#v=onepage&q&f=false>; DN Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' (2015) 9 International Journal of Transitional Justice 150, 7 <https://academic.oup.com/ijtj/article-lookup/doi/10.1093/ijtj/iju021>; Colleen Murphy, 'Introduction', *The Conceptual Foundations of Transitional Justice* (Cambridge University Press 2017) 31–32 <https://www.cambridge.org/core/product/identifier/9781316084229%23CT-bp-1/type/book_part>; Fisher (n 12) 291–292.

[21] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321, 360 <http://muse.jhu.edu/content/crossref/journals/human_rights_quarterly/v031/31.2.arthur.html>.

[22] Sharp (n 20) 151.

focus of this analysis. Consequently, while some challenges are resolved by international law in the aftermath of an armed conflict, they still persist under constitutional laws in the context of a national democratization process after a revolution, and these are the subject of this thesis.

The term "revolution" has many definitions in social sciences depending on the field.[23] In political sciences, a broad definition of revolution by Allan Bullock and Stephen Trombley refer to them as a "fundamental and relatively sudden change in political power and political organization which occurs when the population revolts against the government, typically due to perceived oppression (political, social, economic) or political incompetence."[24] This definition is the one adopted by this study, and it includes both the cases of regime collapse and negotiated transition. This definition is similar to the one used by many prominent scholars, including Huntington, Walt, and Colgan.[25] It may depart from other definitions in the literature that consider revolutions as a strict subset of regime changes.[26] However, it fits the purposes of this research more, as it includes even the failed trials of transformations, which still constitute existing cases of TJ after revolutions, showing various scenarios of post-revolution TJ setups. To this end, I apply a positive economic analysis, also referred to as "the political economy of law,"[27] through the tools and theories of microeconomics, including the rational choice theory, asymmetric information problems as a market failure, and the behavioural biases emerging from a principal-agent relationship.

Throughout the dissertation, I use a mix of legal, political, and economic analysis toolkit, taking an interdisciplinary approach. In some parts of the thesis, the analysis will focus more on the legal aspects, either using a descriptive black letter law methodology to familiarize the reader with the legal sources and principles this research uses. This descriptive

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[23] Dale Yoder, 'Current Definitions of Revolution' (1926) 32 American Journal of Sociology 433, 433 <https://www.jstor.org/stable/2765544> accessed 30 July 2021.

[24] Alan Bullock, Alf Lawrie and Stephen Trombley (eds), *The New Fontana Dictionary of Modern Thought* (3rd edn, HarperCollins Publishers, 1999) 754 <https://searchworks.stanford.edu/view/4150747> accessed 30 July 2021.

[25] Jeff Colgan, 'Measuring Revolution' (2012) 29 Conflict Management and Peace Science 444, 446 <https://journals.sagepub.com/doi/pdf/10.1177/0738894212449093>.

[26] Colgan (n 25).

[27] McNollgast, 'The Political Economy of Law' in A Mitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics Volume 2*, vol 2 (1st edn, North-Holland, an imprint of Elsevier 2007) 1654, 1661–1664 <http://www.sciencedirect.com/science/article/B7P5W-4R2PJJM-5/2/f5c7f23ab2426c2afe1e79b533813295>.

methodology can be seen the most in chapter 3, where I provide the legal standards of the different TJ mechanisms, and chapter 5, where I illustrate the TJ regulation in the Tunisian case. Other parts will use critical and objective legal analyses to explain the consequences of these legal sources and norms and how they are interpreted and applied.

The underlining theory leading this study is the rational choice theory in general and public choice theory in particular. Gordon Tullock (1987) defines the public choice theory as "the use of economic tools to deal with traditional problems of political science."[28] Using this theory, the research touches on topics related to the law and economics of TJ as a constitutional arrangement after revolutions over autocratic regimes. The thesis deals with TJ in these cases as a way of internalizing the consequences of the negative externalities of human rights violations in the autocratic past, minimizing the risks of spoiling the transition, and minimizing the cost of direct interaction between the past-regime members and supporters and the victims. The research also observes asymmetric information as a market failure in cases of TJ after revolutions and the principal-agent problems resulting from this failure. Moreover, I explain how the TJ agency model differs from the original principal-agent problems under the public choice theory and departs from the classic canonical assumptions of principal-agent problems in some points.

Besides, the research goes a step further and uses the behavioural law and economics concepts to explain the behavioural biases in the TJ agency model, which contributes to the TJ dilemmas. From the principals' side (the victims), these biases could emerge from the asymmetric information (a market failure), or bounded rationality (a behavioural bias), which could lead to unrealistic expectations and over-optimism of some TJ strategies. From the agents' side (the policy-makers), the analysis is focused on paternalism considerations and the reasons to reject them especially in the TJ context.

In addition, this research runs a cost-benefit analysis of each TJ mechanism, taking into account the constitutional, financial, and political aspects of their adoption, in addition to the opportunity cost of each mechanism application. This cost-benefit analysis is expected to be made using an inspired utility equation of the *Becker model*,[29] by the policy-makers

[28] Matias Vernengo, Esteban Perez Caldentey and Barkley J Rosser Jr (eds), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan UK 2020) <http://link.springer.com/10.1057/978-1-349-95121-5> accessed 27 April 2021.

[29] Becker model for criminal deterrence is a mathematical model presented by Gary Becker (1968) that treats criminals as rational actors who desire to maximize their wellbeing but through illegal means rather than legal

depending on the context. According to this model $e(u)_m = b\ (1-p) - c(p)$, where $e(u)_m$ is the expected utility of the considered mechanism, $b\ (1-p)$ is the benefit of its application multiplied by the probability of gaining this benefit, and $c(p)$ is the cost of its application multiplied by the probability of incurring this cost. This analysis seeks to achieve efficiency in the Kaldor-hicks meaning, on which cost-benefit analysis is usually based.[30] The end goal of this analysis would be to design a self-enforcing TJ policy, which would be the one in which its benefits (b) exceed its costs (c) for the different parties, or that the costs of its absence are so high, which gives them the incentives to apply it. Otherwise, as a constitutional arrangement, there could be no third-party enforcer to ensure TJ's application.

The cost-benefit analysis is a methodology used differently depending on the field. There are many debates over how far policy-makers should rely on the results of cost-benefit analysis and what their limits in the public policy sphere are. These concerns are especially relevant entries are it is difficult, or even impossible, for the cost-benefit analysis to be monetarized.[31] This debate is, however, not the subject of this research. Nevertheless, it is necessary to mention that the process of quantifying the considered entries in the cost-benefit analysis presented in this thesis is expected to vary from one case to another. For example, the costs of polarization in society are not consistent in every case. It will differ from a society where the past-regime supporters are only a few hundred who belong to the ruling elite, to a society where they represent a minority of the population that can reach tens or hundreds of thousands. Moreover, adding to these entries, or deleting from them, would be inevitable for a policy-maker. Although there will be policy-implications driven by the CBA in chapter 3, it

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ones. Accordingly, Becker suggests that for a criminal sanction to achieve deterrence there should be an equation that takes into account the expected gain of the crime to the perpetrator and the cost resulting of the severity and probability of punishment. For more on Becker's seminal work on crime and dealing with it as an economic concept, see Elena Kantorowicz-reznichenko, 'Any-Where-Any-Time: Ambiguity and the Perceived Probability of Apprehension' (2015) 84 UMKC Law Review 27, 28–38; Cento G Veljanovski, *Economic Principles of Law* (2007) 242–250; Gary S Becker, 'Crime and Punishment: An Economic Approach' [1968] Journal of Political Economy 169–217.

[30] A situation is considered Kaldor-hicks efficient when the economic gains of that situation exceed the economic losses of whoever they occur to, Veljanovski (n 29) 33. This is the same rationale used to run the CBA. Accordingly, in our context, a mechanism is considered efficient if the benefits from its adoption exceed the costs of its application, even if, for instance, the benefits are all accumulated by the victims while the past-regime members incur all the costs.

[31] For more on the discussion over and strategies of cost-benefit analysis in the sphere of public policy, *see* Cass R Sunstein, *The Cost-Benefit Revolution* (MIT Press 2018).

is recognized that this analysis provides a basic model that is meant to be customized by the relevant policymakers who wish to take it as guidance.

Moreover, the research uses economic theory as well to explain the trade-off that the TJ approaches involve. The justice-balance approach is suggested by empirical literature to promote human rights and democracy. I first explain, in the light of the former CBA, why any TJ approach would -require a trade-off between *due process* and *justice* considerations on the constitutional level. Accordingly, I explain the optimization behind the justice-balance approach. I then suggest the rationale that could help us extend this optimization to other combinations than the one suggested by the approach, i.e., amnesties + trials + truth commissions. Afterward, I use this approach as a benchmark to investigate the Tunisian case.

The dissertation finally uses a case study methodology to look at the Tunisian case in dealing with TJ. I first explain the de jure and de facto constitutional TJ regulation in Tunisia after the 2011 revolution, and I build an easy-to-track index illustrating all the TJ mechanisms in law and practice so far. I then explain the approach adopted at both levels, to measure the alliance between them, to test the constitutional compliance, and the alliance between them and the justice-balance approach to predict the future of human rights and democracy in Tunisia.

The data used in this case study analysis are collected by the author from different sources, mainly in the period from 2010 to 2021. These sources include: (1) Official legal texts including constitutions, laws, regulations, orders, and verdicts; (2) The final executive summary published by the Tunisian Truth and Dignity Commission assigned with the TJ process in Tunisia; (3) Reports, news, opinions, and analyses provided by different media platforms, civil society organizations' official accounts, and international organizations, e.g., the International Centre of Transitional Justice (ICTJ), and the Venice Commission[32]; (4) The available scholarship to-date on the Tunisian case; (5) Semi-structured interviews with Tunisian experts, activists, lawyers, and previous members of TDC; (6) The data available by the Transitional Justice Research Collaborative (TJRC). The TJRC is a continuous dataset project on the TJ mechanisms for 109 democratic transitions in 86 countries around the world, from 1970-2012. Although the dataset is by no means complete, it includes the most

[32] The Venice commission is the European Commission for Democracy through Law, which is the Council of Europe's advisory body on constitutional matters. It is better known as "Venice Commission" as it meets in Venice. Tunisia became a member of the commission in 2010. For more on the Commission's role, see https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN

comprehensive single collection of information on human rights trials, truth commissions, and amnesties mechanisms for countries around the world.[33]

V. Scientific and Social Relevance

TJ is an active field for lawyers and political sciences scholars alike.[34] [35] Not only is TJ multidisciplinary over different social fields, but also within the legal scholarship, TJ is internally interdisciplinary.[36] Its disparate aspects are studied by Public International Law,[37] International Criminal Law,[38] International Humanitarian Law,[39] International Human Rights Law,[40] Criminal Law, Administrative Law, and Constitutional Law.[41] However, the focus of this thesis is on TJ as a constitutional arrangement that falls under the public choice problems including agency models, cost-benefit analysis of public policies, and constitutional compliance. There is a close two-way relationship between TJ policies and Constitutional Law. On the one hand, constitutional reforms after wars, revolutions, or conflicts generally are considered as part of the TJ process itself (the mechanism of institutional reforms).[42] This

[33] For more on the TJRC, see https://transitionaljusticedata.com/

[34] Eric A Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2003) 117 Harvard Law Review 761, 762; Tricia D Olsen, Leigh A Payne and Andrew G Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32 The Johns Hopkins University Press 980, 981 <https://www.jstor.org/stable/40930342>.

[35] The field has been becoming increasingly interdisciplinary in that it has been open to analyses from other sciences such as anthropology, psychology, sociology, and philosophy, among others, see David (2017, p. 152).

[36] C Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2008) 3 International Journal of Transitional Justice 5.

[37] See for example, Wen-Chen Chang and Yi-Li Lee, 'Transitional Justice: Institutional Mechanisms and Contextual Dynamics', *Max Planck Encyclopedia of Public International Law [MPEPIL]* (2016) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2191>.

[38] Jens Iverson, 'Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics' (2013) 7 International Journal of Transitional Justice 413.

[39] Elizabeth Salmo, 'Reflections on International Humanitarian Law and Transitional Justice: Lessons to Be Learnt from the Latin American Experience' (2006) 88 International Review of the Red Cross 327 <https://www.icrc.org/en/doc/resources/documents/article/review/review-862-p327.htm>.

[40] Sam Szoke-Burke, 'Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies.' (2015) 33 Berkeley Journal of International Law 526.

[41] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000) 7–9 <https://global.oup.com/academic/product/transitional-justice-9780195100648?cc=us&lang=en&>.

[42] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 31.

broad perspective of TJ relates to what is known as the constructive role of constitutionalism[43] in times of political change within the concept of transitional constitutionalism.[44] Therefore, the discussions within legal literature focus on constitutional justice as a part of the reform that operates in tandem with its counterparts, such as criminal and administrative justice, to achieve political transformation. In other words, constitutionalism in this sense takes a normative transformative approach that addresses not only the future regime but also the past one.[45] Teitel (2011, 2014) provides a further detailed discussion on the interactive relationship between TJ and the transformation of constitutionalism and state responsibility in contemporary constitutionalism.[46] This tension between the backward and forward perspectives of constitutional transformation in transition is also considered one of the TJ dilemmas reflected in the constitution-writing process and the treatment of constitutional courts to the new cases before them.[47] On the other hand, the other mechanisms of TJ raise constitutional objections and arguments related to their violation of established liberal democratic constitutional values such as the ban on retroactivity, equal

[43] The definition of "Constitutionalism", as a concept, is not universally recognized in the literature. However, it generally entails a form of government that is constrained by a supreme law, which is the constitution, to prevent it from an arbitrary rule through institutionalized mechanisms of power control DM White, 'Constitutionalism' [1981] Politics; Richard Bellamy, *Constitutionalism and Democracy*, vol 66 (Routledge, Taylor and Francis Group 2016) <file:///C:/Users/frxx007/Downloads/9781315095455_googlepreview.pdf>; David Fellman, 'Constitutionalism' in Richard Macksey and Philip P Wiener (eds), *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas.* (Charles Scribner's Sons 1973) <http://xtf.lib.virginia.edu/xtf/view?docId=DicHist/uvaBook/tei/DicHist1.xml;chunk.id=dv1-61;toc.depth=1;toc.id=dv1-61;brand=default>; Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Harvard University Press 2002) <https://www.hup.harvard.edu/catalog.php?isbn=9780674009776>.

[44] Teitel, *Transitional Justice* (n 41) 191–211.

[45] Catherine Turner, 'Transitional Constitutionalism and the Case of the Arab Spring' (2015) 64 International and Comparative Law Quarterly 267, 270–274; Teitel, *Transitional Justice* (n 41) 191.

[46] Ruti Teitel, 'Transitional Justice and the Transformation of Constitutionalism' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011); Ruti G Teitel, 'Transitional Justice and the Transformation of Constitutionalism', *Globalizing Transitional Justice* (Oxford University Press 2014) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780195394948.001.0001/acprof-9780195394948-chapter-11>.

[47] Marek Safjan, 'Transitional Justice: The Polish Example, The Case of Lustration' (2008) 1 EuropeanJournal of Legal Studies 235, 235–239 <https://cadmus.eui.eu/handle/1814/7711>.

treatment by the law, and the rule of law. There has always been a debate whether such violations should be permitted and even reasoned by constitutional principles.[48]

TJ in general, and its constitutional aspects in particular, has not been subject to economic methodologies. Some scholars looked into the economics, in the means of financial restrictions of TJ.[49] Others investigated the connection between TJ and economic development.[50] There are also studies that consider economic inequality and socioeconomic factors as roots of the conflict and as aspects of the TJ process.[51] However, except for these aspects that are all related to economics in its financial sense, TJ remained out of the reach of economics as a methodology. Even the connection between property rights or economic transformations, especially in post-communism societies, and TJ, came from a purely legal perspective. Law researchers tried to both compare the different possible strategies for a state to transform these property rights systems, as well as to search for a theory behind these changes, using legal rather than economic approaches.[52] The reasoning, difficulties, and

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[48] David Dyzenhaus, 'Judicial Independence, Transitional Justice and the Rule of Law' (2003) 10 Otago Law Review 345 <https://tspace.library.utoronto.ca/bitstream/1807/89164/1/Dyzenhaus Judicial Independence.pdf>; Hans Petter Graver, *Judges against Justice: On Judges When the Rule of Law Is under Attack* (Springer 2015); Safjan (n 47) 239–249; Posner and Vermeule (n 34).

[49] Olsen, Payne and Reiter, 2010a)

[50] R Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 International Journal of Transitional Justice 253 <https://academic.oup.com/ijtj/article-lookup/doi/10.1093/ijtj/ijn030>; Roger Duthie, 'Toward a Development-Sensitive Approach to Transitional Justice' (2008) 2 International Journal of Transitional Justice 292 <https://academic.oup.com/ijtj/article-lookup/doi/10.1093/ijtj/ijn029>.

[51] Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 International Journal of Transitional Justice 266; Lisa J Laplante, 'Transitional Justice and Peace Building for the Future: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights and Intergenerational Framework' (2011) 2 Sustainable Development, International Criminal Justice, and Treaty Implementation 281; Evelyne Schmid and Aoife Nolany, '"Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 International Journal of Transitional Justice 362; R Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 International Journal of Transitional Justice 310.

[52] Bernadette Atuahene, 'Property and Transitional Justice' (2010) 65 UCLA LAW REVIEW DISCOURSE <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1033&context=fac_schol>; Lavinia Stan, 'Restitution of Property', *Transitional Justice in Post-Communist Romania* (Cambridge University Press 2013) <https://www.cambridge.org/core/product/identifier/9781139104227%23c02053-6-1/type/book_part>; Rafał Riedel, 'The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe. In Search

search of solutions to TJ, as far as I know, still lacks the economic thinking and searching beyond the surface of power setup.

Analyzing TJ after revolutions using the constitutional law and economics methodology enables us to revisit the traditional normative assumptions that the present TJ models are based on. In chapter (2), we see how applying the rational choice theory and behavioural analysis leads us to the fact that these assumptions are mostly unrealistic and reveals the roots of the TJ dilemmas. Moreover, given the constitutional nature of TJ, the typical solutions to these economic dilemmas would not be feasible, and this requires innovative methods to deal with them. Although civil society organizations are presented by the contemporary TJ literature as the saviour party that can mediate the process, constitutional economics analysis tell us that TJ as a constitutional arrangement can't have a third party enforcer. Moreover, The TJ momentum effect precludes applying the standard democratic solutions to the TJ situation post revolution. Consequently, the civil society's role is limited to being the "informer" party, which although being an imperfect solution, it is the best this post-revolution stage can offer. These conclusions not only ask for revisiting the scientific arguments regarding civil society within democratic transformations, but also how international policy-makers invest in civil society organizations. Acknowledging the prime role that civil society can play in achieving social transformation within a democratization process compared to its limited ability to play the role of the arbiter could change the global understanding of how to support its organizations effectively, and also how to manage the expectations from them.

The relevance of this role gets clearer through the cost-benefit analysis of TJ mechanisms was presented in chapter (3), and this supports the tendency towards the holistic TJ approaches that promote combining different mechanisms depending on the context. The policy implications driven by the CBA show how balanced approaches are expected to promote not only more effective TJ processes in achieving the revolutions' goals, but also, more feasible processes. TJ policy makers tend to over-promise regarding the process of TJ and its outcomes. The CBA explains how and why any TJ process would fall short of these promises, even if the transitional rulers' preferences were identical to these of the victims. It

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of a Theory' (2018) 70 Europe-Asia Studies 481 <https://www.tandfonline.com/doi/full/10.1080/09668136.2018.1455468>; Liviu Damşa, *The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe; In Search of a Theory* (Springer 2016) <https://www.springer.com/gp/book/9783319485287>.

then can work as a guide to design more realistic TJ processes. Against this background, the CBA results also suggest that one set combination of TJ mechanisms is not inevitable, depending on the case. In any case, however, it is expected that the adopted combination would be more efficient if it adhered to the balanced approaches to TJ.

The literature categorizes TJ mechanisms into different approaches depending on the field. A formal legal classification by Teitel (2000) categorizes TJ mechanisms into constitutional, reparatory, criminal, and administrative mechanisms,[53] a classification that tends to respond to the legal nature of each mechanism. Other scholars also divide TJ mechanisms into international versus domestic policies.[54] [55]

Social sciences, such as political sciences, sociology, and psychology, have used theoretical and empirical methods to analyze the determinants and outcomes of TJ. The empirical tools were used to measure the impact of the different mechanisms of TJ on the relevant spheres depending on the field. However, the available empirical literature is focused on the design and mechanics of TJ more than on its effects; moreover, the vast majority of it is single-case, single-mechanism, or small N studies.[56]

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[53] Teitel, *Transitional Justice* (n 41).

[54] Craig Lang, 'The Impact of Transitional Justice on the Development of the Rule of Law' (Florida International University 2017) <http://digitalcommons.fiu.edu/etd/3465>.

[55] In the social field, a classification more oriented towards the social effects and the primary recipients was introduced, including reparatory, retributive, reconciliatory, and revelatory justice measures. See, Roman David and Susanne YP Choi, 'Getting Even or Getting Equal? Retributive Desires and Transitional Justice' [2009] Political Psychology 165–168; Roman David and Susanne YP Choi, 'Forgiveness and Transitional Justice in the Czech Republic' [2006] Journal of Conflict Resolution 339; Roman David, 'Twenty Years of Transitional Justice in the Czech Lands' [2012] Europe - Asia Studies. Classificatory models found in the political philosophy literature include various models. The retributive model focuses on applying sanctions on those condemned of violations. The historical clarification model is a TJ model in which truth-revealing mechanisms are used instead of sanctions. Finally, in the thick line TJ model, policy-makers refrain from using neither sanctions nor truth-seeking mechanisms and apply amnesties instead. In all these models, reparations can be used, though. See, Michal Krotoszyński, 'Transitional Justice Models and Analytic Philosophy' (2017) 46 Polish Political Science Yearbook 9, 12–13.

[56] David Backer, 'Cross-National Comparative Analysis' in Hugo Van Der Merwe, Victoria Baxter and Audrey R. Chapman (eds), *Assesing the Impact of Transitional Justice; Challenges for Empirical Research* (United States Institute Of Peace Press 2009) 51, 60–63; ONT Thoms, J Ron and R Paris, 'State-Level Effects of Transitional Justice: What Do We Know?' (2010) 4 International Journal of Transitional Justice 329; Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 3.

In the realm of political psychology, Roman David (2017) presented an analysis of the findings regarding the impact of TJ mechanisms on social efficacy.[57] He stated that although these empirical studies are still too limited to give solid policy implications, some noticeable tendencies in the results could inspire policymakers. His review indicated that TJ is important and that it does have an impact in all the transition stages, and it is largely context-based in both its impacts and its determinants. He also finds that some mechanisms are proven to have positive effects – in terms of social healing from trauma - in some cases and negative effects in others; and that reconciliatory measures have positive effects in this regard. Other studies in the political field targeted investigating the impact of the different TJ mechanisms on boosting democracy, the rule of law, and human rights, which also proved the context-based approaches.

In one of the few cross-country studies in the field, Olsen, Payne, and Reiter (2010) found that the most positive results in promoting democracy and decreasing human rights violations are correlated with the adoption of what they called the Justice-Balance approach.[58] [59] This approach entails a combination between both amnesties and trials. Adding truth-commissions to this combination was proved equally successful. However, the sequence of these mechanisms depends on the type and politics of transition, whether it was a regime collapse or a negotiated transition.

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[57] David (n 15).

[58] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 7.

[59] Although there are more recent large N cross-country empirical studies that compare TJ mechanisms, they are – unlike Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11). - focused on only one dimension of the TJ application. Some of these studies and datasets focus only on violent conflicts Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, 'Evaluating and Comparing Strategies of Peacebuilding and Transitional Justice' (2009) 1 <http://www.lu.se/upload/lupdf/samhallsvetenskap/just_and_durable_peace/workingpaper1.pdf>., political agreements and peace transitions in internal conflicts Giuditta Fontana and others, 'The Dataset of Political Agreements in Internal Conflicts (PAIC)' [2020] Conflict Management and Peace Science; Giuditta Fontana, Markus B Siewert and Christalla Yakinthou, 'Managing War-to-Peace Transitions after Intra-State Conflicts: Configurations of Successful Peace Processes' (2020) 0 Journal of Intervention and Statebuilding 1 <https://doi.org/10.1080/17502977.2020.1770479>., Personnel TJ Bates, Cinar and Nalepa (n 15)., or limited number of mechanisms Dancy and others (n 15). The dataset used by Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11). is a continuous project that is updated constantly under the label of (Transitional Justice Research Collaborative) 'Transitional Justice Research Collaborative (TJRC)' <https://transitionaljusticedata.com> accessed 9 June 2020.

Through chapters (4) and (5) this thesis focuses on a specific categorization of TJ approaches that relates to power dynamics and achieving constitutionalism requirements after revolutions.

Chapter (4) explains a trade-off that enables TJ mechanisms to be classified. Explaining the trade-off between the due process and justice considerations in the justice-balance approach could enable us to extend the rationale of this approach to other combinations that might fit other cases in response to the holistic approaches. As can be seen in chapter (5) Tunisia tended to include almost all the acknowledged TJ mechanisms. However, most of them were only partly implemented. Consequently, a suggestion of extending the rationale of the Justice-Balance approach to different combinations and partial applications can be tested in the Tunisian case over a longer period, i.e., after 5-10 years, to see if they still also have a positive impact on human rights and democracy. The Tunisian case study that this dissertation offers constitutes a first step in this direction by presenting the index of de jure and the de facto constitutional regulation of TJ in Tunisia.

Besides having significance for the international TJ research agenda, this case study research is particularly critical for the ongoing democratization process in Tunisia. Despite the positive steps that Tunisia has taken, the political interaction in Tunisia, including administering the TJ process, still suffers from corruption concerns and conflict between the relevant parties. A conflict led to a significant gap between the de jure and the de facto constitutional approach to TJ after the revolution until now (September 2021). The hope that this gap can be minimized in the near future is unfortunately not strong given the quarrel between the different state authorities on the one hand and between them and the Truth and Dignity Commission on the other hand. This gap is critically alarming for the future of democratization and constitutionalism in Tunisia and demands an imminent action by the Tunisian parties.

VI. Limitations

The analysis of this dissertation is limited to post-revolution phase over autocratic regimes' setups. Consequently, all other forms of internal or external disruption that do not include 1) a group of the state citizens 2) rise against an autocratic national regime and 3) manage to change the governing regime even if temporarily, are beyond the setup of this analysis. These other forms could include rebellions that did not succeed in overthrowing the

government, secession from the state to form a new one, a civil war between different national groups, popular implosion with no demands related to democratization, resistance against a foreign colonizing power, or a coup d'etat by the military. The limit of this dissertation is the analysis of the post-revolution phase in cases of revolutions against autocratic regimes that declared democratization as one of its main demands. This demand could be with an explicit reference to a democratic transformation, or implicitly by demanding policies that represent the pillars of a democratic system. There could be two scenarios of the regime change in this case: Regime collapse or rupture and negotiated transition. However, the differentiation between these two scenarios is beyond this dissertation's analysis.[60]

Within the cost-benefit analysis which this research provides, there are some limitations too. First, the "institutional reforms" mechanism is only analyzed in the meaning of lustration.[61] This approach excludes other non-punitive institutional reforms like new constitutions and training for specific sectors of the state. This last type of institutional reforms could include endless techniques; each of them would have its cost-benefit analysis. It would be too broad and complicated to include, or even track, each form of institutional reforms. Given its constitutional challenges and broad discussion in the literature, lustration was instead selected as the only institutional reform tackled in that cost-benefit analysis.
Moreover, the next phase of the cost-benefit analysis would involve two versions of cost-benefit analyses; one of applying the considered mechanism solely, and the other of applying it within different combinations of TJ mechanisms. These comparisons are, however, beyond the scope of this dissertation. As mentioned earlier, the quantification of each TJ mechanism equation's entries would differ by case. This quantification is also out of the scope of this thesis. However, the analysis and policy implications provided in chapter 3 should give a guidance in this regard.

In terms of the Tunisian case study, the first limitation is the timing of the study. According to the Organic Law regulating TJ in Tunisia, the executive has one year after publishing the final report of the Truth and Dignity Commission to prepare a plan to apply its

[60] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 155–159.

[61] Lustration is "the disqualification and, where in office, the removal of certain categories of office-holders under the prior regime from certain public or private offices under the new regime." Herman Schwartz, 'Lustration in Eastern Europe' in Neil J Kritz (ed), *Transitional Justice; Volume I: General Considerations* (US Institute of Peace Press 1995) 461.

recommendation under the parliament mentoring.[62] This year the period was completed in March 2020, which means that the process is finished and can be evaluated. However, this evaluation is only for its regulation and application so far. Future research will be needed to follow further applications in the upcoming 5-10 years. Empirical research will also be required to evaluate the impact of the whole process on outputs like democracy, human rights protection, the rule of law, and economic prosperity, and how far the justice-balance approach expectations are supported in Tunisia.

Moreover, the study recognizes the conflicts over the final report of the Truth and Dignity Commission as one of the limitations to evaluating the report contribution. The analysis, however, takes these conflicts into consideration when illustrating the case study and building the TJ index in Tunisia.

VII. Content Structure

This thesis comprises six chapters. **Chapter 2** explores the TJ dilemmas after revolutions over autocratic regimes through developing a model that uses the law and economics methodology. The chapter seeks to answer two questions: What drives post-revolution regimes either to resort to or ignore TJ policies towards the past-autocratic regimes? And why is it difficult to adopt and apply welfare-enhancing TJ mechanisms in practice, including popular suggestions within TJ literature to portray the civil society organizations as the key solution to TJ dilemmas? To answer these questions, the chapter provides a positive theoretical analysis of the scenarios and dilemmas of TJ. It argues that transitional justice should originally function both as an internalization mechanism of consequences of the negative externalities of the past-regime violations and a form of constitutional arrangements as an *ex ante* incentives structure to prevent the repetition of these violations. However, due to asymmetric information problems and behavioural biases this is rarely achieved in reality. In addition, the constitutional nature of TJ added to the "TJ momentum" precludes most of the traditional solutions to this principal-agent problem.

Chapter 3 presents the five mechanisms set that the United Nations, within its Rule of Law Initiative, issued in 2010 to work as guidelines for nations recovering from conflicts to achieve the TJ goals of accountability, justice, and reconciliation. I argue that whatever the

[62] Organic law n° 2013-53 dated 24 December 2013, establishing and organizing the transitional justice 2013. Article 70.

mechanism or combination selected by a society transforming from an autocracy into democracy, the nature of these mechanisms requires a trade-off between multiple considerations. To explain this inevitable trade-off, I go through each mechanism in detail, analyze it from both legal and economic perspectives, and then provide a basic cost-benefit analysis. I suggest that transitional justice as a constitutional arrangement requires a holistic approach in its adoption and application because the evaluation of this initial cost-benefit analysis cannot be strictly standardized for all cases. I also suggest that transitional justice policies that take into account proportionality, a combination of different mechanisms, customization of the mechanisms upon the relevant case, and adopting these policies in the formality of basic or organic laws may be expected to have the most effective outcomes achieving the goals of TJ with the least legal complications.

Chapter 4 uses the CBA conclusions to portray the mentioned trade-off. The chapter analyzes the Justice-Balance approach, one of the holistic approaches suggested by the scholars to deal with past regimes' human rights violations. Olsen, Payne, & Reiter (2010) presented this approach; it is the only available approach supported by a large N empirical study, which supports it to be the most effective approach to reduce human rights violations and boost democracy, two goals of transitional justice. The chapter explains the trade-off that this approach entails and discusses the reasoning behind this trade-off and whether it can be extended to further mechanisms than the three it suggests, i.e., trials, amnesties, and truth commissions.

Chapter 5 investigates the approach adopted by Tunisian policymakers after the 2011 revolution regarding transitional justice (TJ) as one of the most critical contemporary TJ case studies. This chapter uses the justice-balance approach as a benchmark model of TJ policy after revolutions and examines how far the Tunisian approach is aligned with it both on the de jure and de facto levels. I find a significant gap between the constitutional texts produced to govern TJ after the revolution and the policies subsequently generated to apply them. However, both of them are mostly compatible with the justice-balance approach, as they both adopt a mix of trials and amnesty tools, combined with truth-revealing mechanisms. However, nearly all the adopted mechanisms were de facto applied only partially. Except for national consultations, all adopted TJ mechanisms, including trials, truth commissions, reparations, institutional reforms, and reconciliation efforts, suffered from either a partial or non-transparent application. This approach raises concerns around the de jure/de facto constitutional gap in Tunisia after the revolution. However, the Truth and Dignity

Commission (TDC)'s work and the other related policies did follow an approach that considered all mechanisms, except for lustrations. Consequently, I expect that although the Tunisian TJ process was not perfect, it still has a chance to contribute to consolidate the democratic transformation and strengthen human rights respect, depending on how the government and parliament are willing to undertake its continuation.

Chapter 6 offers concluding remarks and possible future research.

Chapter 2: The Incentive Structure of Parties to Transitional Justice Post-Revolution: The ugly truth*

I. Introduction

In March 2010, just a few months before the awakening of the Arab Spring in Tunisia, December 2010,[63] The Secretary-General of the United Nations (UN) published its Guidance Note on Transitional Justice as part of its *Rule of Law Initiative*.[64] The note covers the broad aspects of TJ and gives a panel of mechanisms that different societies can use.[65] According to these guidelines, the UN provides a normative rule book that indicates the mechanisms that a nation should follow to achieve its transition into a system that respects the rule of law and promotes human rights. The UN guidelines define TJ as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[66] However, is this process, which is presented by the guidelines, and which involves a straightforward relationship between TJ and transformation into a society that respects the rule of law, realistic?

As many studies argue, the achievement of the previously mentioned goals through adopting some or all of TJ mechanisms is much more problematic in reality than it sounds in a rule-book. The dilemmas of adopting and then applying TJ mechanisms have been under investigation from different social fields including the different veins of law, e.g., criminal, constitutional and international law, besides economics, political sciences, history, sociology,

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[63] 'Tunisia - Arab Spring: A Research & Study Guide * الربيع العربي' (*LibGuides at Cornell University*) <https://guides.library.cornell.edu/arab_spring/tunisia> accessed 8 April 2021.

[64] United Nations (n 10).

[65] ibid.

[66] ibid 3.

psychology, and anthropology, among others.[67] TJ, as normatively presented by the UN guidelines, relies on strong assumptions that are not always met. The dominating model in the UN guidance and the classic legal literature assumed a past-abusive regime that committed human rights violations, a new regime that is willing to transform the old system into democracy and the rule of law, and TJ as the way to achieve this transformation.

In this chapter I use the constitutional economics theory to discuss first, why and how the adoption of successful TJ mechanisms after revolutions over autocratic regimes is remarkably rare and challenging in reality; second, why resorting to classic strategies under the public choice theory and within the TJ literature to solve these dilemmas would not help in this setup. These realizations become clear once we deal with (1) the parties to the TJ processes as choice makers who are rational, but also subject to behavioural biases, (2) with TJ as a constitutional arrangement that differs from any other legal policy in a way that it can't have a third-party enforcer, and (3) the special circumstances of what I call the "TJ momentum."[68]

I will first map the available literature on TJ challenges, And afterwards, I will try to present a more accurate model of how TJ works within democratization processes after revolutions over autocratic regimes, I use the law and economics methodology to firstly explain TJ as a bargaining process between the rulers of the past and the transitional regime, and the rationality of its existence; secondly, to discuss the roots of TJ dilemmas that result from asymmetric information and behavioural biases. I finally explore the classic solutions to these economic problems and investigate whether they could serve in solving the TJ dilemmas after a revolution. I argue that TJ's instantaneous nature after revolutions in the

[67] Bell (n 36) 9–10; Padraig McAuliffe, 'From Molehills to Mountains (and Myths?): A Critical History of Transitional Justice Advocacy' in Jan Klabbers (ed), *Finnish Yearbook of International Law* (Hart Publishing 2011) <https://discovery.dundee.ac.uk/en/publications/from-molehills-to-mountains-and-myths-a-critical-history-of-trans>; Nicola Palmer and Phil Clark, 'Challenging Transitional Justice' in Nicola Palmer, Phil Clark and Danielle Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia 2012) <https://kclpure.kcl.ac.uk/portal/en/publications/challenging-transitional-justice(6410cb74-513e-4d38-a7af-efa392341bd7)/export.html>; David (n 15) 152.

[68] Other scholars referred to transitional justice momentum in the sense of the point when TJ is both needed and possible Eva Brems, Corradi Giselle and Schotsmans Martien (eds), *International Actors and Traditional Justice in Sub-Saharan Africa* (Intersentia 2015) <https://biblio.ugent.be/publication/7048566/file/7048567.pdf#page=245> accessed 19 July 2021; Ismael Muvingi, 'Transitional Justice and Political Pre-Transition in Zimbabwe' [2011] Conflict Trends <https://journals.co.za/doi/abs/10.10520/EJC16117>. The meaning I refer to here is distinct than these aspects although somehow relevant. This will be explained in the following section.

absence of any trusted institutions that could enforce a "contractual" arrangement between the parties, or supply accurate information in the market, precludes the effectiveness of most of these solutions. This conclusion requires innovative methods to treat this exceptional situation.

The remainder of this chapter proceeds as follows: the second section provides an overview of the relevant literature. The third presents TJ's rationale as a constitutional arrangement that plays different roles according to the revolution scenario it falls into. The fourth section explores TJ policies' dilemmas in general and their suggested traditional solutions, and the fifth and final section concludes.

II. Literature Review

The literature on TJ tends to focus on the legal complications of the rule of law and criminal justice implications in the context of dealing with TJ as a part of what is called "transformative law."[69] Additionally, this literature focuses on how these concepts might change or persist in the context of TJ.[70] Interdisciplinary approaches to TJ aim at providing a new understanding of it that is more realistic than the rigid traditional legal approaches that used to monopolize the field.[71] Shy initiatives within the legal literature started to reconsider the role that legal solutions can offer to solve the TJ problems and invite perspectives from other social fields.

One of the most important is the proposal by McEvoy (2007).[72] Not only did McEvoy spell out the limitations of the classic legal theories of TJ in reality, but he also invited law scholars and practitioners to look beyond legalism and to use other social sciences to reach a

[69] "Transformative Law" is a concept that refers to the special nature and extraordinary role that law is expected to play in times of political changes to enable the anticipated transformation. In a closely related vein, there is also the concept of "Transitional Jurisprudence" which refers to the philosophy and dynamics of law that emerges as a paradigm constructive version of law responding to the extraordinary circumstances of substantial political change, see Teitel, *Transitional Justice* (n 41) 11–15.

[70] See for example, Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 Journal of Law and Society 411 <https://www.jstor.org/stable/20109761?seq=1#metadata_info_tab_contents>; Teitel, *Transitional Justice* (n 41); Dyzenhaus (n 48); Posner and Vermeule (n 34); Safjan (n 47); David (n 15).

[71] Bell (n 36) 17; McEvoy (n 71).

[72] McEvoy (n 71).

more realistic understanding of TJ. However, McEvoy's proposal is more into political sciences and criminology as necessary disciplines to interact with conceptualizing TJ, without taking the rational-choice economic theory into consideration. This limitation might, to some extent, endanger the main recommendation his analysis gives, which focuses on empowering and including the "grass-roots" organizations like local communities and civil society. He suggests that properly skilled "grass-roots" organizations can offer "a compelling corrective to legalistic understandings of the field."[73] This proposal goes hand in hand with other analyses coming specifically from the political sciences field, for example by Paige Arthur and Christalla Yakinthou,[74] especially after the way civil society was pictured for its role within democratic transitions in the 1980s as separate from the state and empowering for the transitional processes.[75] However, it ignores the fact that economic analysis captures. This fact is that civil society organizations themselves are a party to the TJ constitutional set-up. They have their own preferences that might diverge from or unite with any of the other parties, and they incur costs and expect benefits from whatever TJ approach adopted. That is why they cannot be considered as a third-party enforcer of the TJ process. TJ itself, as a constitutional arrangement, cannot have a third party enforcer because it is not a usual contract between parties; even international parties are not a third party to the process because they are part of it and have their interests too.

The view of civil society organizations in the TJ context as neutral, secular, and homogeneous parties was recently challenged by Kent, Wallis and Cronin (2019). They shed light on the fact that the role of civil society organizations as portrayed by the TJ literature (1) ignores the fact that these organizations can, and usually have, competing visions of what constitutes "justice" and "reconciliation," and (2) tends to celebrate civil society as an

[73] ibid 431.

[74] Michael W Foley and Bob Edwards, 'The Paradox of Civil Society' (1996) 7 Journal of Democracy 38 <http://muse.jhu.edu/content/crossref/journals/journal_of_democracy/v007/7.3foley.html>; Renee Jeffery, Lia Kent and Joanne Wallis, 'Reconceiving the Roles of Religious Civil Society Organizations in Transitional Justice: Evidence from the Solomon Islands, Timor-Leste and Bougainville' (2017) 11 International Journal of Transitional Justice 378 <http://academic.oup.com/ijtj/article/11/3/378/4091559/Reconceiving-the-Roles-of-Religious-Civil-Society>.

[75] Foley and Edwards (n 75); Lia Kent, Joanne Wallis and Claire Cronin (eds), *Civil Society and Transitional Justice in Asia and the Pacific* (ANU Press 2019) <https://press.anu.edu.au/publications/series/pacific/civil-society-transitional-justice-asia-pacific>.

unqualified good which turns a blind eye to the dynamics that create and constrain that role.[76] Their analysis reinforces the argument of this chapter against the idea of civil society as a third-party enforcer to TJ as a contractual agreement between parties of the post-revolution phase as these organizations have diverse priorities, sources, and backgrounds. However, while they use case studies in Asia and the pacific to show the manifestation of this argumentation, especially in religious and ethnic civil society organizations, I use a theoretical analysis that shows its roots, dynamics, and consequences that can apply to different contexts.

The development of TJ shows that it originates as a social need of a group which is the "victims" that aim ultimately to achieve a social, not only political, transformation, even if this transformation relies on state-level actions.[77] This conceptualization of TJ calls for more focus on the relationship between society-level and state-level actors in the context of TJ adoption and application, including the allegedly intermediate actors, i.e., civil society. Accordingly, putting on the lens of the principal agent problems between the victims (the principals) and the state-actors (the agents) can lead us to necessary realizations for understanding the TJ dynamics. Researchers like McEvoy, McConnachie and Morison argue in the same direction when they ask to look beyond the state-centric approaches to TJ that is dominated by legal and political perspectives of state re-construction,[78] and look into the victims as active agents who participate in re-constituting the society instead.[79]

This research relates also to a growing literature that tries to define determinants of TJ. Whether a nation adopts TJ or not and which TJ mechanisms it tends to select could be reasoned through many theories in the realm of social sciences. Some scholars relate these choices to economic limitations.[80] After all, TJ is financially costly, and it usually faces societies that are already economically exhausted. In a close connection, Grodsky (2010) argues that meaningful accountability towards the past human rights violations is conditioned on the powerful primary actors' ability to secure essential economic and political needs to a

[76] Fisher (n 12) 288.

[77] ibid.

[78] McEvoy (n 71) 25,38.

[79] Kirsten McConnachie and John Morison, 'Constitution Making, Transition and the Reconstitution of Society' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008) <https://www.bloomsburyprofessional.com/uk/transitional-justice-from-below-9781841138213/>.

[80] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 61.

citizenry that demands TJ.[81] Other studies connect the TJ arrangements to the distribution of power depending on many variables, including the past level of repression, autocratic regime duration, the timing of the transition, the type of transition, the leadership type of the past regime, the background of the new leaders, the democratic past of the society, and the strength of the civil society.[82] All these factors should decide if the past regime is weak enough to be held accountable before the new-one, and whether TJ's demanders have enough power to spoil any settlement that excludes this process.

Scholars who looked into determinants of TJ also discussed why societies resort to TJ as a distinctive form of justice, and what are the complications that face this path. Beside classic scholars who adopt this notion of exceptionalism such as Shklar (1986) and Elster (2004),[83] more recent studies also adhere to the same side of the debate over TJ as a distinctive form of justice.

For instance, David C. Gray argues that the source of this extraordinary nature of TJ is that it is not profane, preservative, or retrospective, but rather transformative. What distinguishes TJ is that it aims at changing an abusive paradigm, and abusive paradigm is different than any ordinary crime in the sense that it is a combination of social, legal, and institutional norms and practices that promote a bipolar logic which leads to targeted violence.[84] Constitutional economics give one more perspective to why TJ is an extraordinary form of justice that requires extraordinary solutions. This idea was referred to in a different way by David C. Gray (2010) as a "liminal moment" that needs to be seized in order to achieve sort of parity between the victims and abusers. While Gray is interested in a specific aspect of TJ, i.e., reparations, and liminalism in his argumentation relates to the whole transition from an abusive regime to one that respects human rights and rule of law, the "liminal moment" for this chapter concerns the momentum right after a political change where three conditions apply. First, there is an asymmetric information problem between the principals and the

[81] Brian K Grodsky, *The Costs of Justice : How New Leaders Respond to Previous Rights Abuses* (University of Notre Dame Press 2010) <https://muse.jhu.edu/book/10547>.

