

# 1 ‘Transitional Justice’ discourse in transition

The past two decades have seen a veritable boom in international ‘transitional justice’ practices, advocacy and academic research. At the same time, the conceptual contents of ‘transitional justice’ have undergone important changes as the following pages show – without, however, arriving at a single fixed meaning or theory. More recently, awareness of inbuilt conceptual tensions within the fast growing field of ‘transitional justice’ has given rise to more critical readings of ‘transitional justice’ in the political sciences. Increasingly, these approach ‘transitional justice’ from a discursive perspective.<sup>15</sup> An overview of these developments lends support to the view that the appearance, acceptance and utilisation of the term ‘transitional justice’ is a means of legitimating a host of different measures to deal with the past in countries emerging from authoritarian rule or violent conflict such as trials, vetting, truth commissions and reparations (Paige 2009, p. 329; Gready & Robins 2014, p. 1n). Far from apolitical in effect, the deliberation and implementation of these ‘transitional justice’ policies is about drawing lines of inclusion and exclusion between social groups by reference to their affiliation to the prior and/or the future regime of the transitioning country in question.

This chapter draws out key developments and debates in the field of transitional justice, which are considered to be of particular relevance to my analytical perspective on the discursive struggle over transitional justice policy in Tunisia.

## 1.1 Origins and evolution of ‘transitional justice’ discourse as a field of practice and enquiry

While original authorship of the term ‘transitional justice’ is unclear,<sup>16</sup> there is wide agreement in the literature on the origins of the modern-day understanding of ‘transitional justice’. The term – though originally not used – emerged in the context of transitions from authoritarian rule to democracy in Eastern Europe and South

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15 Int. al. Aoláin & Campell (2005), Bell (2004; 2009), Paige (2009), Leebaw (2008), Subotić (2012) and Lundy and McGovern (2008) approach the subject matter from a discursive perspective. It is noteworthy that the impetus to analyse transitional justice as a discourse originally comes from the legal sciences rather than social sciences, despite the obvious explanatory potential of the latter.

16 Among others, Teitel (2008) has claimed authorship.

America in the late nineteen eighties and early nineties.<sup>17</sup> In particular, Neil Kritz's three volume study titled "*Transitional justice: How emerging democracies reckon with former regimes*" (1995) has been credited with advancing the widespread acceptance and use of the term. Transitional justice thus came to broadly signify ways in which successor regimes should deal with past human rights violations as part of their democratisation process (Paige 2009).

Ever since the level of institutionalisation, scope and consequences of international transitional justice practice and research have expanded greatly. On the level of transitional justice practice, an expanding range of very different legal regimes and mechanisms has helped to institutionalise 'transitional justice' as an international response to past human rights violations in countries transitioning not only from authoritarianism but also, and increasingly, from violent conflict.<sup>18</sup> Institutional milestones along the way include the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, of the South African Truth and Reconciliation Commission in 1995, and the institutionalisation of the International Criminal Court in 1998. The 2004 report of the UN Secretary-General "The rule of law and transitional justice in conflict and post-conflict countries" formalises the cumulative results of this process, in ways that are relevant for the research at hand. It articulated international normative commitment to the notion of 'transitional justice' in broad terms as:

"The full *range of processes and mechanisms* associated with a society's attempts *to come to terms with a legacy of large-scale abuses*, in order to ensure *accountability, serve justice and achieve reconciliation*. These may include both *judicial and non-judicial mechanisms*, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof." (2004, p. III.8 [emphasis added])

Clearly, by the time of writing of the UN Secretary-General's report, increasing and varying practices had pushed the limits of what measures may be considered as falling within the realm of 'transitional justice'. And whereas 'transitional justice' had originally been primarily associated with the goal of justice and accountability to enable transition from authoritarianism to democracy, it was now associated with the less divisive objectives of fostering conflict resolution and the rule of law in 'post-conflict' settings to achieve reconciliation in the long-term. International 'transitional justice' discourse could henceforth be led in ostensibly more neutral, tech-

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17 Academic enquiry has since traced its historic roots back until World War II. Jon Elster (2004) goes still further in linking the origins of transitional justice back to the birth of democracy in classical Athens.

18 International discourse has thus come to associate transitional justice with development and liberal peacebuilding efforts to support state-building in fragile and conflict-affected regions (cf. e.g. Gready & Robins 2014, p. 3).

nocratic terms, rather than prescribing where beneficiary countries are transitioning to (i.e. democracy, as previously) (cf. Leebaw 2008, p. 106).

