

The Legal Framework for Transitional Justice: Comparative Arab Experiences

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ABSTRACT

This paper revolves around the role of transitional justice that seeks to establish democratic and constitutional institutions, in light of the flagrant and dangerous violations of human rights that the Arab world is witnessing, especially in Syria and Tunisia. Moreover, it analyses the role of transitional justice in the transition from an authoritarian society to a democratic one in Arab countries – a case in point are Syria and Tunisia.

Keywords: *Transitional Justice, Syria, Tunisia.*

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INTRODUCTION

Every society that emerges from a state of conflict and strife needs a transitional phase to address the effects of the past and reposition both society and state by establishing accountability and transitional justice and defining a new path for the state. Therefore, transitional justice is one of the means of settling internal conflicts in order to rebuild the state on sound foundations.

The philosophy of transitional justice is based on a saying by Archbishop Desmond Tutu¹ of South Africa: “How to transform human mistakes into human justice.” Transitional justice is the sole and most appropriate option to solve the problems of the past and remedy the abuses that have affected human dignity and humanity as well as to acknowledge said violations and seek to prevent recurrences.²

Transitional justice is based on documenting the grave violations of human rights and other forms of abuse of power. It also seeks to reveal the truth, to hold those responsible for these violations and abuses accountable, and to purge state institutions of those who were involved in committing such crimes. Transitional justice aims to accomplish this as it promotes the reform of institutions with the goal of preventing the recurrence of said violations and, offering effective redress and compensation to victims. All this would ultimately result in national reconciliation and transitioning to democracy and social peace within a framework of national accord.³

Transitional justice, as a term, consists of two compound words, transition and transformation, from a specific ruling system to a democratic regime. The first word refers to the transition from a state of tyranny to a state of effective political participation by citizens, whereby the second means going on a path that includes the greatest degree of democracy⁴ while also referring to the set of procedures, measures, mechanisms, or processes that a state resorts to in this period in order to achieve this hoped-for transition. It aims to get over the pains of the past, overcome societal divisions, and build trust

¹ Based on a graffiti that was on the wall of the house of Desmond Tutu, the former South African Archbishop of Cape Town. Tutu was the 1984 Nobel Peace Prize winner and one of the most prominent anti-apartheid activists in South Africa. He was chosen to chair the Truth and Reconciliation Commission to investigate past human rights violations perpetrated by both pro- and anti-apartheid groups in South Africa.

² International Center for Transitional Justice, What is Transitional Justice?, accessed on 22/05/2021 <https://www.ictj.org/about/transitional-justice>

³ Adel Majed, “al’adalah alenteqaliyah waledarah alnajeha lemarhalet ma ba’ed althawrat”, Mejalat alseyasah Idawliyah, No. 192, April 2013, p. 10.

⁴ Ali Al-Kuwari, “Iemaza entaqala alakheren ela ldyomqratelyah wata’akhar l’arab, derasah moqaraneh ledewel l’erebiyah m’ dewal okhra”, Centre for Arab Unity Studies, Democracy Studies in Arab Countries Project, Beirut, 2009, p. 27.

between the people and those in a position of authority, leading to national accord and national reconciliation⁵.

As a matter of fact, the historical roots of transitional justice go back to the period following World War I, to a time when the international community seriously began to appreciate the value of achieving transitional justice, in light of the gross violations of the laws and customs of war and the rules of international humanitarian law⁶.

The widespread and serious violations of human rights in the decades that followed the end of World War II contributed to the growing interest in the concept of transitional justice and its mechanisms. In parallel, with political transformations from authoritarian regimes to democratic regimes in South and Central America, some manifestations of transitional justice emerged as a result of increasing popular pressure and movements⁷.

Transitional justice has been defined at several levels. At the international level, the United Nations gave it great attention and defined it as what: “Covers the full range of processes and mechanisms associated with society’s attempts to come to terms with a legacy of widespread past abuses in order to ensure accountability, justice and reconciliation. It may also include both judicial and non-judicial mechanisms,

⁵ Ali Al-Qahwaji, “al’edalah lenteqaleyah men menzewe Imolahaqat Ijena’eyah”, Kuwait International Law School Journal, Issue 4, Year 1, December 2013, p. 237.

⁶ The use of the term “International Humanitarian Law” is attributed to the jurist Max Hober, the former president of the International Committee of the Red Cross. International humanitarian law is defined as a set of rules of international law that aims, in situations of armed conflict, to protect people who suffer the scourge of said conflict, and in a broader framework, to protect objects not directly related to hostilities. See: International Humanitarian Law, A Guide to National Implementation, prepared by select specialists and experts, Publications of the International Committee of the Red Cross in Cairo, 2006, p. 17.

⁷ Transitional justice after World War II revolved around the idea of criminalization and the international trials resulting from it, such as the Nuremberg and Tokyo trials. The second stage of the development of transitional justice came after the collapse of the Soviet Union and during the various political changes that took place in eastern European countries. During this stage, was adopted a local or national concept of social justice that was linked to the official structures of the state and thus bypassed the idea of trials and included other mechanisms such as truth and compensation commissions. Thus, transitional justice became a national dialogue between perpetrators and victims. As for the third stage of transitional justice, it emerged during the transitional periods that followed the rule of military and totalitarian dictatorships in Latin American and South African countries and in some other African countries, as there was international consensus on the need for transitional justice measures to deal with human rights violations. This coincided with the objectives of countries and donor bodies for developing countries that demanded that the rule of law be implemented. In other words, the third stage of transitional justice linked democratic transition and justice with a comprehensive reassessment to bring a society in the transitional phase to another phase where democracy is considered one of the primary goals. The establishment of the tribunals and courts for Yugoslavia, Sierra Leone and Rwanda is the greatest reflection of achieving the goals of transitional justice. See: Omar Abdel Hafeez Shanani, “al’edalah alenteqaleyah walmasaleh alwetenyah - almefaheym waltetbyqat”, Dar Elgamaa Elgadida, Alexandria, 2015, pp. 93-94.

with varying levels of (or non-existent) international participation, as well as individual trials, compensation, fact-finding, constitutional reforms, examination of personal record for abuse, dismissal or a combination of these.”⁸ Then, the UN set international standards governing its implementation and later pledged to provide support to countries that seek to implement transitional justice mechanisms.

Transitional justice has been defined also at the national level through laws set by some countries that have called for democracy. For example, the draft Transitional Justice Law in Libya defined it in Article 1, which states⁹ that: “Transitional justice: A set of legislative, judicial, administrative, and social procedures designed to address the incidents that occurred in Libya under the former regime and the government’s violation of human rights and fundamental freedoms, and to achieve amicable reconciliation between social groups.”

Our study thus revolves around the role of transitional justice that seeks to establish democratic and constitutional institutions, in light of the flagrant and dangerous violations of human rights that the Arab world is witnessing, especially in Syria and Tunisia. Our main question is as follows: Will transitional justice be able to achieve its goals, especially as the committed violations are against an entire society?

Moreover, in order to highlight the role of transitional justice in the transition from an authoritarian society to a democratic one in Arab countries – a case in point are Syria and Tunisia – we raise the below set of questions:

1. How effective are transitional justice mechanisms?
2. What is the relationship between transitional justice and human rights?
3. What is the role of internal turmoil in consolidating what transitional justice means?
4. What are the scopes of democratic change during the transitional period? What are the concepts that are comparable to the term “transitional justice”?

⁸ Paper on Transitional Justice in Tunisia, published on 03/03/2014, <http://ar.jurispedia.org/index.php> accessed on 18/05/2021.