[82] Monika Nalepa, 'Captured Commitments: An Analytic Narrative of Transitions with Transitional Justice' (2010) 62 World Politics 341, 341, 370–372; Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 43–59.

[83] Judith N Shklar, *Legalism : Law, Morals, and Political Trials* (Harvard University Press 1986); Jon Elster, 'Moral Dilemmas of Transitional Justice', *Practical Conflicts* (Cambridge University Press 2004) <https://www.cambridge.org/core/product/identifier/CBO9780511616402A019/type/book_part>.

[84] David C Gray, 'Extraordinary Justice' (2010) 62 Alabama Law Review 55.

agents; Second, a lack of trust between the parties because of the absence of political credit; and third, deciding a constitutional arrangement under the veil of uncertainty.[85] Within this research, the TJ momentum is what profoundly constitutes the extraordinary nature of TJ.

Murphy (2017) addresses also the same questions but from a moral perspective. After discussing the limitations of conceptualizing TJ as a moral compromise or a form of restorative justice, she argues for the necessity of considering TJ as a distinctive form of justice. Although Murphy's research and this research start from the same departure point, which is that TJ is a form of societal and political transformation which distinguishes it from other forms of ordinary justice, the two researchers' perspectives are ultimately different. While Murphy looks into the moral aspects that differentiate TJ from other forms of retributive, corrective, or distributive justice (2017), the interest of this research is in offering an economic analysis of how the nature of TJ as a constitutional arrangement within political transitions creates different dilemmas for it than the typical challenges that usually face traditional legal policies. Accordingly, while Murphy argue that the problem of TJ is how to justly seek the societal transformation,[86] I portray the problem of TJ as an extraordinary principal-agent-problem.

Other scholars oppose this notion of "exceptionalism." Some of the most critical research of this view was introduced by Posner and Vermeule (2003).[87] They have two central claims in this regard. First, that legal and political transitions are on a continuum, where the regime change is merely a point, i.e., transitional justice is continuous with ordinary justice.[88] Second, accordingly, there is no need to deal with the moral or institutional grounds of TJ mechanisms with suspicion except as far as we would do the same with the justice of consolidated liberal democracies.[89]

Thomas Carothers (2002) claims about democratization processes flow somehow in the same direction. He argues that those who are interested in democratization should remove the

[85] For more on the veil of uncertainty, see James M Buchanan and Gordon Tullock, *The Calculus of Consent, Logical Foundations of Constitutional Democracy*, vol 3 (Liberty Fund, Inc 1999).

[86] Colleen Murphy, 'The Problem of Transitional Justice', *The Conceptual Foundations of Transitional Justice* (Cambridge University Press 2017) 84 <https://www.cambridge.org/core/product/identifier/9781316084229%23CT-bp-3/type/book_part>.

[87] Posner and Vermeule (n 34).

[88] ibid 763.

[89] ibid 764.

"transition lens" as what is seen as an exceptional transitional middle ground between autocracy and democracy is in reality the case of most of the political systems in the contemporary world.[90] Nonetheless, I agree with Carothers that status of transition is not exceptional and that the scholars and practitioners may over-estimate the effect of "transitional policies" to achieve democratization, I claim that the momentum after a revolution over an autocratic regime under which a society is preparing its new social contract and deciding how to deal with the past and build the future, has exceptional nature that requires exceptional solutions due to low trust levels and lack of a commitment device. Moreover, one of the assumptions regarding democratic transitions that Carothers invites to "let go" is that achieving successful democratization depends primarily on the intentions and actions of its political actors and elite with no significant influence from its social, economics, and institutional legacies.[91] Although this argumentation is sound and important, one can't ignore that when it comes to the calculus of the TJ momentum, this argument can seem flawed, once you look at it from a rational choice perspective. First, the intentions and actions of the public elite are connected and result from the social, economic, and institutional legacy of the past-regime; they are not two different matters. Second, while it can take years before one can de-construct and analyze the economic, social, and institutional legacy of a past-regime to build a strategy to reverse or reform it, it looks more rational to offer strategies that deal with the instant constitutional transaction taking place right after a political change. The following analysis tries to offer insights in this regard. I agree that there is no one-to-go scenario of the political landscape of countries in transition, and that is why I will provide for scenarios of this transition. However, I differentiate between "nations in transition" and nations in the "momentum."

In a close tendency, in their exploration of the problems of the TJ field, Palmer and Clark claim that one of the TJ scholars' quandaries is that they try to "re-invent the wheel."[92] The authors argue that the TJ scholars spent too much effort trying to define and debate about key concepts in the field like "justice" or "reconciliation" while other fields like anthropology, international relations, and philosophy had already established knowledge on these concepts. While I agree with Palmer and Clark that there is a common ground between the social

[90] Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13 Journal of Democracy 5, 5, 17–18 <http://muse.jhu.edu/content/crossref/journals/journal_of_democracy/v013/13.1carothers.html>.

[91] ibid 17.

[92] Palmer and Clark (n 68) 5–6.

sciences that the TJ field can directly benefit from in this regard, I try in this chapter to reassert why the tools and theories traditionally used to achieve these concepts of *justice*, *reconciliation*, or *transformation*, need somehow a "re-invention" to respond to the critically special circumstances of the TJ momentum.

On a final note, the TJ dilemmas can differ distinctively, depending on which domain of TJ is discussed, i.e., conflict to peace or authoritarianism to democracy. Sharp (2014) draws attention to the danger of mixing the analysis and dilemmas of these two folds that might lead to autocrats abusing the peacebuilding mechanisms to consolidate their powers in the name of peace just like victors have often done in the name of justice.[93] This distinction is, however, not only because the mechanisms of focus differ as some scholars and practitioners point out,[94] but also because transforming abusive state authorities to democratic institutions that respect human rights alter the calculus of the relevant actors in a way that creates its own dilemmas. This way will be the topic of this chapter.

III. TJ Scenarios Explained

III. 1. TJ as a constitutional policy

As explained earlier, from a legal perspective, TJ pertains to different legal veins, including constitutional law. The constitutional matters regulated by TJ are such as the formation of the state authorities during and after the transition, the civil rights limitations of some of the citizens, partial organization of the electoral rules, and most importantly, extra-ordinary judicial procedures that could not be valid under the "standard" constitutions. TJ policies can be formalized in different legal forms, including constitutional texts, basic laws, regulations, or merely legal actions or decisions. The analysis of this dissertation is not limited to one of these forms; it rather tackles TJ's concept regardless of its formality. Nevertheless, beyond its legal nature and formality, how can we explain TJ's economic rationale generally?

There is a close two-ways relationship between a successful democratic transition and a successful transitional justice in legal and political thinking. Some may find the latter due to the former[95] since achieving justice is utterly conditional on the presence of political will and

[93] Sharp (n 20) 151.

[94] Arthur (n 21) 360.

[95] Kassem (n 11) 53.

the proper environment, as indicated earlier. Others argue that transitional justice itself is one tool for completing a democratic transition after authoritarian rule as well.[96]

The central rationale of transitional justice is putting an end to the ideology of the past regime not just for provoking accountability or compensating the victims, so that "justice" is restored, but also to promote political, economic, legal, and social change[97] that the revolution aimed at in the first place. In other words, TJ seeks to avoid bearing the roots of the authoritarian regime and its affiliated unsolved inefficiencies into the newly formed system, which can threaten the achievement of a genuine transformation. Finally, TJ policies usually address crimes and use mechanisms that deviate from the standard laws in ordinary situations.[98]

Accordingly, from a law and economics perspective, TJ is, basically, a tool to:

1. Internalize the negative externalities[99] of the past autocratic activity that has ongoing spillover effects on both the individual and collective levels. Although the past-regime's harmful activity is supposed to be "past," the externalities of this activity still have an impact in the present. For example, discriminative policies that led to the poverty of an entire geographical area of the state, or torture in prisons that deprived a family of a member or a person of their health;
2. Minimize the risk of a counter-revolution by the past regime, while at the same time minimizing the risk of its supporters spoiling the transition if they are under attack, depending on their power;
3. Avoid a costly direct interaction between the victims and violators, which could lead to welfare decreasing ends like violence or further social polarization.[100]

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[96] Arthur (n 21).

[97] Kimura Ehito, 'The Struggle for Justice and Reconciliation in Post-Suharto Indonesia' (2015) 4 Southeast Asian Studies 73, 75 <https://www.jstage.jst.go.jp/article/seas/4/1/4_KJ00009707799/_article>.

[98] David (n 15).

[99] For more about externalities as a market failure, see Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, Addison-Wesely, an imprint of Pearson 2012) 39–40.

[100] See also Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Columbia Law Review 1193 <https://chicagounbound.uchicago.edu/journal_articles/1828/>. for the discussion on the economic reasoning of the inefficiency of crime and the necessity of punishment, including both financial crimes which imply the bypassing of the regulated "market" and the crimes motivated by "interdependent negative utilities" such as murder, rape, torture… etc. For political crimes, the same economic arguments applied to democratic vs. autocratic systems can be applied, as they are crimes related to the disruption and corruption of the political

Although TJ deals with past violations, it is an *ex ante* constitutional arrangement in the phase between the past and the new regime. The political actors of this phase decide, when in uncertain times,[101] on a trade-off between their expected political revenue and the expected risk. Given the emotional package involved and the critical momentum of the transition, parties usually view TJ policies as a trade-off between conflicting pay-offs. For example, providing amnesty policies for members of the past regime entails limiting the pay-offs for the victims who supported the revolution and wanted to punish those who committed human rights violations against them. Similarly, seizing all the political pay-offs for the non-members of the past regime through electoral law reforms involves losing their expected utility as human capital. This view gives the sense that TJ is a zero-sum game. However, TJ balanced approaches try to escape this view by explaining all TJ mechanisms as advantageous to all the parties involved. Accordingly, for example, amnesties conditional on truth revealing and confessions are not only profitable for the past-regime members, but also for the victims who will be able to reach the truth about those accountable for the violations committed against them and to receive the proper moral reparation for their suffering. Usually, TJ mechanisms involve a trade-off between the different parties to reach a compromise.[102] TJ should be a structure of incentives to not only prevent the repetition of the autocratic past but also to internalize whatever disutility was caused by that past.

However, do these incentives apply to all post-revolution cases?

III. 2. The TJ parties

A prerequisite for answering this question is an explanation of the incentives' structure of the possible scenarios to democratic transitions after revolutions. I argue that there are three basic scenarios for the post-revolution set-ups.[103] Before presenting them, I first organize the relevant actors in this analysis into three groups:[104]

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democratic practice in the state. For a survey of these economic arguments and analyses, see Stefan Voigt, 'Positive Constitutional Economics II-a Survey of Recent Developments' (2011) 146 Public Choice 205, 242–246.

[101] For more about the concept of constitution making under the veil of uncertainty, see Buchanan and Tullock (n 86).

[102] A detailed analysis of the trade-off involved in TJ approaches and how balanced approaches deal with it is presented in chapter 4.

[103] It is worth noting that through this chapter, I try to establish a theoretical framework of transitional justice after revolutions in general. However, I do not claim that there could – in most of the cases – be a single pattern

1. The past-regime. This group would include; a. The leading figures of the past regime, such as the head of state, the head of the parliament and the executive, and the governing political party's leaders; b. The secondary figures like the high-ranking officials who occupied leading positions under the past government, such as ministers, governors, and the heads of the public authorities, as well as members of the regime's political party.
2. The rulers of the transitional phase. These rulers do not have to necessarily be the same powers that started the revolution, but they should be the party that has sufficient power on the ground to end the past regime and control the transitional phase. For example, in the Egyptian case in 2011, the revolution started by youth movements over social media. However, ruling the transitional phase – even during negotiations before the moment of Mubarak's removal - was in the hands of the Supreme Council of the Armed Forces (SCAF).[105]

   In fact, the revolutionaries are not always represented as transitional rulers or negotiators with the past-regime. The reason is that autocratic regimes do not usually have potent opponents who can have the critical mass to start a revolution. An autocratic regime would not allow plural political parties to share its powers with, and

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or a universal answer to the questions posed by social sciences of law, economics, or political sciences generally, or to the topic of this study in particular. This has already been alluded to regarding existing studies on the topic. The incentives' structure of the relevant parties, the working mechanisms, barriers, and effectiveness of the different TJ policies can vary greatly between one society and another, depending upon numerous variables. These variables include the society's political and social situation, level of education and both legal and political awareness, economic hardships, and social and political polarization, as well as the revolutionaries' preferences and behaviour, among other factors. However, as explained earlier, this chapter focuses on aspects of the economic rationale behind the need for, the strategy of, and the challenges of TJ policies within the general theory on post-revolution transitions from autocratic to democratic governments. These three qualifiers – past-autocratic regime, occurrence of a revolution, and subsequent goal of democratic transition – serve to limit the cases under analysis in this study. The reader should thus notice that although the study gives three basic scenarios that I believe to be the main categories of the post-revolutions' setup, the detailed situation can definitely differ in some details depending on the single cases.

[104] There are more groups to be added for a detailed map of the involved actors in the TJ setup, including the different political parties, the judicial and non-judicial authorities competent in applying the laws. Moreover, these main groups could be divided into sub-categories. For example, the past-regime victims as indicated in point 3 in the text. However, I limited the actors to these three groups only, because these are the active actors in the scenarios which will be explained as a base for this chapter's analysis.

[105] Zoltan Barany, 'Comparing the Arab Revolts: The Role of the Military' [2011] Journal of Democracy.

the result is usually a single-party rule against weak sham parties. The protests are usually popular and only sometimes have a leader or representatives, which makes it harder to negotiate with the revolutionaries in the earlier stages of the transition. Historically, not all revolutions have had a leader; however, many did despite the autocratic regimes' oppressive policies against their opposition.[106]

3. The victims; who are not necessarily persons who were subject to a direct crime that involved human rights violations by the past regime, like torture, but also the indirect victims. These indirect victims include the citizenry who were negatively influenced by the corrupted policies of the autocratic regime. For example, a citizen who was prevented from voting in public elections as part of a general stream also qualifies as a victim under this broad definition.

   However, it is to be noted that victims themselves do not all share the same preferences; some are pro, some are against, and some are neutral towards the TJ issue. This sub-categorization means that there could be various ways that new rulers are representative of, constitutive of, or connected to, different victim groups, which could then influence the understanding of the power dynamics and information gap between them and victims. For this reason, the upcoming scenarios work on the assumption that the critical mass of the victims, which initiated and fuelled the revolution, are pro-TJ, while victims against TJ are considered as part of either the past regime or the transitional rulers' supporters, in case the last are against TJ as well, and the neutral victims are mere bystanders who do not influence the power dynamics.

III. 3. The TJ map

Mapping the post-revolution transitional phase depends not only on each case's circumstances but also on the subject in consideration. For example, a simplified map showing the constitutional transformations could involve the steps of changing the constitutional rules from the start of the revolution until the adoption of the new constitutional order. However, in the case of explaining the map of TJ, the steps are much less clear. Firstly, the steps differ genuinely in nature and sequence depending on the type of transition after the revolution; was it a regime collapse that involved a clean break from the old regime or a negotiated transition with that regime still involved? Secondly, unlike the

[106] Jack A Goldstone, *The Encyclopedia of Political Revolutions* (2015).

other constitutional arrangements, TJ does not end with the adoption of the new constitution; on the one hand, the new constitutional order itself is an institutional reform that falls under TJ; on the other hand, the policies of TJ could still function after the new constitution as they usually take a long time in adoption and application. Thirdly, TJ policies do not take place within one decisive moment that marks the end of the transitional phase; many TJ policies are adopted and/or applied gradually through different points of the transition. All these considerations make it hard to introduce one explanation of the structure of the post-revolution transitional phase concerning TJ. However, for the sake of clarity, I present in figure (2.1) a simplified theoretical map of scenarios of the post-revolution phase regarding TJ.

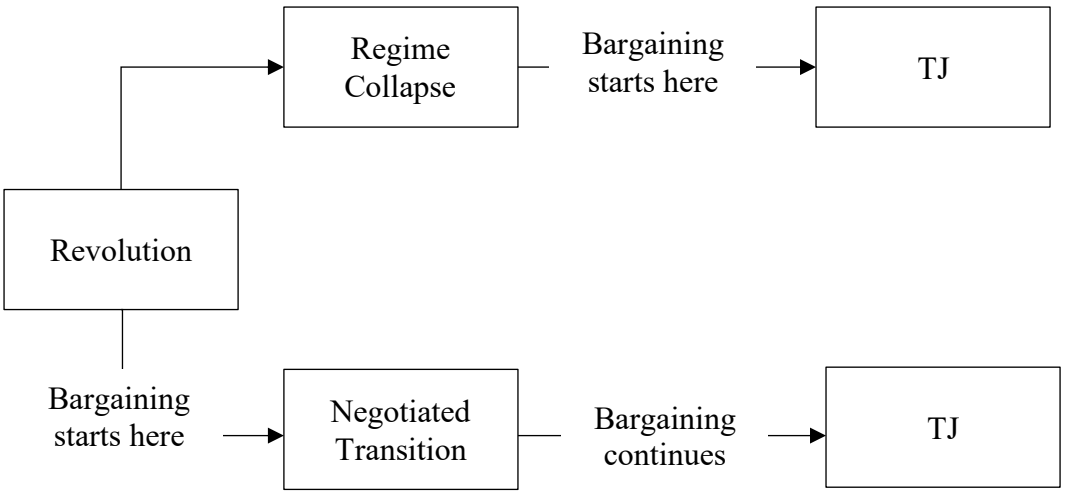

Figure (2.1) Map of TJ Stages in Post-revolution Transitional Phase

The overthrow of a past-autocratic regime can generally happen according to two basic arrangements.[107] [108]The first is when the regime collapses after the revolution, which usually means that it lost its legitimacy and that it does not have staunch supporters who could spoil the transition. In this case, the bargaining over TJ usually starts after the past-regime's collapse, and it excludes the representatives of that regime. Consequently, the parties to the negotiations are the transitional rulers and the representatives of any other groups in society who are powerful enough to influence the transition. In the second scenario, i.e., the negotiated transition, the past regime is too weak to continue, but it also still holds on to power which makes it costly to exclude it from the transition. In this case, the bargaining starts before leaving authority because this move would not happen - at a reasonable cost - without the past-regime's approval, and the negotiations continue after the transitional rulers take over because the past regime remains a party to the process.[109]

However, even in a general mapping that disregards the specific types of past and post-transition regimes, things are more detailed and complicated than this. In this research, I go a step further and divide the transitions on a second level according to the preferences of the three active actors indicated earlier. In this categorization, I refer to the victims as the principals because they are supposed to be the original actors who delegated the power of

[107] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 155.

[108] The scenarios of regime change in the post-autocratic transitions are categorized according to different perspectives. Accordingly, this is not the only transitions classification in the TJ literature. However, this is one of the most general classifications which do not address the specific types of political systems before and after the transition, which provides a better landscape for my analysis. For more on transitions in the field of TJ, see Barbara Geddes, 'What Do We Know About Democratization After Twenty Years?' (1999) 2 Annual Review of Political Science 115.

[109] Empirics show that the more repressive the past-regime was, the more likely the successful revolutions will be followed with a negotiated transition, and then followed by amnesties instead of trials as a form of TJ Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11). These results were in fact contrary to the theoretical hypotheses in the TJ literature, which expected the higher levels of oppression to be associated with higher application rates of trials after the regime falls, due to the fear associated with the authoritarian regime, ibid 58. I find these results though more logical, as they take into account the association between levels of oppression and the strength and depth of the past-regime in the society and different state authorities. The higher levels of oppression and the longer they lasted, the more consolidated is the past-regime will be in the state and the society, which should entail a negotiated transition. In such circumstances where the past-regime still partially holds power and can sanction the other parties, one could rationally expect giving amnesties instead of holding trials, because they make the transition less costly.

reaching their goals to their agents, i.e., the transitional rulers[110] drawing on the theory in constitutional economics that sees citizens as the principals who delegate their powers and try to control their agents, i.e., the government.[111]

The first scenario is when the victims, referred to as the principals, share the same preferences with the transitional rulers, referred to as the agents, including getting rid of the past regime, holding them accountable, and transforming into democracy. This scenario is the classic set-up of the transitional phase which normative assumptions and international guidelines are built upon. The principals' and the past-regime preferences are the same in the second and third scenarios, only the agents' preference (transitional rulers) change from one scenario to another. In the second scenario, the preferences of the principals and the agents diverge. While the principals seek democratization and accountability for the past regime, the agents seek to turn around the revolution and find a safe exit for the past regime. The third scenario involves the divergence of the three actors' preferences; principals desire TJ policies, and agents seek the recreation of the autocratic regime. However, in this case, the agents want to punish the past regime and exclude it. To make it simpler and easier to follow, I refer to the three scenarios as follows:

$$Scenario\ 1\ (PR + AG)\ X\ (EX)$$

$$Scenario\ 2\ (PR)\ X\ (AG + EX)$$

$$Scenario\ 3\ (PR)\ X(AG)\ X\ (EX)$$

Where PR is principals/victims, AG is agents/transitional ruler, and EX is the past-regime.[112]

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[110] For more on the applications of principal-agent theory on the public and political sphere, see Mark A. Zupan and Joseph P. Kalt, 'The Apparent Ideological Behavior of Legislators : Testing for Principal-Agent Slack in Political Institutions' (1990) 33 The University of Chicago Press for The Booth School of Business,University of Chicago and The University of Chicago Law School 103 <https://www.jstor.org/stable/725512>; Gary J Miller, 'The Political Evolution of Principal-Agent Models' (2005) 8 Annual Review of Political Science 203 <https://www.annualreviews.org/doi/abs/10.1146/annurev.polisci.8.082103.104840>.

[111] For more on this theory in the constitutional economics literature, see Voigt, 'Positive Constitutional Economics II-a Survey of Recent Developments' (n 101) 208,234.

[112] This picture does not only depart from the unrealistic assumption that the transitional rulers (agents) are necessarily the revolutionaries but also it does not separate them, i.e., revolutionaries, from the victims (principals). The reason is that this analysis does not tackle the revolution dynamics itself, but the transitional phase interactions after the coup. In that phase, the interplay is between the representatives of the new political situation, whether they were part of the revolution or not. Moreover, note that the privileged groups of the

Scenario 1

The first scenario might look a bit rosy, which is why it has a few historical examples. One of its recent examples is the transitional regime in Burkina Faso after the 2014 uprising.[113] The preliminary consequences of ex-president Blaise Compaoré fleeing the country in response to the protests involved a military rule.[114] However, a transitional map was shortly decided along with civil national, regional, and international actors, transferring the power to a coalition civilian government.[115] Also, measures of banning politicians allied to the ex-president from running for the presidency were taken.[116] [117] On Polity IV, a measure indicator of autocracy characteristics,[118] Burkina Faso jumped from a long history of score 0 in 2014, which listed it as an anocracy, to a consequent score of 6 from 2015 to 2018, which qualifies it as a democracy.[119] The American revolution (1765-1791) could make another excellent example of a revolution that witnessed the unity in preferences between principals and agents against the ex-regime. However, the American revolution's aftermath did not

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citizenry, who support the past-regime are not considered as part of the principals here, because they adopt and advocate the same preferences of the past-regime. This fact does not deprive them of their rights as partly-principals of the authority delegated to the transitional rulers in a political-legal philosophical meaning. However, it does place them on a different side than that which principals of the TJ process, i.e., victims and revolutionaries, have in the bargaining context.

[113] The Guardian, 'Burkina Faso's Revolution 2.0' (*The Guardian*, 2014) <https://www.theguardian.com/world/2014/oct/30/burkina-faso-protests-president-constitution-power> accessed 11 March 2020.

[114] BBC News Mundo, 'Ejército de Burkina Faso Promete Entregar El Poder a Gobierno de Transición, Burkina Faso Army Promises to Hand over Power to Transition Government' (*BBC News Mundo*, 2014) <https://www.bbc.com/mundo/ultimas_noticias/2014/11/141103_ultnot_burkina_faso_golpe_ejercito_fp> accessed 11 March 2020.

[115] BBC News, 'Burkina Faso Leaders Agree Transitional Framework' (*BBC News*, 2014) <https://www.bbc.com/news/world-africa-30046413> accessed 11 March 2020.

[116] BBC News, 'Burkina Faso Profile - Timeline' (*BBC News*, 2018) <https://www.bbc.com/news/world-africa-13072857> accessed 11 March 2020.

[117] Moreover, the African Court of Human and Peoples' Rights, delivered decisions of reparations to past-violations' victims, but with regard to cases that were filed before the revolution Cristián Correa, 'Getting to Full Restitution; Guidelines for Court-Ordered Reparations in Cases Involving Sexual Violence Committed during Armed Conflict, Political Violence, or State Repression' (2014) <https://www.ictj.org/publication/full-restitution-reparations-sexual-violence>.

[118] For more on Polity IV project, see: https://www.systemicpeace.org/polityproject.html.

[119] 'INSCR Data Page' (*Center for Sstematic Peace*, 2019) <http://www.systemicpeace.org/inscrdata.html> accessed 11 March 2020.

involve the TJ process unless we consider the American constitution as the primary institutional reform that could act as what was referred to earlier as *transformative constitutionalism*.[120]

In the example above, and also in other examples where we can find an application for this set-up, it can be noticed that no one party holds power that outweighs the other parties' powers. Taking the Burkinabe military, religious leaders, civilian politicians, and civil society,[121]together, each of them was too strong to be ignored; otherwise, they could spoil the transition. Along with the regional and international pressure,[122] it was too costly for one party to oppress the others, and so, they had to apply cooperative measures to reach a compromise. This compromise aiming to find a cooperative equilibrium is also to be reflected in their adopted TJ mechanisms so far, which did not include large-scale mechanisms but focused further on the institutional reforms to preclude a repetition of the past.

On another note, politicians are still humans; altruistic behaviour seeking the advantage of the group they belong to can also be expected from them, as it adds to their own utility[123] especially in such historical moments. These rare behavioural attitudes explain such an exceptional set-up involving the similarity of preference between principals and agents.

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[120] For more on the American revolution dynamics, see Mary Beth Norton and others, *A People and a Nation: A History of the United States* (9th edn, Wadsworth, Cengage Learning 2011).

[121] Boukari Ouoba, 'POPULAR UPRISING, A Triumph for Young People' (*D+C Development And Cooperation*, 2016) <https://www.dandc.eu/en/article/burkinabe-youth-united-end-rule-president-blaise-compaore>; Robert Mackey, 'Street-Level Views of the Protests in Burkina Faso' (*The New York Times*, 2014) <https://www.nytimes.com/2014/11/01/world/africa/street-level-views-of-the-protests-in-burkina-faso.html>; International News 24/7, 'Thousands Gathered Sunday in the Centre of Burkina Faso's Capital to Protest against the Military's Move to Install One of Its Own, Lt. Col. Isaac Zida, as Interim Leader Following the Friday Ouster of President Blaise Compaore' (*International News 24/7*, 2014) <https://web.archive.org/web/20150927213341/http://www.france24.com/en/20141102-burkina-faso-new-protests-opposition-army-interim-leader/> accessed 12 March 2020.

[122] UN News, 'Burkina Faso: UN Chief Welcomes Adoption of Framework for Civilian-Led Transition' (*UN News*, 2014) <https://news.un.org/en/story/2014/11/483712>; International News 24/7, 'African Union Gives Burkina Faso Two Weeks to End Military Rule' (*International News 24/7*, 2014) <https://web.archive.org/web/20141103231519/http://www.france24.com/en/20141103-african-union-gives-burkina-faso-two-weeks-end-military-rule/> accessed 12 March 2020; REUTERS, 'Burkina Faso Opposition Parties, African Union Reject Army Takeover' (*REUTERS*, 2014) <https://www.reuters.com/article/uk-burkina-politics/burkina-faso-opposition-parties-african-union-reject-army-takeover-idUKKBN0II1JE20141101>.

[123] Herbert A Simon, 'Rationality in Political Behavior' (1995) 16 Political Psychology, Special Issue: Political Economy and Political Psychology 45, 48,59 <https://www.jstor.org/stable/3791449?seq=1>.

This perspective suggests another explanation of the positive empirical results, in terms of democracy and human rights, correlated with TJ's balanced approaches that refuse both maximalist and minimalist TJ policies.[124] Maximalist approaches of TJ tend to favour the "justice" or retribution considerations, which leads to trials and isolation of the past regime.[125] Minimalist approaches favour the "political constraints" or the transition concerns, which leads to amnesties and reconciliation.[126] The current explanations attribute the relative success of the justice-balance approach to its balancing nature between the competing considerations of achieving accountability and politics of transition. However, this could be a form of reversed causality; it could be that witnessing higher rates of achieving TJ goals in these cases is due to the balancing nature and cooperative behaviour of the involved parties

[124] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11).

[125] Scholars who support this approach include JVN P. and Kathleen Dean Moore, 'Pardons: Justice, Mercy, and the Public Interest' [1989] Columbia Law Review; John J Moore, 'Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador' [1991] Stanford Law Review; Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' [1998] Human Rights Quarterly; Robert Rotenberg and John Borneman, 'Settling Accounts: Violence, Justice, and Accountability in Postsocialist Europe' [1999] Anthropological Quarterly; Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' [1990] California Law Review; Michael P Scharf and Naomi Roht-Arriaza, 'Impunity and Human Rights in International Law and Practice.' [1996] The American Journal of International Law; M Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' [1996] Law and Contemporary Problems; Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' [1996] Law and Contemporary Problems; Juan E Méndez, 'Accountability for Past Abuses'.

[126] Studies on this side include Mark J Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' [2000] Human Rights Quarterly; Stephen John Stedman, 'Spoiler Problems in Peace Processes'; Carlos H Acuña and Catalina Smulovitz, 'Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts' in Douglass Cassel and A James McAdams (eds), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame University Press 1997) <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/transitional-justice-and-the-rule-of-law-in-new-democracies-edited-by-a-james-mcadams-notre-dame-london-university-of-notre-dame-press-1997-pp-xxi-290-index-35-cloth-20->; Leslie Vinjamuri and Jack Snyder, 'ADVOCACY AND SCHOLARSHIP IN THE STUDY OF INTERNATIONAL WAR CRIME TRIBUNALS AND TRANSITIONAL JUSTICE' [2004] Annual Review of Political Science; Jack Goldsmith and Stephen D Krasner, 'The Limits of Idealism' [2003] Daedalus; Paul W Zagorski, 'Civil-Military Relations and Argentine Democracy: The Armed Forces under the Menem Government' [1994] Armed Forces & Society; Tom Hadden, 'Punishment, Amnesty and Truth: Legal and Political Approaches', *Democracy and Ethnic Conflict* (2004).

themselves, which reflects on all their choices in the transitional phase, not because of the type of TJ mechanisms they choose.

Scenario 2

In the second scenario, although the autocratic regime could not prevent a revolution, it still holds more power than any other actor. Usually, in this case, the transitional rulers, who are part of the past regime itself will try to absorb the revolutionary wave through making a change only in the prominent faces of the regime or partial constitutional changes. The transitional rulers are a reproduction of the past regime, and consequently, they are not expected to adopt a systematic TJ process that emerges from democratic consultations. Instead, they may tend to give away partial reparations or pardons to the victims while punishing some past regime figures as scapegoats, especially in the immediate aftermath of the revolution. With the past regime still controlling the state, and time passing under crisis, the transitional rulers can finally reach the point where the principals lose any sound weight in the bargaining process and then could be easily overcome.

An example of this scenario is the Algerian uprising in 2019.[127] Although the "Hirak" succeeded in removing the ex-president Boutaflika, the military, which is the most powerful authority in the state, was the only one holding power afterward.[128] The newly elected president is one of the leading figures of the past regime.[129] A number of prominent members of the past regime were presented at trial – not including Boutaflika -,[130] along with

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[127] Rim El Gantri, 'One, Two, Three, Viva L'Algérie' (*ICTJ*, 2019) <https://www.ictj.org/news/one-two-three-viva-l'algérie?fbclid=IwAR1ZPCJ5r2NCqsxB1PF5pJseQyqRv5MRMJo96xjZ0U9wKV96A6LMBBiakgs> accessed 23 March 2020.

[128] Tawfiq Rabahi, 'The Algerian Regime Has Simply Reproduced the Old Idiocy' (*MEMO MIDDLE EAST MONITOR*, 2020) <https://www.middleeastmonitor.com/20200311-the-algerian-regime-has-simply-reproduced-the-old-idiocy/?fbclid=IwAR0nGUPc4off9L8bLO1tHsqUFyg164JdNwzjOHgSRMLTwXs8BMou-VjXZ50> accessed 23 March 2020.

[129] MCD, 'من هو عبد المجيد تبون رئيس الجزائر الجديد؟ [Who Is AbdelMajid Taboun the New Algerian President?]' (*MCD*, 2019) <https://www.mc-doualiya.com/articles/20191213-من-هو-عبد-المجيد-تبون-رئيس-الجزائر-الجديد> accessed 23 March 2020.

[130] CNN, 'محكمة جزائرية تصدر أحكامًا مشددة بالسجن في حق عدد من رموز نظام بوتفليقة [An Algerian Court Delivers Severe Prison Verdicts Regarding a Number of Boutaflika's Regime Figures]' (*CNN* بالعربية, 2019) <https://arabic.cnn.com/middle-east/article/2019/12/10/algeria-former-regime-corruption-trial> accessed 23 March 2020; Lamine Chikhi and Hamid Ould Ahmed, 'Algerian State Energy Company Sonatrach's CEO Sacked: State TV' (*REUTERS*, 2019) <https://www.reuters.com/article/us-algeria-protests-sonatrach/algerian-state-energy-company-sonatrachs-ceo-sacked-state-tv-

promises of constitutional amendments and freeing the demonstrations' leaders.[131] However, Hirak still refuses to accept all these movements and considers them to be a mere facade to carry on with the reproduction of Boutaflika's regime.[132] Nevertheless, with its power fading and as more victims move to the inactive parties' side, the costs it can impose on the other actors to force its demands, become less.

The second scenario is a perfect manifestation of the asymmetric information problem in the context of TJ as a constitutional arrangement. The transitional rulers do not only have more information about the governing laws, crimes of the past regime, and the ongoing negotiations, but they also have the intention of manipulating the principals. Through giving temporary little-valued measures to falsely signal to the victims that they are committed to achieving the goals of the revolution and TJ, they lead to an adverse selection problem; The principals tend to accept a welfare-decreasing situation that involves an absent or malfunctioning TJ process because they do not know how this process is planned by the transitional rulers (agents) to end. The agents tend to give their scapegoat measures in an autocratic form instead of out of democratic procedures to keep the information low on the principals' side. They, additionally, count on the victims' preferences changing through time due to the economic and political prolonged pressure,[133] which should lead to diminishing

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idUSKCN1RZ27B?fbclid=IwAR0IVZuLsVPkrVtQIimS5bNbDLUsaPkeRrP5xiZwp4QihN-CM5W3pfGaZ-Q> accessed 23 March 2020; Lamine Chikhi and Hamid Ould Ahmed, 'Five Algerian Billionaires Arrested in Anti-Graft Investigation' (*REUTERS*, 2019) <https://www.reuters.com/article/us-algeria-corruption-politics/five-algerian-billionaires-arrested-in-anti-graft-investigation-idUSKCN1RY0PJ?fbclid=IwAR19fb98K2ktjj2gt--Aiyad0es-HyoexmoNZr33ZOD7xrMFV9D4PYKQulo> accessed 23 March 2020.

[131] Bernadette Baum and Hamid Ould Ahmed, 'Algerian Leader Pardons More than 6,000 Prisoners in Conciliatory Gesture' (*REUTERS*, 2020) <https://www.reuters.com/article/us-algeria-pardon/algerian-leader-pardons-more-than-6000-prisoners-in-conciliatory-gesture-idUSKBN2001OX> accessed 23 March 2020.

[132] France 24, 'Algerians Gather in Capital to Mark Anniversary of "Hirak" Protest Movement' (*France 24*, 2020) <https://www.france24.com/en/20200221-algerians-gather-in-capital-to-mark-anniversary-of-hirak-protest-movement> accessed 23 March 2020; France 24, ' الانتخابات الرئاسية الجزائرية: فرز الأصوات بعد يوم عصيب شهد مظاهرات منددة بـ"المهزلة" [The Algerian Presidential Elections: Votes' Counting after a Tough Day Witnessed Combating Demonstrations against "The Farce"]' (*France 24*, 2019) <https://www.france24.com/ar/20191212-الانتخابات-الرئاسية-الجزائر-نسبة-التصويت-المشاركة-احتجاجات-تيزي-وزو-القبائل-تبون-قايد-صالح> accessed 23 March 2020; Sky News, 'الجزائر .. جدل بشأن توقيت محاكمة بعض رموز نظام بوتفليقة [Algeria.. A Debate about Some of Boutaflika's Regime Figures' Trials' Timing]' (2019) <https://www.skynewsarabia.com/video/1302775--الجزائر-جدل-بشأن-توقيت-محاكمة-رموز-نظام-بوتفليقة> accessed 23 March 2020.

[133] For more on the costs expected from the lengthy process of TJ, see Nevin T Aiken, 'Weighing the Costs of Transitional Justice' (2012) 14 International Studies Review 340 <https://academic.oup.com/isr/article-

their expected utility from a long-term TJ process compared to the utility of the short-sighted "stability." Meanwhile, through their partial reformations, they try to mitigate the negative outcomes of the past-regime violations.

Scenario 3

In the third scenario, the transitional rulers' preferences diverge from both the victims' and past regime's preferences. The agents want to end the past regime ultimately, punish it, and prevent a possibility of its reproduction. However, meanwhile, they do not aim to produce a regime that achieves the revolution goals or initiates a TJ process. Instead, they seek to establish a radically different autocratic regime of their own.

An example of this scenario is the Iranian revolution in 1979, which resulted in transferring the country from the autocracy of the Shah empire to the Islamic Republic's theocracy.[134] Although both student and socialist movements participated along with the Islamists led by El-Khomeini in the protests, the religious powers were able to seize authority after the Shah fled the country.[135] There were trials held against the past regime that witnessed severe punishments under the label of revolutionary courts, resulting in thousands of executions against different Shah regime members of various levels.[136] However, these trials were not held after either a democratic process or any due process considerations.[137] The mechanisms that were taken after the regime change could be considered more like

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lookup/doi/10.1111/j.1468-2486.2012.01116.x>; Olsen, Payne and Reiter, 'At What Cost ? The Political Economy of Transitional Justice' (n 49); Grodsky (n 82); Kritz, 'The Dilemmas of Transitional Justice' (n 11) 32., and for more on the determinants of the TJ timing after transition, see Nalepa (n 83) 370–372.

[134] Janet Afary, 'Iranian Revolution', *Encyclopaedia Britannica* (2020) <https://www.britannica.com/biography/Mohammad-Reza-Shah-Pahlavi>.

[135] Daniel Brumberg, 'Islamic Revolution of Iran', *Encarta® Online Encyclopedia* (Microsoft® 2004) <https://web.archive.org/web/20040218104114/http://encarta.msn.com/encyclopedia_761588431/Islamic_Revolution_of_Iran.html>.

[136] Ervand Abrahamian, *A History of Modern Iran* (2008) 181.

[137] Shaul Bakhash, *The Reign of the Ayatollahs: Iran and the Islamic Revolution* (Basic Books, Inc, Publishers 1984) 61 <https://books.google.com.eg/books/about/The_Reign_of_the_Ayatollahs.html?id=36WBAAAAMAAJ&redir_esc=y>.

revenge than a transitional justice process, which did not only exclude the past-regime supporters but even most of the victims themselves.[138]

In this scenario, the transitional rulers free-ride over the principals to achieve opposing pay-offs. It could be that the agents alone could not expel the past regime, so they used the victims to achieve their goals and then start the rent-seeking activity. It could also be that the transitional rulers did not participate in the revolution at all, but they had tools that enabled them to transform their political power into votes which gave them control over the authorities. In this latter case, the risk-averse agents free-ride over the revolutionary activity caused by the risk-taking principals, who end up with no return on their investment in the revolution. It is a scenario that will be costly to achieve in the case where the victims are also organized in political parties that have qualifications to oppose the new autocratic regime.

The complexes of TJ are, then, on two levels; the first is in resorting to TJ in the first place, which was explained in this scenarios' landscape; the second works under the assumption that the preferences of both the victims and transitional rulers are the same, i.e., for TJ to operate towards its original ends. Still, under this last assumption, TJ as a concept is much easier said by lawyers than done by politicians.

IV. The TJ Dilemma

To internalize the consequences of the past negative externalities as an *ex post* action, while simultaneously preventing the repetition of the harmful activity as an *ex ante* arrangement, there should be mechanisms that incentivize the agents to achieve principals' preferences. As explained in the last section, the agents' preferences differ depending on the scenario, while the principals' preferences are always to achieve the revolution's goals. This can be problematic in two ways: first, regarding the TJ concept generally, and second, concerning the costs of each mechanism specifically. The second part will be discussed in detail in chapter 3. So, for the first part, how can reaching a point that incentivizes the agents to perform up to the principals' standards, be problematic?

[138] For more details on the executions after the collapse of Shah's regime, see Iran Chamber Society, 'Iran after the Victory of 1979's Revolution' (*Iran Chamber Society*, 2020) <http://www.iranchamber.com/history/islamic_revolution/revolution_and_iran_after1979_1.php> accessed 24 March 2020.

Asymmetric Information Problems

Information asymmetrically distributed in the market between the exchanging parties is one of the market failures which leads to undesired results.[139] In the case of post-revolution transitional justice, two groups of actors have better knowledge and understanding of the legal institutions, facts of the crimes, and the political bargaining. These groups are the past-regime members and the transitional rulers. The third group of actors, i.e., the victims, does not usually have the same advantages.

Two-direction incentives influence the reason why this asymmetry usually continues throughout the TJ process. On the one hand, for most of the victims, the cost of collecting information on the TJ process is high. On the other hand, the other two actors have strong incentives to keep the victims imperfectly informed to provide them only with the information that would keep the process on the track they designed. This situation manifests a principal-agent problem (PAP).

The Principal-Agent Problem (PAP)

The Principal-Agent problem is a result of the information being differently distributed between the disparate parties of the transaction concerned. The principal's benefit is derived from assigning specific responsibilities to the agent, who is then expected to carry them out in a particular desirable manner for the principal. In other words, the agent has the informational advantage, and his actions impact upon the principals' pay-offs. However, the problem is that the agent's incentives could be contradictory with this performance because their rational choice will be to seek their own benefits, not those of the principal. Monitoring the agent is costly both in terms of collecting the necessary information and sanctioning the agent if they fail in realizing the principal's benefits.[140] [141]

In this typical meaning, PAP is a problem in the second and third scenarios, where the victims' and transitional rulers' preferences diverge. In this case, the victims assign the transitional rulers with the responsibility of achieving TJ goals. However, the problem is that the victims don't have the necessary information about the applicable laws, the possible efficient laws, the facts of the cases that can be under consideration, or the incentives and the

[139] For more about asymmetric information as a market failure, see Cooter and Ulen (n 100) 41.

[140] ibid 283–284.

[141] For more about the Agency Problems, also see Eric A Posner, 'Agency Models in Law and Economics' (2000) 92 <http://www.ssrn.com/abstract=204872>.

behaviour of the relevant "agents." Additionally, sanctioning the agents for their rent-seeking behaviour could be precluded by the typical collective action dilemmas in a phase that does not have established democratic authorities yet. Subsequently, the monitoring of the agents' performance is very costly for the principals. On the other side, the transitional rulers may have opposing incentives. For example, they may want to secure a safe exit for the past regime due to close connections with it.

However, how does PAP interplay in the first scenario, where the principals' and agents' preferences are the same, i.e., to achieve TJ goals? In this case, the asymmetric information leads to divergence in the desired means, even if the desired ends are the same.

For example, concerning trials against the past-regime members, agents may try to avoid costly judicial procedures because they prefer economic gains or political stability over the other pay-offs of "achieving justice" which may be more important to the victims than to the politicians.

The traditional solution to the agency problems is to design a contract that incentivizes the agent to perform according to the principal's preferences. So, why can't this serve as a solution in the TJ context?

First, as explained earlier, TJ is a constitutional arrangement. This constitutional nature of TJ means that its policies themselves can't work as a commitment device between the different actors because there is no third party who will enforce this "law" or "contract." Constitutional courts, or the judiciary in general, are also a party to the setup, and they most probably need themselves to be subject to TJ policies, at least in the form of institutional reforms. The only guarantee that these policies will operate is that they are self-enforcing, meaning that they reflect an equilibrium point between the actors' pay-offs.[142] This enforcement difficulty is a typical dilemma of constitutional law that has been analyzed by different scholars.[143]

Second, the TJ agency model deviates from the typical agency problems where the desired end is always for the agent to perform in the way the principal wishes. In other terms, the bias in the traditional agency models is expected only from the agent's side. However, is this the case also in the TJ model?

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[142] This is to be further explained in chapter 3 under the cost-benefit analysis.

[143] Stefan Voigt, 'Positive Constitutional Economics: A Survey', *Constitutional Political Economy in a Public Choice Perspective*, vol 904 (Springer Netherlands 1997) 29–30 <http://www.jstor.org/stable/30024182%5Cnhttp://about.jstor.org/terms>.

Behavioural Biases in TJ Agency Model

The PAP in the public choice literature focuses on intergovernmental relations and bureaucracies besides the relations between the rulers and the public as agents and principals.[144] G. J. Miller explored the possibility of the principal's moral hazard;[145] He also discussed the behavioural biases that could disrupt the rational assumptions of PAP in the political realm and the empirical results that motivated them. In the original PAP, the problem comes from the agent side because there is an assumption that whatever the principal's preferences are, they are legitimate and natural. However, if we take the overall efficiency of the principal-agent relationship, it could be that what principals seek is self-destructive.

The TJ PAP departs from the classic canonical assumptions of PAP[146] in some points. There is still an asymmetry of information, and the agent still impacts upon the principal's pay-off. However, the preferences' asymmetry is not valid in all cases, when it comes to the end goals, not the mechanisms used to achieve these goals; the principal does not always have the privilege to take the initiative; the principal does not hold the possibility of ultimatum bargaining; and lastly, the principal does not have common knowledge of the agent's preferences, which eliminates the backward induction possibility.

Behavioural Biases from the Principals Side in the TJ Context

Due to asymmetric information, principals can have unrealistic expectations about how TJ works, how long it takes, and what it requires, because they have no reference point or sufficient technical knowledge. They also tend to be over-optimistic regarding its results. This over-optimism bias stems from uncertainty about the future. For instance, due to their lack of proper legal information, the victims could estimate the range of criminal sanctions concerning specific crimes and start calculating the probabilities of the sanctions that members of the past regime can receive. However, if, for some reason, related merely to the applied laws, the accused don't receive the sanctions which the victims expected; they will then tend to think that the judges were biased or that the transitional rulers are allied with the

[144] For example, see Dennis C Mueller, *Public Choice III* (Cambridge University Press 2003) 359–385; Robert D Cooter, *The Strategic Constitution* (Princeton University Press 2000) 141–175 <https://press.princeton.edu/books/paperback/9780691096209/the-strategic-constitution>; Miller (n 111); A. Zupan and P. Kalt (n 111).

[145] Miller (n 111) 220–223.

[146] For more on the discussion of these assumptions in the public policy areas, see ibid 205–206.

past regime. This tendency complicates the crisis or incentivizes the people toward further protests, and thus the unrest continues. On another aspect, their lack of information on trials or the economic costs of investigations can lead them to blindly support these mechanisms, despite the fact that one of the revolutions' original strongest motives is usually the economic hardships. Instead, the over-optimism bias could lead them to believe that the exhaustion of the economic resources is not because of their TJ decisions – at least partially-, and instead, they will tend to blame the agents for their poor economic policies.[147]

Principals in the TJ model also could have a high-time preference, so they prefer short-term over long-term pay-offs, which could result in errors concerning decision making, negatively impacting the social welfare. They may also select options that bear implied costs that outweigh the direct benefits. For instance: Victims could prefer arbitrary tribunals that would lead to the execution of every person who was ever a member of the past-regime party, even if this would mean that they give the new system the tool of arbitrary tribunals which don't conform to international standards of fair trials. This preference may not be in their interest in respect of their personal welfare in the long run because this new system would then be able to use this same tool against them. The reasons behind this could be that although they have information about the gains and losses of their choice, they are being myopic, or the benefits of the efficient solutions are not obvious to them. It could also be that the alternative policies desired by agents do not align with the principals' self-serving conceptions of fairness which they desire to provoke. Finally, the possible harm of the wrong choices may not be important to them; that combined with over-optimism, may lead to substantial underestimation of the risks of their choices.

These considerations combine to complicate the PAP further. In the cases explained the problem is not only that the agents' incentives are not in the same direction of the principals' preferences but also that the latter's preferences are against the social welfare. This could lead policymakers or advisors to considering paternalistic policies, which brings us to a discussion of biases from the agents' side.

Behavioural Biases from the Agents Side in the TJ Context

Consideration of paternalistic behaviour in the TJ context would be motivated by the assumption that not only are the end goals of both principals and agents the same, i.e.,

[147] For more on over-optimism, see Eric Van den Steen, 'Rational Overoptimism (and Other Biases)' (2004) 94 American Economic Review 1141 <http://pubs.aeaweb.org/doi/10.1257/0002828042002697>.

achieving the TJ goals, but also the behavioural bias is only imagined on the principals' side. These assumptions are obviously rarely met. Consequently, relaxing the first assumption only, which leads to the possibility of rent-seeking activity by the agents, leads to a rejection of the paternalistic approach. However, there is more to this; even under the first assumption, relaxing the second assumption leads to the possibility of having the same behavioural biases typically expected from the principals, but from the agents' side. For example, transitional rulers could miscalculate the long-term risks of TJ, which leads to sub-optimal decisions. This possibility leaves us under the anti-paternalist conclusion, where paternalistic solutions to the TJ dilemma are also rejected, but for different reasons than unconditionally supporting the principals' preferences.[148] Consequently, paternalistic policies can't be the answer to the TJ dilemmas in either of the cases.

V. Concluding Remarks

During their attempt to move from autocracy to democracy, after revolutions nations witness transitional phases full of doubts, compromises, and experiments. Like any other kind of transition, democratization is a process that can be anything but short, clear, or elegant. It is a concept that bears many aspects. However, usually the legal and political aspects are the first on the agenda of any revolution. One of the major tools to address these is transitional justice.

To explain TJ as a constitutional arrangement after revolutions over autocratic regimes, I first explain the set-up and possible scenarios of the post-revolution phase through real historical examples. In most of the TJ scenarios, victims (principals) desire achieving TJ goals, while transitional rulers (agents) seek to seize power and either offer a safe exit for the past-regime or eliminate that regime to create their new autocracy.

Consequently, achieving the original goals of TJ, i.e., internalizing the negative externalities caused by the consequences of the past regimes' human rights violations,

[148] For more about the debate on paternalist regulations, see Cass R Sunstein, 'The Storrs Lectures : Behavioral Economics and Paternalism' (2013) 122 The Yale Law Journal 1826 <https://www.yalelawjournal.org/feature/the-storrs-lectures-behavioral-economics-and-paternalism>; Christine Jolls, Cass R Sunstein and Richard H Thaler, 'A Behavioral Approach to Law and Economics' in Cass R Sunstein (ed), *Behavioral Law & Economics* (Cambridge University Press 2000) 46–49 <https://www.cambridge.org/core/books/behavioral-law-and-economics/A907C8E3C3400513D299EE6D5232BF69>.

preventing their repetition, and precluding the past regime from spoiling the transition, is usually easier said than done.

The asymmetric information between the victims and the transitional leaders creates a principal-agent problem. The constitutional nature of TJ, added to the extra-classical dynamics of the principal-agent relationship between the victims and the policy-makers, behavioural biases, especially on the side of the victims, and the nature of TJ momentum in a post-revolution phase in the absence of trusted democratic institutions that could play neutral roles, all complicate the work of the traditional solutions to these problems. This conclusion re-emphasizes the exceptionalism of TJ from ordinary justice in opposition to a tendency in the literature that rejects this exceptionalism.[149] It is necessary to realize the roots of TJ's exceptionalism in order to avoid over-estimating its performance or suggesting solutions to its challenges that simply would not work.

Some scholars suggested that civil society organizations can be the key solution to the TJ dilemmas. However, it is important to note that in such an emergent and constitutional moment, there is no third-party enforcer. Nevertheless, there could be a third-party informer. This informed party could use the available empirical results, past nations' expertise, cost-benefit analysis of the possible options, and legal knowledge to supply the necessary information in the market to both principals and agents. This informed actor should not be a direct party to the bargaining. It could be national or international civil society that could play this role, i.e., non-governmental organizations (NGO), or independent international organizations like the UN, the International Center for Transitional Justice (ICTJ), or the International Institute for Democracy and Electoral Assistance (IDEA) for example.

This suggestion is, however, not a perfect solution from a constitutional economics' perception. Although civil society may not be a direct party to the bargaining, it is still a party to the general set-up with preferences that may diverge or unite with one or more of the other parties. Considering civil society as "the communicator, the facilitator, the arbiter"[150] ignores that civil society is itself a party to the conflict. It is associated with political parties, international actors, or even victims. All it can do is to provide more information to the market. Most probably, this information itself will be biased for the reasons explained earlier.

[149] Bell (n 36) 12–13; Posner and Vermeule (n 34).

[150] Paige Arthur and Christalla Yakinthou, 'Refocusing on Civil Society: How to Make – Not Miss – Connections', *Transitional Justice, International Assistance, and Civil Society* (2018) 262.

However, the more academic institutions that are involved, the more competition between civil society organizations, the more variable will be the information distributed in the market. This strategy will not create a perfectly informed set-up but a better-informed set-up. Civil society is then not a veto player, not an enforcer; it is an informer

These conclusions support the new attempt to re-consider the mainstream assumptions about the role of civil society in transitional justice as a secular, unified, neutral and virtuous player. Although this chapter's conclusions sound as though they are pessimistic regarding the role that civil society can play in fostering an efficient TJ process, they support the tendency in the TJ literature and practice that focuses on the social transformation aspect of TJ away from the justice/ reconciliation dichotomy.[151] The civil society in all its forms cannot hold trials, truth commissions, or execute an institutional reform. However, it is the party that can perform the role of distributing information that not only supports the achievement of TJ mechanisms, but also spreads awareness about the roots and dynamics of the oppressive regime in a way that addresses the public communities themselves. This role manifests a huge part in achieving social transformation at the constituencies level, where the popular revolutions start, and supposedly, transformations also.

Moreover, although not a perfect solution, promoting the civil society organizations role as the informer is the best available solution to foster a self-enforcing TJ process. Merely designing constitutional rules where TJ procedures have clear deadlines, sanctions, and authorities to observe are insufficient under the momentum effect. Where constitutional democracy is not yet consolidated, clear constitutional sanctions can be ignored or misinterpreted using the excuse of popular sovereignty, exceptional circumstances, national security, or lack of resources. This will be clearly observed when presenting the Tunisian case. The change that civil society organizations can make to this dilemma, so the TJ policies become more self-enforcing is that when the principals (the victims) are better informed about the TJ process, this makes the costs borne by the agents (transitional rulers), if they deviate from achieving the TJ goals, relatively higher.

[151] Laurel E Fletcher, Harvey M Weinstein and Jamie Rowen, 'Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective' (2009) 31 Human Rights Quarterly 163, 218; Paul Gready and Simon Robins, 'Rethinking Civil Society and Transitional Justice: Lessons from Social Movements and "New" Civil Society' (2017) 21 The International Journal of Human Rights 956 <https://www.tandfonline.com/doi/full/10.1080/13642987.2017.1313237>.

Finally, to address the concerns of behavioural biases, on the assumption of the unity of preferences between agents and principals in achieving TJ goals, observing the democratic procedures in designing these policies, as far as possible, to ensure including all the conflicting parties and views can also help to generate more efficient TJ policies. In this case, the "checks and balances" that they will offer, each against the other, may balance the potential inefficient behaviour by any of them. Further interdisciplinary theoretical and empirical research will be needed to test how far this could be achievable in reality.

In addition to these general complications that apply to all TJ mechanisms in general, the following chapter explains the second part of the TJ dilemma, i.e., the problematic application of each of the TJ mechanisms suggested by the UN guidelines, individually. It also explains how cost-benefit analysis of these mechanisms can help designing self-enforcing TJ mechanisms.

Chapter 3: A Cost-Benefit Analysis of Transitional Justice Mechanisms Post-Revolution: The price of TJ*

I. Introduction

Let us assume that a revolution succeeded against an autocratic regime that committed human rights violations against its people - and probably against the revolutionaries themselves -. Moreover, the revolutionaries, the new-rulers (whoever they are), and the victims (who are every citizen who was directly or indirectly suffering disutility by the corrupted policies of the former autocratic regime) share the same preferences. These preferences are for achieving the goals of TJ, i.e., accountability, justice, conciliation, and of course, the transformation into a democracy. Obviously, this is the most optimistic scenario of a post-revolution set-up that rarely applies in reality, i.e., scenario 1. However, even under these assumptions, the tough questions hold. Which mechanisms of TJ to adopt? Amnesties or prosecutions? Lustration or integration? Financial reparations or symbolic compensation through finding the truth?

The Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice (2010) sets five mechanisms of TJ.[152] These mechanisms are: Prosecution

* This chapter is based on my paper "The Price of Transitional Justice: A Cost-Benefit Analysis of its Mechanisms in Post-Revolution Phase," (October 2021, Bologna Law Review). I would like to thank Michael Faure, Stefan Voigt, Edoardo Martino and the participants of the EDLE seminar at Bologna University, and of the 14th Annual Conference of the Italian Association of Law and Economics, for their valuable comments. In addition, I am grateful to Lamis Saleh and Nada Maamoun for all the helpful suggestions and support. All possible mistakes are however my own.

[152] The guidelines use the terms "components" and "elements" to refer to the mechanisms of TJ. For the sake of consistency and clarity through this dissertation, I only use one term "mechanisms" to refer to them, so as to not confuse the reader. The literature uses "mechanisms", "components", "elements", "policies", "tools", and "measures" alternatively. However, they are all referring to the same issue, being the processes through which TJ is applied.

initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform, and national consultations.[153]

In this chapter, I present a cost-benefit analysis (CBA) of each mechanism to explain the trade-off that the policy-makers need to do in the post-revolution phase. No matter what the adopted mechanism is, there will always be costs for this adoption, including the opportunity cost of adopting a different mechanism, especially if they do not all adhere to the same approach in dealing with past crimes or future arrangements. In each mechanism, the different CBA entries' quantification, multiplied by their probability, depend on the context in which these mechanisms are applied. Accordingly, the policy-makers in each case would need to evaluate the costs and benefits against each other because their impact might be different depending on the context where the mechanisms are applied. For example, the cost of social polarization as a potential outcome of prosecutions is always present. However, the value of this cost and its probability would not be the same in a society where the prosecuted members of the past regime are also the chiefs of religious sects, e.g., Syria, or as in a society where they are merely political leaders, e.g., in Egypt. This also suggests that not only holistic approaches are expected to be the most efficient in achieving TJ goals, but specifically, the balanced approaches that combine different mechanisms, are expected to promote this efficiency.[154] By efficiency, I refer to Kaldor-hicks efficiency, on which CBA is based .[155]

As referred to in chapter 2, although TJ deals with past violations, it is an *ex ante* constitutional arrangement. This is normal in a legal arrangement in transitional times, also as Teitel puts it: "Law in transitional periods is both backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous."[156] In the TJ context, political

[153] Consequently, the guidelines do not include amnesties as one of the TJ mechanisms, although both literature and practice do, *see* e.g., Acuña and Smulovitz (n 127); Goldsmith and Krasner (n 127); Hadden (n 127); Osiel (n 127); Stedman (n 127); Vinjamuri and Snyder (n 127); Zagorski (n 127). As this research depends on the UN guidelines as its reference point, it will be restricted to the five mechanisms they uphold.

[154] This suggestion will be analyzed in more detail in the fourth chapter of this thesis.

[155] A situation is considered Kaldor-hicks efficient when the economic gains of that situation exceed the economic losses to whoever they occur, Veljanovski (n 29). This is the same rationale used to run the CBA. Accordingly, in our context, a mechanism is considered efficient if the benefits out of its adoption exceed the costs of its application, even if, for instance, the benefits are all accumulated by the victims while the past-regime members incur all the costs.

[156] Teitel, *Transitional Justice* (n 41) 215.

actors are making decisions in uncertain times and with imperfect information on a future trade-off between the expected utility and also the expected cost, in the shadow of a risk margin. Their decisions will influence their positions in the new political order. Consequently, the options in the CBA should be evaluated based on *ex ante* efficiency.

This evaluation is expected to be made using an inspired utility equation of the *Becker model*,[157] according to which $e(u)_m = b\,(1-p) - c(p)$. As a constitutional arrangement, TJ is not a contract, and it does not have a third-party enforcer who would guarantee its application. Consequently, TJ policies, like other constitutional arrangements, need to be self-enforcing. The judiciary that enforces the constitution and other laws in the normal situations when the government abstains or precludes their application, are themselves a party to the conflict in this case. The courts of an authoritarian regime would most probably need an institutional reform. Moreover, some members of the judiciary might benefit from a form of reparation and might serve as witnesses in the truth commissions. In other words, the typical enforcer of the law is here a party, either as a victim, perpetrator, or a policymaker, who has their own costs and benefits of any relevant mechanism. A self-enforcing TJ policy would be the one where its benefits (b) exceed its costs (c) for the different parties, or that the costs of its absence are so high, which gives them the incentives to apply it. The rest of this chapter tries to present the potential entries of this equation within each of the TJ mechanisms.

The CBA is a methodology that is used differently in each field. In the sphere of public policymaking, there are many debates over how far we should rely on the results of CBA and concerning their limits. This may especially be an issue when CBA is applied to topics that involve considerations that are difficult – or even impossible – to be monetarized.[158] This is, however, not the subject of this research. Conducting a quantitative analysis using the presented models of the cost-benefit analysis of TJ mechanisms is then beyond the scope of this thesis.

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[157] The Becker model for criminal deterrence is a mathematical model presented by Gary Becker (1968) that treats criminals as rational actors who desire to maximize their wellbeing but through illegal means rather the legal ones. Accordingly, Becker suggests that for a criminal sanction to achieve deterrence there should be an equation that takes into account the expected gain of the crime to the perpetrator and the resulting cost of the severity and probability of punishment. For more on Becker's seminal work on crime and dealing with it as a economic concept, see Veljanovski (n 29); Jolls, Sunstein and Thaler (n 149); Kantorowicz-reznichenko (n 29) 27–59; Becker (n 29).

[158] For more on the discussion over and strategies of cost-benefit analysis in the sphere of public policy, *see* Sunstein (n 31).

The central research questions this chapter answers are: What is the economic rationale behind each of the TJ mechanisms? Moreover, what are the expected costs & benefits of each of these mechanisms, including their constitutional complexities? In doing so, the UN Guidelines on TJ will be used as the model of TJ mechanisms for their international impact and given legal value as a rule book for nations transitioning from autocracy to democracy.

The chapter proceeds as follows: Section two presents five sub-sections, in which each contains the CBA of the five studied mechanisms. Section three gives general notes that apply to all, or multiple, mechanisms and policy implications driven by the CBA. Section four concludes.

II. The Mechanisms of Transitional Justice

The TJ mechanisms are the channels set to achieve its goals. In this section, I explain them from a legal perspective, and provide for the economic intuitions behind them, as well as the challenges faced. Afterward, I give a CBA for each of these mechanisms. Although this CBA is inspired by both theoretical and case studies available on the subject, it is still a positive theoretical analysis of these mechanisms. It aims at predicting the possible costs and benefits of each mechanism, but only the empirical analysis informs us about the prevailing approaches in practice. However, because of the contextual nature of TJ that I have referred to earlier, the reader will notice that some arguments could work as costs and/or benefits at the same time. Moreover, some mechanisms may work negatively and positively in different cases. This was also proven by the empirical studies available so far.[159]

1) Prosecution Initiatives

This mechanism means that those who are involved in committing the addressed crimes are to be put on trial and where appropriate, punished. The measures of these trials, according to the guidelines, are the following:

[159] Dancy and others (n 15) 99–110; Thoms, Ron and Paris (n 56) 329–354; David (n 15) 151–177; Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11).

- The trialed crimes include *"the serious violations of international humanitarian law and gross violations of international human rights law."*[160] [161] The word "include" infers the meaning that these crimes can also include other crimes under national laws. However, in case of revolutions, it is possible, and even likely, that crimes under national laws only are considered, especially in cases where the conflict does not include offences that fall within the scope of international humanitarian law.
- These trials have to be undertaken according to the *international standards of fair trials.*[162] The adherence to the international legal standards is a vital element in estimating the benefits of the adoption of TJ mechanisms generally, because: First, it endows legitimacy to the new-regime by giving it credibility from both the international and national actors; Second, this credibility may secure the international financial and political support which is much needed in the transitional phase.
- There is no single comprehensive source of international law that defines what a fair trial entails. Instead, there are different measures mentioned in regional and international instruments, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions, the African Charter on Human and Peoples' Rights (ACHPR), the European Convention on Human Rights, and the American Convention on Human Rights. The Amnesty International provides a practical manual on free trials provisions that have been approved either as treaty obligations binding to their parties or as part of the customary international law that reflects the collective will of the international community and then binding

[160] International Human Rights Law (IHRL) and International Humanitarian Law (IHL) are two different complementary branches of Public International Law. Although they have the same aim of protecting the lives and rights of humans, they differ in their origins, and scopes of application. Most significantly, while IHL applies only on the armed conflicts, IHRL applies at all times. *See* International Committtee of the Red Cross (ICRC), 'What Is the Difference between IHL and Human Rights Law?' (*International Humanitarian Law; Answers to Your Questions*, 2015).

[161] United Nations (n 10) 7.

[162] ibid.

over all its members.[163] The fair trial standards include a wide range of rights that have to be observed before and during trials.[164] However, the rules governing these standards also acknowledge the exceptional nature of emergency cases. The first condition is that the state of emergency already, and lawfully, exists. *"Under international human rights treaties, a state of emergency can be declared only if there is an exceptional and grave threat to the nation, such as the use or threat of force from within or externally that threatens a state's existence or territorial integrity."*[165] Although they may vary in extent, revolutions and transitional phases are usually an emergency state by nature and law. Some treaties gave the states the right to opt out of some of these fair trial guarantees, under the conditions of being temporary, necessary, and proportional. However, some of them are absolute and cannot be by-passed in any conditions. These absolute rights include:[166]

- The prohibition against torture or other cruel, inhuman or degrading treatment or punishment;
- The right of people deprived of their liberty to humane treatment;
- The prohibition of enforced disappearance;
- The prohibition of arbitrary arrest or detention, including unacknowledged detention;
- The right to be recognized as a person before the law;
- The right to petition a court challenging the legality of detention;
- The right to proceedings before an independent, impartial and competent court;
- The right to a public trial, in all but exceptional cases which are warranted in the interests of justice, the requirement of clear and precise definitions of offences and punishments;
- The prohibition of retroactive application of criminal laws (including the imposition of a heavier penalty than was applicable at the time of the crime), and the right to benefit from a lighter penalty;

[163] Amnesty International, *Fair Trial Manual* (2nd edn, Amnesty International 2014) <https://www.amnesty.org/en/documents/POL30/002/2014/en/>.

[164] For a full review of these rights, *see* ibid.

[165] ibid 232.

[166] ibid 229–338.

- The obligation to separate people held in pre-trial detention from those who have been convicted and to treat them in line with their status as not convicted;
- The presumption of innocence;
- The right to legal aid for those without adequate financial resources;
- The prohibition of collective punishment;
- The principle that the essential aim of punishment involving deprivation of liberty is reform and rehabilitation;
- The prohibition against double jeopardy, judicial guarantees, such as *habeas corpus*[167] and *Amparo*[168], to protect non-derogable rights;
- The right to effective judicial remedies for violations of other human rights;
- The right to compensation for individuals whose innocence is established by a final judgment, in addition to the non-derogable rights guaranteed in death penalty cases.

- The trials should be held in a *non-discriminatory and in an objective and a timely manner*.[169]
- The *jurisdiction* over these crimes is primarily the responsibility of the state, so they will need to develop the necessary capacity to perform the prosecutions according to the previous standards. However, the international community can also provide help in conducting such processes. This point entails the need for national laws that conform to International Human Rights Law (IHRL) and International Humanitarian Law (IHL).[170]
- In the same context as the previous point, the guidelines also suggest, first, that *systematic monitoring* of the judicial performance within these trials can guarantee their effectiveness and fairness. Second, that in cases where the states are *unable*

[167] "*Habeas Corpus"* is a Latin expression that translates into "You have the body". Legally it refers to *"A writ (court order) that commands an individual or a government official who has restrained another from producing the prisoner at a designated time and place so that the court can determine the legality of custody and decide whether to order the prisoner's release."* 'Habeas Corpus', , *West's Encyclopedia of American Law* (2nd edn, 2008) <https://legal-dictionary.thefreedictionary.com/habeas+corpus> accessed 12 October 2018.

[168] *"The writ of Amparo is a remedy for the protection of individual or constitutional rights, found in certain jurisdictions including Mexico, Spain, the Philippines and parts of Latin America."* 'Amparo' (*The World Law Dictionary Project*, 2017) <https://www.translegal.com/legal-english-dictionary/amparo> accessed 12 October 2018.

[169] United Nations (n 10) 7.

[170] ibid.

or unwilling to undertake *effective investigations and prosecutions*, international hybrid criminal tribunals[171] can perform a concurrent jurisdiction.[172] The guidelines ensure that in such cases, such tribunals have to give *priority consideration to their legacy in the country and their exit strategy*; how will their performance influence the treated country by the completion of the prosecution? Moreover, how to help the national authorities to improve their capacities to contribute to bringing the alleged perpetrators to justice?[173] However, this conception of international prosecutions seems problematic in many cases. On the one hand, the crimes which the past-autocratic regime members are supposed to be prosecuted for are not always under the crimes that are subject to the international courts` jurisdiction according to public international law. For example, the financial corruption crimes, or elections manipulation, are not considered war crimes, or crimes against humanity. On the other hand, even if this point was – supposedly - solved by creating a special international court – which has no precedent for similar crimes -, the main obstacle lies in considerations of the principle of national sovereignty. International tribunals to settle national disputes and policies on international monitoring over the national judiciary can be rejected on the basis of breaching the national sovereignty of the state and its independence.[174] Especially since any

[171] Hybrid international criminal tribunals are tribunals that consist of both national and international elements on both the level of subjective (applying mixed laws) and procedural (having both national and international judges) levels, *see* Sarah Williams, *Hybrid and Internationalised Criminal Tribunals : Selected Jurisdictional Issues* (Hart Publishing 2012) <https://www.bloomsburyprofessional.com/uk/hybrid-and-internationalised-criminal-tribunals-9781847319241/> accessed 3 July 2020.

[172] International courts in this case work as a subsidiary jurisdiction when the national courts fail to perform their jurisdiction under the principle of universal jurisdiction, like the case for International Criminal Court for example. For more on the principle of complementarity in international law, see Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' (2006) 88 International Review of the Red Cross 375, 375–398. I think, however, that in case of TJ international hybrid criminal tribunals can be less problematic than purely international courts for the reasons explained in the main texts, generally related to the past-revolution circumstances and concerns.

[173] United Nations (n 10) 7–8.

[174] Chandra Lekha Sriram, 'Revolutions in Accountability: New Approaches to Past Abuses', vol 19 <http://digitalcommons.wcl.american.edu/auilr> accessed 18 March 2021; Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16 European Journal of International Law 979, 979–1000 <http://academic.oup.com/ejil/article/16/5/979/496087/International-Criminal-Law-vs-State-Sovereignty>; Atul

revolution, at least in the beginning, usually faces accusations of conspiracy and foreign interference.

Initially, the trials and prosecutions of the past-regime members who committed violations of IHRL and/or IHL may aim at correcting the negative externalities that were caused by their crimes.[175] However, in this context, the following is noted:

- The crimes of murder, mass killing, torture, and other violence crimes, were either committed during the rule of that regime or the incidents of the revolutions. The other crimes, which include political or economic corruption, were committed during the rule of the past-regime. Consequently, the probability of collecting the legally sufficient evidence, according to the international standards of criminal procedures laws, against the direct committers or against the chief leaders of the regime who gave the orders, is significantly low. Either because the criminals had ample of time and necessary authority to destroy the evidence, which happened for example in Japan after World War II,[176] and in Egypt after the 2011 revolution,[177] or

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Bharadwaj, 'International Criminal Court and the Question of Sovereignty' (2003) 27 Strategic Analysis 5, 5–20 <https://www.tandfonline.com/doi/abs/10.1080/09700160308450071> accessed 18 March 2021; Daniel Partan and Predrag Rogic, 'Sovereignty and International Criminal Justice' [2003] International Law: Revista Colombiana de derecho Internacional 53, 53–82.

[175] Negative externalities of crimes refer to the cost that other individuals and society as a whole suffer because of these crimes. For example, the negative externalities of torture include first, the physical, psychological, and monetary losses to the tortured person and also his family; second, the costs borne by the society as a result of losing the output of a citizen and the potential benefit of other citizens who would contribute more actively to the society if it was not for fear of being tortured as well; and finally, the damage incurred by the society due to a lack of the rule of law, human rights, and democracy which can be cultural, political, and also economical. In this example, and most of the other examples in the sphere of transitional justice context, these negative externalities can reach infinity if we quantify them because of the complexity of including calculations as explained in the example. For more on the negative externalities of the crime, see Graham Farrell and John roman, 'Crime as Pollution: Proposal for Market-Based Incentives to Reduce Crime Externalities' in Kate Moss (ed), *Crime Reduction and the Law* (Routledge 2006) 135–155 <https://www.taylorfrancis.com/books/9780203696842>; John Roman and Graham Farrell, 'Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings and Crime Externalities' (2002) 14 Crime Prevention Studies 53, 53–92.

[176] Zachary D. Kaufman, *United States Law & Policy on Transitional Justice; Principles, Politics, and Pragmatics* (Oxford University Press 2017)

because of the chaotic nature of the incidents of the revolution. This could in some cases entail a high rate of error, when non-criminals are punished. An example of this case is a policeman defending his police station against violent attacks during the protests; it could be that he would never kill an innocent citizen in the usual conditions, but in the current case, he should be in a legitimate defence situation.[178] However, the probability of proving so in the middle of a chaotic, politically tensioned, and unstable security situation like a revolution,[179] could be very low. In a case where these difficulties led to adopting pre-decided punishment based on presumed responsibilities of the position the accused occupied "principle of command liability," this may well result in over-deterrence for public-posts' holders.[180] Officials could stop doing their duties because they are afraid of being subject to legal accountability in the heat of the moment in the aftermath of revolution and the "war" on corruption, past-regime, police violations, or whatever is targeted. This can reduce the public officer's level of activity below the optimal level for social welfare, while exceeding the level of care to socially

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<https://books.google.de/books?id=eTSdDgAAQBAJ&pg=PT141&lpg=PT141&dq=destroy+the+evidence+transitional+justice&source=bl&ots=vDQuRgB3VU&sig=ACfU3U2HVZLU4gNbrYJw31Y89NJ3xrSZVA&hl=en&sa=X&ved=2ahUKEwjli_GTlafqAhWUrIsKHdlmDMcQ6AEwDXoECAgQAQ#v=onepage&q=destro>.

[177] وثيقة المخابرات المصرية تكشف تدمير أدلة إدانة «مبارك» والداخلية بقتل المتظاهرين' [The Egyptian Intelligence Document Reveals Destroying "Mubarak" and the Interior Ministry Condemnation Evidence of the Protestors Mass Killing]' (*'Watan'* وطن, 2014) <https://www.watanserb.com/2014/12/04/وثيقة-المخابرات-المصرية-تكشف-تدمير-أد/> accessed 29 June 2020.

[178] For more about the doctrine of legitimate self-defense in criminal law, *see* Boaz Sangero, *Self-Defence in Criminal Law* (Hart Publishing 2006).

[179] Luc Huyse, 'Justice After Transition: On The Choices Successor Elites Make In Dealing With The Past' in Neil J Kritz (ed), *Transitional Justice; Volume I: General Considerations* (United States Institute Of Peace Press 1995) 345.

[180] Posner, 'An Economic Theory of the Criminal Law' (n 101) 1221. For more on the debate about over-deterrence, see also Keith N Hylton, 'Economics of Criminal Procedure' in Francesco Parisi (ed), *Oxford Handbook of Law and Economics*, vol 3 (Oxford University Press 2017) <http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199684250.001.0001/oxfordhb-9780199684250-e-025>; Richard Craswell, 'Deterrence and Damages: The Multiplier Principle and Its Alternatives' (1999) 97 Michigan Law Review 2185 <https://www.jstor.org/stable/1290184?origin=crossref>; Jolls, Sunstein and Thaler (n 149).

disturbing levels. Such a behaviour has been witnessed already in some cases and will be referred to in more detail later.

In other cases, these difficulties resulted in clearing all the sentences because the authorities were unable to collect the necessary evidence, which may result in under-deterrence.[181] An example of this case is a top official who misused the public resources for his private interests (rent-seeking) but could destroy all the documents that could prove so. The rulers of the transitional phase, the rulers of the new regime, and the public officers of these two regimes would realize that they can get away with abuses against the citizens because the probability of sanctioning them is too low due to evidence difficulties. The level of care while performing public duties would then go lower than the optimal level for social welfare.[182] The Egyptian case, for example, witnessed the failure of many of the prosecution initiatives, because of the adoption of traditional evidence collecting methods that are not effective in the case of TJ process, which led to the insufficiency of the collected evidence.[183]

The difficulties of collecting the necessary evidence are maximized when we take into consideration that even if this task is allocated to international authorities to avoid any conflict of interests, the national authorities are still involved in the process and are the primary parties who provide this evidence, because of logistic reasons.

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[181] This can be another form of error, only made in a pre-trial stage, i.e., investigation.

[182] Concepts of "optimal level of care vs. optimal level of activity" and "overdeterrence vs. underdeterrence" are borrowed from the tort law and economics literature that witnessed lengthy discussions to reach the most efficient liability rule for the social welfare. For more on these discussions, see Steven Shavell, *Foundations of Economic Analysis of Law* (The Belknap Press of Harvard University Press 2004); Michael Faure (ed), *Tort Law and Economics* (2nd edn, Edward Elgar Publishing 2009); Veljanovski (n 29); Jolls, Sunstein and Thaler (n 149); Craswell (n 182).

[183] Abdullah Khalil, *[The Map of Transitional Justice in Egypt Since 25 January Revolution (The Track - The Challenges - The Policies)]* (خريطة العدالة الانتقالية في مصر منذ ثورة 25 يناير 2011 (المسار - التحديات - السياسات (Abdullah Khalil 2017) 440 <https://books.google.de/books?id=tkihDgAAQBAJ&pg=PA1&lpg=PA1&dq=خريطة+العدالة+الانتقالية+في+مصر+منذ+ثورة+25+يناير&source=bl&ots=l7kOfE90uE&sig=ACfU3U3B5q3acNAwOHVKi-UjPZJqRNhGXA&hl=en&sa=X&ved=2ahUKEwjjyb-u4dHqAhXR_KQKHSBjAR8Q6AEwD3oECAoQAQ#v=onepage&q=>.

- The difficulties in collecting evidence are not the only hardship that prosecution initiatives may face, although the TJ literature usually overlooks it. Other legal and political obstacles include other concerns that may be present when judging the past regime because of the political nature of the dispute. These concerns could include: Politicized courts,[184] the partiality of the judges,[185] the pressure of public opinion on the judiciary,[186] sanctioning the adoption of specific political opinions or adherence to a political party which infringes the constitutional right of freedom of opinion, speech or association, and most importantly retroactive justice.[187]

  If the courts follow the past regime's substantial criminal laws, there is a chance that a number of the perpetrators may escape punishment, because the laws were tailored to serve the goals of that regime. An example of this is the acts of the Nazis, which were lawful under the Nazi laws, or at least, adopted by the then applicable legal techniques.[188] There are two broad strategies to avoid this:

  - The first, and typical way, includes the classic techniques that were adopted by the transitioning systems to finesse the long debate between the moral considerations against retroactive laws, or alternatively amnesties. Eric A. Posner & Adrian Vermeule classify these techniques into: [189]

[184] Susan Thomson, 'The Darker Side of Transitional Justice: The Power Dynamics Behind Rwanda's "GACACA" Courts' (2011) 81 Cambridge University Press on behalf of Journal of the International African Institute 373, 373–390 <https://www.jstor.org/stable/41484994>; Ellen Emilie Stensrud, 'New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia' (2009) 46 Journal of Peace Research 5, 5–15.

[185] Richard L Siegel, 'Transitional Justice: A Decade of Debate and Experience. (Review)' (1998) 20 Human Rights Quarterly 431, 431–454; Thomson (n 186).

[186] Siegel (n 187).

[187] Marek M Kaminski, Monika Nalepa and Barry O'Neill, 'Normative and Strategic Aspects of Transitional Justice' (2006) 50 Journal of Conflict Resolution 295, 295–302; Posner and Vermeule (n 34) 761–825.

[188] Graver (n 48).

[189] Posner and Vermeule (n 34).

a) The appeal to higher pre-existing law. Either this law is the constitution, international law, or natural law.[190] Although it may be advocated that these rules, even in the absence of national law, signal the illegality of the actions taken by the accused that are in breach of these legal principles, the historical application of this norm did result in genuinely controversial legal and political consequences.

b) Taking nominal law seriously, i.e., the exact words of the laws. This entails the rigid literal interpretation of the old-regime rules, which could lead in many cases to better results than its implicit goals.

c) Interpretive statutes to the old laws. Unlike the first two techniques that are usually practiced by courts, this technique is followed by the legislature to smooth over the conflict between retroactive laws and procedural legality. Accordingly, the legislatures may enact interpretive statutes that proclaim an understanding of the past-regime laws that is different than the one these laws, despite appearances, authorized or even allowed.[191]

d) Retroactive extension of statutes of limitations.[192]

- The second strategy is to explicitly adopt *ex post facto* criminal legislation, which means "a law is made after the doing of the thing to which it relates."[193] This strategy, initially, conflicts with the constitutional and international established legal principle *nullum crimen nulla poena sine lege*, which means that an act can be neither criminalized nor penalized without a pre-existing law. However, some decisions were delivered by the European Court of Human Rights (ECHR) addressing the cases of lustration laws against the past

[190] The definitions and debates over what constitutes "natural law" are a subject of a voluminous legal literature. For more about its definitions and aspects, *see* Claus Offe, *Varieties of Transition: The East European and East German Experience* (The MIT Press 1996); Graver (n 48) 143–151.

[191] An example of this technique is found in the Belgian case after World War II when the narrow scope of the treason crime in the penal code limited only to the military was widened via interpretive statues to include other forms of indirect collaboration Henry L Mason, *The Purge of Dutch Quislings: Emergency Justice in the Netherlands* (Springer Netherlands 1952) 129–130 <http://link.springer.com/10.1007/978-94-011-9532-4>.

[192] For more about these techniques, *see* Posner and Vermeule (n 34) 791–800.

[193] William Winslow Crosskey, 'The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws' (1947) 14 The University of Chicago Law Review 539, 539–566.

communists in the east European countries, that approved such laws against the allegations of retroactivity. The reasoning of these decisions depends basically on two pillars: First, the emphasis on the justice considerations, and their contribution to the establishment of good governance. The court in one of its decisions explicitly stated: *"it is not a case of the retroactive application of criminal law but of an inexcusable mistake of law;"*[194] Second: that rule of law and justice considerations, and the trade-offs between them, should be interpreted and evaluated in their historical, temporal and political contexts.[195]

Besides these legal concerns, the political consequences of prosecutions are also questioned. Fears of backlash by the past-regime members or supporters, especially if it was a military regime, are highly credible. The stronger and more controlling the past-regime was, the wider is the range of the persons threatened with prosecution initiatives, and the more violent is the "counter-revolution." It is like building an army against the new regime, which is still not adequately controlling the state, because of the nature of the political phase. Another result can be the political and social isolation of a group in society. Moreover, breaching the rule of law and free societies' principles that were mentioned earlier, may also threaten the new democracy.[196] All of these are possible costs of prosecutions.

- As mentioned in the last point, including all the suspects in the prosecution initiatives can mean prosecuting hundreds or even thousands of people depending on the government and police structure of every regime. The administrative costs of collecting the evidence and processing the trials against such a large number of accused persons will be remarkably high. These costs also include the time costs, as one of the guarantees of a fair trial

[194] Cynthia M Horne, 'International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context' (2009) 34 Law and Social Inquiry 713, 735 <https://www.jstor.org/stable/pdf/40539376.pdf?refreqid=excelsior%3Ae62287ca317d373f232a93ac478af73f>.

[195] ibid 734–737.

[196] Huyse (n 181).

is the right to appeal,[197]and the prosecutions usually take years of litigation. A suggestion of selecting a limited number of perpetrators could seem problematic for equality reasons on the one hand, and for the dilemma of "whom to select" on the other. Bruce Ackerman raises these pragmatic concerns about the transitional prosecutions.[198] He argues that selecting the leading figures of the past-regime will face the procedural problems of evidence since usually their orders were implicit or unwritten, whilst selecting minor figures faces the questions of liability in case they were executing higher orders, and this also causes rage against the new-regime for only "hunting the small fish." However, Eric A. Posner & Adrian Vermeule reply to these arguments that this does not mean that these are not typical difficulties of other organized crimes' prosecutions, and moreover, they do not mean that the optimal number of prosecutions should be zero.[199] In the light of this debate, I think that the optimal number of the prosecutions should be a result of a careful calculation of the anticipated costs and benefits of the different scenarios of the prosecuting range, which will differ from case to case. How to define and evaluate the costs and benefits for each scenario? The following cost-benefit matrix in table (3.1) will illustrate the entries that each CBA of a prosecutions' scenario should include.[200]

[197] Amnesty International (n 165) 182–191.

[198] Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press 1992) 69–98.

[199] Posner and Vermeule (n 34) 800.

[200] As explained earlier, this matrix constitutes the first step, i.e., defining the costs and benefits. The second step should be evaluating; how to put value on these entries to solve the different equations and compare the outputs? This process would ultimately be done through national consultations. Consulting national and international experts, civil society organizations, victims' associations, and other institutions representing the pro-past regime preferences should help each society to put approximate numbers on these entries multiplied by their probability. Eventually, comparing each scenario's outcome should help each society choose the most efficient range for prosecution. For example, legal and economic experts would help to estimate 1. the expected time and administrative costs of a scenario that includes prosecuting only the past-regime first-line members, i.e., heads of authorities and ministers, and 2. the amount of financial resources illegally accumulated by these personnel that could be restored to the state treasury and the probability of its restoration. In the meantime, national and international organizations can then advise, based on previous comparative experience, what the extent and probability of this limited range's impact is on public deterrence in the long run. This example continues for the rest of the entries and the rest of the scenarios. The same strategy applies too to evaluating CBAs for the other TJ mechanisms.

- The error costs are also remarkably high. In the case of false convictions, the prosecutions usually lead to either death, a huge fine, or a prison sentence. While the second could mean a non-optimal allocation of financial resources, the first and the third mean a loss of human capital. In the case of wrong acquittals, the ex-perpetrators will have, by law, the opportunity, the necessary expertise, and sufficient incentives to work against the new regime. Taking into account the high probability of error, the error costs, in this case, are multiplied.[201]

- Back to the point of over-deterrence, the costs of mass prosecution, which means prosecuting every suspected perpetrator, as long as they somehow belonged to or served the past-regime, create not only the loss of human capital or financial resources. It also may stop police officers, public employees, and even political officials from taking responsibility and doing the duties of their job because they are afraid of being punished. This attitude requires minimizing the level of activity far below the optimal level while pushing the level of care to be far over the optimal level with regard to social welfare.
- Being after all a political arrangement, a CBA of TJ policies could change from one stage to another, because of considerations of dynamic efficiency.[202] This applies to all TJ mechanisms, but it has a distinguished manifestation in the case of prosecutions. For example, in the beginning, starting the prosecution initiatives to please the public and obtain their trust and thereby seize power may lead to over-deterrence. After some time, however, failing to avoid, or intentionally becoming stuck in the procedural and legal complications, which then lead to the failure of TJ policies or their continuity, could lead to under-deterrence. Accordingly, the possibilities are always open, and the calculations regarding over/under deterrence are mercurial. Therefore, a careful trade-off between *ex ante* and *ex post* efficiency should be made when designing TJ policies from the beginning.

[201] For more about administrative and error costs, *see* Hylton (n 182).

[202] For more on dynamic efficiency vs. static efficiency, *see* Veljanovski (n 29) 35–36. Or as Teitel puts it: "Law in transitional periods is both backward-looking and forward-looking,
retrospective and prospective, continuous and discontinuous." Teitel, *Transitional Justice* (n 41) 215.