⁹ National Transitional Council, Libya, Article 1 of Law No. 17 of 2012, on establishing the rules of reconciliation and transitional justice. Tunisian law also gave the following definition: “Transitional Justice shall mean 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...” See Part One of Organic Law No. 53 of December 24 on Establishing and Organizing Transitional Justice.

5. How can criminal protection provided by domestic and international justice be applied once at the transitional justice stage?
6. Based on the experiences of Arab countries, to what extent is transitional justice able to address past crimes?

These are the questions we will be answering through this study that we have divided into two parts:

1. The Legal System of Transitional Justice
2. Transitional Justice: between regulation and implementation

THE LEGAL SYSTEM OF TRANSITIONAL JUSTICE

Often, countries face internal turmoil that could destabilize security and stability. Such turmoil may be expressed peacefully through demonstrations or work strikes. The constitution regulates these behaviors and confers legitimacy on them, provided that they adhere to the procedures established by the state's legislation in force.

However, the situation changes when these demonstrations turn violent and become driven by organized groups that act against the ruling authority, but without this violence rising to the level of armed conflict, which prompts the authority to use force to end these confrontations. The inevitable consequence of this is a weak rule of law and massive violations of human rights such as the human right to life, and the prohibition of slavery, inhuman, cruel and degrading treatment in addition to torture.¹⁰

The Secretary-General of the League of Arab States, Dr. Nabil Elaraby, described: "2014 as the worst year for the Arab nation," and James Clapper, U.S. Director of National Intelligence, described it as "the bloodiest year in 45 years." This assessment is based on the events of the Arab Spring that resulted in the outbreak of sectarian wars within single countries and across borders. It is additionally based on the fact that the year 2014 saw the dismantling of the central authority of states and the taking over of armed non-state actors such as terrorist organizations and armed militias. This is the result of the accumulation of what happened in the previous decades. The witnessed results are thus the culmination

¹⁰ Omar Abdel Hafeez Shanan, *op. cit.*, p. 58.

of the policies pursued by most Arab governments for decades: policies of political and social exclusion, restrictions on civil and political liberties, distorted economic development, dependence on rentier sectors, and the continued economic vulnerability to other states. This has resulted in dependency, the widening gap in the distribution of income and wealth between the rich and the poor, and the continued deterioration in education, health and other basic needs, with the consequent decline of social capital in these countries. Therefore, the Arab Spring's bloody events were all but surprising.¹¹

Furthermore, revolutions and armed conflicts have resulted in the collapse of regimes in some countries, as was the case in Egypt¹² and Libya¹³. This situation prompted countries to find joint mechanisms aimed at uncovering the facts, compensating the victims, making reparations and establishing a bright future away from the mistakes of the past. Given the aforementioned, and with the aim of highlighting the legal system of transitional justice, we will address the “pillars of transitional justice” in the first section and then proceed to discuss the “mechanisms for achieving the goals of transitional justice” in the second section of this study.

Section 1: Pillars of Transitional Justice

Transitional justice is defined as: a set of judicial and non-judicial mechanisms- “political, economic, social”- that a particular society uses to achieve justice in a transitional period with the aim of moving from the stage of conflict to the stage of consensus.¹⁴

¹¹ Ibrahim Naser Eddine et al., “hal l’omah al’erbiyah 2014-2015, ale’esar: mn taghayyor alnizam ela tafkyk aldowal”, Gamal Abdel Nasser Cultural Endowment, Centre for Arab Unity Studies, Beirut, 1st Edition, 2015, pp. 17-18.

¹² In Egypt, popular pressure after the 2011 revolution resulted in the arrest of the President of the Arab Republic of Egypt, Mohamed Hosni Mubarak. Despite the emergence of clear aspects of transitional justice in Egypt, the reality indicates that measures related to transitional justice such as truth-seeking and reparations for victims were not at the required level. In addition to that, criminal accountability for those responsible for violations in Egypt was not on countries’ agendas after the election of Field Marshal Abdel Fattah el-Sisi to the Egyptian presidency for the year 2012: Transitional Justice in Egypt - State Repression and Polarized Politics Thwart Hopes, ICTJ, article published on 27/09/2015, accessed on 20/05/2021.

<https://www.ictj.org/news/state-repression-polarized-politics-thwart-hopes-justice-egypt>

¹³ Some believe that what happened in Libya was a civil war, and that the ruling authority, with the help of external intervention, has worked to mislead society in order to consolidate its interests: “The civil war in Libya is artificial and not inevitable. The Libyan crisis is the result of the leadership’s failure to transition, not the result of tribalism, or the lack of modernity, or the absence of a national identity.” An Introductory Study on the Status, Challenges and Prospects of the Libyan Economy, Part II of a Baseline Study for the Libya Socioeconomic Dialogue Project, United Nations – ESCWA, 2020, p. 9.

¹⁴ Sabri Mohamed Khalil, The Concept of Transitional Justice, Al Rakoba newspaper, Sudan, 2013. Accessed on 20/05/2021. <http://www.alrakoba.net/articles-action-show-id-43019.htm>

Based on this definition as well as on country experiences in the field of transitional justice, transitional justice may be considered to be founded on five main pillars, which are:

Accountability, truth, reparation, institutional reform, and reconciliation. The order according to which these components are enumerated is not a reflection of the priority of one component over another but rather a methodological necessity. We will discuss below each of these components in some detail.

1) Truth

Truth is necessary and important for several reasons, the most important of which is to help the collective awareness get to the truth regarding the violations that took place, prevent their recurrence in the future, and end the state of fragmentation and controversy over these violations between the different social factions. Habitually, during transitional stages, the need to understand what happened and why it happened arises, especially since the information blackout practiced by tyrannical and repressive regimes conceals their human rights atrocities and violations, in terms of dimensions, components, size and areas.¹⁵

When talking about the truth, one must be aware that it is not absolute and that it has many forms and shapes as well as various components. The most prominent of these is the factual or forensic truth that is presented to the judiciary with all the arguments, evidence, witnesses and legal basis it requires. There are also the testimonies that reflect the reality of individual suffering in the midst of human rights violations. The transitional justice approach seeks to reveal the truth by bringing together these components - as much as possible, investigating and listening to the victims and their families, and enabling the community to know what happened by providing parties with the possibility to express themselves through creativity, writing, media, journalism, hearings and others. Among the non-judicial mechanisms that have noticeably emerged in the last two decades of the past century are truth commissions. This

¹⁵ See: United Nations, GUIDANCE NOTE OF THE SECRETARY-GENERAL, "United Nations Approach to Transitional Justice", March 2010, p.4. (UN.DOC.12-38576)

Also see: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, General Assembly Official Records, A/HRC/21/46, p. 5, paragraph 14, August 9 2012, accessed on 19/05/2021, available on the United Nations official website:

<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx>

mechanism was first used in South America and then spread to many parts of the world with the establishment of more than thirty truth commissions that have achieved varying degrees of success.¹⁶

2) Trials

Amnesty and forgiveness are of importance and necessity in any society that has suffered from the scourge of conflict, repression and persecution. However, this does not eliminate the need for conducting fair and legal trials. Indeed, the role of these trials does not only lie in human rights, but also in strengthening the principle of accountability in a transitional phase to turn the page on the past and start a constructive phase with new foundations. The national judicial system or the international hybrid criminal tribunals are considered the originators and implementers of these principles and foundations, on the basis of domestic legislation and international laws in case the national judiciary is unable to assist in this. Hence, it is possible to benefit and cooperate at the international level through the establishment of hybrid tribunals in the event of the collapse of the local judiciary, or in the event that it is unable to prosecute those accused of crimes related to human rights and the international humanitarian law. In this regard, transitional justice requires ensuring the independence and impartiality of the judiciary, provided that the investigation and trial take place in accordance with legal procedures, and that multiple trials for the same crime are prevented. Securing protection for witnesses and protecting trial procedures are also required. In these trials, what is known as the statute of limitations does not apply, and charges against the perpetrators are not dropped; there is no justification for obeying orders when it comes to military personnel, and no one, including the head of state, enjoys protection and immunity from prosecution.¹⁷