- Another note about deterrence is that achieving it regarding violations that involve political crimes is tricky. The point is that to design efficient *ex ante* laws which can prevent the repetition of the past-autocratic policies, the calculations of sufficient punishment should include the calculations of the regime itself of how to exploit the state resources without getting the people to the point of revolution. Moreover, the offenders should be comparing the gain from the violation with the cost if they are apprehended and punished, i.e., the probability of being sentenced is a part of the deterrence calculation.[203] This probability in the case of TJ is very low for two reasons: 1) As indicated earlier, there will be a lack of evidence and other procedural difficulties. Consequently, a rational authoritarian regime would take the necessary arrangements not to be sentenced, either by destroying evidence, or through bargaining with the new regime to reach a compromise; 2) In a case where the regime heads' calculations reach the point that they think they will not be able to get away with what they committed, they will not be deterred; they will exploit the people until this point, and afterward they will usually make some improvements if possible, or flee the country.[204]

  Despite the low deterrence effect expected regarding political crimes, the negative effect of TJ policies generally on the probability of repetition of past crimes, which is the same goal of deterrence, could be explained through other rationales. These rationales include: 1) The institutional reforms in terms of changing the laws and enforcing them; 2) Institutional reforms in terms of lustration and vetting policies, which should eliminate a number of the leading past-criminals; 3) The national consultations can contribute to this goal by spreading awareness among the people about human rights, the rule of law, and justice, and strengthening the civil society, which is expected to increase the costs of trying to repeat the past violations.

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[203] Posner, 'An Economic Theory of the Criminal Law' (n 101) 18.

[204] For more on the dictator choices regarding succession and retirement, *see* also Gordon Tullock, 'The Goals and Organizational Forms of Autocracies; the Problem of Succession' in Charles K. Rowley (ed), *The Selected Works of Gordon Tullock (Volume 8): The Social Dilemma of Autocracy, Revolution, Coup d'Etat, and War* (Liberty Fund, Inc 2005); Gordon Tullock, 'Revolution and Its Suppression; "Popular" Uprisings' in Charles K. Rowley (ed), *The Selected Works of Gordon Tullock (Volume 8): The Social Dilemma of Autocracy, Revolution, Coup d'Etat, and War* (Liberty Fund, Inc 2005).

From these notes, I do not infer that the outputs of prosecution initiatives are entirely negative. I rather argue that different measures have to be selected for different criminals and crimes, and that prosecuting should not be for everyone, to avoid the previously mentioned hazards.[205] Such a balance should vary from one case to another.[206] In order to reach the optimal design for each case, the policy-makers will have to make a CBA. So, for example, let us assume that the presented case involves a revolution over a regime that committed severe human rights violations towards the majority of its people for long decades to the extent that this policy became an integral part of the deep system of the state. Consequently, the benefits of prosecutions against members of that regime, including achieving accountability for the majority of the population and deterring any possible practice of this inherited policy, are overwhelming. In this case, if the benefits could possibly either weigh or equal the costs, and the policy-makers could think of controlling the costs by minimizing the scale of prosecution. For example, policy-makers, in this case, may decide to prosecute only the heads of the involved authorities in these violations while choosing less costly mechanisms to deal with the lower level of criminals who constitute the more significant number. In this case, fewer prosecutions limited only to major criminals can reasonably minimize the administrative, monetary, and time costs significantly, plus avoiding a wide-ranged polarization in the society, and also limiting the error costs that multiply each time a new accused enters the prosecution circle through complicating the cases and adding new details to them.

Table (3.1) sums up the previous notes in a cost-benefit matrix:

Costs	**Benefits**
Administrative costs	Deterrence
Time costs	Feeling of justice
Error costs	Building trust in the new regime

[205] A similar conclusion was reached by Jeremy Sarkin, *The Tension between Justice and Reconciliation in Rwanda : Politics , Human Rights , Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. LAW 143–172 (2001), studying the Rwandan case.

[206] Customization upon the case is the same conclusion reached empirically by Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11).

Incentivizing a backlash	Respecting the international legal standards
Social and political polarization and isolation	Achieving accountability
Politicizing the judiciary	Avoidance of costly direct interaction between the victim and the wrongdoers
Concerns of what is Unconstitutional and Breach of Due Process Guarantees[207]	
Over or under-deterrence (depending on the adopted strategy)	

Table (3.1) Cost-Benefit Matrix of Prosecution Initiatives as a TJ Mechanism

It should be noted, though, that the number of inputs in the matrix under the Costs and Benefits columns do not qualify to judge the calculation result. Each input of this should have an equivalent number that refers to its value depending on the studied case, as indicated earlier. The decision can be taken afterwards by estimating the total output of this mechanism alone, on the one hand, to decide to what extent it should be applied. On the other hand, a comparison between the output of this mechanism and the outputs of the other TJ mechanisms could then lead to choosing some of them over others. Also, different combinations can be chosen of these mechanisms, they can reinforce each other, and they are not mutually exclusive, but they have to conform with the international standards and obligations.[208] Moreover, as some mechanisms are connected, like prosecutions and truth commissions as will be explained in the following section, analyzing them jointly and individually would also be necessary.[209] This evaluation process can't be constant, i.e., there

[207] Besides the scenarios referred to earlier, the debate over the legality and constitutionality of the post-autocratic regimes is huge. *See* for example, Graver (n 48) 144. Consequently, adopting a specific approach of what counts as "constitutional" will decide the value of this cost.

[208] United Nations (n 10) 3,10.

[209] Accordingly, the second step of the cost-benefit modelling should be comparing the mechanisms solely or when combined with other mechanisms. This step is, however, beyond the limits of this research and is left to future research. These models are only the basic models, and they are to be used and customized according to the different cases.

can't be a standard evaluation that will always lead to prevailing prosecutions over truth commissions, for instance, or limited prosecutions over medium-ranged prosecutions. The equation's entries as explained in the CPA are probably constant in every case, but the number that will be put on these entries to solve the equation, evaluate its output, and compare it to other potential outputs will differ depending on the circumstances of each case. This evaluation or quantifying process is to be done through multiple parties, including victims, experts, policy makers, etc. The more parties that are involved in this process, and the more diverse the background they come from, the more likely the evaluation process can get closer to an accurate result that fits the preferences and nature of each given society. This methodology will also apply to the other mechanisms.

2) Facilitating Initiatives in Respect of the Right to Truth

The purpose of this category of mechanisms is to assist the post-conflict societies in investigating the truth behind human rights violations. This process is usually undertaken by truth commissions (TC), which are "non-judicial or quasi-judicial investigative bodies, which map patterns of past violence and unearth the causes and consequences of these destructive events."[210] The mission can also be done by commissions of inquiry, or other fact-finding committees, which are similar to the truth commissions but usually operate with narrower mandates. Publishing the final results and recommendations is part of the process. Moreover, the documentation and archiving of the related evidence and materials help to reveal the truth about the past, achieve the justice necessary for the transition, and keep the history of the conflict.[211]

Priscilla B. Hayner gives four primary elements for defining truth commissions: 1) they focus on the past; 2) they are not focused on a specific event but on investigating the violations of IHRL or IHL over a specific period; 3) they are temporal and cease to exist by the submission of their report; 4) they are endowed with a sort of authority by their sponsor, which gives them access to more information, protection, and impact for their report.[212] In 2011, she revisited these parameters and added a fifth element: 5) they engage broadly and

[210] United Nations (n 10) 8.

[211] United Nations (n 10).

[212] Priscilla B Hayner, 'Fifteen Truth Commissions - 1974 to 1994: A Comparative Study' in Neil J Kritz (ed), *Transitional Justice; Volume I: General Considerations* (US Institute of Peace Press 1995).

directly with the affected population and gather information on their experience.[213] In her new approach, Hayner emphasizes that what differentiates TC from other similar phenomena is that they intend to improve the social understanding and acceptance of the past events to influence the future, not just to resolve specific facts. The TC's aim, according to Hayner, is to change policies, practices, and relationships in the future in a manner that respects and honours the people who suffered from their past experience.

It is argued that not only do TCs help to find the truth behind crimes for accountability purposes but also, they give recognition to violations of the past, which is necessary to both the victims and the other sectors of the society who supported the old regime. On the one hand, for victims, revealing the truth about the violations against them, confessing the crimes by perpetrators, and the interaction between victims and perpetrators that might also end with apologies, this whole process if it involves having a public voice for the victims, can have a healing effect for them.[214] On the other hand, when supporters of the past-regime hear from both victims and regime-members the details and facts regarding the violations which they were subject to, this could make them understand the catalysts of the revolution and the necessity for the TJ process,[215] which mitigates their opposing behaviour toward the transition process. Both these effects together not only help the society to make a clean break with the past but also to minimize the polarization between its forces and the probability of a counter-revolution. Similar reasonings motivated the formation of TC in many countries, which were getting out of violent conflict and crises, including South Africa, Haiti, Guatemala, and others.[216] However, these motivations don't necessarily turn to actual outcomes because there are many constraints that relate in part to the costs of TCs that will be explained in a greater detail, and to the difficulties of power sharing in post-crisis societies

[213] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2010) 11–12. The other four elements were subject to marginal amendments that shall not change their nature or affect.

[214] Martha Minow, 'The Hope for Healing: What Can Truth Commissions Do?', *Truth v. Justice: The Morality of Truth Commissions* (2010); Holly L Guthrey, *Victim Healing and Truth Commissions: Transforming Pain through Voice in Solomon Islands and Timor-Leste* (Springer International Publishing 2015).

[215] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 155.

[216] Audrey R Chapman and Patrick Ball, 'The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala' (2001) 23 Human Rights Quarterly <https://heinonline.org/HOL/Page?handle=hein.journals/hurq23&id=13&div=8&collection=journals> accessed 2 July 2020; Hayner (n 215).

generally. In the last three examples, concerns related to race biases in Guatemala, time and financial constraints, shortage of using qualified experts, limited publication of the final report in the case of South Africa, the past-regimes destroying most of the archive detailing their crimes, and the failure sometimes in formulating a clear conception of the "Truth" these commissions are looking for, assuming that it would be an automatic result of their mandate application, all restricted the full achievements of these motivations.[217]

The economic rationale of the truth commissions and other truth revealing mechanisms is divided into four main directions:

1. TCs signal the acknowledgment of the victims' losses, the accountability of the criminals, and the commitment to human rights and the rule of law to all the parties of the transitional phase: the victims, the past-regime, the new regime, and the judicial authorities.
2. The truth commissions can have a minimizing effect on the polarization in the society between the supporters and opposition to revolutions, and also the bystanders. When victims speak up about the violations they have been subjected to, this gives a forum within which the other parties can, for the first time, acknowledge the victims' stories and their rights.[218] Consequently, through TC, society can have a clean break with its past.
3. In the case where the truth commissions precede the prosecutions, they minimize the information costs for conducting these trials. This applies to combining truth commissions with any other mechanism.
4. In case amnesties are given to the witnesses or perpetrators who give aid to these commissions, on the condition that they are not accused of gross human rights violations, this will influence the whole TJ process in different ways. First, it will minimize both the error and administrative costs of the prosecutions, thanks to the information and cooperation they will provide; Second, it will incentivize the allies of the past-regime and its supporters to shift positions and take the side of the new regime as they see that they can have a place in this new regime if they cooperate with it. To maximize this influence, though, the pay-offs of amnesties need to be guaranteed even for perpetrators who did not give information until a

[217] Chapman and Ball (n 218).

[218] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11) 155.

late stage, so they don't abstain from positively responding to such an initiative even if they resisted in the beginning due to low trust levels.

However, the truth commissions also have their constraints that may limit their success. These constraints are listed by Priscilla B. Hayner,[219] and they include:

1. The mandate: The way these commissions are called for and formed is problematic. Because of the fragile political context and the time constraints, they are usually not formed through sufficient public debate, discussion, or referendum, which is contradictory to many human rights advocations.[220] This reflects a principal-agent problem[221] between the public and the policy-makers who run these commissions, where the information between the two parties is always asymmetric, and their preferences might or not be similar. This situation may lead to various consequences. Among these possibilities, there could be paternalistic behaviour by the policy-makers that ignore the people's desires or expectations because they first see them as irrational or inefficient. There also could be a rent-seeking behaviour of the policy-makers that disregard the original TJ goals and abuse the people's ignorance of the sophisticated details or techniques of the mandate to achieve personal or elite pay-offs. Another scenario could be heavy pressure from public opinion to eliminate any form of amnesties even if the process could not be completed without an incentive for past perpetrators to cooperate. And the possibilities go on.
2. The political constraints: Despite what has been referred to in the benefits of the truth commissions as a minimizer of the polarization in the society between for and against past-regime sides, the later revelation of the truth can also work in the opposite direction. There is a risk that revealing the crimes stirs the hatred against the members of that regime, and consequently makes the process of integrating them into the new-regime more difficult.

   The answer to the question about the direction in which this mechanism will work can only be given through future empirical studies. The political constraints may also include the desire to preserve the image of some of the perpetrators

[219] Hayner (n 214).

[220] ibid.

[221] For more on agency problems in the law and economics sphere, see Francesco Parisi, *The Language of Law & Economics; A Dictionary* (Cambridge University Press 2013) 5–9.

mentioned in these investigations. In this case, the pay-offs for the policy-makers for keeping at least part of the truth hidden are higher than the pay-offs for signalling the control of the new-regime to the past one.

3. Restricted access to information: Some of the information needed for TCs to achieve their goals may be sensitive to national security, destroyed by competent persons, or blocked because of a conflict of interests. In any case, information costs can be too high.
4. Lack of resources: The process of investigation and collection of past violations is financially costly. Not all nations have the necessary financial, human, and time resources necessary for achieving such a process. In other terms, administrative costs can be quite substantial. This obstacle may be overcome through international aid, and there are already experiences in different contexts that involved such aid. However, accepting these aids and making the best use of them depends on the country's international relations and relevance, the acceptance of the national parties for receiving international aid and involving international parties in the national TJ process, and how far the international experts can understand the national context they aim to help with and communicate effectively with its parties.

The interaction and sequence between prosecutions and truth commissions are problematic and complicated. While the first aim is to impose criminal sanctions on the guilty accused, the second aim is to record the truth and acknowledge it, to keep a record of the history, learn from it, and make sure that the victims are heard. They usually complement each other; however, in some cases, the truth commissions act as a substitute for prosecutions, in case the latter were prevented because of amnesties or by force.[222] The difficulty is, however, to find the best sequence of them. Should trials precede truth commissions or the opposite, or should they be simultaneous? Alexander Dukalskis presents these three possible scenarios and the pros and cons for each of them.[223] The output of each scenario depends on the different contexts of every transition. Scenario (1) is when the truth commissions precede the prosecutions; Scenario (2) is when prosecutions precede truth

[222] Douglass W Cassel and Jr., 'International Truth Commissions and Justice' in Neil J Kritz (ed), *Transitional Justice; Volume I: General Considerations* (US Institute of Peace Press 1995); Alexander Dukalskis, 'Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other' (2011) 13 International Studies Review 432; Hayner (n 214).

[223] Dukalskis (n 224).

commissions; Scenario (3) is when they work simultaneously. Depending on the literature's concerns and remarks on the truth commission's performance generally and their interaction with trials in particular, in addition to the preceding normative analysis, one can draw a picture of the pros and cons of each scenario. I will integrate the expected costs and benefits of each scenario in the cost-benefit analysis of the truth commissions.

From the previous analysis, a cost-benefit matrix of the truth commissions can be presented as follows in table (3.2):

General Costs			**General Benefits**		
Time costs			Signaling commitment to the rule of law		
Administrative costs			Archiving the history		
Information costs			Achieving accountability		
Political polarization			Adherence to international standards		
Standard error costs			Reducing the costs of institutional reforms		
Costs by Scenario			**Benefits by Scenario**		
Scenario 1	**Scenario 2**	**Scenario 3**	**Scenario 1**	**Scenario 2**	**Scenario 3**

Error costs by providing amnesties before prosecutions	Probability of lack of incentive to cooperate in case the accusations were declared	Too high admin. costs for managing the conflict between the two mechanisms	Minimizing admin. costs of the prosecutions	Probability of incentivizing the relevant perpetrators to cooperate in case of conviction of the principal perpetrators + offering amnesties or reduced sanctions	Minimizing the costs of the other scenarios
	Multiplying the time costs		Minimizing info. costs of the prosecutions	Minimizing admin. costs of truth commissions in respect to the trialed violations	
	Higher info. costs in respect to the untrialed violations because of the time gap			Minimizing info. costs of the truth commissions in respect to the trialed violations	

Table (3.2) Cost-Benefit Matrix of Truth Commissions as a TJ Mechanism

The general costs and benefits refer to the variables that are present in any mechanism of truth commissions regardless of its type of combination with prosecution initiatives. The costs and benefits by scenario, added to the previous general variables, refer to the costs, and benefits of the truth commissions that change depending on the selected scenario. Note also that the "standard error costs" refer to the margin of error that is possible in any mechanism, as different from the "error costs," referring to the errors in judicial decisions.

3) Delivering Reparations

The reparation programs seek to redress the victims of human rights violations through material or symbolic benefits.[224] The victim's right to reparation in the case of violations of IHRL and IHL is a well-established principle under international law.[225] This reparation may take different forms.

The forms of reparation include: 1) *Restitution* which aims at restoring, to the victim, the situation before the violation, to the possible extent; 2) *Compensation* which should be provided for redressing violations that can be financially redressed; 3) *Rehabilitation* which entails providing services for the victims to restore their dignity, health, and reputation, including legal, medical, and psychological care services; 4) *Satisfaction* which aims at restoring the dignity and reputation of the victims through different measures like judicial decrees or official declaration, public apology, the acknowledgment of violations against the

[224] United Nations (n 10) 8–9.

[225] Theo Van Boven, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' in Neil J Kritz (ed), *Transitional Justice; Volume I: General Considerations* (US Institute of Peace Press 1995) 66–84; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012) <https://books.google.de/books?hl=en&lr=&id=jTYgAwAAQBAJ&oi=fnd&pg=PR7&dq=reparations+in+international+criminal+law&ots=eUOaP00ecb&sig=F31tdGsEQEr0FMeH-dnEG_JvzG0&redir_esc=y#v=onepage&q=reparations in international criminal law&f=false> accessed 29 March 2021; Lisa J Laplante, 'The Plural Justice Aims of Reparations' in Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories* (Routledge, Taylor and Francis Group 2014) <https://books.google.de/books?hl=en&lr=&id=mUjhAQAAQBAJ&oi=fnd&pg=PA66&dq=reparations+in+transitional+justice&ots=wzWxs17YZl&sig=fNHGIKzKYwKvwFtsD7OiWgjF79A&redir_esc=y#v=onepage&q=reparations in transitional justice&f=false> accessed 29 March 2021; Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice: Research Handbooks in International Law Series* (Edward Elgar Publishing Ltd 2017) 377–400 <https://www.elgaronline.com/view/edcoll/9781781955307/9781781955307.00028.xml> accessed 29 March 2021.

victims, commemorations, and tributes to the victims; 5) *Guarantees of non-repetition* by ensuring effective civilian control over the military and the police, and the obligation of the different parties by the international legal standards of due process and fairness.[226]

Reparations as a TJ mechanism have the same economic reasoning as tort law in respect of internalizing the harm caused by the wrongful party to the victim and inducing other persons to invest in taking precautions to prevent such harm. It is also a way through which law manages the bargaining between parties whose interaction comes with relatively high transaction costs, taking into consideration the possible difficulties of direct bargaining between the victim and the wrongdoer.[227] These difficulties are supposed to be more intense in the case of a transition from an autocratic rule which involved mass violations against the human rights of the victims.

However, in many cases, reparations cannot, alone, achieve the internalization and the avoidance of the costly direct negotiations between the victim and the wrong-doer, for two main reasons:

1) By their nature, as mentioned earlier, reparations include other mechanisms of TJ as well, like investigating the truth and Institutional Reforms. For example, the fifth tool, which requires the guarantee of non-repetition, will necessarily entail an institutional reform.
2) Most importantly, some damages either cannot be assessed, or the costs of their assessment will be significantly high in comparison with the costs of other mechanisms. For example, what could be the correct way to assess the harm caused by a corrupted supervisory elections' authority that was in power for several years or even decades? Moreover, in case of an error in the reparations' allocation, this will result in an inefficient allocation of the already significantly limited resources because of the phase nature, as indicated earlier.

Additionally, the more powerful the past-regime, the longer it ruled, and the more severe and wide-spread its violations, then the more victims there will be, and the greater the resources which will be needed to cover their redress, especially if the financial costs of these reparations are not covered by the past-regime members.

[226] United Nations (n 10) 9; Van Boven (n 227) 548–549.

[227] Cooter and Ulen (n 100) 189–190.

However, in the case where the state will be responsible for delivering the reparations, rather than the wrongful persons directly as a consequence of their criminal liability, the reparations mechanism has a competitive advantage. This advantage is that the probability of proving the damage is significantly higher than the probability of proving the accusation against specific persons and the causation linkage between that accusation and the damage that happened to the victims because many of the rules of criminal proof and criminal procedures are lifted in this case. This advantage is especially significant in the big scale crimes which affect a wide range of victims and crimes in which the probability of the proof of the criminal liability is low. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states in the section addressing the "Victims of Crime" that:

> *"2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."*[228]

However, there will still be costs for proving the harm that happened to the presumed "victim," and consequently, possible error costs as well in case someone was proved a victim, who is not, or vice versa, which is the standard error in any possible mechanism.

This separation between the criminal conviction and the reparations could also be an effective way to internalize the harm of the crimes with less polarization in the society because it does not require holding specific persons accountable. Moreover, it saves human and financial capital that is needed for prosecutions.[229] However, the value of these advantages depends on the source of these reparations. Is it covered from the state budget or by international actors, or through payments that the wrongdoers secure in exchange for guarantees given to them to escape the criminal liability or the possibility of political isolation? In both cases, there will be costs.

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[228] Neil J Kritz (ed), 'United Nations: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; General Assembly Resolution 40/34 (November 29, 1985)', *Transitional Justice; Volume III: Laws, Rulings, and Reports* (US Institute of Peace Press 1995) 646.

[229] Note that in this part there is no comparison between reparations and prosecutions as two mechanisms of TJ, but an explanation of the possible advantages of separating reparations from criminal liability.

This issue brings us back to the error costs. Besides the standard error costs, there is a form of reparations that could involve an additional margin of error. This form is the suspension of the custodial or financial sanctions that were previously imposed by the past-regime against its combats. The assumption that whoever was prosecuted by the past-regime for a crime that has a political aspect, like: terrorism, violence crimes, attempts to change the regime (in the systems that have such a crime), membership of an illegal organization, or any other form of a relevant crime, can be either proven or falsified. However, given the time element and the high administrative costs, this can be either highly costly or, in some cases, impossible. If the sanctions against these "victims" are not suspended or re-evaluated, this disturbs the goals of the whole process, and adds new enemies for the new-regime. While in case the sanctions were mistakenly suspended, the harm that can be caused by these "victims" can be very severe. For example, there are cases where members of past illegal-organizations were subjects of amnesties in the context of TJ processes, but were proven later to have a terrorist behaviour. The Egyptian case could be a useful reference in this regard.[230] In other words, the lack of due process towards the past-regime's combats' trials is not by itself a guarantee that they are entitled to a declaration of the accusations against them, or of other possible accusations. This is a probable error-cost related only to this form of reparations. I call this the "False Benefit of Doubt Error."

Table (3.3) shows the CBA of reparations as a TJ mechanism:

Costs	**Benefits**
Administrative costs	Possibility of eliminating part of the proof costs (in case of comparison to mechanisms that require a proof, like prosecutions or lustration)
Assessment barriers	Inducing an optimal level of caution and activity
Standard error costs	Internalizing the harm to the victim

[230] Hossam Bahgat, 'Who Let the Jihadis Out?' (*Mada Masr*, 2014) <https://madamasr.com/en/2014/02/16/feature/politics/who-let-the-jihadis-out/> accessed 24 April 2019.

Probability of a significant number of victims	Adherence to the international legal standards
Financial resources limitations	Avoidance of costly direct interaction between the victim and the wrongdoers
Probability of false benefit of doubt error	

Table (3.3) Cost-Benefit Matrix of Reparations as a TJ Mechanism

Note that this CBA represents the case where reparations are granted on the basis of the harm, as explained earlier, not based on a criminal conviction or tort liability. Consequently, no probability of error costs is added to the costs because reparations, in this case, are not dependent on additional judicial decisions other than decisions related to the reparation itself, if any. Consequently, the error that could happen is just the standard error in any mechanism. However, if the reparation mechanism was designed in a way that requires a judicial trial that identifies and convicts a perpetrator, then the judicial procedures' error costs should be included in the calculation as well, among the other costs and benefits of the prosecutions.

4) Institutional Reform

Although most legal systems promise perfect institutions for their citizens, only a few systems deliver on this promise.[231] While the de jure constitutional regulations of autocratic regimes may draw democratic institutions that promote human rights, the de facto performance of these institutions usually does not reflect this drawing. The institutions involved in causing the conflict by breaching human rights in their de facto performance have to be transformed into institutions that respect these rights and the values of the rule of law, to prevent the recurrence of these violations. According to the UN guidelines, this transformation should include both lustration and training on the application of human rights law and humanitarian law standards.[232]

Institutional reforms are a mechanism that can have a broad or narrow meaning. In its narrow meaning, it refers to lustration, purges, and vetting, which are processes that aim at

[231] Stefan Voigt, 'Mind the Gap – Analyzing the Divergence between Constitutional Text and Constitutional Reality' (2020) 32 2 <http://hdl.handle.net/10419/213491%0AStandard-Nutzungsbedingungen:>.

[232] United Nations (n 10) 9.

changing the corrupted personnel among the state institutions. In its broad meaning, it refers to changing the state institutions in a way that prevents the repetition of the past-violations; In other terms, the repetition of policies and state actions that represent the same dynamics and approach of the past regime. In the case of revolutions over autocratic regimes, this includes human rights violations and autocratic behaviour. With this interpretation, constitutional change, structural change of the authorities' performance, mentoring institutions, and any other effort to stop the culture and the institutional cycle that produced the past, are all considered as part of TJ. Although the second meaning sounds more crucial for achieving TJ goals, it is hard to be specified in specific policies, and it is too broad to be tackled within the limitations of this research. Consequently, I here adopt the narrow meaning of institutional reforms.

Because of its legal complications and mixed-blessings, lustration is usually the most problematic aspect of institutional reforms; consequently, it will be the focus of this sub-section. Lustration is "the disqualification and, where in office, the removal of certain categories of office-holders under the prior regime from certain public or private offices under the new regime."[233] Lustration has many complications and various pros and cons. I will first start discussing its legal complications, and then present the economic reasoning behind lustration laws and their social costs and benefits.

Some of the legal complications of the application of lustration are the typical challenges of prosecution initiatives that were referred to earlier, including retroactivity, difficulty of collecting sufficient evidence, and the other due process considerations.[234] However, besides these complications, there are other legal challenges of applying lustration laws in particular.[235] These challenges include:

1) Considerations of inequality and discriminatory treatment as a cause of the breach of IHRL[236] and the unconstitutionality of lustration laws accordingly;

[233] Schwartz (n 61) 461.

[234] Choi and David (n 15); Schwartz (n 61).

[235] Beside these challenges, a typical argument against lustration laws is that some people were just following the orders, especially the minor officials. There is a huge debate on this point. For more on this, *see* Graver (n 48) 148; Posner and Vermeule (n 34) 778. Whatever side of the debate one can take, this still shows how it could be better to lustrate only the main officials not the minors as well.

[236] Roman Boed, 'An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice' (1999) 37 The Columbia Journal of Transnational Law 357.

2) Who should be subject to lustration or vetting processes?[237] And on what basis? For example, dismissing the collaborators of the past-regime creates problems of collective responsibility and guilt, and the legality of the orders given to them by the previous legal system;[238]
3) If lustration is applied directly through the legislature or an executive act without prior prosecutions, this could be challenged in a court as a denial of the right to a fair hearing guaranteed by IHRL;[239]
4) Lustration laws may also violate individual rights to work.[240]

These considerations, however, could be countered by the following arguments:

1) The right to equal treatment and to work guaranteed by IHRL and most of the constitutions, do not prevent the state from applying sanctions on its citizens, or listing specific conditions for some of its offices;
2) These mechanisms can be justified by the protection of the state against threats of its order;[241]
3) Lustration laws as administrative or labour laws have privilege over the criminal laws used in the ordinary prosecutions, which is the possibility of overcoming the low probability of collecting sufficient evidence through the application of the principle of "Presumed Liability," or *"responsabilité objective / responsabilité sans faute"* as known originally and established by the French state council and legal literature, on the leading officials of the past-regime. This principle dispenses with the "fault" element of proving the liability and takes into account only the elements of "harm" and "causation."[242] The principle of Presumed Liability is originally used for

[237] Lustration and vetting are usually used as synonymous in the literature. Although they are both forms of personnel institutional reforms after crises, there is a scholarly work on differentiating between them on the base that the last is more general than the first. According to this differentiation, the lustration policies are more gravitated to the extra-regional cases. For more on this, *see* Cynthia M Horne, 'Transitional Justice: Vetting and Lustration' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 424–442.

[238] Schwartz (n 61) 463–464.

[239] Boed (n 238).

[240] ibid.

[241] ibid 399.

[242] Raed Mohamed Adel Bayan, 'Al Asas Al Qanooni Lelmasooleya Al Edareya Bedoon Khataa : Derasa Moqarna [The Legal Basis for the Administrative Responsibility without a Mistake : A Comparative Study]'

establishing monetary damage. However, I cannot think of any legal barrier to apply another aspect of the administrative liability, which is the qualification conditions of the state offices, as long as it is not a penal sanction, to avoid the unconstitutionality concerns based on the breach of the principle of the "Presumption of Innocence."[243]

4) Finally, the rulings, decisions, and opinions of the competent international legal bodies, mainly the European Courts of Human Rights, International Labour, and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in lustration cases are not anti-lustration per se. They forgo the challenges of retroactivity, discrimination, and employment barriers, as a part of the whole structure of democratization. As referred to earlier, they also advocate protecting and interpreting the rule of law and justice considerations in their historical context and accordingly favouring the compelling interests of achieving justice and strengthening the new democracy, in such cases of exception like transitioning from crises or autocratic regimes. The problem with lustration laws, according to these rulings are not with the logic of these laws, but with their implementation.[244] There should be legal guarantees for lustration processes to be aligned with international legal principles. These rulings, added to other literature on lustration as a mechanism of TJ[245] advocate two essential considerations to be taken into account to avoid the costs and illegal concerns of lustration:

1) The guarantee of a fair hearing, due process, legal certainty, and clarity;
2) The individualization of the process, which means that some differentiation should be made between the different officials of the past-regime. According to that differentiation, the lustration decisions should be made after a proper investigation, hearing, and evaluation of the fault[246] committed by the relevant official and his/her possible threat to the new order. In other terms, an evaluation of whether the costs of

(2016) 43 Dirasat Shari a and Law Sciences 289 <http://platform.almanhal.com/CrossRef/Preview/?ID=2-90655>.

[243] For more about the "Presumption of Innocence," *see* Kenneth Pennington, 'Innocent Until Proven Guilty: The Origins of a Legal Maxim' (2003) 63 CUA Law Scholarship Repository 106 <http://scholarship.law.edu/scholar>.

[244] OHCHR, 'Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Framework' (2006); Horne (n 196).

[245] Boed (n 238); Choi and David (n 15); Schwartz (n 61).

[246] In case of application of the presumed liability principle the evaluation can be made of the harm caused by the relevant officials or the authority under their control.

their violations could be justified. However, is this possible? This takes us to economic reasoning.

The question then remains; Why do states need to apply lustration processes in the first place? Unlike other institutional reforms, lustration and its similarities have a punishment aspect that is in the core basis of the criticism mentioned above. Lustration policies not only reform the institutions but also punish the personnel involved in past-violations by preventing them from claiming the benefits of one of their constitutional rights, i.e., the right to hold public offices. Consequently, a significant aspect of the lustration's rationale could be found in the original debates over the reasoning, effectiveness, and efficiency of punishment per se. The economic reasoning of crime and punishment is subject to lengthy debates.[247] Some scholars refer to the notion of punishment by the external cost that crime causes, which needs to be redressed.[248] Others give more attention to the unconditional deterrence that punishment should achieve to force criminals not to substitute a market transaction.[249] However, besides criminal laws' task in pricing the harm of the crime to internalize it, and achieving deterrence to other people to not commit the same crimes, some actions are criminalized in order to prevent their repetition.[250]

This means that in some cases, the aim of the punishment is not the typical mission of deterrence or pricing, but to prevent the repetition of the same crime through the elimination of the parties from positions through which they can cause the harm, or in other words, the incapacitation of the criminal.[251] The literature refers to this goal as specific deterrence vs.

[247] Veljanovski (n 29) 241–262; SAMUEL CAMERON, 'The Economics of Crime Deterrence: A Survey of Theory and Evidence' (1988) 41 Kyklos 301 <http://doi.wiley.com/10.1111/j.1467-6435.1988.tb02311.x> accessed 9 July 2020.

[248] Becker (n 29).

[249] Richard A Posner, 'Criminal Law', *Economic Analysis of Law* (9th edn, Wolters Kluwer Law & Business 2014) <https://books.google.de/books?hl=en&lr=&id=o77fDgAAQBAJ&oi=fnd&pg=PT21&dq=posner+economic+analysis+of+law&ots=tyfKuHI0Sw&sig=i9T3y9RHE8b9f-C-ZXYJQgRgvwE#v=onepage&q=posner economic analysis of law&f=false>.

[250] Posner, 'An Economic Theory of the Criminal Law' (n 101); Charles H Logan and others, 'Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates.' [1980] Contemporary Sociology.

[251] A Mitchell Polinsky and Steven Shavell, 'The Theory of Public Enforcement of Law' in Mitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics Volume 1* (Elsevier BV 2007) 443.

general deterrence.[252] An example of that is imprisoning a criminal, so forcing him/her to stop their criminal activity.[253] This reasoning applies to the category of crimes, of which a small proportion is socially cost-justified. An example of a socially cost-justified crime is theft by someone who faces a deadly hunger. Nevertheless, this is a low probability and might be non-criminalized at all. So, the smaller the proportion of such a socially cost-justified crime is, the smaller is the social cost and the higher is the social benefit of its prevention, and that is why such crimes tend to be prevented instead of priced.[254]

Could the common crimes involved in TJ processes, including genocide, torture, corruption, and other human rights violations, be cost-justified? The cost of these crimes is so high that only a small proportion of them could be cost-justified, and then prevention via lustration can be argued to be more efficient than just punishing the act if it is repeated.

Incapacitation can be achieved through different mechanisms, not only imprisonment but also nullifying a licence to perform a specific activity, for example.[255] In the case of TJ, the same reasoning applies to the rationality behind lustration laws. It is not about internalizing the harm of the crimes, because this can be done through reparations. Also, it is not only about deterrence, because this can be achieved through criminal prosecutions. However, the main reasoning is preventing the same corrupted persons or the persons who adopted the strategies of the past-regime from corrupting or disturbing the new regime.

The question of the social cost and benefit of such laws, and whether incapacitation should be executed through lustration or imprisonment, or even the death penalty, is however subject to the calculations of every different society, depending on other variables. The basic equation, as presented by A. Mitchell Polinsky & Steven Shavell, is that the harm caused by the prospective criminal is larger than the cost of his/her incapacitation.[256] Some studies find that this harm is reduced with age,[257] i.e., the older the criminal is, the less is the harm expected to

[252] For a review, *see* Mark C Stafford and Mark Warr, 'A Reconceptualization of General and Specific Deterrence' [1993] Journal of Research in Crime and Delinquency 123.

[253] Imprisonment as an incapacitation measure is, though, debatable. For more, *see* Isaac Ehrlich, 'Crime, Punishment, and the Market for Offenses', vol 10 (Winter 1996).

[254] Posner, 'An Economic Theory of the Criminal Law' (n 101) 1214–1215.

[255] JL Nichais and HL Ross, 'The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers' [1991] Journal of Safety Research; Polinsky and Shavell (n 253) 443.

[256] McNollgast (n 27).

[257] Polinsky and Shavell (n 253) 443.

be caused by him/her to the society if he/she is incapacitated. This tendency could be due to the lifetime left for his/her potential criminal activity or health reasons. In our case, though, it can be argued that it is reduced by time, given that the older the transition gets, the new regime consolidates, and consequently, the ability of the past-regime members to spoil the transformation and repeal the new rules decreases. Accordingly, the incapacitation should continue as long as the cost of the harm caused by the relevant member of the past-regime is more than the cost of his/her incapacitation.[258] These costs are to be assessed by the policy-makers, with technical experts' help, at the given point in or after the transition. For the side of the equation reflecting the cost of the harm caused by the considered member, there should be:

- A variable standing for a rough estimation of the costs resulted from his/her past behaviour divided by his/her years of service to reach an estimation of these costs per year (C_y). The word "rough" is used because many of these past-violation costs are hard to assess and have long-lasting domino effects. Consequently, what would be feasible is estimating only the direct impact of the rent-seeking activity; For example, the evaluation of the financial losses caused to the national treasury because of allocating lands to well-connected investors without fair compensation to the state. Some harms would be easier to evaluate than others, and the evaluation process itself is costly. This is a reason why these calculations are not widely used.
- The previous variable would be multiplied (1) in the probability of repeating the past behaviour given the extent of the new-regime consolidation and control over the authority where this member operates (P_r). The more control this regime is able to perform on its institutions, the less dangerous is the personal desire of any of public officials to violate its laws, because of the high costs they would incur by so doing. The variable would be multiplied (2) also by the number of years remaining in his/her service until retirement (N).

[258] It is necessary to bear in mind that we are not comparing a cost that happened in the past (the cost of the member's behaviour before the revolution) to a present cost (the cost of the incapacitation). Instead, the comparison is between two present costs, i.e., the cost incurred by the potential behaviour of that member under the new regime with the costs of his/her incapacitation. This "potentiality" aspect can be reasoned in plain economic thinking; it is however somehow problematic in a legal sense, as one can't be punished for a crime he/she has not committed yet.

For the equation's side concerning the incapacitation cost, the exact general costs of lustration indicated in table (3.4) apply (G). However, an added variable would be the probability of the availability of an efficient member of the new-regime to replace the considered past-regime member ($P_{\emptyset}$).

Accordingly, to apply incapacitation, $C_y \times P_r \times N$ should exceed $G - P_{\emptyset}$.

However, Richard A. Posner refers to a critical qualification that should be entered into the calculation, which is the effect of the elasticity of supply of the offenders.[259] If this elasticity is "very high," the effect of taking one criminal out of the scene would be making room for another criminal to get in.[260] This theory may not apply to the crimes committed amid the revolution upheaval because of the mass violation and chaotic nature of the situation, which influences a rational actor's standard calculation. However, taking into account the high pay-offs that politicians can expect of the rent-seeking activity manifested in autocratic policies, this could be possible in the case of TJ also. Lustration policies are indeed *ex post* arrangements dealing with the old-rulers; they will be removed from power and replaced by new-rulers adopting the revolution goals. However, lustration alone does not guarantee the non-repetition of the past, because the new-rulers themselves, or the officials who were removed from their positions in the first place, could still have tempting incentives to reproduce their own autocracy. Especially because this behaviour would be *per se* in their self-interest, this is what justifies the combination of this mechanism between "lustration" and "training" under one mechanism labelled "institutional reform." If it is only for clearing away the criminals of the past-regime, there will be no effective impact of this mechanism. The aim is preventing the repetition of the crime, or reducing its probability to be more accurate, because a zero-crime probability would be too costly,[261] and reducing the supply of criminals. The way to do so is by accompanying the lustration laws with training, policy reforms, and monitoring that could guarantee the transformation of the institutions themselves.

On the one hand, the use of lustration laws may also result in a loss of the human capital, by diminishing the technical and administrative expertise of the dismissed persons.[262] The

[259] Posner, 'An Economic Theory of the Criminal Law' (n 101).

[260] ibid 1217.

[261] ibid 1215.

[262] Schwartz (n 61) 464.

more persons lustration is applied to, the greater the loss of human capital, and consequently the weaker the institutions may become, and thus the probability of polarization in the society and an organized backlash by the dismissed officials, becomes greater. These drawbacks could apply to other mechanisms as well, like criminal prosecutions. The evaluation is then influenced by context. For example, the deeper and wider the past-regime is rooted in the institutions, the higher are the expected costs of wide-ranging lustration processes.

On the other hand, keeping the key past-regime officials increases the probability of the repetition of their past performance, and leads the people to suspect the transparency and loyalty of the new-regime to the values of the revolution, i.e., the distrust in the prior-regime because of its corrupted policies could spill over to the relationship between the people and the new-regime.[263] Some systems, however, tried to escape this dilemma by adopting what is called "lustration systems," which differentiate between three strategies of lustration: dismissal, exposure, and confession. Dismissal aims to purify the government by sacrificing its "tainted officials" but with demeaning them socially; Exposure aims to increase the transparency of the government but inadvertently stigmatizing its "tainted officials" socially; Confession is an act of self-purification by the "tainted officials" who are to be morally re-born under new conditions.[264] However, a systematic empirical study is still lacking to measure the effectiveness of these mechanisms in achieving the original purposes of lustration laws.[265] For example, although they can save the loss of human capital, their impact on the prevention of new corruption crimes can be questionable.

Gordon Tullock briefly referred to institutional reforms as one of the possible smooth democratization processes to escape from autocracy.[266] He argues that when a tyrant thinks of retirement, most probably, the main reason that would make him abstain would be worrying about his safety after retirement. Consequently, a good strategy for him would be making up a democratic constitution and holding elections to choose a new government. Tullock thinks that in this case, the new government will both be grateful to the past tyrant, and too busy sorting the new system out to harm him, which would be the best case for the autocrat.

[263] Choi and David (n 15) 1173–1174.

[264] ibid 1173.

[265] (Choi & David, 2012) present experimental evidence from Hungary, the Czech Republic, and Poland on the different effect of these three strategies on trust. However, a general theory can`t be derived from such a study. Moreover, it measures only the effect on trust, while other purposes of the lustration laws are not discussed.

[266] Tullock, 'Revolution and Its Suppression; "Popular" Uprisings' (n 206) 219.

However, most of the examples of this set up in South America involved turning back to autocracy after a few years.[267] The reason, in my opinion, is that the case which Tullock presented is neither a case of revolution nor of democratization. The reason is that there is only one way for the autocrat to be sure that his own autocratic government will not turn behind him and attack both him and the new democratic government, defending their benefits from the autocratic regime. This way is that the new democratic government has to be a new version of the same past-officials and beneficiaries. In this case, although this set-up is a safe exit for the autocrat and his government that could save the country lots of blood and costs, it does not represent any form of real institutional reform. First, the past abuses were not recognized, and no one asked for forgiveness or promised the non-repetition of these violations. Second, it is probably a mere change in the de jure without a change in the de facto application of constitutional democracy principles. Consequently, any thinking of the safe exit principle for autocrats to incentivize them to relinquish their hold on power should also include two necessary conditions: a genuine institutional reform; robbing the dictator of his top officials so they would not reproduce his government; and recognition of his violations in return for giving him, and probably his family, a blanket amnesty. This definition of institutional reforms entails lustration policies against the first line personnel, who usually include the directory board of the governing party, the cabinet, and heads of the leading state authorities, e.g., the parliament's head. Although these personnel, in addition to the autocrat, do not perform alone, and they are usually connected to a complex and broad net of beneficiaries and collaborators, they are the most critical because they control this net. Consequently, minimizing their influence could ease the control of the rest of the system.

The point of safe exit also drags the attention to another TJ mechanism that the UN not only abandoned, but totally rejected, i.e., amnesties. Although the UN guidelines ignore amnesties as one of TJ mechanisms and promote the value of accountability, the previous CBA suggests a thorough consideration for this mechanism. Amnesties and lack of TJ are two different things. When applying amnesties, the society and the government recognize in the first place that there were violations against the victims, they are not acceptable, and they will not be repeated, but they will be forgiven because seeking "justice" for them would be too costly, to the extent that it would be an obstacle to achieving TJ goals themselves. This is different than closing the page of the past without even looking into it.

[267] Tullock, 'Revolution and Its Suppression; "Popular" Uprisings' (n 206).

Upon the previous legal/economic analysis, the costs and benefits of lustration will depend on the adopted legal system. However, to build only a basic matrix of the cost-benefit analysis, I will assume that the legal considerations are countered by the previously indicated arguments and that the two broad legal guarantees required by the international rulings and literature are applied. Accordingly, the cost-benefit analysis would be as follows in table (3.4):

Costs	**Benefits**
Administrative costs	Recovering the trust in the government
Error costs	Adherence to international standards
Loss of human capital	Deterrence
The threat of backlash by the past-regime and its collaborators	Prevention of repetition of the crimes (depending on combination with training, new policies, and monitoring)
Polarization in society	
Constitutional considerations	

Table (3.4) Cost-Benefit Matrix of Lustration as a TJ Mechanism

Note that the probability of the adoption of complementary mechanisms of institutional reforms, i.e., training, new policies guaranteeing the rule of law and IHRL, and monitoring, is added as a prerequisite to the benefits of lustration generally. The reason is that other benefits, including deterrence, trust, and international standards, depend on them too.

5) National Consultations

This mechanism involves public participation in laying down the principles and mechanisms of transitional justice and interaction with their application. This participation also includes the necessity of the outreach of transitional justice, its knowledge, details, and implementation in society.[268] The mechanism then takes two ways: The first is integrating the

[268] United Nations (n 10) 9.

feedback from the public into the design of the TJ mechanisms, and the second is reaching out to the public to teach them about TJ mechanisms.[269]

It has been argued in the literature and the analysis provided above, that the design and selection of TJ mechanisms differs and depends on the case and the context in which these mechanisms are applied. The more these mechanisms are context-oriented, the more they are likely to succeed. National consultations are a way through which the policy-makers of TJ can seek a better understanding of this context.[270] In other words, it contributes to solving the principal-agent problem between the public (the principal), including the victims, and the policy-makers (the agents) through two means. First, involving the agents in the design of the TJ mechanisms; Second, providing more information in the market on both sides, i.e., policy-makers could know more about the needs and priorities of the victims and concerns of the supporters of the past regime or neutral parties, and the victims and other involved parties understand more about how the TJ mechanisms work and at what cost. This "low information cost" effect that national consultations cause also minimizes other possible problems in the market, including a gap between the supply and demand of TJ mechanisms, and concerns of paternalism practised by the policy-makers. Moreover, the integration of the public and relevant actors in the negotiation phase increases the probability of their cooperation in the implementation phase.[271]

The techniques through which national consultations are practically applied vary, they may include:

1) Doing empirical research to assess the mechanisms needed and the preferences of the public. The effectiveness of this research and their methods is presented in a study by Phuong Pham & Patrick Vinck.[272] This empirical research may be quantitative, qualitative, or through mixed methods.[273] This is a way of using the scientific research

[269] Anna Triponel and Stephen Pearson, 'What Do You Think Should Happen? Public Participation in Transitional Justice' (2010) 22 Pace Int'l L. Rev. 103, 107.

[270] Phuong Pham and Patrick Vinck, 'Empirical Research and the Development and Assessment of Transitional Justice Mechanisms' (2009) 1 The International Journal of Transitional Justice 231; Triponel and Pearson (n 271).

[271] Triponel and Pearson (n 271).

[272] Pham and Vinck (n 272).

[273] Office of the United Nations High Commissioner for Human Rights, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES; National Consultations on Transitional Justice* (2009).

methods, which are distinguished by being objective, to reach the most accurate estimations of the public needs, concerns, and preferences. Better results could be expected when these studies are run by neutral scientific institutions instead of governmental bodies.[274]

This step is important for operating TJ generally, and also for the completion of the CBA for all the mechanisms. The measurement of the given variables in the presented models of TJ mechanisms should be preferably derived from local studies besides international. As explained, the value of each cost and benefit can differ from one society to another. This local evaluation can be achieved through the pre-empirical studies referred to here.

Even if some data will be challenging to collect, "*lawmakers would do better to use imperfect empirical analysis than perfect non-empirical analysis*."[275] Some of the main reasons why empirical analysis is not still commonly used in the law-making processes, especially in less developed systems, are first that most legal scholars and practitioners lack the necessary training for empirical analysis. Secondly, many law thinkers tend to trust the doctrinal analysis more than the empirical one. This skepticism is probably back to the conviction that "not everything can be quantified or measured." Although this might be true, still using the imperfect empirical findings to accompany, not replace, the pure legal classic doctrinal methods can be expected to give better guidance for legal design and application, especially where the momentum

[274] It can be noticed by now that the different TJ mechanisms are interrelated and that rigid distinctions between them are in many cases inapplicable. For example, to deliver reparations, information will have to be collected about the victims and the damage they suffered from, which means that one mechanism can, but not necessarily, include reparations, initiatives to reveal the truth, and national consultations. It is still important, however, to analyze the main aspects of each mechanism individually to better estimate its challenges and benefits. For example, while revealing the truth can be a side purpose of a mechanism like reparations or prosecutions that may or may not be achieved, truth revealing is the core of truth commissions. That is why the operation of these commissions, the right of the victims to tell their stories, and reserving the memory are significant aspects that do not have the same place within prosecutions or reparations. In the same sense, while collecting data may be present in other mechanisms than national consultations, it is a basic requirement of these consultations. One could find prosecutions that did not manage to collect enough systematic data about the corruption policies, but national consultations without reference to national institutions involved in collecting and studying data about corruption generally not just regarding one or a few persons, are only partial consultations that suffer from a serious shortage.

[275] Cooter (n 145).

is critical and cannot be reversed like in transitional policies. Finally, one can expect that these transitional systems would tend to lack the necessary expertise, human capital, and financial resources to run such analyses. International cooperation could help in this regard.

One of the ways to overcome the possible shortcomings of the pre-application empirical analysis is to consider TJ pilot projects and phased approaches with continuous consideration of the public feedback of these projects or phases. This way can minimize the costs of mechanisms that contribute negatively to the anticipated goals;[276]

2) If TJ laws are incorporated in the interim constitutions, they will be automatically subject to the national consultations and popular approval over the constitution as general. The first, in the drafting phase, happens through deliberations among the constituent assembly, which is either elected or formed by an elected authority, and the political elites generally. The public also take part in this phase not only through electing their representatives, but also through civil society organizations, national bars, media polls, and other common methods of involving society in the constitution-making process. The second is the popular approval phase through national referenda;

3) Another technique for national consultations could be integrating national actors, civil organizations, non-governmental authorities, and the other relevant actors in the discussions over the design,[277] the implementation and follow-up phases of the TJ mechanisms. For example, in some cases, these entities can collect information from victims regarding their expectations from the reparations programs and communicate these expectations, victims' numbers, and their cases' details to the authorities handling TJ. Grass-root and regional organizations are specifically helpful in this regard because of their familiarity with some levels, regions, and contexts that the high-level policymakers may not be specifically familiar with. This method was

[276] Office of the United Nations High Commissioner for Human Rights (n 275).

[277] Triponel and Pearson (n 271).

applied recently in Tunisia,[278] for instance, the only system that completed a TJ process among the first-wave Arab Spring cases.

4) The national hearing sessions accessed by the public regarding TJ policies, whether they are held in person or aired on TV and radio or online, the media coverage of the TJ processes, and the cultural and educational activities undertaken by the state, or the non-governmental institutions are all forms of integrating the public into the process which promotes the national ownership of it.

The two possible costs of national consultations are: First, increasing the time costs of the TJ process by increasing its length, before and after its start; Second, adding extra administrative costs to the process.

Table (3.5) shows a matrix of the costs and benefits of National Consultations as a TJ mechanism:

Costs	**Benefits**
Extra administrative costs	Minimizing the info-gap between the victims and the policy-makers
Extra time costs	Raising awareness among the public
	Adherence to international standards
	Facilitating the implementation of the other mechanisms (high probability of cooperation)
	Reducing the probability of risk in adopting the other mechanisms, and consequently, reducing the costs of possible failures (time, administrative, and moral costs)

Table (3.5) Cost-Benefit Matrix of National Consultations as a TJ Mechanism

[278] The Tunisian Commission of Truth and Dignity (TDC), 'الملخص التنفيذي للتقرير الختامي الشامل للهيئة التونسية للحقيقة والكرامة [The Executive Summary of the Final Total Report of the Tunisian Commission OfTruth and Dignity]' (2019) 38 <http://www.ivd.tn/rapport/index.php>.

III. General Remarks and Policy Implications

In this section, I give some notes on the previous analysis of TJ and its mechanisms. Some of these notes might be useful for the policy-makers, and others suggest research questions for future studies, especially empirical studies. The objective of this research is to use economic thinking in order to explain TJ mechanisms as presented by the UN Guidelines in the context of revolution against autocratic regimes. A CBA of each mechanism was provided to achieve this objective, drawn from the available literature and empirical findings, and following rational choice theories, especially public choice. Although this research represents a starting point for using CBA in the field of TJ, there are general remarks that still have to be taken into account when doing so both by researchers, practitioners, and policymakers. These remarks include the following:

- Although the UN guidelines are clear in affirming that the TJ mechanisms should be victim-centric,[279] the previous analysis shows how, in many cases, this centrism is not realistic. Other variables in the process sometimes outweigh the "victim" considerations in their short-term sense, like the consolidation of the new system or the practical limitations.
- The concern of the unconstitutionality considerations is present in all of TJ mechanisms, because of the retroactivity of legal bans and inequality arguments. However, taking into account the international rulings on this matter, some concerns are less worrying in the contemporary and anticipated legal and political scholarship than in the past.

  However, besides the already mentioned legal reasonings, one of the legal finesses that can be used to resolve the constitutional objections, which, as far as I know, was not mentioned in the available legal literature, is adopting TJ mechanisms in the form of a basic law. The basic laws, also known as fundamental or organic laws, are these laws that stipulate the regulation of constitutional matters, such as the rules governing the state authorities, elections, formation of the judiciary, …etc. However, they are not included in the constitutional document. In other words, they are constitutional by nature, but not by formality. Usually, such laws are briefly referred to in the constitution, and it gives them a specific procedural framework to be issued or amended by the

[279] United Nations (n 10) 2.

legislative. This means that these laws have supremacy over the other ordinary laws and regulations in the state, just like the constitution itself. They are considered complementary laws to that constitution. The only difference is that they are not a part of that constitutional document.[280] In France, which has a separate written constitutional document, these laws are called *Lois Organiques*.[281] In other jurisdictions, basic law is a term that is used alternatively to refer to the constitution, but with inferring the meaning that it is a temporary measure without formal enactment. However, it can last for a long time like in the case of Germany. This codified or uncodified form of constitutions may be used for transitionary circumstances, or for avoiding the claim of being the highest law for religious reasons.[282]

In the case of adopting the first meaning of basic laws, i.e., constitutional by nature, legislative by formality, the reasoning of issuing and differentiating them from both the constitutional text and the ordinary laws could have two sides. First, minimizing the administrative and time costs of issuing and amending them in the normal relatively complicated constitutional process for their relative flexible and/or urgent nature, while, second, maximizing the costs of their surpass for their vitality.

In the case of adopting TJ mechanisms in the form of laws, can these laws be considered as basic laws by nature? This can be debatable, and it is not the topic of this study to go through this legal debate. In some cases, the constitution-makers can avoid any suspicion or debates by explicitly stating that the laws of transitional justice in a specific phase will be considered, or will be regulated, by a basic law. For example, one of these cases is the Basic Law of Transitional justice of Tunisia.[283] However, in brief, the legal opinion that this research adopts is: Yes, transitional justice laws are by their nature basic laws. The reason is that

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[280] Sabry El Senousy, 2014 القانون الدستوري؛ شرح لأهم المبادئ الدستورية في المرحلة الانتقالية وأحكام دستور *Constitutional Law; An Explanation for the Most Important General Constitutional Principles and Con* (1st edn, Matba`at Koleyat Al Hokook, Game`at Al Qaherah 2014) 17–23.

[281] George Burdeau, *Droit Constitutionnel et Institutions Politiques [Constitutional Law and Political Institutions]* (20th edn, Librairie Générale de Droit et de Jurisprudence 1984).

[282] David M O`Brien, *Constitutional Law and Politics, Struggles for Power and Governmental Accountability* (9th edn, Content Technologies Inc & Cram 101 Textbook Reviews 2017).

[283] Organic law n° 2013-53 dated 24 December 2013, establishing and organizing the transitional justice.

although they are genuinely relevant to criminal law because they regulate the penalizing and sanctioning of specific acts, they still regulate constitutional matters. These matters are issues such as: the formation of the state authorities during and after the transition, the limitation of the civil rights of some of its citizens, partial organization of the electoral rules, and most importantly, extra-ordinary judicial procedures that could not be valid under the "usual" constitutions.

This last detail is utterly vital, specifically for this study, as it relates to one of the dilemmas that TJ usually faces, which is the constitutional challenges. These dilemmas were presented and analyzed through the discussion of the different mechanisms of TJ. This formality could then work as a shield against any judicial challenge of the adopted TJ mechanisms because the constitutions are not challenged before the supreme courts; they are the highest laws in the state.

The effectiveness of this solution depends on the relevant mechanism, though. For example, in the case of reparations and truth commissions, because they lack the punishment aspect, the concerns of unconstitutionality are not as strong as in the case of prosecutions and lustration. For example, being a member of the past regime's party, or following orders that may lack moral reasoning even if they were legal, could not be sanctioned without retroactive laws, or laws that could be struck down in constitutional courts based on inequality considerations between citizens. For example, this was the position of the Egyptian Supreme Constitutional Court regarding the Political Lustration Law after the 2011 revolution.[284] Interesting enough, amnesty can be subject to the same concerns of unconstitutionality on the basis of a lack of due process, which happened in the Nepali or South African cases, for example.[285]

Moreover, generating the TJ policies in the form of a basic law guarantees that more relevant actors are represented in the process of their designation, because their delivery usually requires more sophisticated procedures and more representative authorities than those in the case of the ordinary laws or

[284] Khalil (n 185) 212.

[285] Amanda Cats-Baril, *Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building* (International Institute for Democracy and Electoral Assistance (International IDEA) 2019) 19–20 <https://www.idea.int/publications/catalogue/moving-beyond-transitions-to-transformation>.

regulations. This reduces information asymmetry, which could lead to policies that are more likely to be self-enforcing. Finally, in this way, these laws can work as a pre-commitment device that includes all the interested parties, which could make feasible the movement forward through the political transformation.

Generally, a TJ policy that takes into account: Proportionality + Combination of different mechanisms + Customization of the mechanisms upon the relevant case + Basic laws of TJ, should have the most effective outcomes achieving the goals of TJ with the least legal complications. A balance between two considerations needs to be done, not only by lawmakers but also by the constitutional courts. These considerations are: 1) The necessity of a radical break from the authoritarian past and consideration of the context in which the principles of the rule of law, democracy, and due process are applied which can justify a less strict application of their measures, and 2) The rejection to give up the human rights considerations at all in the first step of the democratization, which could have a "killer effect" on the process.[286] [287]

- The combination of prosecution initiatives and/or lustration for only the chief members of the past-regime and reparations and/or truth commissions could be an effective strategy to avoid a counter-revolution, society polarization, over-deterrence, stigmatization of possibly innocent people, and loss of human capital and qualities. At the same time, it achieves the accountability and prevention of the top criminals from continuing their criminal activities. In other words, giving the heads of the past-regime amnesty could be dangerous, unlike the inferior personnel who worked for them. This policy can be justified through the same economic rationality used by Richard A. Posner in explaining the economic reason behind the Multiple Offender Laws.[288] The first part of the justification is that the leading criminals who create the policies, commanded, and directed the ordinated officials to apply them, showed a higher propensity to commit similar crimes in the future. The second is that the sanction value should be raised on people who, through their past, have shown that the return of the crime is higher

[286] Mark A Drumbl, 'Prosecution of Genocide v.the Fair Trial Principle: Comments on Brown and Others v.The Government of Rwanda and the UK Secretary of State for the Home Department' (2010) 8 Journal of International Criminal Justice 289; Safjan (n 47); Horne (n 196); McEvoy (n 71).

[287] For more on the benefits of constitutionalizing TJ policies, *see* also Cats-Baril (n 287).

[288] Posner, 'An Economic Theory of the Criminal Law' (n 101).

for them than for other possible criminals. This means that this variation in justice mechanisms should achieve a higher probability of preventing crimes and achieving deterrence. Further systematic empirical research is needed to measure the effects of the different combinations of TJ mechanisms.

- This strategy, however, has a low probability of success in the case of mechanisms against the army and the police as a part of what is called in the TJ literature as "Security Sector Reform (SSR)." While most of the pro-past-regime persons can find a place for them in the new regime and obey the new system of democracy and the rule of law, the police, the persons who used to protect the past-regime and get the highest rewards in the society to do so, may find more difficulty in getting integrated into the new system. The reason is that any change in the regime incurs a loss for them; they will be deprived of the extra- pay-offs they used to gain under the old-regime. At the same time, if all or most of them were vetted or prisoned for a while, this would be like forming an army against the state, a trained army that lacks any incentive to work for the new regime, and with many incentives to destroy it. The SSR as a part of TJ is already under-studied. The available studies on SSR focus on establishing the connection between it and TJ at all, reasoning SSR, its limits and challenges, and exploring some of the case studies that witnessed the application of it.[289] However, up to my knowledge, none of these studies analyzed this specific concern of SSR. This is definitely a dilemma. A solution, however, might be replacing the leading staff of the police and the army by influential leaders who are pro the new-regime. It could be successful if the chiefs are pro the new regime, and can strictly monitor these troops. The empirical analysis will be needed to test such a suggestion and to investigate whether this concern was existent in any of the cases that applied SSR, and what is the impact of the different strategies – if any – to deviate.

[289] Eirin Mobekk Geneva, *Geneva Centre for the Democratic Control of Armed Forces (DCAF) Transitional Justice and Security Sector Reform: Enabling Sustainable Peace* (2006); Ana Cutter Patel, 'Transitional Justice, DDR and Security Sector Reform' (2010); Christopher Gitari Ndungú, 'Failure to Reform; A Critique of Police Vetting in Kenya' (2017); Laura Davis, 'Transitional Justice and Security System Reform' (2009); Sumit Bisraya and Sujit Choudhry, *Security Sector Reform in Constitutional Transitions* (International Institute for Democracy and Electoral Assistance (International IDEA) 2020) <https://www.idea.int/publications/catalogue/security-sector-reform-constitutional-transitions>.

- Each of the CBA presented in this chapter assumed that the relevant mechanism would be applied for a specific period; i.e., it is not open-ended. However, that analysis would change if this time cap is lifted. For example, in this case, one could expect that the administrative and time costs would be multiplied. This is not a suggestion of time-limiting the application of TJ, and despite that, any typical reasoning of the legal principle of *lapse by prescription* could be presented here. It can be faced by a counter-analysis of the exceptional nature of the violations subject of TJ. The point is: to decide what the time cap of a relevant TJ mechanism should be, if there should be any, the following will be needed:

  a) an empirical assessment of the legal complications and multi-aspect practical consequences of the application of the open-ended TJ mechanisms compared to the time-limited ones.[290]

  b) an updated CBA analysis that adds the aspect of the time limitations to the assessment of the costs and benefits of the relevant mechanism to be compared to the time-capped original CBA.

  c) considering the possibility of innovative ways to apply the classical forms of TJ mechanisms that could minimize the costs and maximize the benefits of lifting the time-limits when applied to them. Also, considering that not all the mechanisms – and sub-mechanisms - will respond equally to the variable of "time-cap." Consequently, a comparison between the updated CBA should be kept in mind.

  d) despite the last point, attention should be given to the fact that lifting the time-limits has an effect that will apply to all of the cases and all of the mechanisms. This effect is that it will open the negotiation over the truths, information, and amnesties with the past-regime members endlessly. The possible costs of negotiations, both legal and illegal negotiations, will always be present.

[290] See for example some of the notes on the German case of the open-ended application of some of the TJ mechanisms provided by Thomas Weber, 'Time Appears to Have Run Out on the Last Nazi War Crimes Trials. But There Are Other Roads to Justice' *Time* (3 April 2019) <https://time.com/5563615/nazi-trials-over/> accessed 30 April 2019.

IV. Conclusion

Systems transforming from autocracy to democracy need to internalize the harm left by the past regime and promote respect of democracy and human rights. One of the tools to achieve this transformation is Transitional Justice. This is done through the adoption of different mechanisms.

Each of the mechanisms provided by international law has its challenges, costs, and benefits. The decision to adopt one or more of these mechanisms should be built on a careful analysis of the costs and benefits of each mechanism, and each possible combination. This chapter provided a theoretical cost-benefit analysis derived from the literature on the Transitional Justice of case studies, reports, empirical studies, laws, rulings, and theoretical analyses. I explained the possible complications and anticipated pay-offs of each mechanism from a legal, political, and economic perspective, to help building a matrix of variables that have to be examined before taking decisions regarding which TJ mechanisms to follow or omit. However, the evaluation given to these inputs will vary from one case to another, and that is how the output will vary as well. Consequently, an effective mechanism for one case may be ineffective for another, depending on many other possible variables like the lengh of the previous autocracy, the level of autocracy, the existence of established constitutional institutions, the availability of financial funds, etc. This process is costly and complex due to the nature of entries considered and the different – and even opponent - stakeholders involved. However, deliberative and multilateral solutions, including democracy, are always more costly for the short-term than authoritative and unilateral processes. Arbitrary plans are also expected to be less costly in the short term than informed study-based plans and decisions. However, the deliberative, multilateral, and study-based decisions are expected to be less costly in the long run, especially in a critical and broad project like TJ after a revolution.

On another note, by their nature, from a constitutional legal perspective, transitional justice laws are basic organic laws. In the case where their formality is aligned with this nature, this may solve some of the legal complications TJ faces. Future empirical research can tell us more about the effectiveness of this solution. However, as explained, this constitutional aspect is only one of the challenges that could face the implication of Transitional Justice.

Consequently, the discussion of the CBA provided by this chapter shows that in general, TJ policy that takes into account: Proportionality + Combination of different mechanisms + Customization of the mechanisms upon the relevant case + Basic laws of TJ, would be expected to achieve better results regarding TJ goals with fewer complications. It also supports the adoption of limited punitive measures, e.g., prosecutions and lustration, against the leading members of the past-regime, combined with other mechanisms that aim to redress the harm against the victims, and/or reveal the truth. This combination should, theoretically, achieve a higher probability of preventing crimes and deterrence, while reducing the probability of social polarization and loss of human capital. In other words, the previous analysis supports the balanced approaches of TJ.

The difficulty regarding TJ is not only about selecting the proper mechanism/s, but also about the political economy of the different actors bargaining over this selection. The limits and dynamics of this bargaining depend in a significant part on the approach which nations could decide to adopt. Some systems tend to minimalist approaches that favour the political considerations of transitions. Some others tend to the maximalist patterns according to which the justice considerations prevail. While others try to make a balance between both. Each choice of these involves a selection between many opportunity costs, and a trade-off between political and justice considerations.

The next chapter discusses this trade-off, explaining the different approaches of TJ, and providing for an economic explanation for a holistic approach that some research finds to be more likely to promotoe democracy and human rights, i.e., the justice-balance approach.

Chapter 4: The Balanced Approaches: Explaining the trade-off

I. Introduction

There have been many approaches to TJ, both in theory and practice. However, the empirical cross-country studies that enable reaching general conclusions regarding these different approaches' impact are scarce. Until now (September 2021), the most comprehensive study that includes almost all TJ mechanisms and compares their impact is the study by Olsen, Payne, & Reiter (2010).[291] For their overall analysis they use the Transitional Justice Data Base that covers 161 countries around the world in the period 1970-2007 taking into account trials, amnesties, reparations, truth commissions, and lustration policies.[292] To observe the association between these TJ mechanisms and the goals of promoting democracy and reducing human rights violations within democratic transitions, they look into 91 transitions in 74 countries between 1970-2004.[293] They find that TJ's most positive outcomes regarding promoting democracy and reducing human rights violations are associated with what they called the "Justice-Balance" approach. The next chapter examining the Tunisian case will focus primarily on these two specific goals of TJ in Tunisia as an example of TJ in the context of revolutions against autocratic regimes.

Although there is no agreement on TJ's most effective approach to achieving democracy and human rights between either theorists or practitioners, there is yet no competing approach with the same empirical weight as the justice-balance approach. Although there are more recent large N cross-country empirical studies comparing TJ mechanisms, they are – unlike Olsen, Payne, & Reiter (2010) - focused on only one dimension of the TJ application. Some of these studies and datasets focus only on violent conflicts,[294] political agreements and peace transitions in internal conflicts,[295] Personnel TJ,[296] or a limited number of mechanisms.[297] [298]

[291] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11).

[292] ibid 29.

[293] ibid 140.

[294] Sriram, Martin-Ortega and Herman (n 59).

[295] Fontana and others (n 59); Fontana, Siewert and Yakinthou (n 59).

[296] Bates, Cinar and Nalepa (n 15).

The dataset used by Olsen, Payne, & Reiter (2010) is an ongoing project that is continuously updated under the title of "Transitional Justice Research Collaborative (TJRC)."[299]

The Justice-Balance approach suggests that combining trials with amnesties is more likely to achieve higher rates of democracy and reduce human rights violations than using single mechanisms or other combinations. According to this approach, adding truth commissions should be equally successful, and this combination should hold whether the transformation witnessed a regime collapse or a negotiated transition.

This chapter tries to explain the economic rationale of the Justice-Balance approach, which can not only help to understand better how it works but also to suggest further ways for its application using a broader set of TJ mechanisms that fit different societies. Finally, it adds to the constitutional economics literature by analyzing the choices offered within TJ as a constitutional arrangement after revolutions using economic theory. In the next chapter, this contribution continues by analyzing a unique contemporary institutional transformation case in its context, i.e., Tunisia.

II. On TJ Approaches and the Justice-Balance Approach

The literature categorizes TJ mechanisms into different approaches depending on the relevant field. One of TJ mechanisms' classifications into broad approaches is the categorization by Olsen et al., which incorporates both the legal and political evaluation of the different TJ mechanisms (2010). Before introducing their justice-balance approach of TJ, Olsen et al. classify the legal and political literature approaches into four other categories. First is the Maximalist approach, which advocates the strictest way of condemning past violations, i.e., human rights trials. This approach refuses amnesties and accepts the other mechanisms but not as a substitute for trials. It stresses the "justice" part of the equation,[300] in the meaning of retributive justice, also referred to as accountability considerations. Second is the Minimalist Approach, which, on the contrary, emphasizes the "transition" part of the

[297] Dancy and others (n 15).

[298] For more on the available empirical literature on TJ before Olsen, Payne, & Reiter (2010), see also Backer (n 56) 61.

[299] For more on this project, see: https://transitionaljusticedata.com

[300] Scholars who support this approach include P. and Moore (n 126); Moore (n 126); Akhavan (n 126); Rotenberg and Borneman (n 126); Roht-Arriaza (n 126); Scharf and Roht-Arriaza (n 126); Bassiouni (n 126); Scharf (n 126); Méndez (n 126).

equation. It advocates amnesties, which are, according to this approach, the only way to neutralize the potential spoilers of the democratic transition.[301] Third, the Moderate Approach tries to find a middle ground between "accountability" considerations and "political constraints" by emphasizing the restorative mechanisms and truth-finding.[302] Finally, the holistic approach rejects the three approaches, advocating a mix of the different mechanisms instead of adopting a single mechanism.[303] However, the scholars advocating this approach do not recommend a specific combination; they argue that each context is different and that mixes should be selected on a case-by-case basis. Some of the holistic approach supporters argue that trials should always be included, and others claim that the more mechanisms are used, the better are the results.[304] Olsen et al. add to the last four approaches[305] their own "Justice-Balance Approach." According to this approach, a combination of trials and amnesties is the best way to achieve democracy and reduce human rights violations, two TJ goals. This combination supposedly balances between the legal imperatives that require punishment to the past crimes on the one hand and practical considerations that may prevent the full application of many TJ mechanisms on the other hand. They also found that adding truth commissions to this combination is equally successful, as it compensates for the partially missing justice element stemming from giving amnesties to some of the past-regime perpetrators and opens the door to restorative justice. According to their results, the same

[301] Studies on this side include Osiel (n 127); Stedman (n 127); Acuña and Smulovitz (n 127); Vinjamuri and Snyder (n 127); Goldsmith and Krasner (n 127); Zagorski (n 127); Hadden (n 127).

[302] See for example, Neil J Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights'; Jaime Malamud-Goti, 'Transitional Governments in the Breach: Why Punish State Criminals?' [1990] Human Rights Quarterly; Lyn S Graybill, 'Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods' [2004] Third World Quarterly; Richard Goldstone, 'Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals' [1995] NYU Journal of International Law; Neil J Kritz, Aryeh Neier and Martha Minow, 'War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice.Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence.' [1999] The American Journal of International Law; Annette Weinke and Tina Rosenberg, 'The Haunted Land: Facing Europe's Ghosts after Communism' [1997] German Studies Review; Minow (n 216).

[303] See ICTJ, 'What Is Transitional Jusitce' (*International Center for Transitional Justice*, 2009) <https://www.ictj.org/about/transitional-justice>; Paul Van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' [1999] Journal of International Affairs.

[304] Olsen, Payne, and Reiter, supra note 5 at 153.

[305] It will be noted that the Justice-Balance approach can fit also under the holistic approaches. However, it is defined as an independent approach because it suggests a specific combination of mechanisms to be more effective than any other combinations.

combination (Trials + Amnesties + Truth Commissions) holds whether the regime collapsed, or it was a negotiated transition, only the sequence of these mechanisms changes with the relevant scenario.[306]

Thinking of this categorization, we find that it goes beyond the primary "overlapping" categorization that Olsen et al. referred to of accountability, restorative justice, and security and peace mechanisms.[307] The five approaches referred to earlier in fact rely on assuming a trade-off between considerations of accountability and retribution as a definition of "justice" on the one hand and due process and political transition constraints on the other hand. This trade-off's end goal is to contribute to the optimization of human rights protection efforts and democratization in the aftermath of a revolution. However, why is there a necessity of a trade-off between these two considerations in the first place?

Looking into the CBAs provided in the last chapter, one can notice that on the two ends of one spectrum stand two interests of policymakers, which unite in the goal but vary in the means.

On one end stand all the arguments of the maximalist approach supporters. The core of these arguments is that constitutionalism and the rule of law as pre-requisites of a democratic system that respects human rights should give more weight to the considerations of achieving accountability and protecting the human rights of potential victims of oppression.[308] In TJ's context, this perception entails applying the mechanisms that guarantee the rights of the victims regardless of any other concerns. Accountability in this context does not only mean attributing a specific crime to the suspect and then holding him/her legally responsible, but also acting upon this attribution and punishing the perpetrator. The punishment aspect of this approach is necessary for many reasons, including private and public deterrence, avoiding a costly interaction between the victims and the perpetrators, depriving the corrupt personnel of their powers that they can use against the new system, and adhering to international standards against impunity. This understanding of accountability then aims to achieve *justice* in its

[306] Olsen, Payne, and Reiter, supra note 5 at 154–155.

[307] ibid.

[308] This approach aligns with a *maximalist account of the rule of law* which although not denying the importance of the formal considerations, it focuses more on the substantive aspects, Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law after Military Interventions* (Cambridge University Press 2006).

retributive sense.[309] According to this view, these mechanisms boost the values of accountability and the rule of law in its essence, not just its formality, and signal the commitment to the new democratic-regime values. At the same time, they achieve deterrence to future governors and public officers. Doing so prevents the repetition of the corrupt past and avoids the damage altogether.

On the other end come the considerations of the minimalist approach advocators. These considerations are argued to be more focused on the practical concerns of smoothing the *transition* and respecting the legal formalities. This concept entails that a TJ approach that promotes constitutionalism and the rule of law as pre-requisites of democratic systems and respecting human rights is restricted by respecting the due process's constitutional guarantees.[310] These guarantees include the ban of retroactive laws, equality before the law, the right to work,[311] the right to the presumption of innocence, the prohibition of collective punishment, the rule of *nullum crimen nulla poena sine lege* (no crime and no penalty without a law), in addition to the democratic and transparent process of delivering these laws. These considerations represent typical objections to applying some of the TJ mechanisms.[312] International laws may include a solution to circumvent these legal defences.[313] The most distinct international efforts in this regard started with the Nuremberg trials after World War II, where principles like "command responsibility," invalidity of "due obedience," invalidity of "lapse of time," and direct responsibility under international law were applied.[314] Regardless of the legal debate over these principles and solutions, it is not necessary that the national constitutional laws of the subject system adopt them. As long as the TJ process is within a national constitutional framework, i.e., applicable laws and jurisdiction, the

[309] Retributive justice is defined as that form of justice that "responses to criminal behaviour that focuses on the punishment of lawbreakers and the compensation of victims. In general, the severity of the punishment is proportionate to the seriousness of the crime." Jon'a F Meyer, 'Retributive Justice', *Encyclopaedia Britannica* (Encyclopædia Britannica, inc 2014) <https://www.britannica.com/topic/retributive-justice>.

[310] This choice adheres to the procedural view of the rule of law that is also labeled as *the minimalist conception of the rule of law,* STROMSETH, WIPPMAN, AND BROOKS, *supra* note 27 at 70. This conception focuses on the formal components of the rule of law, or as U.S. Supreme Court Justice Scalia put it, *the rule of law is a law of rules* Antonin Scalia, 'The Rule of Law as a Law of Rules' [1989] The University of Chicago Law Review.

[311] In the context of transitional justice lustration policies, the right to work is under question in the case of restriction on the past-regime members to hold public offices. For more on this legal debate, see Horne (n 196).

[312] Kritz, 'The Dilemmas of Transitional Justice' (n 11).

[313] Teitel, *Transitional Justice* (n 41) 33.

[314] ibid 32–39.

reference would be to due process considerations under this framework. And, in case the transitional constitutional principles don't include legal guarantees that adopt international solutions to the legal defences explained, the application of national constitutional laws can mean that many crimes may go unpunished.

Moreover, this conception of TJ adopts a realistic approach by recognizing that even if the revolution could overthrow the head of a past regime, this does not mean that the whole society is on the revolution's side or that its combats can be easily ignored. Consequently, retributive justice mechanisms raise concerns of polarization in the society and then give the past-regime supporters incentives to spoil the transition. These prospective supporters argue that by respecting these considerations, the policymakers signal to the people that legal and constitutional rights are to be respected in the new regime and allow a smoother and less costly transition into democracy and the rule of law.

The policymakers will have to decide which opportunity cost they are willing to bear, which trade-off can better achieve TJ goals in their case. However, how exactly are these two considerations competing in practice?

Justice

In the aftermath of a revolution over an autocratic regime, which committed violations against its citizens, the transitional government could decide to achieve accountability for the victims. In these terms, accountability means recognizing and investigating the violations that happened, their attribution to specific persons, and punishing them for their crimes.

The violations referred to here could include three categories: 1. Violations of human rights and personal dignity, 2. Corruption accusations, 3. Political crimes.[315] The third category refers here to the adoption of autocratic policies and the state authorities' systematic

[315] Vidal defines political crimes as "felonies and misdemeanors which violate only the political order of a state, be that order exterior, as in attacking the independence of the nation, the integrity of its territory, the relations of the state to other states; or interior, as in attacking the form of government, the organization and functioning of the political powers and the political rights of citizens. They are distinguished from ordinary violations and from those of the ordinary penal law by the nature of the right violated, by the motives by which the action is impelled and by the end the authors pursue" Robert Ferrari, 'Political Crime' (1920) 20 Columbia Law Review 308, 309–310 <https://www.jstor.org/stable/1112548>. In this chapter, the term is used to refer to these crimes when committed from the side of the past-regime members only.

dysfunction. Given this analysis's limitation to a revolution over an autocratic regime, the applicable legal framework here is only the national law.[316] However, punishing the perpetrators under national laws, in this case, may usually not be feasible if the international humanitarian law does not apply. The reason for this is explained by differentiating between two types of crimes:

I. Crimes Type 1:

These are the acts that were already penalized under the past-regime laws. Consequently, there should not be a legal concern about putting those who committed them on trial within TJ. However, the application of the criminal procedural rules over them is usually problematic. Usually, these trials face challenges like lack of evidence, hardships of linking the crime to a specific person, the disappearance of the victims, lapse of period that leads to time bar of the case, legal immunity that may have been given to the perpetrators according to the past-laws. Any of these concerns could prevent punishing the perpetrators involved in these crimes under standard trials.

II. Crimes Type 2:

These refer to the acts that were legalized under the past regime's laws; however, they violated the citizens' fundamental human rights under international standards that the state adheres to or constitutional principles. For example, the application of emergency and exceptional laws which gave the authorities the right to violate the standards of a fair trial or deprived citizens of their personal or political civil freedoms. In this case, holding members accused of these violations accountable for crimes and sanctioning them could require retroactive laws or resort to a supranational law.

According to this distinction, for the transitional regime to hold the perpetrators of these two types of crimes accountable, there will be a need in some cases to dispense with the considerations of *due process* and *political constraints*, these two considerations are here titled as the *transition concerns*.

[316] In other forms of TJ, e.g., TJ after civil and international laws, these concerns are usually much less troubling. The crimes involved in these cases usually constitute war crimes and crimes against humanity. The international laws applicable in this case guarantee accountability against the legal defences referred to in the text.

Transition Concerns

On the one hand, as explained, the due process entails restriction by the constitutional limitations, even if this results in the lack of accusation or punishment due to earlier considerations. On the other hand, retributive mechanisms exclude some parties from the transition process. In contrast, inclusive policies that involve more parties of the society in the new regime are expected to make it easier to apply the adopted policies and smoothly complete the transition.

If the transitional government prioritizes the transition considerations over the justice considerations, one of two scenarios will apply.

The *first* scenario is eliminating any mechanism that punishes for or seeks any kind of accountability for a crime that falls under the types 1 and 2 mentioned above, including trials and lustration, and adopting only non-punishing mechanisms including reparations and amnesties, in other words, ignoring the *justice* considerations completely. The *second* scenario is adopting mechanisms that recognize the harm and reveal the truth about who committed it; however, it lacks the punishment aspect. Truth-revealing mechanisms like truth commissions usually achieve this.

There is a *third* scenario; however, that would differentiate between the violations that could be subject to retributive justice without violating the due process and the other violations and mixing between mechanisms in a way that achieves a balance between both. In this case, trials and/or lustrations are applied on the first violations, while truth commissions, reparations, amnesties are applied collectively or separately on the second. In this way, legal rights will be respected, and the punishment will be limited to grieve violations that were proven in a fair trial, which minimizes the probability of a triggering or polarizing effect.

However, a critical differentiation needs to be made between different types of amnesties. Both blanket amnesties and de facto amnesties do not reflect the *transition-oriented* mechanisms. Blanket amnesties refer to the amnesties granted to all persons involved in a given type of violations.[317] De facto amnesties refer to the situation when the post-revolution regimes do not address the issue of punishment or amnesty in the first place,[318] so they do not

[317] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS 2009) <https://www.ohchr.org/documents/publications/amnesties_en.pdf>.

[318] OHCHR, supra note 34 at 43.

refer to a granted pardon but a total absence of the notions of accountability and truth. The problem with these two concepts is that they do not offer a way for civil peace or for past denial. For amnesty to lead to reconciliation and be sustainable, it needs to be preceded with truth revealing and admitting the violation and redressing it, then comes the pardon and reconciliation.[319] Another concern regarding these two concepts' dynamics is that although they might seem less costly because they do not involve all the procedures of selective or conditional amnesties, they lack the incentives' component. Both blanket and de facto amnesties lack the incentive structure for perpetrators to participate in the TJ process and the desired institutional reforms because they will benefit from the amnesties regardless. These types of amnesties then deprive the state not only of reconciliation, restored funds, or evidence for the ongoing trials but also of a precious source of information about how violations took place systematically to tailor counter policies that could prevent their repetition.

One may also argue that the trade-off between these two categories of TJ mechanisms is a trade-off between long-term and short-term pay-offs. Prioritizing accountability concerns pays off in the short term because it signals a clear cut with the past regime, strengthens the new regime, roots its values firmly in the institutions, and deters future violators. However, these accountability-oriented mechanisms harm the transition in the long run because they polarize the society and increase the costs of transition, which could then either lead to authoritarian backsliding or make it hard for the society to heal and reconcile or both. The transition concerns, on the contrary, may fail to achieve the previous short-run pay-offs, but they have long-lasting positive effects, especially regarding reconciliation, trust, and stability. This comparison could be a sound argument; however, only further empirical studies beyond the five to ten years cap of the available studies could test this assumption.

Another argument could be that the trade-off between the two categories is, in fact, a trade-off between victims' welfare vs. social welfare. This argument does not seem to be theoretically convincing because society itself needs the achievement of justice to establish values necessary for social welfare like democracy, the rule of law, and constitutionalism.

In any case, neither category of these mechanisms entirely excludes the considerations of the other. Retributive measures might threaten the due process considerations in some cases, but where they can be legitimately conducted, they are a guarantee of a genuine

[319] OHCHR, supra note 34.

transformation into the rule of law and constitutionalism, which are the main aspirations of due process. Although reconciliatory measures do not achieve justice in its retributive sense, they do include the notion of confessing the victims' damages and redressing them. Selection of the TJ approach is then not a zero-sum game. However, some mechanisms tend to serve specific goals at the expense of others if needed. That explains why a balanced approach can be expected to have better outcomes, as both categories can in these cases compensate for each other.

III. Conclusion

There are many approaches that nations transitioning from an autocratic past to democracy may adopt regarding TJ. The only available empirical study that includes a large number of observations and compares the effect of almost all TJ mechanisms on human rights and democracy across world geographical areas and through a timeline that goes back to 1971 is the study presented by Olsen et al. (2010). Their results support the Justice-Balance approach as the most effective combination that is associated with promoting democracy and reducing human rights violations. The approach combines trials and amnesties, with adding truth commissions proving equally successful. This chapter suggests an economic rationale to understand the trade-off's optimization between "transition" and "accountability" considerations that the TJ approaches generally, and the Justice-Balance approach in specific entails, and its necessity in practice.

In some cases, respecting the constitutional due process consideration comes at the expense of achieving retributive justice through excluding mechanisms like trials and lustration. Adopting only inclusive non-retributive measures like amnesties, truth commissions, and reparations, although it reduces polarization and entails less legal complexes compared to trials, it leads at the same time to partially compromising the victims' rights and might lead to under-deterrence. Balanced approaches seek to optimize the trade-off between these two concerns by adopting partial application of both approaches that take the severity of the committed violations, centrality of the regime member's role in them, and the political economy of each context into account. This analysis complements the CBA's results given in the last chapter as it reinforces the suggestion that holistic-balanced approaches are expected to minimize the costs of each mechanism while not totally compromising its benefits. The trade-off that each mechanism entails makes it impossible to portray one mechanism as always successful as opposed to others.

Based on this theoretical background, chapter 5 examines how well the Tunisian TJ policies conform to the Justice – Balance Approach specifically using three indicators: (1) trials that conform to due process, (2) amnesties, and (3) truth commissions, and balanced approaches in general. First, however, it is necessary to define the de jure and de facto TJ policies adopted by the Tunisian state.

Chapter 5: Transitional Justice Approaches in Tunisia after the Revolution: The de jure and the de facto constitutional TJ approaches*

I. Introduction

Tunisia is presented by many scholars and activists as the only successful example among the Arab Spring countries in terms of democratization as a goal of the revolution.[320] [321] Among the first-wave countries, i.e., Tunisia, Egypt, Libya, Syria, and Yemen, the first is the only constitutional system that witnessed not only a transformation into a democratic system but also a complete transitional justice (TJ) process. The constitutional change-makers in

* This chapter is based on my paper "Transitional Justice Approaches in Tunisia after the Revolution: Falling from High Hopes." The paper is currently under revision and resubmission process with Arab Law Quarterly, Brill Publishing. The paper was also presented at ICON·S Mundo: The Annual Meeting of the International Society of Public Law, Jul 6-9, 2021, the 4th Annual Congress of the French Association of Law and Economics, Rennes, France, Oct 10-11, 2019, and was also accepted for the Twelfth Annual Constitutional Law Colloquium, The George Washington University Law School and Loyola University School of Law, Washington DC, The USA, Nov 12-13, 2021. I thank the participants of these conferences, and the attendants of the "Future of Law and Economics" seminar, Rotterdam, 2019, for their valuable feedback that helped me to improve this analysis. I also thank Aymen Briki and Hela Boujneh for their major assistance in navigating through the Tunisian TJ process.

320 Yahia H Zoubir, 'The Democratic Transition in Tunisia : A Success Story in the Making' (2015) 2015 Conflict trends <https://journals.co.za/doi/10.10520/EJC168659> accessed 10 February 2021; Raphaël Lefèvre, 'Tunisia: A Fragile Political Transition' (2015) 20 Journal of North African Studies 307 <https://www.tandfonline.com/action/journalInformation?journalCode=fnas20> accessed 10 February 2021; Sarah Yerkes, 'The Tunisia Model: Lessons from a New Arab Democracy' (2019) 98 Foreign Affairs <https://heinonline.org/HOL/Page?handle=hein.journals/fora98&id=1169&div=127&collection=journals> accessed 10 February 2021.