¹⁶ Historically, by examining global experiences in this field, we find that Latin American countries have formed many commissions. In Bolivia, the National Commission of Inquiry into Disappearances was established in 1982. Argentina established in 1983 the National Commission on the Disappearance of Persons. Chile followed suit in 1990-1991 by establishing the National Commission for Truth and Reconciliation and the National Corporation for Reparations and Reconciliation. A commission on human rights violations was established in El Salvador in 1994, followed by Peru in 2001 and Paraguay in 2003 with the formation of truth and justice bodies. On the African continent, what is noteworthy are the experiences of Rwanda in 1990, South Africa in 1995 and Sierra Leone in 2000. The events of East Timor in the Asian continent pushed to establish the Commission for Reception, Truth, and Reconciliation in 2002. Chile's experience is considered the first indication of international solidarity with the victims, when in 1975 the United Nations General Assembly confirmed practices of torture, ill-treatment and arbitrary detention. Omar Abdel Hafeez Shanani, *op. cit.*, pp. 113-114.

¹⁷ Omar Abdel Hafeez Shanani, *op. cit.*, p. 116.

The abovementioned trials are about taking penal measures against the perpetrators of human rights violations, in accordance with the requirements of international law and the obligations that each country has taken upon itself through its accession to a number of conventions and treaties that signatory countries have ratified. However, country experiences demonstrate that this obligation remains dependent in one way or another on the presence of a political will, of identified priorities for democratic transition, and of the criteria necessary for the judiciary to fully and impartially play its role. This explains the divergence in the priorities of many country experiences, including Chile and Argentina.¹⁸

The application of the principle of accountability undoubtedly takes into account the political assessment of the country's situation and the objectives envisaged at each stage, but that does not mean that the state is to abandon its obligations in this regard. There is no doubt that the law has its limits; whenever human rights violations occur on a large scale – as was the case in former Yugoslavia or in Rwanda – it is impossible to identify and prosecute everyone. While international criminal law can hold some accountable when it comes to international crimes, there are limits to what can be achieved. Nevertheless, criminal accountability remains an option that has its motives and objectives in the steps taken to address past violations. These are mainly: Helping to deter the perpetration of new violations, overtly and officially condemning crimes, and reflecting the state's involvement in building respect for the law, in addition to building confidence in the state's policy and institutions.

¹⁸ The importance of the Argentinean experience in transitional justice is due to two reasons: The first is that the Argentinean experience is one of the first experiences in the world in the field of implementing transitional justice, as it can be said that the term transitional justice was born in Argentina. The second reason is that the Argentinean experience has faced great obstacles and resistance in order to achieve its purpose. Trials of military figures and personnel accused of committing human rights violations had begun, but Argentina faced obstacles mainly the fact that: "Some leaders of the Argentinean army follow the policy of hiding evidence and documents, that some leaders in the Argentinean army use terrorist methods inside the country such as bombings, and that some army leaders threaten to plunge the country in a civil war, as long as trials for members of the army continue." Jubeiry Yassin, "al'adalah alentiqalyah fy mythaq almsalha alwataniyah aljza'ery", Dar Elgamaa Elgadida, Alexandria, 2019, p. 325 ff. As for Chile, the seizure of power by the army led by General Augusto Pinochet on September 11, 1973 and its overthrow of the Popular Unity coalition government led by Salvador Allende put an end to a democratic experience that did not enjoy the United States' blessing. The US was thus involved in this bloody coup that left in its wake, in only 3 months, 1220 casualties. As a result of the popular resistance against the regime, the ruling military authority was forced to hold a plebiscite to transition to civilian rule. After the 1989 elections that resulted in the Christian Democrats' win and Patricio Aylwin's accession to the presidency, the process of transition to a new regime began while the presence of the military authority remained in power for several years and failed to consolidate civilian rule. The Chilean experience in democratic transition was carried out gradually and with moderation until the military authority was stripped of its vast powers without any more casualties. The transition phase was a bridge to a more stable and representative phase of the popular will that insisted on knowing the truth, especially the repercussions of the bloody military coup the likes of which no country in the continent has ever seen in terms of the suppression of liberties, assassinations, and torture in the name of freedom and democracy. In April 1990, following a presidential decree, a commission was established under the name "National Commission for Truth and Reconciliation": Jubeiry Yassin, op. cit., pp. 329-330.

Additionally, it has been noted from past country experiences that there are many challenges that prevent the full-scale implementation of prosecutions, such as lengthy litigations in some cases, as well as litigation costs and requirements in terms of evidence and witnesses. Despite the magnitude of the challenges that face the principle of accountability, prosecutions should not be removed from the agenda. Rather, they should be included in the strategy of rehabilitation and enhanced institutional reform in order to transition to what guarantees justice delivery.

3) Reparation

The concept of reparation extends to more than just material compensation to the victims. It also becomes an acknowledgment of the responsibility of the state towards human rights violations, and that the resulting damages must be compensated in accordance with the relevant requirements of international law. Additionally, it is part of the rehabilitation that takes into account the repercussions of what the victims have been exposed to, their professional and financial conditions, their property, and the repercussions of these incidents on their families.

Reparation comes at different levels and has different forms, such as: individual reparation for victims and their families, and it includes compensation, treatment, reintegration and health care; collective reparation which concerns groups and regions that may have endured special conditions in terms of policies of repression, extermination or general marginalization as a result of political positions or their support of a political party and not another; and finally, reparation based on gender, which aims to address the special situation of women victims of violations.¹⁹

4) Institutional Reform

Countries newly emerging from the cycle of conflict or repressive rule often need to reform institutions, laws and policies, in order to avoid a return to authoritarian rule and to prevent the recurrence of human rights violations in the future. However, the field of institutional reform is vast and complex, and it is constrained by the existing political climate, available resources, and the need to formulate a project with realistic objectives.

¹⁹ United Nations, Security Council, Report of the Secretary-General on The rule of law and transitional justice in conflict and post-conflict societies, (New York: Report number S/2004/616, August 23, 2004), p. 6.

Also see: Office of the United Nations High Commissioner for Human Rights, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: Reparations programmes, United Nations Publications, New York and Geneva, 2006, p. 6.

In fact, efforts to achieve institutional reform must be carried out gradually and in proportion to the size of local capabilities and in accordance with the existing political conditions since this process may affect sensitive agencies of the state such as the judiciary, police and army.²⁰

The process of institutional reform and the process of rebuilding the state are mechanisms of transitional justice, especially if these institutions bear a large part of the responsibility for the spread of corruption and violations in society. It has been noted that the majority of countries that seek to implement transitional justice suffer from the collapse of both civil and military state institutions.²¹

Institutional reform is fundamental for democratic transition, given that wars, civil wars and authoritarian regimes have devastating repercussions on state institutions and workers. In such settings, everyone is to follow a systematic policy of oppression and subjugation. This usually leads to the violation and abuse of the law, lack of oversight, fulfillment of personal agendas, bribery, etc.