321 The first draft of this chapter was written before the latest grab of power by the Tunisian president on July 25, 2021. The author inserted some updates afterward, however, updates are still going on in this regard, and the features of the new phase of the Tunisian transition is still unclear. For more on this matter, see Mounir Saidani, 'Tunisia after July 25: Meanings and Prospects' (*MadaMasr*, 2021) <https://www.madamasr.com/en/2021/08/09/opinion/u/tunisia-after-july-25-meanings-and-prospects/> accessed 15 September 2021.

general after the Tunisian revolution, and the TJ actors in particular, promised a process that would achieve justice to the victims and combat corruption so that the country could successfully transform into democratic rule, respecting human rights and economic prosperity. Human rights are positively associated with economic growth[322] and foreign direct investment.[323] Both economic welfare and democratization were basic demands of the Arab Spring uprisings, which started in Tunisia in 2010-2011. It thus becomes essential to ask whether the Tunisian TJ process as designed and applied conforms to the approaches which were empirically positively associated with achieving these goals. This study investigates the TJ approach adopted by Tunisia after the 2010-2011 revolution and its expected impact on human rights and democracy promotion. It thus deals with TJ as one of the arrangements that the Tunisian system adopted to prevent the repetition of both human rights violations and past autocratic policies.

As explained in chapter 4, The Justice-Balance approach suggests that combining trials with amnesties is more likely to achieve higher rates of democracy and reduce human rights violations; adding truth commissions should be equally successful.

Whether these expectations were proven in the Tunisian case or not is beyond the scope of this thesis. This question could be answered ultimately after 5 – 10 years from now when it would be meaningful to associate any changes in democracy and human rights indicators in Tunisia, if any, with the TJ approach adopted. However, this chapter investigates how far the TJ Tunisian de jure and de facto approaches aligned to each other and the justice-balance approach, being the only democratized state in the aftermath of the Arab Spring, at least until the July 2021 crisis.

TJ in Tunisia was guaranteed and included in the post-revolution constitutions; also, a basic law established it.[324] According to Organic law n° 2013-53 dated December 24, 2013, establishing and organizing the transitional justice,[325] the Truth and Dignity Commission

[322] Lorenz Blume and Stefan Voigt, 'The Economic Effects of Human Rights' [2007] Kyklos.

[323] Shannon Lindsey Blanton and Robert G Blanton, 'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment' [2007] Journal of Politics.

[324] Basic or organic laws are known in some jurisdictions as legal texts that have the same form of an ordinary legislation, but they tackle constitutional law matters. They subsequently take the same legal value of a constitution in the legal hierarchy, and sometimes the constitution requires specific procedures for their issuance or amendment. See for the example article 64 of the Tunisian constitution of 2014.

[325] Organic law n° 2013-53 dated 24 December 2013, establishing and organizing the transitional justice.

(TDC) was established to perform the TJ policies. Although there is some literature on the TJ process in Tunisia,[326] there are no systematic studies that differentiate between the de jure and the de facto policies in this process, fit these policies under the broad mechanisms they belong to, or classify which approach this process adopted if any. There are several reasons why it is essential to analyze the Tunisian case in particular. First, although Tunisia has lived under constant political and constitutional disputes and economic hardships since the revolution, it is - as previously mentioned - argued that it is the only case among the other first Arab Spring countries that still has the potential to achieve its goals.[327] It would be useful to see how far the *de facto* application of transitional policies supports this argument, away from the optimal impressions one can get from the *de jure* laws.

Moreover, while many outsiders used to look up to the Tunisian case, many Tunisians think their TJ process was a total failure and let down their hopes.[328] This conviction could be due to a lack of knowledge of the non-Tunisians on the case details or the usual degrading impression of people in the crisis's heart. Only a down-to-details analysis can provide us with an answer. Second, as the second wave of Arab Spring states – supposedly - started their path of democratic transition, including Sudan and Algeria, besides Libya from the first wave

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[326] Mariam Salehi, '"Droits de l'homme, Bien Sûr": Human Rights and Transitional Justice in Tunisia 1', *Accessing and Implementing Human Rights and Justice* (2019); Christopher K Lamont and Hannah Pannwitz, 'Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia' (2016) 7 Global Policy 278; Xafier Philippe, 'Economic Transitional Justice in Tunisia: Turning a New Anti-Corruption Leaf in Africa?' in Charles M Fombad and Nico Steytler (eds), *Corruption and Constitutionalism in Africa: Revisiting Control Measures and Strategies* (1st edn, Oxford University Press 2020) <https://books.google.de/books?hl=en&lr=&id=XY_UDwAAQBAJ&oi=fnd&pg=PA341&dq=transitional+justice+tunisia+failure&ots=3uJ2WiXH0m&sig=2L5bGd8YzqNWuWDiz5DMLmTx8DQ#v=onepage&q=transitional justice tunisia failure&f=false>; Noha Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region : A Comparative Study of Egypt, Libya, Tunisia and Yemen* (Hart Publishing 2017); Corinna Mullin and Ian Patel, 'Contesting Transitional Justice as Liberal Governance in Revolutionary Tunisia' [2016] Conflict and Society.

[327] Leo Siebert, 'Tunisia's Transition Hits a Rough Patch Following COVID Lockdown' (*United States Institute of Peace*, 2020) <https://www.usip.org/publications/2020/08/tunisias-transition-hits-rough-patch-following-covid-lockdown?fbclid=IwAR1uKmWocooeQA3MK-cUaqGWMdUwCt5_4Y8h64s9uF3xpCKvagEtfd8xu9A> accessed 14 September 2020.

[328] Eric Goldstein, 'Transitional Justice in Tunisia—a Transition to What?' (*Human Rights Watch*, 2019) <https://www.hrw.org/news/2019/01/22/transitional-justice-tunisia-transition-what> accessed 14 September 2020; Şebnem Yardımcı-Geyikçi and Özlem Tür, 'Rethinking the Tunisian Miracle: A Party Politics View' (2018) 25 Democratization 787.

countries, while Syria and Yemen are still on hold, some lessons could be learned from the Tunisian case in this regard. There are differences in the form of transformation and the internal political and constitutional setups between these states. However, the close geographical, cultural, and political connections and the same historical context all support why these other states should observe the Tunisian case, avoid its mistakes, and take inspiration from its achievements.

As far as I know, this is the first study that encompasses the Tunisian TJ process and draws this differentiation between the de jure and the de facto TJ approaches, and then classifies them using a precise, easy-to-trace index. Consequently, it presents a first-of-its-kind dataset on the TJ mechanisms in Tunisia after 2011. Finally, as referred to in chapter 4, it adds to the constitutional economics literature by analyzing TJ as a constitutional arrangement and analyzing a unique contemporary case of institutional transformation in its context.

Against this background, this study will first construct the de jure and de facto models of the Tunisian TJ policies. Afterwards, I will try to measure how far these two models are aligned with each other on the one hand and how far the Tunisian model is aligned with the justice-balance approach on the other hand.

Examining the Tunisian TJ process in the light of this approach, I find that the constitutional de jure policies, as included in the Tunisian constitutions adopted after 2011 and the 2013 Tunisian Organic Law on TJ, respond positively to the justice-balance measures. However, the de facto application of these policies so far in (1) the TDC work, (2) other actions and policies adopted to apply TJ's constitutional laws, and (3) applying the TDC's recommendations, does not align perfectly with it. In addition, the ordinary TJ legislation adopted separately from the constitutional text significantly diverges from the de jure TJ constitutional approach as well. This conclusion is alarming regarding both achieving TJ goals and constitutional compliance in Tunisia after the revolution. According to the TDC report and Organic TJ Law, the parliament and the executive both should prepare an action plan to execute the recommendations given to them by the TDC within a year of issuing its comprehensive report. The report was publicized on the TDC's official platform and handed to the state authorities on March 26, 2019, and published, in a breach of TJ Organic Law, in

the Official Gazette almost one year and four months later on June 24, 2020.[329] Until the end of September 2021, this plan was neither issued nor commenced. Future studies can complete this work by investigating how far, through the next decade, the follow-up policy responds to the justice-balance, or other balanced approaches, the de jure model, and the de facto model adopted so far. Up to now, although TDC and other policies adopted a complementary approach, the lack of necessary resources and cooperation of other parties and suspicions of conflict of interests keeps the completed de facto application only partial. Consequently, although, as a start, one can still be optimistic about the future of democratization in Tunisia, it is cautious optimism that depends on how matters will develop in the next months and years.

The chapter is divided into four sections. Section II explains the structure and differentiation between the de jure and the de facto TJ policies in Tunisia. Section III is divided into two subsections; the first presents the de jure policies, while the second explains the de facto policies. The sources the analysis resorts to include, in addition to the available literature, documentation of the Tunisian case through media, legal sources, and local and international reports. Each of these sections also includes an analysis of how far the Tunisian model corresponds to the justice-balance approach. Concluding remarks are offered in Section IV.

II. Defining the Tunisian TJ: De Jure, and De Facto

The following section will first explain the de jure TJ approach in Tunisia, looking into the constitutional texts that regulated TJ after the revolution in 2010. I will then investigate which of the justice-balance approach criteria can be found in this regulation. Second, I will turn to the de facto application of this constitutional approach and analyze its different mechanisms. To do so, I will explore the decisions, legal and material actions adopted to apply TJ in Tunisia. After explaining the de facto TJ approach, I will compare this approach to the justice-balance approach criteria. As second-degree de jure resources on TJ, I will also explain the group of laws and regulations issued post-revolution that relate to TJ before exploring the de facto policies. This group does not perfectly fit under the de jure resources,

[329] Jamel Arfaoui, ‘هيئة الحقيقة والكرامة تنهي أعمالها وتواصل تسليم قرارات جبر الضرر [The Truth and Dignity Commission Finalizes Its Operation and Continues Handing Restitution Decisions]’ (*Tunisie Telegraph*, 2019) <https://tunisietelegraph.com/2019/05/31/74685-هيئة-الحقيقة-والكرامة-تنهي-أعمالها-وت> accessed 15 April 2021.

because it does not include constitutional laws. It also does not qualify as a de facto application, because they can be ignored just like constitutions. However, I include them in a separate supplementary sub-section under the TJ de facto approach for two reasons. First, given their strong relevance to the adopted TJ approach in Tunisia, I use them as a further indicator on the choices taken by the Tunisian policymakers through the different stages after the revolution. Second, and most importantly, they are a vital part of tracking constitutional compliance in post-revolution Tunisia. It will be seen that there were repetitive initiatives taken by different Tunisian parties to pass laws that violate the constitutional regulation of TJ. The most famous and successful attempt is the Administrative Reconciliation Law. As I will finally compare the de jure and de facto approaches to each other to check the extent of constitutional compliance regarding TJ after the revolution, I find it important to draw attention to the extent of consistency between the constitutional and following legal regulation of TJ as well.

A significant source of TJ's de facto application in Tunisia is the TDC report, which summarizes the commission's work in five years since it was formed in 2014 until it publicized its output in 2019. The executive summary of the report is 529 pages. It includes details of all the TDC efforts, whether they were successful or not, and the approach it adopted, the challenges to its work, and the recommendations it gives for the future. Although the report itself was subject to criticism from different parties, and there are legal disputes and complaints about it, it is the most comprehensive source available for the TJ process outcomes in Tunisia so far. The conflicts over the report are recognized as one limitation of the study. However, these objections and all other complementary legal actions and policies adopted in the TJ context are considered in the following analysis to give the best possible accurate evaluation.

Disentangling the de jure and the de facto TJ approaches in the Tunisian case is not easy. On the one hand, there is a legal resource package that governed TJ from different legal hierarchies. On the other hand, the de facto application sometimes takes the form of either another legal action or a material act. For example, the TDC report can be seen as a part of the de facto application regarding truth revealing because it investigated the truths behind crimes committed by the past regime and published them to the public. However, it is also a de jure regulation in terms of institutional reforms, for example, because it suggests specific institutional reforms to prevent the repetition of the past, but achieving these reforms, in reality, will depend both on the executive and the legislative authorities.

It then can be said that there are different de jure and de facto stages: First, the constitutional text, then the organic law of TJ, then the executing laws and regulations, then the work of the TDC, and finally, material application in action. Furthermore, all these stages can include both aspects, i.e., de jure and de facto. As explained in earlier chapters, the primary constitutional text itself is considered one of the forms of institutional reforms and symbolic reparations, two mechanisms of TJ, under the broad definition. However, for the purposes of this chapter, the post-revolution constitutions are only considered while investigating the de jure constitutional TJ approach to feasible measuring of the constitutional compliance. Figure (5.1) explains this structure of de jure/de facto forms of TJ regulation in the Tunisian case.

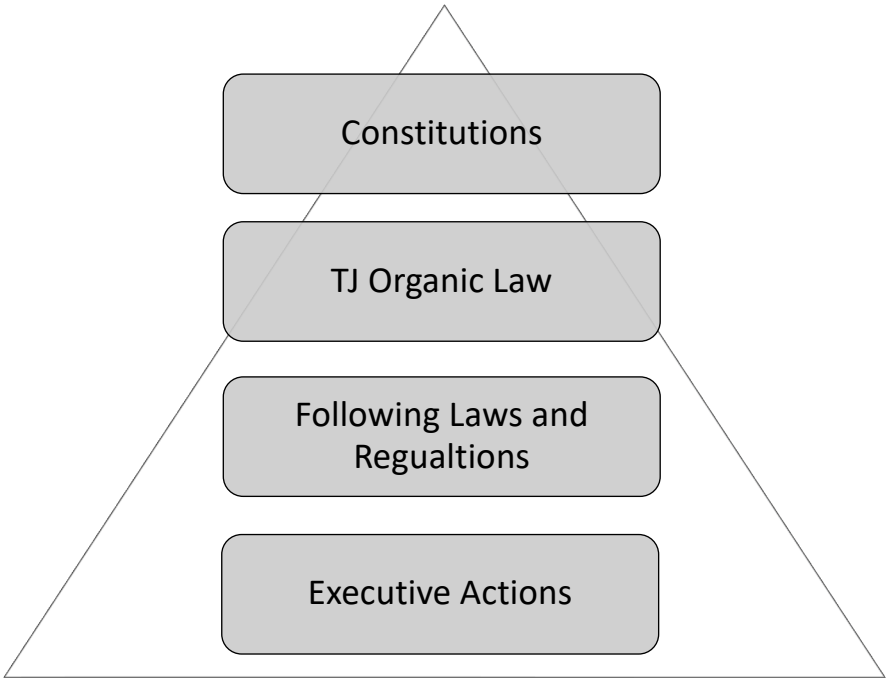

Figure (5.1) The Legal Structure Governing TJ in Tunisia

This analysis will consider only the de jure vs. de facto constitutional dichotomy to keep things more straightforward and more feasible to track. It will consider anything mentioned in the constitutional text as the de jure part; legal, material actions and policies as the de facto part; while further laws or regulations as a complementary check on the constitutional compliance. As long as the TJ law in Tunisia is an organic law, i.e., it has the same legal value as a constitution, this law will also be considered as a set of the de jure TJ regulation.

III. The Tunisian De Jure and De Facto TJ Approaches and the Justice-Balance Approach

III. 1. Tunisian De Jure TJ and Justice-Balance Approach

After the 2010 revolution, Tunisia had two interim constitutions and one permanent constitution. The two interim constitutions are 1. Decree-law n° 2011-14 dated March 23, 2011, relating to the provisional organization of the public authorities, issued by the interim president, and 2. Constituent-law n° 2011-6 dated December 16, 2011, relating to the provisional organization of the public authorities, issued by the elected constituent assembly. The current constitution is the permanent constitution of Tunisia of 2014.

The first interim constitution (March 2011) did not refer to TJ. It did not include remarkable institutional reforms but more of emergency procedures to facilitate the state authorities and dissolve the past institutions,[330] which is expected. The second interim constitution (Dec 2011), on the contrary, included a very brief but complete section referring to Transitional Justice. Article 24 of the second interim constitution states that the constituent assembly is to issue an organic law that regulates TJ, its foundations, and its scope.[331] The Dec 2011 interim constitution also included a rather general and shy reference to some transitional institutional reforms and honouring the revolution's martyrs and figures throughout the document. The permanent constitution of 2014 was the ultimate regulation on the top of the constitutions guaranteeing TJ in Tunisia after the 2011 revolution. The constitution includes multiple radical institutional reforms, especially regarding human rights protection, democracy, and the rule of law. It also profiled the gratitude to the revolution and the victims from the Tunisian people in their struggle against the past autocratic regimes. Most importantly, it includes a legal shield for TJ. Under Title 10, "Transitional Provisions," article 148 refers twice to TJ. The first reference is in section 1, where article 148 prohibits the constituent assembly from presenting any other draft laws starting from the entry into force of the constitution until the election of the new parliament, except for laws related to the election process, transitional justice systems, and the bodies created by laws adopted by

[330] مرسوم عدد 14 لسنة 2011 مؤرخ في 23 مارس 2011 يتعلق بالتنظيم المؤقت للسلط العمومية [Decree-law n° 2011-14 dated 23 March 2011, relating to the provisional organization of the public authorities] 2011.

[331] قانون تأسيسي عدد 6 لسنة 2011 المؤرخ في 16 ديسمبر 2011 يتعلق بالتنظيم المؤقت للسلط العمومية [Constituen-law n° 2011-6 dated 16 December 2011, relating to the provisional organization of the public authorities] 2011.

the National Constituent Assembly. The second reference is in section 9, which obliged the state to apply the TJ in all its domains according to the deadline prescribed by the relevant legislation and considered inadmissible in this regard the invocation of most of the typical "due-process" reservations on TJ mechanisms, including the non-retroactivity of laws, the existence of previous amnesties, the force of *res judicata*, and the prescription of a crime or a punishment by lapse of time.[332]

TJ Organic Law issued in December 2013 started with defining transitional justice in its first article as:

"an integrated process of mechanisms and methods used to understand and deal with past human rights violations by revealing their truths, and holding those responsible accountable, providing reparations for the victims and restituting them in order to achieve national reconciliation, preserve and document the collective memory, guarantee the non-recurrence of such violations and transition from an authoritarian state to a democratic system which contributes to consolidating the system of human rights."[333]

This definition, which nearly includes all TJ mechanisms, is reflected in the following articles dealing with each mechanism. Articles from 2 to 5 address "Truth Revealing and Preserving Memory," which involves two mechanisms: truth commissions and a symbolic form of reparations. Article 3 also defines what constitutes a "violation" according to this law in a broad manner as: *"any gross or systematic infringement of any human right committed by the state's agencies or by groups or individuals who acted in the State's name or under its protection, even if they do not have the capacity or authority to do so. Violation shall also cover any gross or systematic infringement of any human right committed by organized groups."*[334] [335] A reference to other types of violations that may or may not involve a direct assault on human rights, i.e., financial crimes e.g., corruption, or political crimes e.g., misusing electoral laws, which are also usually harder to trace and sanction, are found in

[332] دستور الجمهورية التونسية [Constitution of the Tunisian Republic] 2014.

[333] According to an Unofficial Translation by the International Center for Transitional Justice (ICTJ) 'Organic Law on Establishing and Organizing Transitional Justice [Unofficial Translation by the International Center for Transitional Justice (ICTJ)]' (*ohchr*, 2013) <https://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf> accessed 7 October 2020.

[334] ibid.

[335] The author replaced the word "apparatuses" mentioned in the original translation by the ICTJ by the word "agencies" for the sake of clarification.

other parts of the law and the later executing actions. Article 4 puts the truth revealing initiatives in the context of efforts seeking further goals, including 1. dismantling the authoritarian system and understanding its operation; in reference to the institutional reform goals; and 2. revealing the identity of those responsible for violations, which helps to achieve accountability.

Chapter 3 of the law, which includes articles from 6 to 9, addresses accountability. Not only do these articles establish trials against violations, but they also do not limit trials to the examples mentioned in the law, which included even the political and economic crimes referred to earlier. Moreover, article 9 states that lawsuits involving violations stipulated explicitly in article 8 are not limited by lapse of time. These violations include: deliberate killing, rape or any form of sexual violence, torture, forced disappearance, execution without fair trial guarantees, election fraud, financial corruption, misuse of public funds, and pushing individuals to forced migration for political reasons.

Chapter 4 deals with Damage Redress and Rehabilitation, in other words, reparations. The articles from 10 to 13 include all forms of reparations and assistance to victims, and the definition of victims itself is significantly broad. The definition includes the victims' family members who were harmed by the violation and any other person who was harmed while intervening to help the victim or prevent the violation. This chapter also pioneered in introducing the concept of the "victim region," which refers to *"every region which was marginalized or which suffered systematic exclusion."* Article 11, however, puts a reservation that, while the state is responsible for achieving reparations, the available resources for the state at the time of enforcement should be taken into account.

Chapter 5 addresses Institutional Reforms in its broad definition, including fixing the institutions and lustration and vetting of persons held accountable for violations. The chapter then defers the regulation of lustration to article 43. The most remarkable note about article 43 is that it gives TDC, the commission formed by this law, the competence to only "recommend" and "suggest" policies and procedures of institutional reforms. Moreover, while it forms a commission titled "the Committee for Vetting Public Servants and Institutional Reform" under the TDC, this committee also has only the authority to provide suggestions and recommendations regarding both institutional reforms in general and lustration in particular. This provision means that the TDC, per se, does not have the authority to perform any of these mechanisms. On another note, a reference to lustration and isolation policies can also be found in other places of the law, including Article 22 that

explains the conditions of membership to the TDC and closes it against different groups whom the law considers as part of the past regime, starting in 1955. However, a proposal to add an article to the law regarding "Political Immunization of the Revolution" that would involve political isolation of the past-regime leading figures was rejected by the Constituent Assembly.[336]

Regarding National Consultations: although there is no separate chapter addressing this mechanism, we can find a reference to it under the fourth chapter, which tackles the missions and competencies of the TDC. According to article 39, one of these missions is to hold auditing sessions, either secret or public, for the victims or any other aim related to its activities.

Finally, Reconciliation, which necessarily relates to the concept of amnesties: Chapter 6 of the law is devoted to reconciliation. It is a brief chapter that consists of only one article, number 15, that explains the approach of this law regarding reconciliation. The article states: *"Reconciliation aims at consolidating national unity, achieving justice and social peace, building a State of Law and restoring the citizen's confidence in State institutions. Reconciliation* ***shall not mean*** *impunity and lack of accountability for those responsible for violations."* This article means that the Tunisian de jure TJ approach includes a combination between both trials or accountability and amnesties and uses them as complementary stages to achieve the democratic transformation. This policy is applied through a committee formed by article 45, entitled the Committee of Arbitration and Reconciliation. The most remarkable notes regarding the work of this committee are the following: First, the mission of this committee is

"to be entrusted with reviewing cases and issuing judgments in regards to violations prescribed hereof, with the approval of victims and in accordance with principles of justice and fairness, and the recognized international standards, regardless of statute of limitations. In cases of grave violations, the decision of this committee does not preclude prosecution of perpetrators. However, courts shall take the committee's decision in consideration when deciding punishment.

The committee for arbitration and reconciliation shall also consider requests for reconciliation related to cases of financial corruption. The request shall not suspend

[336] Yadh Ben Achour, تونس: ثورة في بلاد الإسلام *[Tunisia: A Revolution in the Countries of Islam]* (معهد تونس للترجمة/ سراس للنشر 2018) 209.

litigations; statutes of limitations shall not apply until the implementation of the terms of reconciliation judgment.

The implementation of the terms of reconciliation judgments in cases related to financial corruption entails suspension of litigation or suspension of executing the sentence. However, litigation or punishment shall be resumed if it was proven that the perpetrator of a violation has deliberately hidden the truth, or deliberately did not report all what he/she has taken unlawfully."

Besides, article 46 lists conditions to accept arbitration and reconciliation requests, including a written confession of the violation committer and an explicit apology. If the request is related to financial corruption, it must explain the incidents that led to the unlawful benefits and their monetary values and supporting documentation that proves the requester's allegations. Moreover, article 48 stipulates that *"Standing before the committee shall interrupt any prescription. Judicial commissions shall no longer look into disputes referred thereto while taking all actions and measures necessary to ensure there is no impunity for the duration of the implementation of the reconciliation provisions which are being examined by the committee until the issuance of the arbitration award.."* However, the law does not explain if the arbitration reconciliation does affect the lustration policies against the reconciliation requested. Finally, the decisions of this committee are final and cannot be appealed before any other authority.

It could then be claimed that Tunisian de jure TJ policies do not give blanket amnesties, mass amnesties, or de facto amnesties. They only involve conditional amnesties that do not contradict accountability values but complement them.

Constitutional Text	**Amnesties**	**Trials**	**Reparations**	**Institutional Reforms 1**	**Institutional Reforms 2**	**National Consultations**	**Truth Commissions**
Interim Constitution Mar 2011	NA	NA	Partial	Partial	NA	Na	NA
Interim Constitution Dec 2011	NA	NA	Partial	Partial	Partial	NA	NA
Permanent Constitution 2014	NA	NA	Partial	Yes	NA	NA	NA

TJ Organic Law 2013	Partial	Yes	Yes	Yes	Partial	Partial	Yes

Table (5.1) Tunisia De Jure TJ Mechanisms

Table (5.1) shows how the post-revolution Tunisian constitutions respond to the different TJ mechanisms. "Yes" means that the relevant source ultimately included this mechanism. "No" means that the resource forbids the relevant mechanism. "Partial" means that it adopted it partially either in scope, be it temporal, geographical, personal, or nature of the relevant violation, or in the extent of the mechanism application itself, be it the variety of the tools or the severity of the application. For example, enforcing national consultation during only one TJ stage without sustaining it in all the stages is considered partial adoption of national consultations. Finally, "NA" means that the relevant source did not refer to this mechanism at all.

While both "No" and "NA" should lead to the same result, which is "negative" for this mechanism, I find it essential to differentiate between these two cases for two main reasons. First, forbidding a mechanism gives a different, more potent signal of the policymakers' adopted approach than just neglecting to refer to it entirely. Second, as long as we consider a constitutional rule, it is crucial to investigate how far the subsequent laws and legal actions generally were following and obliged by this rule; otherwise, they should be considered unconstitutional. For example, if the constitutional text neglected to mention any kind of amnesties, but later, the applying laws and policies included giving any type of amnesty to any personnel, it could be argued that it does not violate the constitution but just complements it. However, if the organic law explicitly forbids any kind of amnesty, any following law or practice giving amnesties should represent a de jure/de facto constitutional gap. This point is critical in the Tunisian case specifically where the constitutional court is still not formed almost 7 years after the permanent constitution of 2014 (September 2021).

Note that as the interim and permanent constitutions are the general framework, it is not expected that all mechanisms should be represented in them and that even those which are represented will not mention many details that could lead them to be categorized as "yes" instead of "partial." Consequently, the TJ Organic Law of 2013 alone can be considered the de jure TJ regulation, especially that there is no contradiction between this law and its former or subsequent constitutional texts; it is merely a more precise regulation of the same rules and principles they adopt.

Note also that I do not refer to "lustration" alone here but to "institutional reforms" generally. There is a huge difference here in relevance to the investigated TJ approach. While lustration includes a punishment aspect, as indicated above, institutional reforms can be regulation and policy reforms that do not include any isolation or prevention of holding public offices for past-regime personnel. That is why I give two "institutional reforms" types. "Institutional Reforms 1" refer to non-punishing reforms, while "Institutional Reforms 2" refer to any kind of lustration.

Accordingly, table (5.1) shows that the de jure Tunisian TJ mechanisms included trials, institutional reforms including lustration (partially), truth commissions, reparations, partial national consultations, and partial amnesties. This combination makes it respond very well to the Justice-Balance Approach, as it uses different tools for different violations and even the punishing mechanisms; it uses them as a step to reach reconciliation. Most importantly, the de jure policies included the combination of trials + amnesty + truth commissions. However, does the de facto application of these constitutional laws respond to the same values?

III. 2. Tunisian De Facto TJ and Justice-Balance Approach

As indicated before, the de facto TJ approach in the Tunisian case in this research refers to the actions and policies applying TJ's de jure constitutional regulation. This includes the available data on TJ application so far derived from different resources and, most importantly, the TDC final report. To clarify this entangled application, I will divide this subsection into four titles. The first refers to the accompanying and following legislations related to TJ that are not part of the de jure constitutional TJ approach but are a second-degree de jure resources on TJ in Tunisia. The second title includes the legal measures taken before the Organic TJ Law, and the third explains the post-Organic TJ Law legal actions. A fourth title will explain other policies and concerns that don't adhere to this timeline, as they start before the TJ Organic Law and continue after it was passed.

III. 2. A. Laws and Regulations TJ Related (Second-Degree De Jure Policies)

1) Law Decrees Issued before TJ Organic Law

The first is the General Pardon Decree no.1 of the year 2011, dated February 19, 2011, and issued by the first interim president Fouad El Mebazza. This law gave general pardon to all those who were accused of "political crimes," such as crimes related to the state

security, terrorism, money laundering, journalism, assembly, political parties, professional bar activities, some military crimes, escaping prison, or assisting escape for one of those accused of these crimes.[337] The law also gave all who will benefit from the pardons the right to resume their jobs and reparations.[338] These policies represent a partial application of the Reparations mechanism.

The second legislation is the Confiscation Decree no. 13 of 2011, dated March 14, 2011, also issued by the first interim president Fouad El Mebazza. The law regulated the state's taking over of all the properties of the overthrown president, Zein El Abdin Ben Ali, his wife, Laila Trabelsi, and another 112 persons of their relatives.[339] As long as this law regulates financial reforms relevant to past personnel and the institutions and persons who unlawfully dealt with them, this can represent a "partial" application of the Institutional Reforms 1 mechanism. Additionally, the law creates the Confiscation Committee and gives it authority to investigate such unlawful financial activities, which can also be considered a partial application of the Truth Commissions mechanism.

Third, Decree no. 40 of the year 2011 dated May 19, 2011, related to redressing the damages resulting from disruptions and popular movements that the country witnessed.[340] This decree represents a "partial" application of the Reparation mechanism.

Fourth, Decree n. 35 of the year 2011 dated May 11 related to regulating the Constituent Assembly elections. Article 15 of the decree explains the past-regime members who are banned from being elected to the Constituent Assembly as it states *"The following can't be nominated: (1) Everyone who took over responsibility within the past president's government except its members who did not belong to the Democratic Constitutional Assembly Party (El Tagamoa); (2) all who assumed responsibility within the Structures of the*

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[337] مرسوم عدد 1 لسنة 2011 مؤرخ في 19 فيفري 2011 يتعلق بالعفو العام [Decree n° 2011-11 dated 19 February 2011, related to the general pardon] 2011.

[338] It is to be noted also that in the same issue of the official gazette, the interim president issued two other decrees, approving Tunisia's adherence to the optional protocol attached to the international charter on the civil and political rights, and the international agreement to protect all persons from forced disappearance. These represent two further institutional reforms.

[339] مرسوم عدد 13 لسنة 2011 مؤرخ في 14 مارس 2011 يتعلق بمصادرة أموال وممتلكات منقولة وعقارية [Decree n° 2011-13 dated 14 March 2011, related to the confiscation of money, movable and real estate properties] 2011.

[340] مرسوم عدد 40 لسنة 2011 المؤرخ في 19 ماي 2011 المتعلق بجبر الأضرار الناتجة عن الاضطرابات والتحركات الشعبية التي شهدتها البلاد [Decree n° 2011-40 dated 19 May 2011, related to redressing the damages resulted from the disruptions and popular movements that t 2011.

Democratic Constitutional Assembly Party during the past president's era, the meant responsibilities shall be defined through an order by the suggestion of the Higher Authority for Realisation of the Objectives of the Revolution, Political Reform, and Democratic Transition; (3) those who asked the past president to candidate for a new presidential term for the year of 2014."[341] Later, order no. 1089 of the year 2011 dated August 3, 2011 was issued to define the responsibilities referred to in article 15. The decree and the order represent a partial application of Institutional Reforms 2 (lustration).[342]

Fifth, Decree no. 97 of the year 2011 dated October 24, 2011, related to reparations to the martyrs and injured persons during the 2010-2011 revolution. The decree establishes and regulates a wide variety of reparations forms for the martyrs and injured persons during the revolution and their families. Some of these reparations are symbolic, like teaching the revolution's events in schools or opening a museum for the revolution's martyrs. Other reparations are financial, like free medical treatment and a monthly stipend.[343] This provision also is a partial application of the Reparations mechanism.

2) Administrative Reconciliation Law

On September 14, 2017, the Tunisian parliament passed the Administrative Reconciliation Law according to a proposal by President El Sebsi, who was himself one of the figures of Ben Ali's regime, despite the massive opposition by both civil society and the TDC.[344] The earlier drafts of the law included amnesties for some former corrupt officials and removed some economic crimes from the TDC's preview authority.[345] Due to the stubborn opposition of the civil society, and especially the "Manich Msamah" movement[346] -

[341] Ben Achour (n 339) 206.

[342] ibid.

[343] مرسوم عدد 97 لسنة 2011 مؤرخ في 24 أكتوبر 2011 يتعلق بالتعويض لشهداء ثورة 14 جانفي 2011 ومصابيها [Decree n° 2011-97 dated 24 October 2011, related to reparations for the martyrs and injured persons of the January 14, 2011 revolution] 2011.

[344] Amna Guellali, 'New Reconciliation Law Threatens Tunisia's Democracy' (*World Policy Blog*, 2017) <https://www.hrw.org/news/2017/10/02/new-reconciliation-law-threatens-tunisias-democracy>.

[345] Goldstein, supra note 15.

[346] For more on Manich Msamah movement and the battle over the Reconciliation Law generally, see their official page: https://www.facebook.com/manichmsame7 ,and the recent study by Aymen Belhadj and Arnaud Kurze, 'Whose Justice? Youth, Reconciliation, and the State in Post-Ben Ali Tunisia' (2021) 20 Journal of

which translates to “I do not forgive” -, the parliament ended up enacting a “lighter” version of the law. According to the version that was passed,[347] the corrupt businessmen are not covered by amnesties, so it only includes public servants. However, even for them, there is a distinction between the two groups. The first are those who misused public funds for their personal gain; this group is out of coverage for amnesties as well. The second is those officials involved in corruption but who did not personally benefit, so they only followed orders. For this group, the law called off prosecutions, granted amnesties for any convictions and compensations for any fines they had to pay. However, objectors to the law argue that it did not guarantee any mechanism through which this distinction can be made, or the indirect benefits can be followed through.[348] However, this is not the only objection; other objections include:

- The law turns the corrupt personnel into victims who are entitled to compensation from the state;
- In the light of the previous concern, there is no proof of the law’s economic return. On the contrary, there are fears that it would become an economic burden on the state in such a critical phase;
- It undermines the work of the TDC and does not provide for any mechanism to preserve the truth behind these corruption incidents even if their committers do not face prosecution;
- The law violates not only the constitution by precluding a complete TJ application in a violation of previously mentioned article 148, section 9, but also the TJ Organic Law, which explicitly prohibited impunity in article 15. These violations led both the Venice Commission and the Tunisian Temporary Authority of the Judiciary to

Human Rights 356 <https://www.tandfonline.com/doi/abs/10.1080/14754835.2020.1868296> accessed 15 September 2021.

[347] قانون أساسي عدد 62 لسنة 2017 مؤرخ في 24 أكتوبر يتعلق بالمصالحة في المجال الإداري [Organic Law n° 2017-62 dated 24 October 2017, related to reconciliation in the administrative sphere] 2017.

[348] ICTJ, ICTJ Denounces the Passage of Tunisia’s New ‘Administrative Reconciliation’ Law that Grants Amnesties to Public Officials for Corruption, ICTJ (2017), https://www.ictj.org/news/ictj-denounces-passage-tunisia’s-new-‘administrative-reconciliation’-law-grants-amnesties (last visited Oct 14, 2020); Goldstein, supra note 15; Manich Msamah مانيش مسامح, , https://www.facebook.com/manichmsame7/ (last visited Oct 14, 2020); Amna Guellali, New Reconciliation Law Threatens Tunisia’s Democracy, World Policy Blog (2017), https://www.hrw.org/news/2017/10/02/new-reconciliation-law-threatens-tunisias-democracy.

rejecting its draft, while in the absence of a Supreme Constitutional Court, the Temporary Constitutional Council failed to deliver any opinion on the matter;

- There were concerns of violation of the separation of powers and undermining the competence of the judicial bodies;
- Some of Ben Ali's regime figures were appointed in critical positions just after passing the law;
- Most importantly, those who opposed the law argued that reconciliation and amnesties should be a part of the TJ process, not an ad-hoc measure. Consequently, before reconciliation, there should be confessions, asking for pardon, and returning illegal benefits, so that society can break with the past and set rules for the future. However, amnesties without prior truth investigation, acknowledging the past, and fixing it (in other terms, blanket amnesties) are just authoritarian backsliding and lack equality.

The Administrative Reconciliation Law, accordingly, gives partial amnesties. However, it should also be noted that any further lustration or trials' policies in Tunisia will partially conflict with it because it should preclude applying these policies to those who benefited from the amnesties it gave.

Table (5.2) shows how the second-degree de jure applications respond to the first-degree de jure constitutional mechanisms. Despite the partial combination between different TJ mechanisms that might signal an indicator of a balanced TJ approach, this positive indicator is accompanied by a quite negative level of constitutional compliance regarding TJ. We find a significant inconsistency between the approach taken by the constitutional laws and subsequent legislations in Tunisia after the revolution regarding TJ. The only consistent measure is Amnesties. However, even this consistency does not give much promising indicators given the apparent diversion regarding both Institutional Reforms 2&1, and Trials. Unfortunately, this tendency will be confirmed through analysing the de facto application of TJ policies in the upcoming subsections.

Application	Amnesties	Trials	Reparations	Institutional Reforms 1	Institutional Reforms 2	National Consultations	Truth Commissions
General Pardon Decree 2011	NA	NA	Partial	NA	NA	NA	NA
Confiscation Decree	NA	NA	NA	Partial	NA	NA	Partial

2011							
Redress Decree 2011	NA	NA	Partial	NA	NA	NA	NA
Constituent Assembly Elections Decree 2011	NA	NA	NA	Partial	Partial	NA	NA
Reparations Decree 2011	NA	NA	Partial	NA	NA	NA	NA
Administrative Reconciliation Law 2017	Partial	Partial	NA	NA	NO	NA	NA
Collective	Partial	Partial	Partial	Partial	NO	NA	Partial

Table (5.2) Tunisia Second-Degree De Jure TJ Policies

III. 2. B. Pre-Organic TJ Law

Before the TJ Organic Law was passed, there were already actions taken regarding TJ. These actions are categorized into two types: truth commissions, and the Transitional Justice and Human Rights Ministry.

1) Truth Commissions (TC)

Two TCs, before the TDC, were formed to reveal the truth about the violations that took place during the revolution and corruption during the rule of Ben Ali.

First, The National Committee to Investigate Truths regarding the Corruption and Bribery Cases. This committee was formed in February 2011, and its investigations include incidents since 1987. The committee did more than revealing the truth in its final report;[349] It also deferred a number of corruption cases to the judiciary. Moreover, it prepared the draft of a law decree to combat corruption, which was later issued by Decree no. 120 of 2011, dated November 14, 2011, related to combatting corruption. After the committee finished its work, the National Authority to Combat Corruption was formed according to that decree.[350] These steps leave us with three partial mechanisms applied: Truth commissions, Trials, and Institutional Reforms 1.

[349] The National Committee of Investigating Truths regarding Bribery and Corruption, ' التقرير النهائي للجنة تقصي الحقائق حول الرشوة والفساد [The Final Report of the National Committee to Investigate Truths Regarding Bribery and Corruption]' (2011) <https://drive.google.com/file/d/13dGmOdLKjOZ6HiP2rG4pr6sFJ6oFaCrf/view>.

[350] مرسوم إطاري عدد 120 لسنة 2011 مؤرخ في 14 نوفمبر 2011 يتعلـق بمكافحـة الفسـاد [Frame Decree n° 2011-120 dated 14 November 2011, related to Combatting Corruption] 2011.

Second, the National Committee to Investigate Truths regarding Recorded Violations in the Period from December 17, 2020, until necessary. This Committee was formed by Decree no. 8 of the year 2011, dated February 18, 2011,[351] and it presented its final report to the president in April 2012. The committee recorded both the violations and victims from December 17, 2010, until October 23, 2011.[352] These actions are another partial application of the TC mechanism.

2) Ministry of Human Rights and Transitional Justice

The Ministry of Human Rights and Transitional Justice was established by Decree no. 22 of 2012, dated January 19, 2012.[353] The major accomplishments of this Ministry include:[354]

- Holding national consultations for six months to build a vision of TJ. This initiative included forming committees of civil society organizations and victims' assemblies throughout the country;
- Drafting and presenting to the Constituent Assembly the Organic Law of TJ accordingly;
- Applying the temporal reparations regulated by the General Pardon Decree and the Martyrs and Injured Persons Reparations Decree.

The Ministry was dissolved in January 2015. Its formation and accomplishments partially fulfill three of the TJ mechanisms: Institutional Reforms 1, National Consultations, and Reparations.

3) Other Institutional Reforms

- Ben Ali's party, the Democratic Constitutional Assembly Party (ACAP), was dissolved by a judicial decision in a case that the minister of the interior established,

[351] مرسوم عدد 8 لسنة 2011 مؤرخ في 18 فيفري 2011 يتعلق بإحداث اللجنة الوطنية لاستقصاء الحقائق في التجاوزات المسجلة خلال الفترة الممتدة من 17 ديسمبر 2010 إلى حين زوال موجبها [Decree n° 2011-8 dated 18 February 2011, related to establishing the national committe 2011.

[352] The National Committee to Investigate Truths Regarding Violations, ' تقرير اللجنة الوطنية لاستقصاء الحقائق حول التجاوزات والانتهاكات [The National Committee Report to Investigate Truths Regarding Violations]' (2012) <https://www.leaders.com.tn/uploads/FCK_files/Rapport Bouderbala.pdf>.

[353] أمر عدد 22 لسنة 2012 المؤرخ في 19 جانفي 2012 يتعلق بإحداث وضبط مشمولات وزارة حقوق الإنسان والعدالة الانتقالية [Order n° 2012-22 dated 19 January 2012, related to establishing and regulating the components of the ministry of human rights and transitional 2012.

[354] The Tunisian Commission of Truth and Dignity (TDC) (n 280).

and its funds and properties were returned to the state properties ministry.[355] This action resembles Institutional Reforms 1 application.

- The dissolution of the State Security in March 2011, a body that was responsible for most of the systematic torture and oppression against citizens.[356] (Institutional Reforms 1).
- October 23, 2011, elections, the first free and transparent elections that Tunisia witnessed,[357] and the next elections and establishing an independent authority that supervises elections[358] are a significant manifestation of the Institutional Reforms 1. However, the political money, i.e., the funds used by candidates for campaigns illegally, is still a problem that undermines these reforms to some extent.[359]

III. 2. C. Post-Organic TJ Law

1) Policies Separate from the TDC Report

- Striking Down the Political Isolation Law:
  On May 26, 2014, the Tunisian Constituent Assembly issued the Organic Law n. 16 regulating the elections and referenda.[360] In its early versions, the article number 167 of the law aimed to ban the leading figures of the past regime from nominations for the parliament. The proposed article stated *"Whoever took over responsibility within the government of the ousted president can't be nominated for the People's Council, except for those of the government's members who didn't belong to the dissolved Democratic Constitutional Assembly Party (El Tagamoa). Those who took over responsibility within the structure of the latter can't be nominated either according to the order n. 1089 dated August 3, 2011."*[361]

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[355] ibid 114–115.

[356] ibid 156.

[357] ibid 209.

[358] ibid 208.

[359] ibid.

[360] قانون أساسي عدد 16 لسنة 2014 مؤرخ في 26 ماي 2014 يتعلق بالانتخابات والاستفتاء (1) [Organic Law Number 16 of the Year 2014 Dated May 26, 2014 Relating to Elections and Referendum (1)] 2014 1384.

[361] إسقاط الفصل 167 الخاص بالعزل السياسي في القانون الانتخابي' [Striking Down the Article 167 on the Political Isolation Withing the Electoral Law]' (*Babnet*, 2014) <https://www.babnet.net/rttdetail-84441.asp> accessed 14 September 2021.

Article 167 was struck down within the Constituent Assembly after significant debates and with the support of the El Nahda party.[362] This decision opened the possibilities for the past-regime's significant figures to participate in the political sphere post-revolution, even before the completion of a TJ process. This policy represents a negative application of Institutional Reforms 2 (lustrations) and a partial application of Amnesties.

- In 2017, the National Authority of Corruption Combat submitted its first annual report of corruption in the public domain since its formation in 2011 and deferred 94 cases to the judiciary for the year 2016 only.[363] These steps are not only Institutional Reforms 1 initiatives but also involve the application of Trials.
- Instead of adopting the law reforms recommended by the TDC regarding the security sector, a draft was proposed by some parliament members that involves "the protection of security forces" (November 2020). However, the draft is heavily criticized by civil society and international organizations for bringing back "the police state" and strengthening the security sector vs. citizens against fundamental civil and human rights.[364] This law would be a step backward regarding Institutional Reforms 1.