This is why the transition stages necessitate institutional reform as one of the main entry points to ensure the non-recurrence of the violations that have taken place and to provide protective constitutional and legal guarantees in case that happens. This reform comprises several areas, most notably constitutional reform and law review. Reform also takes place by assuring the independence and advancement of the judiciary, subjecting security and law enforcement institutions to oversight, providing good governance conditions based on transparency and accountability, and training state employees working in the judiciary, security and law enforcement, army and media.

5) Reconciliation

Reconciliation does not mean burying the truth and turning the page without reading it. Rather, it is a goal that is achieved through all the elements and pillars of transitional justice, such as revealing the truth, having a public debate or discussion, reforming institutions, providing reparations, and so on. Reconciliation does not mean oblivion, for it is necessary to preserve the memory of what has happened so that people can learn from their mistakes and prevent the same actions from recurring. There are many ways - political, legal or other - to reach reconciliation. Creating mechanisms for dialogue,

²⁰ United Nations Record, General Assembly Official Records, Record number A/HRC/30/42, p. 11-23.

²¹ Samar Muhammad Hussein Abu Al-Saud, "dewr almahkamah alkhasah lesyeraleyawn fey tehqeyq al'edalah alentiqaliyah", presented by: Ibrahim Nasr Al-Din, Elmaktab Elarabe Llmaref, Cairo, 1st Edition, 2015, pp. 33-34.

establishing a common ground between the parties, and laying the foundations for a common societal project that ought to be defended by society itself are all means of achieving reconciliation.²²

Thus, one can conclude that applying said pillars requires several mechanisms. This will be discussed in detail in the second section of this requirement under the title “Mechanisms for Achieving the Goals of Transitional Justice.”

Section 2: Mechanisms for Achieving the Goals of Transitional Justice

Transitional justice is a relative concept that changes with time and place. Accordingly, the mechanisms that new regimes resort to in order to confront the legacy of the past change, especially since the experience in the field of transitional justice differs from one country to another.²³

In its 2010 guidance note entitled “United Nations Approach to ‘Transitional Justice’”²⁴, the United Nations adopted a definition of the concept of transitional justice. For the United Nations, transitional justice is 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. It also consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations.

Truth commissions, institutional reforms and compensation programs are among the most prominent transitional justice mechanisms that seek to examine the root causes of conflicts and relevant human rights violations. They enable transitional justice to achieve its goals of preventing future violations, building social peace and promoting national reconciliation.²⁵

²² The real use of the term “national reconciliation” emerged towards the end of the last quarter of the 20th century in countries of South America as well as in some African countries such as Algeria and South Africa before it was used in the Middle East. National reconciliation is defined as a process, the aim of which is to shift towards democracy and attempt to build a state where principles of humanity are respected and human rights are not violated. Report on transitional justice and national reconciliation in Egypt, Ibn Khaldun Center for Development Studies, Cairo, 2013, pp. 7-8.

²³ Some experiences have relied mainly on mechanisms of accountability and retribution, and they are characterized by punitive justice, which was carried out in Rwanda, former Yugoslavia, East Timor and Iraq. Other experiences have relied on revealing the truth, forgiveness and reconciliation, as was the case in South Africa and the Kingdom of Morocco; they were intricately tied to restorative justice. Adel Majed, “m’eayeyr tetbeyq al’edalah lenteqaleyah fey l’ealem l’ereby”, selselat esdarat l’edalah lenteqaleyah fey l’ealem l’ereby, Nass Printing Company, 2nd Edition, 2013, pp. 44-45.

²⁴ United Nations, Guidance Note Of The Secretary-General, “United Nations Approach to Transitional Justice”, March 2010, p.4. (UN.DOC.12-38576)

²⁵ Maher Jamil Abu Khawat, “Iejnat teqasey alheqa’eq wal’edalah lenteqaleyah”, Dar Alnahda, Cairo, 2014, p. 122.

Truth/Fact-finding Commissions²⁶

The Office of the United Nations High Commissioner for Human Rights defined truth commissions as: “These commissions—officially sanctioned, temporary, non-judicial investigative bodies—are granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report.”²⁷

Truth commissions are considered among the most important mechanisms used to achieve the goals of transitional justice. That is because revealing the truth is essential and necessary to help collective awareness establish the truth about the violations that took place and to avoid their recurrence. The commissions work on documenting an important stage of society’s history to circumvent its forgery or its rewriting in the future.²⁸

National commissions of inquiry have been established at the local level in more than forty countries during the past decades. Before the outbreak of the Arab Spring revolutions at the end of 2010, the world had known more than forty such experiences, five of which were African and one Arab. Between 1974 and 2004, twenty-five truth commissions were established.²⁹

There is a set of characteristics that truth commissions must have. A truth commission shall be an investigative body, be formally established by the state, enjoy some form of independence from the state, have specific authority under the relevant law and operate within a specific timeframe. It is a non-judicial body and shall focus on past events. The jurisdiction of these commissions shall also be limited to investigating serious violations of human rights or international humanitarian law. The law establishing said commissions determines the violations that their work will cover and the respective timeframe. These commissions ought to give priority to victims and their suffering and to conclude their work with a report and recommendations.

²⁶ The term “fact-finding” is mentioned in the second paragraph of the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, UN General Assembly, 1991; it stipulates that:

“For the purpose of the present Declaration, fact-finding means any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security.”

²⁷ See: Office of the United Nations High Commissioner for Human Rights, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES Truth commissions*, United Nations Publications, New York and Geneva, 2006, p. 1.

Also see: *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, Document number: S/2004/616, para. 50, p. 17.

²⁸ Omar Abdel Hafeez Shanan, *op. cit.*, p. 113.

²⁹ Ahmed Shawky Benyoub, “al’edalah alantiqalyah btownis- ausos nazaryah, tatbyqat ‘emaliyah wtasaworat mostaqbaliyah”, presented by: Amin Al-Ghali, Al-Kawakibi Democracy Transition Center, 2013-2014, p. 10.

The mechanism of truth commissions has been able to help support the process of democratic transition in various experiences by comprehensively addressing serious violations of human rights. This is done with the assurance that these commissions do not stop at trials, but rather expand their scope to reveal the truth of what happened and create a dynamic for dialogue and public debate with the participation of victims and various political, civil and union parties, in addition to workers in state institutions and others. Throughout this very process, mechanisms were developed as support and have gained great importance, most notably the public hearings in which testimonies about what happened are presented; countries such as Peru, South Africa and Morocco have experienced this.³⁰

Some commissions were given special powers such as the “conditional” amnesty that the Truth and Reconciliation Commission of South Africa had the power to grant, or the capacity to determine and award compensation that the Equity and Reconciliation Commission of Morocco enjoyed.

It must be noted that the reports issued by truth commissions usually include recommendations for reform and non-recurrence, and thus serve as a road map on the agenda of all state institutions and political actors. The formation of these commissions requires necessary procedural conditions to ensure their credibility and efficiency. Therefore, what is required is looking closely into its components, resources, political independence and areas of expertise. These are issues and problems that allow country experiences to take away the most effective practices in line with the objectives of the commissions’ establishment.