2) TDC Report

The executive summary of the final report of the TDC comes in 529 pages, in addition to appendixes. The commission received more than 63,000 requests to be considered a victim.[365] The TDC work covers violations from 1955 until 2013, the date of issuing the TJ Organic Law. The report shows three criteria that were used to sort the requests out to decide the qualified requests. First, the reported violation has to have occurred from July 1, 1955, to December 31, 2013. This period covers the violations committed since the Tunisian

[362] Moustafa El Qalii, 'لماذا أسقط راشد الغنوشي قانون العزل السياسي في تونس' [Why Did Rashed El Ghanouchi Strike Down the Political Isolation Law in Tunisia?]' (العرب - *AlArab*, 2014) <https://alarab.co.uk/لماذا-أسقط-راشد-الغنوشي-قانون-العزل-السياسي-في-تونس> accessed 14 September 2021.

[363] 'هيئة مكافحة الفساد تحيل أكثر من تسعين ملفا على القضاء خلال عام' [The National Authority for Corruption Combat Defers More than 90 Cases to the Judiciary within One Year]' (العرب - *AlArab*, 2017) <https://alarab.uk/هيئة-مكافحة-الفساد-تحيل-أكثر-من-تسعين-ملفا-على-القضاء-خلال-عام> accessed 22 October 2020.

[364] DW, 'تونس – قانون "حماية رجال الأمن" يثير القلق على حقوق المواطنين' [Tunisia - The "Security Forces Protection" Law Raises Worries Regarding Citizens Rights]' (*DW*, 2020).

[365] The Tunisian Commission of Truth and Dignity (TDC) (n 280) 2.

Republic's independence until adopting the TJ law. Second, the violator has to be the state, a person acting in its name or under its protection, or organized groups. Third, the violation must be grave or systematic.[366] These criteria are broad and align with international standards. For example, they open the door for taking into account the political crimes that the past regime committed against the Tunisian people, and that could not usually be traced under the typical criminal code, like forbidding free elections. The TDC report shows that the commission received 620 victims' requests regarding violating the right to transparent and free elections.[367] Also, the TDC was aware of the hardships that women have usually faced in the previous TJ comparative experiences and devoted a special committee for violations against women.[368]

Moreover, the TDC associated both human rights violations and corruption crimes in the means of their performance. The report argues that human rights violations were committed to cover for the authoritarian regime that aimed primarily to accumulate illegal wealth.[369] The TDC then suggested that curing the corruption system can also have positive spillovers on the human rights status.[370] The report explains in detail all the work, goals, and recommendations of the TDC, in addition to the obstacles it faced, its relationship with national and international parties, and its unfinished business.

Although the final report was submitted to the president, head of parliament, head of the executive, and head of the high judicial council on March 26, 2019, according to article 67 of the TJ Organic Law, it was not published in the Official Gazette until June 24, 2020. This delay constitutes a breach of both the Organic Law and the Constitution. The delay is not, however, random. According to article 70 of the TJ Organic Law, the executive will have only one year from issuing the comprehensive report to preparing an action plan to implement the TDC recommendations under the parliamentary mentoring. Given the battles that the commission had to go through with both legislative and executive authorities[371] and other parties, it could be expected that they will not be willing to perform such a duty.[372]

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[366] ibid 41.

[367] ibid 197.

[368] ibid 315.

[369] ibid 334.

[370] ibid 341.

[371] The Tunisian Commission of Truth and Dignity (TDC) (n 280).

[372] Until the end of September 2021, no such plan was delivered.

The first part of the report summarizes the other parts and presents the TDC operation's motivations and dynamics. The second part focuses on deconstructing the authoritarian system by showing how exactly that system performed, and its tools. The third part explores the deconstruction of the corruption system by showing its different faces and reasons. The fourth part is devoted to reparations (symbolic and monetary). The fifth part presents the guarantees of non-repetition.

I will divide my analysis of the report by mechanisms. This categorization does not follow the same order or categorization as the report, but it enables a better understanding for the purposes of this analysis.

First, Amnesties (Partial Application)

According to the TDC report approach, reconciliation happens in the context of the democratic transition. It then comes after truth revealing, accountability, apology, memory preserving, reparations, and guaranteeing the non-repetition of the past to achieve civil peace.[373] According to this approach, all these mechanisms are connected and complementary, and none of them can be ignored even for *Force Major* or emergency reasons; otherwise, this would violate the constitution.[374] It is worth noting here that reconciliation does not equal amnesties. The second is a tool to achieve the first, among other tools like truth revealing and institutional reforms. However, the word "amnesties" was not used as independent from "reconciliation" in the report, reflecting the TDC's approach.

The Arbitration and Reconciliation Committee (ARC) is formed according to the TJ Organic Law as an organ of the TDC to reach these goals.[375] The ARC's mission is to decide cases related to grave human rights violations, and corruption, and public funds violations, in the period from July 1955 to December 2013. This competence departs from the original legal rule that prevents arbitration in these matters.[376] The legal effect of the arbitration decision, though, differs between these two types of violations. In the case of human rights violations, the decision has only a relative effect, which means that it will decrease the sanction that the perpetrator is expected to receive; however, it does not close the case before

[373] The Tunisian Commission of Truth and Dignity (TDC) (n 280) 442–443, 445–447.

[374] The Tunisian Commission of Truth and Dignity (TDC) (n 280).

[375] ibid.

[376] ibid.

the competent criminal judicial circuits. In the case of financial crimes, the legal effect is absolute, which entails ceasing the case or the sanction and compulsory non-pursuit of the case.[377] There are, however, conditions for accepting the request of reconciliation:

- A written confession by the request initiator along with an apology;
- The agreement of the victim (the state in case of public financial crimes);
- Explaining the incidents that led to the illegal profit and the value of that profit;
- Attaching evidence of the reconciliation seeker's claims;
- The acceptance of attending public hearings;
- Accepting the arbitration decision and that it will be a final decision that cannot be subject to any kind of appeal;
- The right to any of the TDC committees to check the procedures and files of the arbitration cases, and in case it was found at any stage that the requester intentionally hid or delivered inaccurate information, then the decision and all its effects are to be considered null and void;
- However, the parties can agree to other conditions if they explain them specifically in the arbitration agreement.[378]

The ARC assumed its works starting in August 2015.[379] The requests were closed for victims from June 15, 2016, but remained open for perpetrators until the end of the TDC work. The TDC did not give a reason for this favourable treatment for the perpetrators; however, it did refer to the fact that most of the requests came from the victims, not the perpetrators.[380]

The report records that neither perpetrators of human rights violations nor economic crimes took the initiative to confess their crimes and ask for forgiveness.[381] It also accused the state authorities of abstaining from benefiting from arbitration and reconciliation mechanisms that could return huge funds to the public treasury.[382] However, the report shows that the Arbitration and Reconciliation Committee formed by the TDC concluded eight

[377] ibid.

[378] ibid. Other minor conditions can be found in ibid.

[379] The Tunisian Commission of Truth and Dignity (TDC) (n 280) 454.

[380] ibid 455.

[381] ibid 1.

[382] ibid 25,442.

arbitration agreements that restored 746 million Dinars to the Tunisian State.[383] Moreover, it settled the dispute with 11 human rights violations victims, among them two victims of a violation of property rights who were granted reparations with 700 thousand Dinars.[384] Generally, the filed requests reached 25,998 requests that resulted until the publication of the TDC final report in only nine arbitration decisions, 6 for human rights violations, and 13 for financial crimes.[385]

The report also suggested holding a national conference for reconciliation attended either by the state representatives, political parties, civil society, professional bars, or only the political parties to exchange collective confessions and apologies. However, this conference did not occur until the TDC report was published, and not until September 2021 either.[386]

In total, the TDC application of amnesties was only partial. Although the commission made efforts regarding starting a reconciliation process, this process results were remarkably modest, especially compared to TJ law's ambitions and the TDC goals. The reasons behind this modest harvest are not self-evident given the mutual accusations between the TDC, civil society, and state authorities.

Second, National Consultations (Full Application)

According to the report, the TDC involved the assemblies representative of victims and civil society in the admission of victims' requests. It also initiated campaigns around the country, physically and through media, to communicate with citizens in the phase of requests registration.[387] Additionally, the TDC held 14 public hearing sessions regarding various violations that aimed to involve the public opinion about the TJ process and past violations and preserve truth.[388] The TDC also involved the victims in its design of the reparation programs and surveyed the victims who benefited from the earlier General Pardon Law to use their feedback to design its later reparation strategy.[389]

[383] ibid 442.

[384] ibid.

[385] ibid 459.

[386] ibid 447.

[387] ibid 38.

[388] ibid 54–58.

[389] ibid 359.

Third, Reparations (Partial Application)

According to the TDC's approach, preparations include nearly all other TJ mechanisms, especially institutional reforms. The reparations processes started with a symbolic reparation through the process of receiving the victims' requests. Through this process, the state authorities started acknowledging the harm caused to the victims and initiated the reconciliation process with them.[390] It also considered preventing the violations' repetitions (institutional reform) part of the reparation to the victims.[391] In this regard, the TDC formulated specific recommendations derived from the victims' requests, evidence, actual capabilities of the Tunisian state, and the national and international legal framework. It then integrated the concepts of reparation and institutional reforms as a step towards reconciliation.

Reparations included dealing with 13586 urgent interfering requests.[392] The TDC strategy acknowledges the right to reparation whenever there is a causal relationship between the damage and the state's violation.[393] In that case, both moral and financial reparations are granted. It also granted reparations for the victims' family members in case of the death of the victim.[394] Reparations are granted to the victims of human rights violations from the "Karama" (which translates to Dignity) treasury that belongs to the TDC, while reparations for violations related to corruption and property are to be granted by the competent judicial authorities.[395] The monetary reparations are to be granted in installments or monthly stipends.[396] The moral reparations included integration, rehabilitation, and apology,[397] in addition to the recommendations regarding institutional reforms to prevent the repetition of systematic violations.[398]

Most interestingly, the TDC pioneered in adopting the concept of the "Victim Territory," which refers to the geographic areas that were systematically deprived of resources and development and subject to human rights violations. The TDC granted both financial and

[390] ibid 39.

[391] ibid 359.

[392] ibid 50.

[393] ibid 361.

[394] ibid 363.

[395] ibid 363–364.

[396] ibid 363.

[397] ibid 364–365.

[398] ibid 366–403.

moral reparations for these areas,[399] which necessarily overlapped also with some of its institutional reform recommendations.

Despite this up-to-standard approach, the de facto application of a considerable part of the reparations program is still in the government's hands and other competent authorities and will then need future studies to investigate how far it was practically applied.

Fourth, Truth Commissions (Partial Application)

Most of the TDC work involved initiatives to reveal the truth. The TDC work started with collecting the victims' requests and then holding secret hearing sessions for the admitted requests, including 49564 victims, and recording these violations.[400] Afterward, it moved to the phase of investigating the files it had.[401] Then the investigation would lead to either accepting the file or rejecting it. In the case of acceptance, either the commission will have the final decision, or the file can be referred to the competent judicial authority.[402]

In terms of accountability, the TDC was also concerned with specifying the liable perpetrators even if this did not necessarily lead to a trial through instituting the violations' political and institutional liability.[403]

The final conference of the TDC involved presenting to the public the full work record, results that the TDC reached, the obstacles it faced, and its recommendations.[404] However, as long as the TDC truth revealing efforts were not completed because of lack of cooperation, and limitations of time and resources, it is considered here as a partial application.

Fifth, Trials (Partial Application)

Applying judicial trials started as early as January 14, 2011. However, it took slowly confused steps and lacked the legitimacy of the acting governments at many steps. This practice undoubtedly negatively influenced the whole process, especially for reasons of loss

[399] ibid 378–387.

[400] ibid 42–46.

[401] ibid 47–49.

[402] ibid 49.

[403] ibid 67–68.

[404] ibid 104–106.

of material evidence. However, this eliminatory failure proves once more that the TJ prosecutions' process needs to be a separate path with its dynamics, even if it will use the regular judicial tools. It should be expected that the judiciary, in its typical operation, is itself part of the state authorities that need to be investigated and reformed. One cannot expect that a judiciary of a solid authoritarian regime will within a day move from the oppressor side, a party to the conflict, to become suddenly the judge of the very same conflict. This short, confused experience finally, and expectedly, led to the TJ Organic law. However, it was resumed with the TDC work.[405]

In the Tunisian approach, the TDC is not a judicial authority, and it is not an alternative to the original competent judiciary but a complementary authority. Accordingly, the TDC's mission was to collect the requests, process them, do the investigations, and then defer to the competent judicial circuits the qualified cases according to specific criteria.[406] The TDC's approach to trials recognized that due to the enormous amount of requests that it received, and the limited time and resources available for both the commission and the judicial authorities, there is no way all violations will be prosecuted. Consequently, the commission set criteria according to which it decided which violations would be referred to trial. These criteria are: First, availability of sufficient evidence; Second, grave human rights violations only; Third, priority for prosecuting the persons who are more responsible than others; Fourth, priority for the most dangerous crimes; Finally, the commission tried to represent the different historical contexts in the referred files to trial.[407] It is also interesting that the TJ Tunisian policy ignored two principles, among other standard constitutional principles. The first is that it permitted criminal responsibility based on international law principles directly, not only applicable national laws.[408] The second is that it established criminal liability for negative acts, or abstention, for example, the chiefs who abstained from taking action regarding an illegal violation committed by their subordinates.[409] This last example, which involves leaders' liability, represents a priority for the TDC, which insisted on stressing it even if it would resort to public international law instead of applicable national

[405] ibid 452.

[406] ibid 446.

[407] ibid 59–60.

[408] ibid 65.

[409] ibid 66.

laws, i.e., achieving accountability.[410] However, these exceptions on the due process standards (under the strict national constitutional law) do not mean the total lack of it. Instead, the Tunisian TJ process tended to interpret the due process considerations in their contexts and set clear criteria and rules of TJ trials that guarantee both fair trials and accountability considerations.

The TDC deferred 1120 cases that involved 1426 criminals to the criminal judicial circuits.[411] In addition, 131 cases that involved 527 victims were also deferred but without the necessary evidence due to non-cooperation from different state authorities. The deadline in which the TDC had to defer all the files had already passed by then. Consequently, despite lack of evidence, the TDC found that it would do more for preserving the victims' rights to defer these files to the competent authorities so they would finish their investigations and then take decisions regarding them.[412] One 119 of these cases involved ordinary persons as victims, while 12 cases involved the state as victims of violations against public funds. The report states that all of them enjoyed their rights to defence, confrontation, and the presumption of innocence.[413] However, not all of the perpetrators accepted to be present before the court; security forces unions specifically pushed their members not to cooperate with the prosecution procedures.[414]

Regarding corruption crimes, the TDC issued a request for investigation against a list of accused persons. When they refused to show before the commission, the TDC deferred them to the competent circuits in 2018[415] in addition to other investigations that the TDC deferred to the competent criminal circuits regarding administrative corruption.[416]

Sixth, Institutional Reforms (Partial Application)

Throughout the TDC report, there are complaints regarding different state authorities and personnel who refused to cooperate with the TDC operation, despite the constitutional protection. One of the remarkable manifestations of that is the TDC allegation that the

[410] ibid 67.

[411] ibid 68.

[412] ibid 77–78.

[413] ibid 69.

[414] ibid 69–70.

[415] ibid 342,348.

[416] ibid 345.

reparations treasury was formed after several delays without applying any TDC recommendations. Until the TDC finalized its operation, the treasury was not activated.[417] Other complaints included the presidency, the national archive, the Ministry of the interior, the military judiciary, the financial judiciary, justice of ministry experts, Ministry of culture, Tunis municipality, the cabinet, part of the parliamentary members who supported the ad hoc reconciliation law drafts and the suspension of the TDC operation, the state property minister, the administrative court, in addition to some informal authorities like the security forces unions.[418] This non-cooperation not only challenged the complete application of the different TJ mechanisms, including reconciliation efforts, which were repeatedly delayed and suffered from a conflict of interest concern but also signalled a significant resistance by the majority critical state authorities to the TJ application at all. This attitude is an alarming indicator of how far the other institutional reforms suggested by the TDC, or the reforms achieved through the new constitution or new laws, will ever be applied. However, it is hard to judge how far the TDC was biased or a party to a political conflict.

The part from p. 107 to 208 of the TDC's report was devoted to exploring and analyzing the aspects of the past authoritarian regime's operation. This exploration is not only vital for revealing the truth, documentation, and memory as forms of other TJ mechanisms, but most importantly, it gives practical guidance on how in legal terms and on the ground, the authoritarian and corrupt government worked and could still be working. This documentation is an inevitable first step to deconstruct this system and depart from its dynamics and strategies. The report shows in detail, and in far from general emotional statements, how the autocratic regime worked. It gives a full report of the past autocratic regime's operation in a clear, detailed, structured manner and supported with factual evidence.

Besides, the TDC report presented a detailed list of the recommended institutional reforms, which are currently (2021) in the possession of the executive and the parliament, which have one year period to implement them. This comprehensive list included reforms in the following sectors: security sector,[419] elections,[420] the judiciary,[421] civil rights,[422]

[417] ibid 87.

[418] ibid 90–103.

[419] ibid 161-163,366-370.

[420] ibid 208.

[421] ibid 370.

[422] ibid 371–377.

geographical zones justice and decentralization,[423] women rights,[424] the disabled,[425] Children's rights,[426] National Memory.[427] The third chapter of the fourth part of the report is entirely devoted to institutional reforms.[428] More general, inclusive, and diverse recommendations are given in the fifth part of the report.[429]

Despite this impressive work of the TDC regarding institutional reforms 1, i.e., reforms other than lustrations, it is hard to conclude that this mechanism was applied in practice. The main reasons that preclude such a conclusion are numerous. First, the parliament and the executive are the competent authorities in executing these reforms, not the TDC. So far, no enforcement of the TDC's recommendations took place. Second, the non-cooperation of these two branches with the TDC does not make the observer any optimistic about this mechanism's future application. Finally, the way political parties have been reacting to TJ issues before and after the TDC report release tends to ignore the commission's work and boycott it and adopt impunity instead.[430]

However, there is no mention for institutional reforms 2, i.e., lustrations, throughout the report, except in the context of explaining the TDC approach to arbitration and reconciliation and their necessity for screening and reforming the current administrative authorities.[431] However, no explanation of that "screening and reforming" process was given, although it may be thought that isolation or prevention from holding public positions could be a criminal sanction resulting from accusations against perpetrators in the ongoing trials. Moreover, the Administrative Reconciliation Law will prevent the application of these reforms on the public servants who benefit from its amnesties unless the law is to be struck down by a future constitutional court.

[423] ibid 378–385, 387–389.

[424] ibid 392,395-396.

[425] ibid 397–398.

[426] ibid 399–401.

[427] ibid 419, 425–430, 433–437.

[428] ibid 477–496.

[429] ibid 497–526.

[430] Mariam Salehi, 'How Tunisia Is Addressing Its Authoritarian Past — and Why It Matters' (*The Washington Post*, 2019).

[431] The Tunisian Commission of Truth and Dignity (TDC) (n 280) 449.

3) Deficits of the TDC Operation

- From another perspective, the TDC work itself does not come entirely clean. There are accusations of conflict of interests between members of the TDC. The accusations focus primarily on the head of the ARC and some of the arbitration and reconciliation decisions beneficiaries.[432] The investigations in these accusations by the National Authority of Corruption Combat led to deferring them to the competent judicial circuits in April 2021.[433] Other accusations also included arbitrary control by the head of the commission, Siham Ben Sedrin.[434] These accusations do not come only from outsiders but also from inside the commission itself.

  Moreover, according to the arbitration decisions, any value of properties or funds the state seized from the reconciliation requesters can be deducted from the estimate of funds that the reconciliation requesters have to repay the state. This rule comes with no precedent or support from the TJ Organic Law and could lead to a bizarre result, that the state has a debt instead of getting back money from the corrupt.[435] This same rule was one of the grounds of a first of its kind judicial decree issued by the first-degree court in Tunis, March 2021, considering an ARC arbitration decision null and void.[436] This verdict constitutes a precedent that violates the immunity given to the ARC decisions by the TJ Organic law. Besides, there are allegations regarding partial

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[432] تضارب مصالح شبهات فساد وتجسس في هيئة الحقيقة والكرامة (فيديو)' [Conflict of Interests, Spying, and Corruption Suspects Withing the Truth and Dignity Commission (A Video)]' (*Mosaique FM*, 2019) <https://www.mosaiquefm.net/ar/ميدي-شو-أخبار/546591/تضارب-مصالح-شبهات-فساد-وتجسس-في-هيئة-الحقيقة-والكرامة> accessed 22 October 2020.

[433] هيئة مكافحة الفساد تحيل شكايات ضد سهام بن سدرين إلى القضاء' [The Corruption Combat Authority Defers Complaints Against Siham Ben Sedrine to the Judiciary]' (*El Shorouk Newspaper*, 2021) <https://www.alchourouk.com/article/ هيئة-مكافحة-الفساد-تحيل-شكايات-ضد-سهام- بن-سدرين-إلى-القضاء> accessed 16 April 2021.

[434] تضارب مصالح شبهات فساد وتجسس في هيئة الحقيقة والكرامة (فيديو)' [Conflict of Interests, Spying, and Corruption Suspects Withing the Truth and Dignity Commission (A Video)]' (n 435).

[435] Monia Al Arfawy, 'رداً على سؤال رئيس الدولة: أموال الشعب.. عبثت بها هيئج سهام بن سدرين [A Reply to the President: People's Money.. Manipulated by Siham Ben Sedrin's Commission]' (الصباح - *Al Sabah*, 2020) <http://www.assabah.com.tn/article/165695/-بن-سهام-هيئة-بها-عبثت-الشعب-أموال?fbclid=IwAR25RgahZpWKEHU5Mgqb0JiJyo71KW5KvcLGHruJINniuQ2XmXfhnucu_p8سدرين> accessed 22 October 2020.

[436] 'سابقة قضائية في ملف عماد الطرابلسي! [A Judicial Precedent in Emad Eltrabelsi's File]' (7 - لاين أون حقائق*akaek Online*, 2021) <https://www.hakaekonline.com/article/129900/سابقة-قضائية-في-ملف-عماد-الطرابلسي> accessed 16 April 2021.

application of the Seizure law against Ben Ali and his relatives. Part of these accusations was later supported by the Auditing Circuit report that was issued on April 30, 2019, as the only authority that has mentoring competence over the TDC work according to the TJ Organic Law. The report shows a broad range of concerns related to:

- Procedural defections;
- Lack of due investigations in many cases;
- Depriving some victims of this legal title which meant depriving them of the reparations to which they were entitled;
- The modest number of accomplished arbitration and reconciliation decisions, and the conflict of interest in a number of the accomplished ones;
- Unnecessary expenses and deficiencies in managing the financial resources;
- Incomplete transparency of the financial resources requested and available to the commission and other critics regarding the TDC work governance.

The Auditing Circuit report does not allocate the responsibility of these violations to the TDC only but also to other state authorities, which did not cooperate with its work. The report states that the financial violations which could constitute a financial crime are to be deferred to the competent judicial circuits.[437] The final judicial decisions in these concerns and accusations, and how far they influenced the total work of the TDC, in addition to the further application of the incomplete policies started by the TDC, including reparations, trials, and institutional reforms, will both decide how far the de facto TJ Tunisian policy is aligned with its de jure aspirations.

- It is not to be forgotten that the TDC had to end its work before its completion due to the end of its term. According to article 18 of the TJ Organic Law, the term of the TDC is four years starting from the date of nominating its members and can be extended for one year by a decision from the commission itself. However, this decision has to be reasoned and has to be submitted to the legislative body three months before the end of its original term.[438] This extension, however, did not happen smoothly. On February 27, 2018, the TDC decided to extend its operation until the

[437] The Tunisian Auditing Circuit, ‘تقرير دائرة المحاسبات حول هيئة الحقيقة والكرامة [The Auditing Circuit Report on the Truth and Dignity Commission]’ (2019) <http://www.courdescomptes.nat.tn/upload/RapportSepec/IVD2019.pdf>.

[438] The Tunisian Gazette/ الرائد الرسمي, supra note 12.

end of the year, justifying this extension with the lack of cooperation from some state authorities.[439] One of the parliamentary parties appealed the decision before the Tunisian judiciary, which ruled in favour of the TDC.[440] On the same day, a parliamentary session attended by the TDC was held; although the quorum was not complete; still, the parliament voted against the extension.[441] Due to the defect in procedures, the TDC head decided to ignore the parliamentary vote and continue its work.[442] Later, the TDC signed a joint declaration along with the Minister of Relationship with Constitutional Authorities, Civil Society, and Human Rights.[443] The declaration stated that the TDC would continue to perform until it finishes its work. This quarrel, along with other tensions previously referred to, limited the Truth Revealing mechanisms' application. However, most importantly, it reflects that the TJ path is not supported by the political parties in Tunisia, even those who were victims of the past regime, like the El Nahda Islamic Party.

The reason for this tendency can probably be found by using a rational choice perspective. For these parties, TJ is merely a card that they use to force pay-offs from other parties. After the revolution, the two most powerful political parties in Tunisia are El Nahda Islamic Party (Muslim Brotherhood) and Nidaa Tunis Party (past-regime members).[444] El Nahda tends to focus only on reparations, as most of their

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[439] Aljazeera, 'هيئة الحقيقة بتونس تمدد عملها "لعدم التعاون" [The Truth Commission in Tunisia Extends Its Operation for "Non-Cooperation"]' (*Aljazeera*, 2018) <https://www.aljazeera.net/news/humanrights/2018/2/28/هيئة-الحقيقة-بتونس-تمدد-عملها-لعدم> accessed 23 October 2020.

[440] Al Sabah News, 'المحكمة الإدارية: قرار هيئة الحقيقة والكرامة بالتمديد في مدة عملها هو من صلاحياتها [The Administrative Court: The Truth and Dignity Commission's Decision of Extending Its Mandate Is within Its Competence]' (*Al Sabah News*, 2018) <http://www.assabahnews.tn/article/178169/المحكمة-الإدارية-قرار-هيئة-الحقيقة-والكرامة-بالتمديد-في-مدة-عملها-هو-من-صلاحياتها> accessed 23 October 2020.

[441] 'التصويت بعدم التمديد لهيئة الحقيقة والكرامة [Voting with Non-Extention for the Truth and Dignity Commission]' (*Babnet*, 2018).

[442] Aljazeera, 'هيئة العدالة الانتقالية بتونس تتحدى البرلمان [The Transitional Justice Commission in Tunisia Challenges the Parliament]' (*Aljazeera*, 2018) <https://www.aljazeera.net/news/arabic/2018/3/29/هيئة-العدالة-الانتقالية-بتونس-تتحدى> accessed 23 October 2020.

[443] Aljazeera, 'اتفاق لا غالب ولا مغلوب بين بن سدرين والحكومة [A Win-Win Agreement Between Ben Sedrin and the Government]' (*Aljazeera*, 2018) <https://www.aljazeera.net/news/arabic/2018/5/27/اتفاق-لا-غالب-ولا-مغلوب-بين-بن-سدرين> accessed 23 October 2020.

[444] Rory McCarthy, 'The Politics of Consensus: Al-Nahda and the Stability of the Tunisian Transition' (2019) 55 Middle Eastern Studies 261, 261 <https://www.tandfonline.com/doi/full/10.1080/00263206.2018.1538969>.

funds will go to members' pockets[445] while using other mechanisms only as pressure and negotiation tools with other parties to achieve political pay-offs. Nidaa Tunis, as members of the past regime themselves, do not benefit from the TJ process; on the contrary, it would have costly consequences for them. TJ's problem in Tunisia seems to be the same problem with all other unresolved conflicts and pending institutional transformations. The subsequent governments failed to achieve meaningful political and economic reforms that the Tunisians revolted for in the first place. This failure could be because all the institutional arrangements are only a sphere for political quarrel and compromises between the political parties. Meanwhile, no party has been capable of controlling the state alone and eliminating its opponents up to the present (September 2021), and many of the young Tunisian people claim that all these parties do not represent the real aspirations and interests of the Tunisian people. Mostly, the youth communities behind the revolution and the civil society in Tunisia are still incapable of forming political parties that can compete for power. One fact that may support this reasoning is the victory of the independent presidential candidate Kais Saied, over all other candidates from all political parties, including El Nahda, in 2019,[446] despite not having any political qualifications. The current Tunisian political setup would probably use a second "historical consensus" like the one that saved the democratic transition back in 2014. The latest mass protests that the country witnessed in 2021[447] are a more apparent indicator of such a need.

III. 2. D. Other Applications and Concerns

Besides the policies referred to in the earlier subsections, other remarkable separate actions were taken through different stages which relate to TJ application. Most of these developments can be categorized under more than one TJ mechanism. However, to make it easier to follow, I will include each one using the mechanism that I find it relates the most to, with a reference to the other mechanism/s it relates to.

[445] Hatem El Shafei, 'تونس- تعويضات لضحايا الدكتاتورية: جبر للضرر أم نهب للأموال؟' [Tunisia - Reparations for Dictatorship Victims: Redress or Looting?' (*DW*, 2012).

[446] The Guardian, 'Tunisia Election: "Robocop" Kais Saied Wins Presidential Runoff' (2019).

[447] euronews, 'PROTESTS IN TUNISIA' (2021).

1) Amnesties

- In 2019, the trials in progress against Ben Ali's Regime members accused of violations reached nearly 170 prosecutions.[448] A bill was presented to the parliament by the Ministry in charge of Relations with Constitutional Authorities, Civil Society and Human Rights under the title "Preliminary draft of an organic law on the completion of the transitional justice process, the establishment of general reconciliation and the consolidation of national unity".[449] Generally, the bill aimed at first, guaranteeing reparations to the victims, and second, granting amnesties regarding pending accusations in exchange for apologies to the proposed reconciliation committee.[450] Although the bill was under attack by the civil society, the mere initiative shows the inconsistency in the TJ project in Tunisia, and the absence of the will to enforce the policies that were already adopted through constitutional measures after national consultations.[451]
- On another note, in the aftermath of the controversial Administrative Reconciliation Law, appointing personnel who either benefited from that law[452] or were mere leading figures of the past regime[453] in key positions raised concerns about the seriousness of the whole TJ process. The non-publication of the law's beneficiaries list so far also

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[448] Olfa Belhassine, 'Tunisia : The Threat of an Amnesty' (*JusticeInfo.net*, 2019) <https://www.justiceinfo.net/en/41007-tunisia-the-threat-of-an-amnesty.html> accessed 16 September 2021.

[449] ibid.

[450] ibid.

[451] For a further discussion on the political analysis of the non-linearity of the Tunisian TJ process, see Mariam Salehi, 'Re-Tunisia's Re-Confgurations and Transitional Justice in Process: How Planned Processes of Social and Political Change Interplay with Unplanned Political Dynamics' in Rachid Ouaissa, Friederike Pannewick and Alena Strohmaier (eds), *Re-Configurations: Contextualising Transformation Processes and Lasting Crises in the Middle East and North Africa* (Springer Fachmedien Wiesbaden 2021) <https://library.oapen.org/bitstream/handle/20.500.12657/42938/2021_Book_Re-Configurations.pdf?sequence=1#page=46>.

[452] Manich Msamah مانيش مسامح, 'تعيين "كفاءة" من المتمتعين بقانون الفساد [Appointing a "Skilled" among the Corruption Law [Beneficiaries' (*Manich Msamah* مانيش مسامح, 2018) <https://www.facebook.com/manichmsame7/posts/1898707103768645> accessed 23 October 2020.

[453] Monia Ghanmy, 'تونس.. جدل بعد تعيين "رجال بن علي" بمناصب رفيعة' [Tunisia.. A Debate after Appointing "Ben Ali Men" in Key Positions]' (*Al Arabiya*, 2020) <https://www.alarabiya.net/ar/north-africa/2020/09/23/تونس-جدل-بعد-تعيين-رجال-بن-علي-بمناصب-رفيعة#> accessed 23 October 2020.

left question marks behind its motives.[454] The law's opponents think that it was delivered for the benefit of high-ranking past-regime personnel specifically as part of a political compromise between El Nahda and Nidaa Tunis, and that is why the names of its beneficiaries were not publicized.[455] In the same context, the current head of parliament, Rachid El Ghanouchi, who belongs to the Tunisian Muslim Brotherhood Party (El Nahda), appointed Mohamed El Ghiryani, the last General Secretariat of Ben Ali's Party, Al Tagamo,[456] as his counsel for transitional justice and national reconciliation matters.[457] Further research is needed to test whether these measures could be considered mere reconciliation and reintegration or a total ignorance for the institutional reform process.

2) Reparations

- There were judicial decisions to cancel unfair decisions against opposing judges taken by the Ben Ali regime that were kept on hold for decades and finally were delivered after the revolution.[458] These judgments are a form of both Institutional Reforms 1 and Reparations.
- The military staff victims of the case of Barraket El Sahel formed a coalition to initiate prosecutions and demand reparations for violations committed against them.[459] In 1991, Ben Ali's minister of interior accused 244 of the military members of conspiring with the Muslim Brotherhood to commit a coup. The accused were

[454] بعد عام من تمرير قانون المصالحة يني قائمة المنتفعين بقانون العار ؟' [A Year Since Passing the Reconciliation Law Where Is the List of the Beneficiaries of the Shame Law]' (*Manich Msamah* مسامح مانيش, 2018).

[455] The law does not mention explicitly either a requirement or a prohibition of publication of its beneficiaries' identities. However, the government's insistence on ignoring the civil society's demands for this publication boosts the later's suspicions regarding the motives behind the law enactment.

[456] Ammar El Araby, 'اختيار راشد الغنوشي لمحمد الغرياني مستشارا له: إذا فهمنا السبب بطل العجب [Rachid El Ghanouchi's Selection of Mohamed El Ghiriani as His Counsel: No Wonderthat We Understand the Reasons]' (*Kapitalis* أنباء تونس, 2020).

[457] Kareem Wannas, 'محمد الغرياني يستقيل من تحيا تونس [Mohamed El Ghiriani Resigns from "Tahya Tunis"]' (*Mosaique FM*, 2020) <https://www.mosaiquefm.net/ar/أخبار-سياسة-تونس/816912/محمد-الغرياني-يستقيل-من-تحيا-تونس> accessed 2 November 2020.

[458] The Tunisian Commission of Truth and Dignity (TDC) (n 280) 149.

[459] Wafa Sdiri, 'Vidéo: «Le Complot de Barraket Essahel»: Nos Militaires Réclament Justice [POLICYVideo: "The Plot of Barraket Essahel": Our Soldiers Demand Justice]' (*Tunisie Numerique*, 2011) <https://www.tunisienumerique.com/video-«le-complot-de-barraket-essahel»-nos-militaires-reclament-justice/> accessed 15 September 2021.

tortured by the security forces; both the convicted and the acquitted groups were fired from the military and deprived from all benefits of their jobs.[460] The coalition in cooperation with the Tunisian ministry of defence retroactively restored these rights.[461] The interim President, Al Marzouky, offered the official state's apologies to the victims in 2012 on the Memorial Day for Establishing the National Military of Tunisia, and they received honours from the minister of defence.[462] They were also invited to the presidential palace for the celebration day of the International Declaration of Human Rights.[463]

In 2014, the government ratified a bill that guarantees health benefits and pensions for 151 military staff who are not subject to the general pardon, the Constituent Assembly later issued the bill including all the 244 victims.[464]

These policies are an application of both material and symbolic Reparations.

- The Tunisian state authorities took initiatives to restore the illegally seized funds abroad. In March 2021, the UN Human Rights Council approved a draft of a decision prepared by the Tunisian state besides other African countries to restore the funds illegally seized abroad to their original countries.[465] The judicial procedures of the funds' restoring file are still ongoing (September 2021). For example, earlier in March 2021, the Swiss authorities transferred what amounted to 3,5 Million Dinars (Around

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[460] المظالم القضائية: براكة الساحل نموذجاً' [The Judicial Injustices: The Barraket El Sahel Example]' (*Legal Agenda*, 2016) <https://legal-agenda.com/المظالم-القضائية-براكة-الساحل-نموذجا/> accessed 15 September 2021.

[461] ibid.

[462] 'Tunisie - ANC: Les Militaires Victimes de l'affaire de Barraket Essahel Réhabilités Par La Loi [Barraket Essahel Affair Rehabilitated by Law]' (*Directinfo*, 2014) <http://directinfo.webmanagercenter.com/2014/06/13/tunisie-anc-les-militaires-victimes-de-laffaire-de-barraket-essahel-rehabilites-par-la-loi/> accessed 15 September 2021.

[463] 'Affaire Barraket Essahel : Après La Torture, Les Honneurs Au Palais de Carthage [Barraket Essahel Affair: After Torture, Honors at the Palace of Carthage]' (*Leaders*, 2012) <https://www.leaders.com.tn/article/10107-affaire-barraket-essahel-apres-la-torture-les-honneurs-au-palais-de-carthage> accessed 15 September 2021.

[464] 'Tunisie - ANC: Les Militaires Victimes de l'affaire de Barraket Essahel Réhabilités Par La Loi [Barraket Essahel Affair Rehabilitated by Law]' (n 465).

[465] الخارجية: مجلس حقوق الإنسان اعتمد مشروع قرار استرجاع الأموال المنهوبة إلى بلدانها الأصلية' [The Foreign Affairs Ministry: The Human Rights Council Approved the Bill of A Decision to Restore the Illegally Seized Funds to Their Origin Countries]' (*Business News* عربي, 2021) <https://ar.businessnews.com.tn/ الخارجية: مجلس حقوق الإنسان اعتمد مشروع قرار استرجاع الأموال المنهوبة إلى بلدانها الأصلية,3,18114,520> accessed 17 April 2021.

1 million euro) to the Tunisian state's account in the Tunisian Central Bank.[466] These initiatives constitute a form of restitution, which is so far a partial application of Reparations.

- In March 2021, the executive finally published the list of the revolution's martyrs and injured persons in the Official Gazette, more than one year and five months after the list was published by the head of the Supreme Authority of Human Rights and Fundamental Freedoms.[467] This delay pushed some of the injured and martyrs' families to protest with a sit-in in December 2020.[468] The late publication constitutes a partial application of Reparations.

3) Truth Commissions

- The intentional damage of part of the presidential archive and the external communication archive after the revolution[469] is a negative application of the Truth Revealing mechanisms.
- Preventing the TDC's access to the Presidential Archive that was followed by the draft of Administrative Reconciliation Law[470] and inaccurate information provided by the National Archive[471] both reflect a negative application of Institutional Reforms 1 and Truth Revealing efforts.

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[466] رئاسة الجمهورية: السلطات السويسرية تحول مبلغ مالي يقدر بحوالي 3 مليون دينار الى البنك المركزي' [The Presidency: The Swiss Authorities Transfer around 3 Million Dinars to the Central Bank]' (أنباء تونس*Kapitalis*, 2021) <http://www.kapitalis.com/anbaa-tounes/2021/03/10/رئاسة-الجمهورية-السلطات-السويسرية-تح/> accessed 17 April 2021.

[467] نشر القائمة النهائية لشهداء الثورة ومصابيها بالرائد الرسمي للجمهورية التونسية' [The Publication of the Final List of the Revolution's Martyrs and Injured Persons in the Tunisian Official Gazette]' (*Ithaet Al Kaf* - إذاعة الكاف, 2021) <http://www.radiokef.tn/نشر-القائمة-النهائية-لشهداء-الثورة-وم/> accessed 16 April 2021.

[468] Basma Barakat, 'عائلات شهداء ومصابي الثورة التونسية تضرب عن الطعام' [The Tunisian Revolution's Martyrs and Injured Persons' Families Enter a Strike]' (*The New Arabi* العربي الجديد, 2020) <https://www.alaraby.co.uk/society/عائلات-شهداء-ومصابي-الثورة-التونسية-تضرب-عن-الطعام> accessed 16 April 2021.

[469] The Tunisian Commission of Truth and Dignity (TDC) (n 280) 173.

[470] ibid 411.

[471] ibid 417.

4) Trials

- The Transitional Justice Research Collaborative (TJRC) data shows 13 trials against human rights violations from 2011 until 2015.[472] These trials record the application of trials by a third international party, which is a partial application of trials.
- In addition to the trials referred to in the TJRC database, there are prosecution initiatives against Ben Ali and a number of his family members and leading regime figures. The initiatives include trials before both military and civil courts; some of them were initiated as early as 2011, while others were referred later by the TDC,[473] and others were on trial over and over again before different jurisdictions, especially after receiving reduced sanctions that started a rage among the public.[474] The crimes subject of these trials include mass killing, torture, and a variety of violations related to public funds.[475] Some of these trials have already ended with final verdicts, while

[472] Note that this database is constantly changing and does not cover all the involved variables in the relevant case at the time. It was thankfully provided to the author upon request on June 9, 2020. It was agreed also that the data collected by the author within this research will be offered for inclusion in the updated dataset on TJ in Tunisia within TJRC. See more here: https://transitionaljusticedata.com

[473] 'Tunisia: Truth Commission Sends Uprising Case to Trial' (*Human Rights Watch*, 2018) <https://www.hrw.org/news/2018/05/23/tunisia-truth-commission-sends-uprising-case-trial> accessed 15 September 2021.

[474] القضاء التونسي يعيد محاكمة مسؤولين أمنيين في نظام بن علي' [The Tunisian Judiciary Re-Prosecutes Security Commands in Ben Ali's Regime]' (سوا, 2015) <https://www.radiosawa.com/archive/2015/04/30/القضاء-التونسي-يعيد-محاكمة-مسؤولين-أمنيين-في-نظام-بن-علي> accessed 15 September 2021; 'دوائر قضائية مرتقبة بتونس لمحاكمة "قتلة الثوار" [Awaited Judicial Circuits in Tunisia to Prosecute "Killers of the Revolutionaries']' (الجزيرة.نت, 2014) <https://www.aljazeera.net/news/arabic/2014/4/15/مرتقبة-بتونس-لمحاكمة-دوائر-قضائية> accessed 15 September 2021; Noura Al Haddar, 'قضية براكة الساحل: عاشر الجلسات في منتصف الشهر الحالي فهل سيحضر بقية المنسوب إليهم الانتهاك ؟' [The Case of Braket El Sahel: The Tenth Session Is Mid This Month, Will the Rest of the Accused Attend?]' (جريدة المغرب, 2021) <https://ar.lemaghreb.tn/قضاء/item/50027--قضية-براكة-الساحل-عاشر-الجلسات-في-منتصف-الشهر-الحالي-فهل-سيحضر-بقية-المنسوب-إليهم-الانتهاك-؟> accessed 15 September 2021.

[475] الحكم غيابيا على الرئيس السابق زين العابدين بن علي وزوجته بالسجن 35 عاما' [Absentia Verdict with 35 Years Imprisonment Againt the Ex President Zen Al Abdin Ben Ali and His Wife]' (*France 24*, 2011) <https://www.france24.com/ar/20110620-ben-ali-trabelsi-sentenced-35-years-prison-trial-public-funds-tunisia-abstentia> accessed 15 September 2021; 'الحكم بالسجن 15 عاما ونصف على زين العابدين بن علي في ثاني قضية مرفوعة ضده' [Verdict with 15 Years and Half in Prison Delivered against Zein Al Abdin Ben Ali in the Second Case against Him]' (*France 24*, 2011) <https://www.france24.com/ar/20110704-tunisia-politics-unrest-trial-ben-ali-verdict-charges-drugs-weapons> accessed 15 September 2021; 'إدانة بن علي ومسؤولين تونسيين سابقين بممارسة التعذيب' [Conviction of Turture for Ben Ali and Other Past Tunisian Officials]' (*France 24*, 2012) <https://www.france24.com/ar/20120407--محكمة-عسكرية-تونس-زين-العابدين-بن-علي-سجن-مسؤولين-تعذيب-ضباط-عبد-الله>

others are still in progress. The prosecution initiatives against Ben Ali reached around 140 cases, some of these cases resulted in lifetime imprisonment sanctions.[476]

According to Human Rights Watch (HRW) notes on the trial of Ben Ali and a number of his regime members for mass killing against protestors back in 2011-2012, the trial had positive aspects in terms of due process considerations and the effort done in collection of evidence and application of the relevant national laws.[477] However, it suffered from some flaws under the international standards.[478] These flaws can also be noted in other trials against Ben Ali and his regime members after the revolution.