As a complementary step to the previous stages, institutional reform comes to ensure the success of the democratic transition process. It is not permissible to subject to accountability and to compensate the victims drawing upon the same institutions that had been linked to the violations or upon the

³⁰ As examples, we mention some of the investigation commissions in chronological order: The Commission of Inquiry into the Disappearances of People in Uganda (1974), the National Commission of Inquiry Into Disappearances in Bolivia (1982), the National Commission on the Disappearance of Persons in Argentina (1983), the Presidential Committee on Human Rights in the Philippines (1986), the International Commission of Investigation on Human Rights Violations in Rwanda (1990), the National Commission for Truth and Reconciliation in Chile (1990), the National Corporation for Reparations and Reconciliation in Chile (1991), the Commission on the Truth for El Salvador (1991), the Truth and Reconciliation Commission of South Africa (1995), the Truth and Reconciliation Commission for Sierra Leone (2000), the Peruvian Truth and Reconciliation Commission (2001), the Commission for Reception, Truth and Reconciliation in East Timor (2002), the National Reconciliation Commission in Ghana (2002), the Truth and Justice Commission in Paraguay (2003), the Truth and Reconciliation Commission for Serbia (2004) and the Equity and Reconciliation Commission of Morocco (2004). For more details see: Priscilla B. Hayner, *Truth Commissions: A Schematic Overview*, *International Review of the Red Cross (IRRC)*, Vol. 88, No. 862, June- 2006, pp. 295-310. 2nd ed., *Unspeakable Truths Transitional Justice and the Challenge of Truth Commission*, Priscilla B. Hayner- 2011, pp.239-240., Routledge, New York & London.

representatives of institutions who contributed to the violations or were involved in committing crimes. This requires fundamental changes to be made in these institutions, or at least carrying out purging campaigns against personnel whose involvement in committing crimes and violations under the previous regimes shall be proven.³¹

As for compensation, it is useful to note that it aims to bring justice to the victims. Thus, the term justice must be understood broadly by incorporating the elements of recognizing the victims and restoring their dignity, rebuilding trust between them, the citizens and state institutions, and establishing the value of social solidarity.³²

Compensation for victims of human rights violations may take a material form, such as granting monthly salaries to the families of the victims, and it may be moral, such as an apology and psychological rehabilitation.

TRANSITIONAL JUSTICE: BETWEEN REGULATION AND IMPLEMENTATION

As a matter of fact, there are many concepts that are similar to that of transitional justice, such as peacebuilding³³, peacekeeping³⁴ and national reconciliation³⁵.

³¹ Omar Abdel Hafeez Shanan, op. cit., p. 119.

³² Ibid., p. 118.

³³ The concept of peacebuilding is a set of activities or actions related to creating the necessary conditions for achieving sustainable peace in conflict societies and identifying and supporting structures that contribute to strengthening and consolidating social peace in order to avoid a return to a conflict situation: Ayman Shabana, "dawr l'omam lmetahedah fey bena' essalam fey afreyqya - derasat halat mewzembeyq wleybeyrya", Ph.D. Thesis, University of Cairo, Institute of African Research and Studies, 2009, p. 22.

This concept was developed in Lebanon with the UNDP Peace Building Project aimed to address the underlying causes of conflict in Lebanon and sought to create "safe spaces" for local identity groups to discuss their concerns openly and enhance mutual understanding of the different "other". Stakeholders were equipped to contribute to peace building, community dialogue and ensure an effective bottom-up impact of efforts. There are also initiatives to strengthen civil peace in Lebanon, focused on strengthening dialogue, trust- and consensus building, enhancing and nurturing partnerships between civil society and local government actors. Focus was also directed towards strengthening initiatives that promote collective memory and integrate peace building concepts into formal and non-formal educational channels. UNDP.

<https://www.lb.undp.org/content/lebanon/en/home/projects/TheUNDPPeaceBuildingProject.html>

³⁴ Today's multidimensional peacekeeping operations are called upon not only to maintain peace and security, but also to facilitate the political process, protect civilians, assist in the disarmament, demobilization and reintegration of former combatants; support the organization of elections, protect and promote human rights and assist in restoring the rule of law. UN Website. <https://peacekeeping.un.org/en/what-is-peacekeeping>

However, what brings these concepts and transitional justice together is the quest to establish democratic and constitutional institutions that aim at the non-return of tyranny and the violation of human rights.

Since human rights and freedoms revolve around the protection provided by transitional justice mechanisms, which we discussed earlier, it was necessary put forth a general obligation to protect these rights in both the national and international legal system, especially with regards to fundamental rights that may not be infringed, even in a state of war and emergency.

There is no doubt that the principles of amnesty and tolerance are important in any society that has suffered from the scourge of conflict, oppression and persecution. However, this does not negate the necessity to conduct fair trials in order to reinforce the principle of accountability and to be able to build a new phase on new foundations, so that the national judicial system or the mixed criminal courts are considered the official bodies implementing these foundations and principles.³⁶

In order for the transition from the phase of authoritarianism to the phase of democracy to happen through the basic means and mechanisms of transitional justice, it must first be stipulated in the constitution and the laws regulating it in order for this very transition to enjoy legislative protection. This is what we will discuss in the first section under the title “Transitional Justice: Legislative Aspect”, in which we shed light on the Tunisian and Syrian country experiences. Then, we move on to talk about criminal prosecutions, which are considered among the most difficult transitional justice procedures given the grave violations of human rights that took place under the previous regimes, and accordingly, we will address “Transitional Justice: Penal Aspect” in the second section.

Section 1: Transitional Justice: The Legislative Aspect

The concept of transitional justice is presented whenever a change occurs within a society, and it aims to establish mechanisms that operate according to an integrative vision to foster the transition from dictatorship regimes, financial corruption and political tyranny to emerging democracy, with the purpose of confronting the legacy of past human rights violations and preventing their recurrence.

³⁵ National reconciliation is the result of conflicts and disputes between the state and its citizens, whereby ending the conflict is based on involving all political actors and pushing for the elimination of its motives. Omar Abdel Hafeez Shanani, *op. cit.*, pp. 98-99.

³⁶ *Ibid.*, p. 116.

Revolution is one of the most prominent factors influencing transitional justice and its means of achieving democracy. It is a political change whose scope is time-limited yet may extend into the future. Revolution aims to replace an existing regime whose ties to society have been severed with another one, since due to these weakened ties, the regime has lost the legitimacy to stay in power. The revolution may be limited to replacing one set of rulers with another, and some faces with others, without paying attention to the frame of reference they derived from and whose provisions they have applied. This replacement, in addition to abandoning corrupt symbols of governance, may lead deeper, to focusing on the mental roots and behavioral traditions that produced those symbols and generated this regime, which later became a reason for the revolution.³⁷

As for the Tunisian experience, transitional justice came in the context of a spontaneous revolutionary movement that raised the slogan of overthrowing the regime and not the state. It also demanded accountability and trial, but did not call for revenge. Said movement rushed to elect a National Constituent Assembly to draft a new constitution, and in the midst of all this, the term transitional justice emerged as a popular demand and a central slogan.

The first chapter of the draft Truth and Dignity law presented to the National Constituent Assembly in Tunisia defined transitional justice 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.”³⁸

It seems clear that this definition has summarized the general transitional justice process, which includes the basic pillars required to support those persecuted and oppressed under the previous regime: Calling for those responsible for human rights violations to be held accountable; revealing the truth through special truth commissions; providing material and/or moral reparations for those affected and restituting them; seeking to ensure the non-recurrence of abuse by reforming institutions and isolating the people who caused these violations; working on a reconciliation that is confirmed by the rebuilding

³⁷ Mustafa Filali, “althewrah alnewneseyah walbena’ Idymeqratey, althewrah walenteqal Idymeqratey fey lwatan l’ereby nahew khetat tereyq”, Centre for Arab Unity Studies, Swedish Institute Alexandria, 1st Edition, 2012, p. 316.

³⁸ Organic Law No. 53 of 2013 on Establishing and Organizing Transitional Justice, December 24, 2013, Official Gazette No. 105 of December 31, 2013, p. 4335.

of social ties between the aggressors asking for forgiveness on the one hand, and the victims who are supposed to accept the apology on the other.

Indeed, a decree-law relating to amnesty³⁹ was issued in Tunisia, and it stipulated in its first article the erasure of crimes and violations committed by opponents as long as they were imprisoned or prosecuted for crimes as a result of their political or trade union activities, provided that the crimes were committed before January 14, 2011. The second article of the decree-law also indicated that “all those who will be subject to amnesty in accordance with this decree-law will be entitled to be reinstated in their jobs and to claim compensation.” However, the decree-law did not specify the type of damage nor the mechanism for compensation for these damages.

As for reparation, it was referred to in Decree No. 40/2011⁴⁰. It was decided that material compensation is to be in the form of monthly pensions, free transport, education and treatment, in addition to extra financial compensation that is for the benefit of the families of the martyrs and the injured.⁴¹ Additionally, the National Pension and Social Providence Fund was designated to disburse pensions. For this purpose, the fund is annually assigned a grant from the state equal to the amount of the granted pensions, in accordance with Article 12 of the aforementioned decree.

On the other hand, moral compensation by the state will be by erecting a monument to commemorate the January 14, 2011 revolution that includes a list of the revolution’s martyrs; by creating a museum for the revolution and its events to draw lessons and defend national memory; by asking local communities to assign the names of the martyrs to roads, streets and public squares; by working to commemorate the Tunisian revolution annually in an official capacity and with popular events in order to perpetuate the ideals related to it; and by including educational material about the revolution in school programs’ history books.⁴²

³⁹ Decree No. 1/2011 of February 19, 2011 relating to the general amnesty in Tunisia, Official Gazette No. 12, dated February 22, 2011, p. 179 ff.: Amnesty is granted to any person who, before January 14, 2011, has been convicted or prosecuted by the courts for attacking the internal security of the State, carrying out terrorist acts and money laundering, violating the provisions relating to non-recognized political parties, violating the provisions relating to defamation and insults against individuals, and violating the provisions relating to public meetings, processions, demonstrations and gatherings as well as union activities... (Article 1) This results in the amnestied being “entitled to be reinstated in their jobs and to claim compensation” (Article 2).

⁴⁰ Decree No. 40/2011 dated 19/05/2011 on the reparation for the damage caused by the unrest and popular movements that the country witnessed.

⁴¹ Articles 8 through 10 of the aforementioned Decree No. 40/2011.

⁴² Articles 1 through 5 of the aforementioned Decree No. 40/2011.

After the issuance of Framework Decree No. 220 of 2011 related to anti-corruption, the National Anti-Corruption Commission was established, which was enabled to detect areas of corruption in the public and private sectors and to receive and investigate complaints about cases of corruption as well as refer them to the concerned authorities. This commission can handle corruption cases, but it requires the implementation of the aforementioned decree. Property and funds of many businessmen have been confiscated, and criminal proceedings, whose activities are yet to be carried out, have been initiated against them. Precautionary measures, in the form of travel bans⁴³, have been taken against these businessmen. A truth commission was also formed to look into issues of bribery and corruption⁴⁴, which in turn refers such files to the judiciary. Additionally, a decree was immediately issued regarding the confiscation of funds, movable and real estate property, and the rights acquired after October 7, 1987, which belonged to the former President of the Tunisian Republic, Zine El Abidine Ben Haj Hamda Ben Haj Hassen Ben Ali and his wife Leïla Bent Mohamed Ben Rahuma El Trabelsi, to the other persons that appeared on the list attached to this decree and whoever may be proven to have acquired movable or real estate property or rights as a result of their relationship with the abovementioned persons.

The first parliamentary elections held under the new Tunisian constitution of 2014 resulted in the “Nidaa Tounes [Tunisia’s Call]” party coming to power, ending the tripartite alliance led by the moderate Islamist Ennahda [Renaissance] party.

As for Syria⁴⁵, the ruling authority tried to carry out some superficial reforms, including lifting the state of emergency and ending the work of the State Security Court after popular demands for change and

⁴³ Abdel Sattar Ben Moussa, “mesar l’edalah lenteqaleyah fey tewnes, l’edalah lenteqaliyah fey lsaqat l’erebiyah”, Arab Organization for Human Rights, 1st Edition, 2014, p. 150.

⁴⁴ Decree No. 13/2011 dated 14/03/2011 on confiscation, Official Gazette No. 18, dated 18/03/2011.

⁴⁵ The conflict began with a popular revolution following a new violation by the ruling authority. It started with the arrest of a number of school students in Daraa because of graffiti on the wall. This was the spark for the outbreak of the revolution: the children were arrested by the security services and were, while under custody, subjected to human rights violations. All appeals for their release fell on deaf ears. The scope of the revolution expanded to include many Syrian regions, and the regime met it with repression through the security services and those associated with them, then through the army that entered the villages and cities to support the security services in their repression of those protesting. This stage was characterized by massive violations of human rights, including arrests, disappearances, killings under torture, shooting protesters and other violations that later turned the demonstrations into an armed conflict, which the regime tried to suppress by all means. Such means included besieging and starving cities and villages, bombing them with planes and all kinds of weapons, which led to hundreds of thousands of victims and millions of displaced people and refugees. It also led to the emergence of radical movements and to foreign intervention: Reports of the United Nations Human Rights Council Independent International Commission of Inquiry on the Syrian Arab Republic <https://www.ohchr.org/AR/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>

after the need of Syrian citizens to regain freedom and rebuild their society arose. However, all this only occurred after the regime followed - during the period between the Baathist coup of March 8 and the popular revolution of March 15, 2011 - several methods to detain any possible democratic development in Syria. It also occurred after the ruling authority's success in establishing an authoritarian regime through focused policies that serve its interests and reinforce its separation from society. This was in addition to establishing authoritarian societal structures based on defining the roles and positions of classes and social forces and making them pass through its channels in order to allow it to have both negative and positive control over the political sphere, divide the society and hold its major keys and axes⁴⁶. After popular demands for change and the need of the Syrian citizens to regain their freedom and rebuild their society, the ruling authority attempted to enact some theoretical reforms like lifting the state of emergency. Also, the Court of National Security was suspended. The regime compensated for all that through the enactment of the anti-terrorism law and the establishment of a special court for terrorism cases that would be an alternative tool for suppressing protesters and opponents. Likewise, a new constitution was approved; one of its most prominent contributions was repealing Article 8, which stated that the Baath Party is the leading party in the society and the state. Nevertheless, this new constitution preserved the absolute powers of the president and kept rights and freedoms at the mercy of laws that the president could tailor to his will. Moreover, during this period, many laws and decrees targeting the Syrian citizens' freedoms and money were issued. They were tools that fostered the recurrence of violations. Despite all this, Syrian President Bashar al-Assad secured a fourth term in the presidential elections after obtaining 95.1% of the votes.⁴⁷

The Syrian reality today, after a war and armed conflict that began in 2011 and whose effects are still unfolding as we write this, is that 13 million Syrians have been displaced since the start of the conflict, with 6,300,000 having sought refuge in neighboring countries and about a million and more in Europe⁴⁸. After the serious human rights violations committed by all fighting parties in Syria, transitional justice becomes only a means to rebuild Syria democratically.

⁴⁶ Michel Kilo, "alente'fadah Ish'ebayah wenata'ejha leslaheyah (halat sowriyah), lthewrah walenteqal Idymeqrately fey lwaten l'ereby, nahew khetat taryeq", Centre for Arab Unity Studies, Swedish Institute Alexandria, 1st Edition, Beirut, 2012, p. 501 ff.