First, the trials of civilians or security forces' members before the military judiciary in matters that are not purely related to military disputes are against the international standards of seeking trials against human rights violations before civilian courts.[479]

Second, because of lack of evidence of orders to use fatal violence against protestors, the court could not convict a number of the leading accused figures in the case.[480] The Tunisian law does not include the principle of "command responsibility" recognized under international law which enables the conviction of the chiefs and civilian superiors for crimes committed by their subordinates if they knew, or had reason to know, of these crimes but they failed to prevent or punish them.[481]

Finally, although international law does not forbid *absentia* status in trials,[482] it considers them undesirable.[483] The absence of a number of the accused and witnesses

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القلال> accessed 15 September 2021; 'علي حكم جديد بالمؤبد على بن [New Verdict with Lifetime Imprisonment against Ben Ali]' (الجزيرة.نت, 2014) <https://www.aljazeera.net/news/arabic/2014/5/13/حكم-جديد-بالمؤبد-على-بن-علي> accessed 15 September 2021; 'حكم بسجن بن علي وأحد أقاربه ست سنوات [Verdict with Imprisonment of Ben Ali and One of His Relatives for 6 Years]' (الجزيرة.نت, 2015) <https://www.aljazeera.net/news/arabic/2015/4/23/حكم-بسجن-بن-علي-وأحد-أقاربه-ست-سنوات> accessed 15 September 2021.

[476] 'نقض حكم ببراءة ضباط بن علي من قتل المتظاهرين [The Court of Cassation Strikes Down Acquittal Verdict of Ben Ali's Officers Regarding Murder of Protesters]' (الجزيرة.نت, 2015) <https://www.aljazeera.net/news/arabic/2015/4/30/نقض-حكم-ببراءة-ضباط-بن-علي-من-قتل> accessed 15 September 2021.

[477] 'Tunisia: Flaws in the Landmark Ben Ali Verdict' (*Human Rights Watch*, 2012) <https://www.hrw.org/news/2012/07/05/tunisia-flaws-landmark-ben-ali-verdict> accessed 15 September 2021.

[478] ibid.

[479] ibid.

[480] ibid.

[481] ibid.

[482] A term that refers to the trials held in the absence of the defendant or his/her lawyer.

[483] 'Tunisia: Flaws in the Landmark Ben Ali Verdict' (n 480).

on the one hand flawed the protection of their basic defence rights, while on the other hand it led to difficulties in reaching the truth and enforcing the delivered sanctions.[484] Accordingly, the HRW asked the Tunisian government to reform its domestic laws to adopt the international standards in this regard.[485]

Although some of these concerns were resolved in the TDC's work, it is yet to be seen whether the trials following the commission's work adopted such a change in their approach and legal standards.

Two other significant trials that were anticipated after the revolution[486] did not result in sanctions and lack any clear media or research coverage.

The first involves General Habib Ammar, the past Commander of the Tunisian National Guard and past Minister of Interior. The World Organization against Torture filed a complaint against the General back in 2003 in the Canton of Geneva's Attorney General.[487] However, He benefitted from immunity as a member of the Tunisian delegation to the International Telecommunications Union.[488] In 2018, a first instance court in Tunis issued an arrest order against the General and his personal driver for "the embezzlement of public office movables that he had in his possession by virtue of his position, transferring them by any means and participating in that, carrying and holding firearms of the first, second and third classes, transferring them without a licence and transferring them without a legitimate reason."[489] The ministry of inferior did not enforce that arrest order.

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[484] ibid.

[485] ibid.

[486] For more on the cases of Barraket El Sahel, General Habib ben Ammar, and Khaled Ben Said, see Noha Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region : A Comparative Study of Egypt, Libya, Tunisia and Yemen* (Hart Publishing an imprint of Bloomsbury Publishing Plc 2020) 63–66 <https://books.google.de/books?hl=en&lr=&id=6VQvDwAAQBAJ&oi=fnd&pg=PR7&dq=Noha+Aboueldahab&ots=c19pCf59_r&sig=5T_nq8F13lFFFG6mEgtDQHxKmds&redir_esc=y#v=onepage&q=Noha Aboueldahab&f=false> accessed 15 September 2021.

[487] 'Habib Ammar - TRIAL International' (*Trial International*, 2016) <https://trialinternational.org/latest-post/habib-ammar/> accessed 16 September 2021.

[488] ibid.

[489] 'مفاجأة / القصة الكاملة لإصدار بطاقتي إيداع بالسجن في حق الجنرال الحبيب عمار و سائقه الشخصي..!! [A Surprise/ The Full Story for Issuing Two Arrest Orders against General Al Habib Ammar and His Personal Driver- !!]' (*Al-*

The second, is Khalid Ben Said, an official at the Ministry of Interior. The official was convicted of torture against a Tunisian citizen, who could not seek trial in Tunisia, in a French Court back in 2008.[490] Tunisia did not extradite Ben Said and there are no known judicial proceedings against him until now.

Although these prominent examples show partial prosecution initiatives, they also show how Tunisia is still struggling with institutional reforms generally, and how these prosecution initiatives lacked efficient and transparent proceedings in many cases.

5) Institutional Reforms

- The Military Judiciary is still under question due to its reluctance to abide by fair trial considerations regarding the martyrs and victims of the 2011 revolution before the TJ Organic Law and its non-cooperation with the TDC after it.[491] This policy is a negative application of Institutional Reforms 1.
- The continuation of internet blocking attempts after the revolution[492] is a negative application of Institutional Reforms 1.
- One of the ongoing corruption cases that show another lack of TJ measures application is the judicial dispute between the French Tunisian Bank (a public bank) and the Arabic Investment Group for Commercial Operations. The case is a manifestation of the struggle that institutional reforms face in Tunisia. According to the TDC report, the bank faced massive financial troubles resulting from granting loans without collateral for Ben Ali's relatives. Instead of devoting the case to the competent judiciary or accepting recommendations regarding financial compromises, the Tunisian state insisted on going further in arbitration, which was lost in the end.

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thawraNews, 2018) <https://althawranews.blogspot.com/2018/05/blog-post_5762.html> accessed 16 September 2021.

[490] نائب القنصل التونسي سابقا بستراز بورغ خالد بن سعيد محكوم ب 12 سنة سجنا من أجل التعذيب و"الأنتربول" يطارده، [The Tunisian Ex Vice-Consul in Strasbourg Khaled Ben Said Is Convicted with 12 Years of Imprisonment for Torture and the Interpol Chases Him]' (*Toures*, 2012) <https://www.turess.com/alfajrnews/103204> accessed 15 September 2021; '8 8] سنوات سجنا للجلاد التونسي خالد بن سعيد Years of Imprisonment for the Tunisian Executioner Khaled Ben Said]' (*Labor Party*, 2008) <https://albadil.info/البديل-الوطني/article/8-سعيد-بن-خالد-التونسي-للجلاد-سجنا-سنوات> accessed 16 September 2021.

[491] The Tunisian Commission of Truth and Dignity (TDC) (n 280) 144–145.

[492] ibid 178.

The loss will financially cost the Tunisian people great economic hardship. The Tunisian government's strategy was adopted with the aim of concealing the real faces behind corruption in this case, which are closely associated with the governing elite.[493] These cases are a negative application of both Institutional Reforms 1 & 2.

The Tunisian de facto TJ policies explained in this section in the pre and post-Organic law phases are diverse and manifold. These policies are summarized in table (5.2). Table (5.2) shows the de facto policies achieved within the Tunisian case in each of its manifestations referred to in this section individually and then sums up the collective end measurement of the adopted mechanisms. It uses the same methodology used in table (5.1).

Application	Amnesties	Trials	Reparations	Institutional Reforms 1	Institutional Reforms 2	National Consultations	Truth Commissions
TC Corruption 2011	NA	Partial	NA	Partial	NA	NA	Partial
TC HR Violations 2011	NA	NA	NA	NA	NA	NA	Partial
HR & TJ Ministry 2012	NA	NA	Partial	Partial	NA	Yes	NA
ACAP Dissolution 2011	NA	NA	NA	Partial	NA	NA	NA
State Security Dissolution 2011	NA	NA	NA	Partial	NA	NA	NA
2011 Elections	NA	NA	NA	Partial	NA	NA	NA
Striking Down the Political Isolation Law 2014	Partial	NA	NA	NA	NO	NA	NA
National Authority of Corruption Combat Report 2017	NA	Partial	NA	Partial	NA	NA	NA
TDC Report 2019	Partial	Partial	Partial	Partial	NA	Yes	Partial
Further Applications	NA	Partial	Partial	Partial	NO	NA	NO

[493] ibid 348–349.

Collective	Partial	Partial	Partial	Partial	NO	Yes	Partial

Table (5.3) The De Facto Application of the Constitutional TJ Policies in Tunisia

The table shows an almost partial application for all TJ mechanisms, except for full application in terms of National Consultations and the preclusion of Institutional Reforms 2. It is also to be noted that although there is a partial application of Institutional Reforms 1, its value as indicated in the Other Applications and Concerns would be significantly low due to many negative applications of this mechanism in the referred category. This policy responds positively but not entirely to the Justice-Balance approach components, including TC, trials, and amnesties. Although these mechanisms were not perfectly applied, one could expect that the application of other complementary mechanisms like national consultations, reparations, and institutional reforms are likely to compensate for the defects within the other mechanisms' application. However, this will depend to a great extent on their future application. Moreover, in the absence of lustrations and the limited trials achieved so far, it could be argued that the TJ de facto Tunisian approach tends more towards the "transition" part of the equation at the expense of the "accountability" part. This tendency is, first, contrary to the TJ de jure Tunisian approach because, for example, the TJ Organic Law explained the procedures regarding vetting public positions, while the de facto application ignored it altogether. This de jure\ de facto gap itself is an alarming indicator. Second, the details given in the previous analysis raise the question of whether the Tunisian TJ de facto approach is transition, or impunity oriented.

IV. Conclusion and Future Research

This chapter presents the de jure and de facto constitutional application of TJ in the Tunisian case and investigates how far it is aligned to the Justice-Balance approach.

Tunisia is presented as the only survivor of the first wave of Arab Spring states, which turned to a drastic fall in the rest of its countries. It has finalized its TJ project while the second wave in Sudan and Algeria has only just been starting what is aspired to be their "democratic transition." Empirical analysis can help us understand how far the Tunisian project is going and then predict how it will be evolving in the future. It also helps us give

informed insights to the states starting their TJ experience in a relatively close context. There have been no empirical studies that provide systematic data on the Tunisian TJ case study to start with. Looking into the results of the previous analysis, it appears that the rosy picture painted for the Tunisian transition is not exactly accurate, especially after 2014. Through time and with the influence of the revolutionary powers weakening and ignoring them becoming easier, the Tunisian set-up has been swinging between scenarios 2 & 3 explained in chapter 2.

This chapter uses the Justice-Balance approach to measure the de facto TJ application's expected impact on promoting human rights and democracy in Tunisia. It also gives a detailed report of both constitutional de jure and de facto application of all TJ mechanisms, which translates to an easy-to-track index.

I find a remarkable gap between the constitutional texts produced to govern TJ after the revolution, the ordinary TJ legislation (second-degree de jure policies), and the policies generated to apply them. The TJ Organic law guarantees a full application of all TJ mechanisms, except for a partial adoption of amnesties and national consultations. However, the following policies did not involve a full application of any mechanism except national consultations. Institutional reforms 2, i.e., lustrations, were entirely left out and even undermined by the Administrative Reconciliation Law. All other mechanisms were only partially applied. For example, the reconciliation and arbitration requests were significantly limited, and many lacked transparent procedures. Trials were initiated only against grave violations according to a list of conditions. TDC did not have the necessary cooperation and resources to reveal all truth in the cases involved and then preserve them appropriately. However, the TDC's work and the other executing policies did follow the contemplated approach that considered all mechanisms, except for lustrations. Nevertheless, both de jure and de facto TJ policies are mostly compatible with the justice-balance approach, as they both adopt a mix of trials and amnesties tools, combined with truth revealing mechanisms. Consequently, I expect that although the TJ Tunisian process was not perfect, it still has a chance to contribute to consolidating the democratic transformation and strengthen human rights values, depending on how the government and parliament are willing to undertake its continuation. However, although the Tunisian de facto policies respond well to the Justice-balance approach indicators, which could have been promising, unlike the de jure approach, there is a tendency in the de facto application towards the "transition" at the expense of "accountability" oriented mechanisms. This tendency is not only worrying in terms of a lack

of balance in the trade-off between these two considerations but also because it is alarming regarding the compliance of the Tunisian state with the constitution.

The period given by the TJ Organic Law to the executive and the parliament to apply the recommendations given by the TDC ended last year. Some argued that the period started with the TDC report official publication in June 2020, and then the period only ended in June 2021. In my view, the count started significantly earlier, since the submission of the final report back in March 2019. In any case, the further application of the adopted policies like reparations and trials will be going on for years. Moreover, new elections are approaching in which Tunisians can have a say in how the current parties in power are dealing with TJ's application. Finally, the latest plot in the Tunisian transition after the President's grab of power in July 2021 was only followed with confusing and foggy measures that do not give definite answers to the current open-ended questions. Therefore, future investigative studies are still needed to follow up with the further TJ application in Tunisia. Additionally, future research will be necessary to investigate further the impact of this application in the Tunisian case and how far it aligns with other comparative cases.

Chapter 6: Conclusion

Transitioning from autocratic to democratic regimes through revolutions is a path full of hard choices. One of the most challenging choices that the parties in the post-revolution phase have to make is how they deal with the concept of transitional justice (TJ). The United Nations (UN) guidelines on TJ, which are part of its *Rule of Law Initiative,* define TJ as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."[494]

The TJ adoption and application are, however, not as straightforward as one might think. It is a question that depends on the post-revolution scenario, which differs from one case to another, and a careful analysis of each mechanism and the different combinations of mechanisms. Such analysis faces many challenges because of first the TJ dilemmas emerging from conflicting preferences and behavioural biases, and second the trade-off of the competing costs and benefits that each mechanism entails. While some will advocate respecting the constitutional due process considerations, others will be against any policy that endangers achieving justice, in its retributive sense, for the victims of the past regime. Some approaches try to optimize the trade-off between these two considerations; so far, the justice-balance approach is one of them that is equally supported by empirical research. The Arab Spring offers a new opportunity to test this approach and observe the interplay of TJ concepts generally in the contemporary constitutional systems. One of the most promising cases of these systems is Tunisia which recently completed its TJ project.

This dissertation tried to give more realistic answers to the questions of TJ after revolutions through using the constitutional law and economics analysis via diverse tools including rational choice theory, cost-benefit analysis, and qualitative case study methodology. The questions that this research tackled included: Why resorting to efficient TJ processes in the aftermath of revolutions over autocratic regimes is remarkably rare? What are the costs and benefits of each mechanism as proposed by the UN in the aftermath of a revolution, especially the constitutional legal complications? Why the holistic-balanced TJ approaches are expected to achieve higher rates of democratization and human rights

[494] United Nations (n 10).

protection than minimalist, maximalist, and moderate approaches? And what is the need for a trade-off between due process and accountability considerations? How did the TJ project in Tunisia respond to the UN TJ mechanisms, the Justice-balance approach, and the requirements of constitutional compliance?

What precludes countries from seeking or achieving TJ after revolutions?

The dissertation started with presenting TJ from a constitutional law and economics perspective as a constitutional arrangement that aims to (1) internalize the negative externalities of the past-regime's abusive behaviour, (2) minimize a costly direct interaction between the past-regime members and supporters and the victims, and (3) minimize the probability of repeating the past practices of autocracy and human rights violations. However, achieving TJ in this sense is problematic from two perspectives. First, resorting to TJ in the first place is not as intuitive as it sounds. This is what we can call the first-order TJ dilemmas. Second, choosing which mechanisms to apply is usually problematic. This choice represents the second-order TJ dilemmas. Chapter 2 deals with the first issue, while chapters 3 and 4 deal deal with the second.

Regarding the question of whether a country will resort to TJ or not, both history and rational choice theory tell us that the policy-makers (the agents) and the victims (the principals) would have divergent preferences in most cases. I argue that there are three main possible scenarios for the preferences set-up of agents and principals, whether it is a negotiated transition or a regime collapse.

The first scenario is the classic portrayal where the agents and the principals have the same preference of getting rid of the past regime, holding its members accountable for their rent-seeking behaviour, and wanting to achieve democratization. This scenario has only a few historical examples; one of them is the transition in Burkina Faso after 2014. It could be, however, explained by both public choice theory and behavioural analyses. On the one hand, this scenario usually applies where no single party holds sufficient power to control the state, and at the same time, each party has sufficient influence to spoil any political arrangement. Consequently, each party seeks a cooperative equilibrium to the situation instead of losing all pay-offs. On the other hand, being human, political leaders sometimes could show altruistic behaviour for the good of society. This perspective offers a new explanation of the success of the balanced TJ approaches, which seek to find a compromise between the retributive justice and political constraints considerations. Among these approaches is the justice balance

approach presented by Olsen et al. (2010), which chapter 4 analyzed in detail. According to this thesis analysis, there is a probability that explaining this success involves a reversed causality where the promotion of democracy and human rights are attributed to the selected TJ mechanisms. Instead, it could be that this promotion is connected with the incentive structure of the parties to TJ and their tendency to cooperative measures, which is reflected not only in choosing balanced mechanisms but also in the processes through which these mechanisms are selected, designed, and applied.

The second scenario is where the preferences diverge; the principals desire TJ, while agents seek to reproduce the past regime and a safe exit for its members. In this scenario, the transitional rulers are part of the past regime that realized that it does not have sufficient power to resist the revolutionary wave. Consequently, they choose to show limited flexibility to absorb this wave while using the time passage to weaken the principals' influence on the situation. An example of this scenario is the Algerian uprising in 2019. This scenario is a perfect manifestation of asymmetric information in TJ as a post-revolution constitutional arrangement, where the agents know better than the principals. The agents are perfectly familiar with the past-regime crimes, the governing laws, and the plan designed to turn around the revolution, while the principals' knowledge about all of this is limited. Consequently, the agents give only minor TJ measures as scapegoats that were designed unilaterally. Due to their limited information, the principals accept these welfare decreasing measures while losing their bargaining power over time.

The third scenario shows another form of preferences divergence where agents desire TJ, while transitional rulers seek the recreation of the autocratic past but with punishing the past regime and its members. An example of this scenario is the Iranian revolution in 1979 over the Shah regime. In this case, the transitional rulers free-ride over the principals to achieve their opposing pay-offs, either because the agents were risk-averse, so they did not participate in the revolution at all, or because they could not overthrow the past regime on their own.

Even on the first rosy assumption, where the principals' and agents' preferences are similar regarding the end goals of the TJ process, the TJ dilemmas continue. Two-direction incentives influence the reason this asymmetry usually continues throughout the TJ process. On the one hand, for most of the victims, the cost of collecting information for the TJ process is high. On the other hand, the other two actors have strong incentives to keep the victims imperfectly informed to provide them only with the information that would keep the process on the track they designed. This situation manifests a principal-agent problem (PAP). In the

first scenario, this problem leads to divergence in the desired means, even if the desired ends are the same.

The traditional solution for PAP is designing a contract that aligns the agents' incentives with the principals' preferences. However, this is not feasible in the case of TJ for three reasons. First, as a constitutional arrangement, TJ can't have a third party needed to enforce contractual agreements. The only way is to design an arrangement that is self-enforcing in the sense that its application is more profitable for its parties than deviating from it. Second, unlike the standard agency models, the behavioural biases in the TJ context are not only expected from the agents' party but also from the principals. This means that satisfying the principals desire in that case could be against social welfare. The transitional rulers can make this a reason for imposing a paternalistic behaviour. Third, the momentum nature of TJ in a post-revolution phase over an autocratic regime where there is no credit or trust between the involved parties and in the absence of trusted, neutral democratic institutions complicates this situation.

A solution that recent literature on TJ gives for TJ complications is promoting civil society as a mediator and facilitator between the different parties. Subjecting the civil society to the same lenses of the public choice theory makes us realize that it is another party to the bargaining just like the others, including policy-makers and victims. It has its own preferences that it wishes to achieve, consequently, it can't be considered a third-party enforcer to the situation. However, being an indirect party, it can be considered a third-party informer, whose role is to provide more information in the market to at least partially improve the situation emerging from the asymmetric information problem. However, this research recognizes the limitations of this role being significantly less perfect than portrayed by literature.

What are the costs and benefits of the TJ mechanisms presented by the UN post-revolutions?

Regarding the question of which mechanism to apply, even when ignoring the first-order TJ dilemmas, in order to internalize the externalities of the past-regime harmful activity as an *ex post* action while simultaneously preventing its repetition as an *ex ante* arrangement, there should be mechanisms that incentivize the agents to seek the principals' preferences that reflect social welfare. The selection of the best mechanism to achieve it so requires a careful analysis of its costs and benefits. The UN guidelines, which constitute the starting

point for this study, suggest five mechanisms: Prosecution Initiatives, Reparations, Truth Revealing, Institutional Reforms, and National Consultations.

To compare the five mechanisms, I run a cost-benefit analysis for each of these mechanisms to explain the trade-off that each mechanism requires. This analysis includes the constitutional, political, and economic aspects of each mechanism application. Although this analysis provides a basic blueprint for systems to quantify depending on their different circumstances, it does consider the inevitable fact that its results will vary widely from case to case depending on these circumstances. However, the analysis leads to common insights that may be useful for any nation in the democratization process after a revolution.

The evaluation mentioned is expected to be made using an inspired utility equation of the *Becker model*,[495] according to which $e(u)_m = b\,(1-p) - c(p)$. As explained earlier, TJ is a constitutional arrangement that can't have a third-party enforcer but needs to be self-enforcing. In this regard, a self-enforcing TJ policy would be the one in which its benefits (b) exceed its costs (c) for the relevant parties, or that the costs of its absence are so high, which gives them the incentives to apply it.

One of the CBA findings that might come as a surprise is that prosecutions are not expected to perform well in preventing the repetition of past crimes. The necessary calculations for the successive governments to run to reach the result that not repeating the autocratic behaviour is more profitable than repeating it are very complicated. On the one hand, under the rare assumption of similarity between the policymakers and the people preferences, the first should make sure that the calculations of the sufficient punishment include the calculations of any new subsequent regime of how to exploit the state resources without getting the people to the point of revolution. On the other hand, the potential offenders' calculations will consider the probability of being punished, which is considerably low due to the complications explained in the CBA of prosecutions. On the contrary, both punishing and non-punishing institutional reforms are expected to perform better in terms of the deterrent effect.

[495] Becker model for criminal deterrence is a mathematical model presented by Gary Becker (1968) that treats criminals as rational actors who desire to maximize their wellbeing but through illegal means rather the legal ones. Accordingly, Becker suggests that for a criminal sanction to achieve deterrence there should be an equation that takes in account the expected gain of the crime to the perpetrator and the cost resulting of the severity and probability of punishment. For more on Becker's seminal work on crime and dealing with it as a economic concept, see Veljanovski (n 323); Jolls, Sunstein and Thaler (n 462); Kantorowicz-Reznichenko (n 323); Becker (n 323).

The trade-off within the same mechanism then moves us to discuss the trade-off between the different mechanisms.

Why are holistic-balanced approaches expected to perform better regarding achieving democracy and human rights than maximalist, moderate, and minimalist TJ approaches? And why is a trade-off between due process and justice considerations necessary?

There have been many approaches to TJ, both in theory and practice. However, the empirical cross-country studies that enable reaching general conclusions regarding the different approaches of this impact are scarce. The reason this research chose the justice-balance approach to be the starting point and benchmark for its second part of the analysis is that, unlike the other available studies, it is drawn from results that include almost all TJ mechanisms and compares their impact in 91 transitions from autocracy to democracy in 74 countries around the globe from 1971-2004, being the study by Olsen, Payne, & Reiter (2010).[496] They find that TJ's most positive outcomes regarding promoting democracy and reducing human rights violations are associated with this approach which entails a combination between prosecutions and amnesties; adding truth commissions is equally successful.

Looking into the Justice-balance approach, one can notice a trade-off between *accountability* in the meaning of retributive justice and *transition* in the meaning of constitutional due process considerations. The approach achieves in a form the optimal trade-off between these considerations. Understanding the approach in this way opens the possibility of other combinations that optimize the same trade-off to be equally effective in achieving democracy and human rights protection, depending on their context.

Although this trade-off is not inevitable, within the national constitutional framework that does not necessarily adopt the solutions given under the international humanitarian law there is a higher probability that some violations of the past regime can go unpunished. This tendency is either because the violation was a crime under the past-regime laws, but it is hard to prove in a standard national court of law (crime type 1), or because the violation was legalized under the past regime (crime type 2). In these cases, there would be a need to partially dispense with some of the constitutional due process considerations to achieve justice in its retributive meaning.

[496] Olsen, Payne and Reiter, *Transitional Justice In Balance: Comparing Processes, Weighing Efficacy* (n 11).

How do the de jure and de facto constitutional approaches to TJ in Tunisia respond to the justice-balance approach? And what can the Tunisian TJ approach adopted so far tell us about the future of democratization and human rights in Tunisia?

Starting from the optimization logic explained in the last section, I look in chapter 5 into the Tunisian case study after the 2011 revolution.

While outsiders look at Tunisia as the only success story among the Arab Spring states, and many Tunisians think of their transition as a failure, the truth probably stands between these two extremes. The Tunisian TJ process is a clear example of this swinging situation.

Tunisia regulated TJ through its multiple constitutional texts generated after the revolution in 2011. On top of these constitutional laws is the TJ Organic Law in 2013, which also established the Truth and Dignity Commission (TDC). These constitutional laws adopted trials, institutional reforms 1 (non-punitive institutional reforms), reparations, and truth commissions fully. Amnesties, institutional reforms 2 (all forms of lustrations), and national consultations were adopted partially. The Tunisian de jure constitutional approach to TJ consequently responds well to the justice-balance approach and even out-performs it.

However, when it comes to the de facto application in September 2021, things become less promising. Drawing on the TDC final report, the decisions and policies generated to apply the TJ laws, institutions formed in this regard, and the conflicts and legal actions over all the former, I find a significant gap between the de jure and the de facto TJ approaches in Tunisia. The de facto application shows the full adoption of only one mechanism, i.e., national consultations. Trials, reparations, institutional reforms 1, amnesties, and truth commissions were only partially applied. The Administrative Reconciliation Law blocked institutional reforms 2 application. This de facto approach still somehow responds well to the justice-balance approach, which could be promising for the future of democracy and human rights protection in Tunisia. However, the concerns over the transparency of the process and the non-cooperative behaviour between the different parties over applying the TJ project makes this positive response only partial and keep this promise pending on the future policies. Moreover, it shows a highly alarming sign regarding constitutional compliance and the cooperative political landscape in Tunisia. According to the TJ Organic Law, the government is obliged to present a plan to achieve the TDC recommendations within one year from the publication of the final report of the latter. This report was published in March 2019; however, no such plan was presented (September 2021). The political quarrel between the

Tunisian parties not only threatens the completion of TJ's application, but the democratic transformation as a whole.

Contribution to the Literature

This dissertation adds to the literature on TJ generally and on TJ after revolutions in particular using a methodology that is new to this field, i.e., constitutional law and economics analysis.

Chapter 2 aims to contribute to the debate within the TJ literature over the last question through a four-fold analysis. First, it adds to the legal scholarship that uses the constitutional nature of TJ as a starting point to better understand its dynamics and problems. Second, it adheres to the interdisciplinary approaches to TJ that benefit from other fields than law and politics to explain TJ after revolutions by using constitutional economics for the first time. Third, it supports the direction within TJ literature that stresses on the importance of framing TJ as a distinctive form of justice through the notion of "TJ momentum." And fourth, accordingly, it questions a common suggestion in the TJ literature that civil society can be the answer to many of the TJ dilemmas a way from typical state-centric and traditional legal solutions.

Interdisciplinary approaches to TJ aim at providing new understanding of it that is more realistic than the rigid traditional legal approaches that used to monopolize the field.[497] This research interplays in the same direction by using economic thinking to reconsider typical portraits regarding TJ to explain what precludes them in practice. It builds on what other law and politics scholars started with looking beyond classic legal understanding and adding a realistic flavour to the TJ analysis. Although the economic thinking and political analysis have the common consideration of political dynamics, power and information asymmetry in the TJ set-up, constitutional economic analysis is still needed to add a missing aspect to the current understanding of TJ.

Moreover, out of the CBA presented in chapter 3, this research suggests the addition of "amnesties" to the UN recommended TJ mechanisms as a sixth mechanism that does not equal the absence of TJ or impunity. While amnesties require truth revealing, redressing, achieving accountability, and asking for forgiveness, impunity lacks any of these measures and means only ignoring the past as if it did not happen. In the same context, while both the

[497] Bell (n 36) 17; McEvoy (n 71).

UN guidelines and the vast literature on TJ affirm that the TJ process should be victim centralized, this centrality is not realistic in many cases. Other variables in the process sometimes outweigh the "victim" considerations, like the consolidation of the new system or the practical limitations.

The discussion of the constitutional complications that face TJ mechanisms shows also that there is a gap between the international and national constitutional jurisprudence in this regard. While TJ in the context of post-armed conflict is subject directly to international humanitarian law, the violations subject to TJ after revolutions are not all subject to this law, and usually, they go through the national legal processes which are subject to the national constitutional standards. The recent international rulings and opinions in this regard are minimizing this gap although not demolishing it. It will always be dependent on the policy-makers choice to adopt the international standards regarding interpreting the ban of retroactivity, and the equality before the law, for example, or not. Until then, bearing the constitutional complications in mind as one of the TJ mechanisms' costs that differ from one mechanism to another critically influence the trade-off that each mechanism involves between due process and justice considerations. This trade-off marks the categorization of the TJ approaches.

Connecting the CBA results to the trade-off that chapter 4 explained between the (retributive) justice and due process considerations, and the empirical findings available on TJ, reinforce the suggestion that holistic-balanced approaches are likely to achieve better outcomes regarding the TJ goals. The reason is that first, balanced approaches seek to achieve the optimization between the justice and due process considerations, and second, that the holistic approaches recognize the critical role that context plays in deciding which combination can achieve this optimization better, depending on the given circumstances.

The case study of Tunisia in chapter 5 uses this analysis to test how far the TJ Tunisian approach responds to the justice-balance approach in the constitutional text and its application. Tunisia used to be presented as the only democracy in the Arab region. No study that was performed on Tunisia after the revolution presented the TJ mechanisms adopted both in law and practice and then used them to categorize the approach they adhere to. The analysis given in chapter 5 not only presents the first complete dataset on TJ mechanisms in Tunisia after the revolution, but also uses this data to predict the future of the democratic transition in Tunisia by showing the most critical problems that the transition faces. The first

is the absence of cooperative behaviour between the Tunisian parties, and the second is the weak constitutional compliance.

This conclusion influences our view of the role that constitutional complications can play in the success or failure of TJ after revolutions, and of the impact of the balanced-approaches in achieving TJ goals, especially the justice-balance approach. First, the Tunisian case showed practically that the suggestion presented in chapter 3 of forming or treating TJ laws as basic laws does help to reduce the legal complications of TJ application. However, it is not effective in achieving the compliance with the TJ laws. The design of the TJ process in Tunisia disregarded the capabilities of the Tunisian state, and the strong role that the past-regime members still have in the Tunisian political landscape. This stresses again the importance of self-enforcing policies that might promise less but achieve more. Second, the de facto application of TJ and the development of the democratization process in Tunisia also drags attention to the fact that balanced approaches do have other critical conditions to deliver the positive outcomes expected from them. Partial application of trials along with partial amnesties does not mean per se a positive TJ process. The grounds of these partial applications, how the application range was decided, the transparency of the process and its consistency, all play a defining role in the effectiveness of the balanced approaches. This begs the reconsideration of the defining characteristics of the balanced TJ approaches, and reinforces again the policy implications given in chapter 3.

This study can be a starting point for other studies that would investigate the TJ application in Tunisia and its short and long term effects. It also contributes to the cross-national efforts on tilting the TJ field more towards empirical studies that test the theories which the literature offers. These efforts start with collecting the necessary data on TJ mechanism. Due to the vast variety of TJ forms, mechanisms, and their resources in laws, verdicts, and policies, the availability of this sort of data is still one of the most challenging parts of running large N studies on TJ determinants and outcomes. I hope this research introduced a humble contribution in this regard.

Policy Implications

Although there could be no third-party enforcer in an emergent and constitutional moment like the post-revolution phase over an autocratic regime, there could be a third-party informer. This informed party could use the available empirical studies, other nations'

experience, cost-benefit analysis of the possible options, and legal knowledge to supply the necessary information in the market to the involved parties. This informer actor should not be a direct party to the bargaining. It could be a knowledge-based national or international civil society that could play this role, like academic institutions and research centres.

Stressing the "knowledge-based" component of any relevant civil society organization tries to avoid the imperfection of the suggestion of civil societies in general performing as the third-party informer. First, although civil society may not be a direct party to the bargaining, it is still a party to the general set-up. It has preferences that may diverge or unite with one or more of the other parties. Considering civil society as "the communicator, the facilitator, the arbiter"[498] as other studies mention, ignores that civil society is itself a party to the conflict. It is associated with political parties, international actors, or victims. Even if it can provide more information in the market, this information will probably be biased for the reasons explained earlier. However, the more academic and research institutions are involved, the more competition there will be between civil society organizations, and the more variant information will be distributed. This research suggests an invitation to the academic and research institutions to expand their social responsibility role, not its political involvement.

Second, it is worth noting that fixing the information problem does not necessarily fix the TJ principal-agent-problem. Consequently, the sound solution maybe, under the assumption of the unity of preferences between agents and principals, observing the democratic procedures in designing these policies, as far as possible, to ensure including all the conflicting parties and views. In this case, the "checks and balances" that they will offer each against the other may balance the potential biases by any of them.

However, this strategy will not create a perfectly informed set-up but a better-informed set-up. Civil society is then not a veto player, not an enforcer; it is an informer. As an internal institution, it outperforms any individual efforts in this regard. After all, it is more likely to overcome the collective action problems because it already forms a kind of this collective action. A good example of initiatives of this solution is the role played by the civil society organizations in Tunisia, like the "Manich Msameh" and "Ana Yaqeth" movements. These movements' role is still immature because they failed until now to be either partial organizations that provide objective consultation or full alternative political parties to the current ones that failed to complete Tunisia's constitutional institutions. However, they did

[498] Arthur and Yakinthou (n 151).

help the TJ process and constitutional compliance; proof of this conclusion can be found in the Reconciliation law-making process and how these movements' role altered it.

I am moving from this point to the second stage, i.e., selecting which mechanisms to apply. The answer to this question should depend on the cost-benefit analysis (CBA) that the policy-makers will operate in each case.

Quantifying the CBA equation on a case-by-case basis entails using local evaluation along with international. This evaluation would be available through the available empirical studies. That is another reason why both empirical research in TJ and using the research institutions are vital. The research will translate the abstract concerns to evaluations derived from the reality that can be compared and lead to informed decisions by the policymakers. After a revolution, systems transitioning from autocracy usually lack the necessary human capital that can engage in such studies.

Consequently, the most vital role that the international community can provide to these systems is investing in their human capital through training and knowledge transfer instead of merely transplanting international expertise that would not work the same for every society. The more this investment is given to partial institutions and experts, like academic and research centres that do not have political labels, the better. This approach would also eliminate to a great extent the concerns over sovereignty which are usually raised around direct international assistance given to specific parties to the transition.

In the light of the shortage in these empirical studies, TJ pilot projects and phased approaches can be helpful to minimize the costs of mechanisms that contribute negatively to the anticipated goals.

On another note, while the typical constitutionality objections concerning some TJ mechanisms are a challenge in most cases, there could be inherently the key to a balanced, efficient TJ process. The recent international legal rulings and opinions on the interplay between principles like the ban of retroactivity and the right to work are more flexible than the traditional legal analyses. These rules and opinions consider the context of the questioned laws and policies and the history of violations they try to treat. This means that adhering to the international standards would still guarantee the victims a TJ process that respects their right to accountability and truth. However, the guarantees of due process should still apply during all phases of this process. Respecting the due process requirements in the TJ context in the light of evidence collection difficulties, concerns of polarization and partial judiciary, and

the demand sometimes from the public to ignore these requirements altogether and apply a "mass retribution" can all be challenging. However, in this case, communicating to the public the fact that adherence to international standards is necessary for restoring funds seized from abroad, receiving international assistance, or being admitted to international organizations can, to some extent, ease this challenge and bring the public to the deal. Here rises, again, the importance of the knowledge-based "third-part informer," which entails supporting the social role and responsibility of these institutions. Their role is also essential to provide an impartial CBA that departs from each party's vision of the compared mechanisms' costs and benefits that would respond to their personal preferences depending on the post-revolution scenario.

Although this analysis concurs with the balanced approaches to TJ, it adds new components to them.

First, the individual design of mechanisms depending on the case, as explained earlier. Second, on a technical level, formulating TJ laws in the form of basic or organic laws could save society huge costs spent on challenging these policies constitutionally before the courts. Third, deliberative and multilateral solutions, including democracy, are always more costly in the short-term than authoritative and mono processes. Arbitrary plans are also expected to be less costly in the short term than informed study-based plans and decisions. However, the deliberative, multilateral, and study-based decisions are expected to be less costly in the long run. Fourth, applying similar economic reasoning to the one provided by Richard A. Posner in explaining the economic reason behind the Multiple Offender Laws,[499] the analysis recommends the adoption of proportionality principles. It would not be efficient to treat both the leading past-regime members and the subordinates with the same mechanisms. A combination between prosecution initiatives and/or lustration for only the head members of the past regime and amnesties coupled with reparations and/or truth commissions could be an effective strategy to avoid a counter-revolution, society polarization, over-deterrence, stigmatization of possibly innocents, and loss of human capital and qualities. Fifth, the quality of the application is a pre-requisite for any positive outcome expected from these balanced aprroaches. Accordingly, a partial application of a specific mechanism does not mean arbitrarly applying it on some cases and excluding others. Instead, this partial application must also translate to an application that responds to the constitutional regulation, involves transparent procedures, and cooperative behaviour between the parties. Finally, to

[499] Posner, 'An Economic Theory of the Criminal Law' (n 101).

guarantee both constitutional compliance and cooperative behaviour, nations should try to avoid promising too much in their TJ laws and take into consideration the available resources and the actual power of the different players in the political landscape.

In general, TJ policies that take into account: Proportionality + Combination of different mechanisms + Customization of the mechanisms upon the relevant case + Self-enforcing and realistic basic laws of TJ + Multilateral democratic process that includes knowledge-based civil society + Transparent application, are expected to have the most effective outcomes achieving the goals of TJ with the least legal complications. This equation should also seek to achieve the balance between the due process legal standards, so it does not have a killer effect on the democratization and transformation into the rule of law on the one hand, and the necessity of a radical break from the past regime on the other hand.

Finally, for the Tunisian case, the previous recommendations hold. An imperfect TJ process is better than no TJ process. Despite the conflicts over the steps taken towards TJ so far, Tunisia still has the opportunity to abide by a vast part of its designed TJ policies. This application is not essential for the TJ goals alone but for achieving constitutionalism which is a pre-requisite for the transformation, the Tunisians aspire to. The Tunisians could have a say in how their political elite has been quarreling over the past decade, blocking a genuine reform or moving forward in the upcoming elections. This, definitely, became harder after the last updates in summer 2021, but it is still not impossible. While the Tunisian civil society still tries to mature their work, and the international parties still provide assistance, one aspect is still missing; a party that provides an alternative to the current ones and works for turning the constitutional aspirations after 2011 into reality.

Future Research

What TJ discipline needs the most is more empirical research that can prove or falsify the available theoretical landscape. Many questions seek answers in this regard.

First, would cross-national studies prove that the knowledge-based civil society as a third-party informer does have a positive effect in minimizing the PAP in the TJ context or generating more successful policies to achieve its goals? Which are proven to perform better in this regard, national or international organizations? And under which conditions?

Second, in terms of making TJ policies, do the democratically designed TJ policies tend to give significantly better results in achieving TJ goals than ad-hoc measures? Are they

more enforceable than unilaterally designed policies? Are TJ policies formed as basic or organic laws correlated with less legal challenges? Is that attributed to the legal formality or the adherence of these policies to international standards? Does the answer differ depending on whether the making of these laws involved democratic methods or not? Do these laws receive more agreement among the public more than ordinary laws? Do they receive more acceptance from the international community regardless of their content? And most importantly, do they perform as skeletons in the closet that come back to haunt society whenever the government wants to enforce policies that could be constitutionally questionable?

Third, does the application of proportionality principles significantly affect a successful TJ process in terms of democratization, reconciliation, and promoting human rights? There are available studies that show that combining punishing and non-punishing mechanisms has positive effects. Other studies show some mechanisms to be better than others in protecting specific kinds of human rights.[500] However, as far as I know, no research yet investigates whether applying prosecutions to leading past-regime criminals while giving amnesties to less important members has more social welfare enhancing outcomes than mass prosecutions or mass amnesties. And if this applies, then in which conditions?

Fourth, is the combination that the justice-balance approach suggests, i.e., trials + amnesties + truth commission, the only one that optimizes the trade-off between accountability and transition considerations? Following the economic analysis offered in chapter 4 of this thesis, one can expect that other combinations that follow the same rationale could also have effective outcomes in promoting human rights and democracy. For example, could a combination between lustrations, reparations, and amnesties achieve comparable results?

Fifth, future follow-up empirical research on the further application of TJ policies in the Tunisian context is necessary. How did this application continue or stop or develop? How did the adopted TJ approach by Tunisia influence its democratization in the short and long-term?

Finally, although national consultations are usually ignored in the empirical literature on TJ impact, the conclusions of this dissertation expect that it could be the decisive element for the success of TJ in achieving its goals. Using knowledge-based civil society as a third-

[500] See for example, Dancy and others (n 15).

party informer, the democratization of the TJ-making process, and formulating TJ policies as organic laws, which are essential recommendations of this thesis, come under this mechanism. National consultations also are expected to achieve the national parties' ownership of the TJ process, which then is expected to encourage them to apply it. Empirical research that looks into the comparison between transitions that guaranteed this mechanism and others that did not, would tell us to what extent the outcomes of this dissertation analysis could contribute to more optimal TJ processes.

Further theoretical analysis is also still needed to answer questions on TJ that would help us build a more robust foundation for any empirical analysis.

Most importantly, regarding CBA, a second stage would be to compare the different mechanisms' combinations and the comparison between the cost and benefits of sole mechanisms and combined mechanisms. In addition, while the CBA provided in this dissertation assumes that all mechanisms are time-limited, further analysis of lifting this time cap effect on the costs and benefits, and comparing the time-limited and unlimited mechanisms, would be interesting. Especially as many crimes that fall under the TJ scope are not subject to the principles of time-lapse, like torture.

Moreover, the security sector reform within TJ still represents an understudied dilemma that challenges the current rational analysis, consequently needing innovative treatments.

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Summary

This dissertation addresses the timely questions of transitional justice (TJ) in the aftermath of revolutions against autocratic regimes. Dealing with TJ as a constitutional arrangement through the lenses of constitutional economics explains how the classic legal analysis of TJ is mostly built on normative bases that do not respond to rational choice theory or historical examples, especially that it rarely draws the consequences of the distinction between constitutional law challenges after a revolution and international law principles post-wars.

To shed more light on TJ as a constitutional arrangement after revolutions over autocratic regimes, this thesis uses a mix of legal and economic methods to answer both positive and normative questions.

The dissertation consists of an introductory chapter that explains the questions analyzed and the methodology to answer them, besides the research placement in TJ literature.

Chapter 2 deals with the TJ dilemma post-revolution in its first stage, i.e., why nations rarely adopt meaningful TJ processes in the first place. The chapter uses rational choice theory and forms of behavioural analyses to explain the post-revolution phase's different setups and why resorting to the typical solutions in the domain of public policies would not solve the TJ principal-agent-problem. It then provides for the limitations of a popular solution in the modern TJ literature, i.e., supporting civil society as the arbiter, facilitator, and enforcer of TJ policies.

Chapter 3 tackles the second-stage TJ dilemmas, i.e., which mechanisms to choose? The chapter uses the UN Guidelines on Transitional Justice that sets five principal TJ mechanisms. It provides a cost-benefit analysis (CBA) of each mechanism and suggests policy implications out of this analysis.

The CBA inspires the analysis of chapter 4 that suggests a tradeoff under constitutional laws in some of the violations that TJ deals with between due process and the retributive forms of accountability considerations. The tradeoff is used to explain the suggested efficiency of the Justice-Balance Approach that Olsen et el. (2010) associate with promoting democracy and reducing human rights violations.

This approach is used as a benchmark for the case study analysis of TJ in Tunisia after the 2011 revolution given in chapter 5. The chapter presents the first index of TJ mechanisms in Tunisia through novel data collected by the author. It shows an ultimate de jure TJ approach that, until September 2021, ended in only a modest harvest in the de facto application. Although the partial application of TJ policies in Tunisia so far could still respond positively

to the justice-balance approach, the lack of cooperation between the Tunisian parties added to the absence of transparency in many TJ measures threatens any positive outcomes to be expected from this approach. In addition, the gap between constitutional regulation and de facto application of TJ policies is extremely alarming regarding constitutional compliance in a system that – until recently - used to be considered the only democracy in the Arab region.

Finally, chapter 6 summarizes the thesis findings in light of its limitations. It also explains the potential opportunities for future research.