⁴⁷ The Syrian presidential elections were held on 26/05/2021, and the result was announced on 28/05/2021.

⁴⁸ As the Syrian crisis enters its tenth year, the Syrian people continue to experience acute tragedy. Every second Syrian man, woman and child has been forcibly displaced since the start of the conflict in March 2011 – often, more than once. Today, Syrians are the largest refugee population in the world. United Nations High Commissioner for Refugees Website: <https://www.unhcr.org/news/press/2020/3/5e67ade92d6/9-years-tragedy-resilience-solidarity-world-must-forget-displaced-syrians.html>

Although the path and outcome of the political solution in Syria is not clear, the international resolutions on Syria, especially Security Council Resolution No. 2254 of 2015 spoke of a political transition to establish a credible and non-sectarian governance, and of elections to be held pursuant to a new constitution. As part of the constitutional process, the Constitutional Committee was established, and it held its first meeting on October 30, 2019.

Despite the absence of the term *transitional justice* from the Security Council resolution, and due to talk of a political transition to a credible government and the drafting of a new constitution, the reality necessarily translates to the emergence of a new constitution that will open the door to the transition from a totalitarian regime to a democratic one. To this end, the new constitution must include in its text the foundations that set up a regime which guarantees the non-recurrence of violations and establishes the rule of law and human rights.

Peace is not achieved by ending the war but by establishing justice, and since justice requires addressing the great legacy of violations in a way that guarantees a just and sustainable peace, the new constitution, in order to bring peace to the Syrians, must respond to their aspirations. The most prominent aspiration is addressing the causes of conflict and dismantling the totalitarian regime, thus paving the way for the beginning of a new era founded on the respect for human rights.⁴⁹

Justice is not established in the legislative aspect only but must also be applied. This prompts us to study the criminal procedures taken against perpetrators during the transitional period from the authoritarian

⁴⁹ The problem remains that the inclusion of transitional justice in the constitution requires several factors that have not been available so far in the Syrian context. The Syrian regime continues with its violations and tyranny without admitting guilt and without a political will for real change. Part of the armed opposition has adopted the regime's tactics in committing violations. Therefore, there are fears of them agreeing on solutions that go beyond the issue of transitional justice.

The international community is also searching for a solution to the conflict in Syria in light of a Russian division and veto that impedes any progress made towards accountability. This explains the reserved tone of international resolutions when it comes to telling the truth regarding the causes behind the conflict.

Another problem is the design of the political solution. After Resolution 2254, the Special Envoy put forward the idea of the four baskets, and after the Sochi conference, the constitution became the entry point to the political process. Therefore, working on the constitution in light of the halt in the political process and the regime's intransigence poses a danger to the possibility of producing an appropriate constitution for Syrians.

Therefore, civil society, the true bearer of the will for change and the launch of the transitional justice process, and in particular human rights organizations, must exert pressure at all local and international levels to prevent the production of a constitution that does not recognize the Syrians' pain.

See "Transitional justice and the Constitution" (a research paper by Syrian lawyers in cooperation with the legal experts team). Accessed on: 25/05/2021.

<https://freesyrianlawyers.com/index.php/ar/>

to the just and democratic regime. Thus, we will address the topic of “Transitional Justice: Penal Aspect” in the second section of this study.

Section 2: Transitional Justice: The Penal Aspect

Criminal justice is characterized by a degree of strictness and discipline regarding legal texts when it comes to dealing with perpetrators, regardless of the nature of their crimes and their positions. However, transitional justice, which is associated with transformation and the desire to enter a new political stage, is often characterized by dealing with the legacy of the past with a degree of flexibility, wishing to strengthen the paths to development and democracy⁵⁰. Transitional justice is used to address past abuses through mechanisms and procedures that may be considered exceptional in most cases. Therefore, these mechanisms and procedures should only be employed during the transition phase without exception: once obligations are fulfilled, recourse to these tools is discontinued.⁵¹

In fact, based on the committed crimes and violations and the pain they have caused to the victims and their families, it is fair to track down, prosecute and punish those accused of committing those crimes so that these violations do not recur.

There may appear a contradiction between achieving criminal justice as previously explained and achieving national reconciliation between members of society themselves, between them and society's institutions, and between them and the state. This is due to the existence of some basic and recognized criminal law principles in modern criminal laws and international treaties that must, and must not, be respected, such as the principle *nullum crimen sine lege*, the principle of non-retroactivity, the principle of fair trial, the principle of the presumption of innocence, the principle of legality, the principle of certainty of conviction, the principle of extradition, the limitations and controls of amnesty, and other principles. These are specific and categorical principles whose concepts have strict definitions in criminal law. However, this contradiction is apparent but not necessarily real, given the possibility of adapting these principles to what is appropriate to the conditions and objectives of the transitional phase. In other words, these strict principles can be mitigated, formulated and interpreted in proportion to

⁵⁰ Idris Lakrini, “al’adalah lanteqaleyah wa’atharha fey Itahawol aldymeqratey: moqarabeh lenamadej ‘ealemiyah fey daw’ lherak l’ereby”, research published in the book “atewar Itareykh lenteqaley ma’al lthewrat l’erebiyah”, 1st Edition, Arab Center for Research and Policy Studies, Beirut, November 2015, p. 513.

⁵¹ Adel Majed, op. cit., p. 154.

the circumstances of said phase without sacrificing them or deviating from them in an absolute way, so that real criminal justice can be achieved on the one hand, and real national reconciliation on the other.⁵²

Proceeding from the individual's right to legal recourse, Article 8 of the Universal Declaration of Human Rights⁵³ stipulates that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

With the development of the rules of customary international law, it has become possible to establish the criminal responsibility of individuals for grave violations of human rights, whether they are officials or not, in accordance with the principle of individual criminal responsibility established by Article 25 of the Statute of the International Criminal Court⁵⁴. However, since Syria has not signed the Rome Statute of the International Criminal Court, the latter can only investigate war crimes committed in Syria if the case is referred to it by the United Nations Security Council.

Accordingly, the UN Security Council unanimously adopted 5 resolutions related to Syria:

- Resolutions 2042 and 2043 of April 2012, relating to the possibility of sending an advance team of 30 unarmed international observers, with the possibility of raising the number of observers to 250 by a new resolution.
- Resolution 2118 regarding Syrian chemical weapons, which was linked to the final communiqué of the Geneva I Conference on Syria.
- Resolution 2139 of February 22, 2014, to Ease Aid Delivery to Syrians, which was submitted by the Hashemite Kingdom of Jordan, Luxembourg and Australia after lengthy discussions. It was considered the strongest resolution adopted by the Security Council on the Syrian issue, expressing grave alarm at the significant and rapid deterioration of the humanitarian situation in Syria, in particular the dire situation of hundreds of thousands of civilians trapped in besieged areas, most of whom are besieged by the Syrian armed forces and some by opposition groups. The resolution also pointed out that the situation would continue to deteriorate in the absence

⁵² Ali Al-Qahwaji, *op. cit.*, p. 238.

⁵³ United Nations General Assembly Resolution 217 A(III) of 10 December 1948.

⁵⁴ Adel Majed, *op. cit.*, pp. 146-147.

of a political solution and that the latter represents the only sustainable opportunity to resolve the situation in Syria peacefully.⁵⁵

- Resolution 2170⁵⁶, the last resolution issued by the UN Security Council regarding Syria, which emphasized the need to separate civilians from the conflict and that a political solution is the only solution.

Building peace in Syria requires understanding the roots of tyranny and conflict, analyzing the causes that led to all the violations that occurred, identifying the institutions responsible, the violators, and the errors and shortcomings in the state authorities and institutions, as well as understanding the effects of tyranny and conflict on Syrians and other related social, cultural, economic and political effects. Consequently, a transitional justice program commensurate with the nature and gravity of violations must be designed; a program that, in addition to revealing the truth, establishing accountability and providing reparation, guarantees social justice and the rights of marginalized groups and strengthens the rule of law. This program must also attach great importance to reforming institutions, especially those that have a long history of human rights violations, through legislation and regulations, in addition to restructuring, and to vetting employees.

Any transgression of the concepts and mechanisms of transitional justice would rekindle violations and conflict. Therefore, the political process aimed at establishing peace requires taking into account the necessity of implementing transitional justice mechanisms, just as achieving peace requires the presence of a Syrian political will, a societal will, and a collective awareness.

Determining the criminal responsibility of the perpetrators of violations and abuses moves slowly, on a case-by-case basis handled by civil or military courts according to law. Military courts are specialized in hearing cases involving internal or external state security or the maintenance of order and in which agents of the Internal Security Forces on duty are a party.⁵⁷

Article 8 of the Organic Law on Establishing and Organizing Transitional Justice in Tunisia focuses on prosecuting perpetrators of violations by Specialized judicial Chambers for deliberate killing, torture,

⁵⁵ Ibrahim Naser Eddine et al., “hal l’omah al’erbiyah 2014-2015, ale’esar: mn taghayyor alnizam ela tafkyk aldawal”, Gamal Abdel Nasser Cultural Endowment, Centre for Arab Unity Studies, Beirut, 1st Edition, 2015, pp. 531-532.

⁵⁶ Resolution 2170 of August 15, 2014, prohibiting the recruitment and financing of terrorists. The resolution named the “Islamic State in Iraq and the Levant (ISIL, also known as ISIS) and Al-Nusra Front” when referring to terrorist groups.

⁵⁷ Art. 22, paragraph 1 of Law No. 70 dated August 6, 1982, fixing the general organic law of the internal security forces after it was revised by Decree No. 69 dated July 29, 2011.

enforced disappearance, and other crimes, whereas military courts have jurisdiction to hear cases related to police conduct. These cases were referred with the possibility of appeal being included in their rulings as a potential amendment. The Constituent Assembly worked to enact Organic Law No. 17 of 2014, which revised the aforementioned Transitional Justice organic law and granted jurisdiction in such cases to the Specialized Chambers. The same law instructed the Attorney General to refer such cases to the said Chambers to ensure follow-up and prevent some cases from being illegally closed. In addition to issues related to human rights violations as defined by law, these Chambers specialize in cases related to violations committed during the revolution.⁵⁸

CONCLUSION

The importance of this research stems from the creative role that transitional justice can play in countries that have emerged from conflicts and wars. It also stems from the urgent need to take all transitional justice steps so that countries can be built on sound foundations to ensure a better future under a democratic rule far from human rights violations. Experience has shown that the success of mechanisms related to transitional justice requires the availability of a specific and clear strategy to enable transitional justice to achieve its goals, as well as the development or amendment of existing legislation in a manner befitting the expected role of the institutions concerned with these procedures.

Transitional justice is thus a way to advance on the path of democracy, especially if we identify the mistakes that were committed and then work to overcome them and prevent the recurrence of tragedies and violations.

However, new laws proposed in the transitional justice phase can pose obstacles not only with regard to the path adopted by transitional justice, but also with regard to the possibility of achieving human rights goals and the extent to which these rights can be protected from violations and abuses.

The anti-terrorism law⁵⁹ passed by the Assembly of the People's Representatives in Tunisia in 2015 raises concerns seeing as it adopted a broad interpretation of terrorism⁶⁰. This opens the door to the

⁵⁸ Jubeiry Yassin, "al'adalah alentiqalyah fy mythaq almsalha alwataniyah aljiza'ery", a comparative study, Dar Elgamaa Elgadida, Alexandria, 2019, pp. 355-356.

⁵⁹ Organic Law No. 26 dated 07/08/2015 concerning the fight against terrorism and the prevention of money laundering, Official Gazette No. 63 dated 07/08/2015, p. 2163 ff.

exploitation of this definition, to misinterpret and abuse it, and thus to misapply it, in addition to other disadvantages found in this law. They vary from placing restrictions on freedom, to allowing detention for a period of up to two weeks before trial without respecting the right of the suspect to assign a defense attorney or even the right to have access to his family, and to allowing trials to be conducted in secret. The most dangerous point in this law is the provision of the death penalty⁶¹, which has become a refused form of punishment in the contemporary international community.

As for the recorded results of transitional justice, we can draw the following conclusions:

- 1- Transitional justice is based on overcoming the tragedies of the past and moving towards building a future based on a democratic regime, and this can only be implemented by restoring the rights of the victims of violations, especially since these rights are imprescriptible.
- 2- Investigation commissions must present themselves as an independent body that is not affiliated with the ruling authority, so that they can document violations in a way that leads to revealing the truth.
- 3- Reconciliation, which is a cornerstone of transitional justice, does not mean closing and forgetting about certain files on the pretext of restoring the social bond, but rather opening them, revealing the truth, recognizing violations, and seeking to declare and restore rights, as well as compensating the victims.
- 4- Acknowledging responsibility for past crimes would enhance the citizen's confidence in the ruling authority. This would positively reflect on the democratic path to be taken towards transitional justice.

⁶⁰ Terrorism was defined under the aforementioned Law 26/2015 in Article 5 - Section 1 of Part 1: General Provisions as follows: "Is considered to have committed the terrorist crimes stipulated in this law anyone who incites others, by any means, to commit these crimes. He shall be punished with half the sanctions prescribed for these crimes. All this is considered when this person's act, by its nature or context, creates a risk of these crimes taking place... Is considered to have committed the terrorist crimes stipulated in this law anyone who intends to commit them, if his determination is accompanied by any preparatory act for later implementation."

Article 13 - Section 2 also stipulates that: "Is considered to have committed terrorist crimes anyone who intentionally, by any means, while seeking to implement an individual or collective project, commits one of the acts specified in Articles 14 to 36 with the act's aim being, by nature or context, to spread terror among the population or to compel a state or an international organization to act differently or abandon one of their tasks."

⁶¹ Anyone who commits the act referred to in the first image, or commit the actions referred to in the rest of the images and cause the death of a person, shall be punished with the death penalty and a fine of two hundred thousand dinars: Article 14 - Section 2, related to terrorist crimes and their related penalties.

Based on these results, we will present some recommendations to avoid the mistakes that afflicted the experiences of some Arab countries and prevented transitional justice from achieving its goals:

- 1- Work to separate the trials from political rivalries and to depoliticize them.
- 2- Develop strategic plans to prosecute the perpetrators in order to ensure the country's ability to transition to a just democratic regime.
- 3- Work to raise citizens' awareness through educational programs about their rights and duties during the transitional period, while involving the civil society in the formulation of these programs.
- 4- Train lawyers in the skills necessary to understand the technical approach to the committed crimes and violations, especially as the techniques of investigation and prosecution of crimes directed at the whole community differ from those related to ordinary crimes.
- 5- Seek to protect witnesses before and after giving their testimony.
- 6- On the one hand, take away lessons from the experiences of countries that were able to transition to democracy and succeeded in restoring peace and guaranteeing security to their people who suffered from attacks and violations, thus considering them as experiences worthy of research and study. On the other hand, draw lessons from the experiences of Arab countries that failed to move from the authoritarian regime to a democratic one.