In tandem an active international transitional justice advocacy network has been developing. Growing numbers of institutions and individuals advocate for and offer their technical expertise in the design of transitional justice mechanisms around the world. In the process they set rules, standards and actionable principles. Also, they construct and elevate specific issues to priority issues of international concern. By doing so, institutionalised advocacy plays an important role in the expansion and transformation of the field of 'transitional justice'. Among the most visible NGOs in the field count the International Center for Transitional Justice (ICTJ) and Human Rights Watch, to name but two institutional examples, which are of particular importance to the Tunisian case. In her article "Transformation of International Transitional Justice Advocacy", Subotić (2012) charts the implications of increasing levels of professionalization and institutionalisation among these high leverage 'gatekeeper' organisations for the development of international transitional justice discourse. She finds that they also impact on the organisational behaviour of smaller organisations in the field.

Two connected trends in international 'transitional justice' discourse, that is, its growing influence in the political realm – however couched in apolitical terms – and its "templatization" deserve special mention. As part of its institutional expansion the transitional justice industry has permanently established itself in the area of international development policy and assistance to promote the rule of law (Lundy & McGovern 2008, pp. 266-269; Lenzen 2010).<sup>19</sup> The major consequence of this move into the realm of the political has been the "recast[ing of] transitional justice from a moral or legal duty to one that is instrumental, that can be used as a political tool" (Subotić 2012, p. 116). Backed by the international development aid, increasing sophistication has also brought transitional justice advocacy greater visibility and credibility. Increasing "lawyerisation" of the network has contributed to its international standing. As a result, transitional justice revindications can now be framed in terms of international human rights terms as universally applicable and uncontroversial.<sup>20</sup> Thus, policy debates on transitional justice are increasingly conducted in terms of which policies to adopt and not in terms of whether transitional justice policies should be adopted at all. At the same time, the scope of proposed transitional justice policies has been broadened with donor support to encompass politically sensitive areas of institutional reform, including security sector reform, under the policy label of "guarantees of non-recurrence".

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19 A contributing factor has been that development aid around the world increasingly prioritises the promotion of rule of law. This trend is connected to the expanding operation of international development aid in fragile and conflict affected states to promote 'peacebuilding'.

20 This development also has conceptual implications, because transitional justice has thus become a part of the broader field of international human rights activism.

A connected trend in international transitional justice policy discourse has been the “templatisation” or standardisation of international approaches to transitional justice, notwithstanding a certain division of labour between different organisations. The widespread exhortation to take a ‘holistic approach’ pinpoints a convergence of practice towards a policy package offering of transitional justice. This package consists of four elements, which have been institutionalised as best practice within the UN: The promotion of truth (for example through the work of truth commissions); of justice/criminal accountability (trials, vetting); reparations (comprising both financial and non-financial compensation); and guarantees of non-recurrence (institutional reforms, namely in the justice and security sector).<sup>21</sup> At the same time, there has been increased recognition that ‘transitional justice’ should be responsive to the domestic context and political dynamics of transitioning countries to be able to effectively advance political reconciliation. Key international parties to the policy debate on how to shape transitional justice in Tunisia have also repeatedly expressed this view (e.g. ICTJ 2012; UN Secretary General 2004).

Such standardisation of the ‘transitional justice’ policy tool kit may be driven by several factors, most importantly by the “revolving doors” factor. It refers to the movement of personnel in the field of transitional justice between professional roles as non-profit advocates, as technical advisors and as staff of international development aid institutions and staff of international and domestic justice institutions, which the former support. A strong case in point is the nomination of the director of research at the ICTJ, Pablo de Greiff, to the position of First Special Rapporteur of the UN OHCHR<sup>22</sup> on the promotion of truth, justice, reparation and guarantees of non-recurrence in May 2012 (UNHCR 2012). Another contributing factor to the templatisation of available transitional justice models is heightened donor attention to demonstrating effectiveness of development aid. The need to evaluate hard- to-measure outcomes in the governance sector may have contributed to the development of standards of operation against which effectiveness is to be measured.

It is thus possible to state a momentarily fixed mainstream, “intersubjective understanding of what constitutes transitional justice [...] it brings people together and gives them a sense that they are linked in a network of likeminded people who share similar interests and are pursuing similar goals.” (Subotić 2012, p. 121) This is not to say that the scope and contents of international transitional justice discourse may not be subject to further modification. Not least, because there are financial

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21 Proof of the significance of this “mantra” for national level debates are common references to it by members of the Tunisian civil society organisations and policy makers during interviews. As shown under chapter 4.3, the National Dialogue on transitional justice and the resulting law establishing a legal framework for transitional justice have been structured from the beginning along these four dimensions of truth, justice, reparations, institutional reform as internationally advocated.

22 The Office of the High Commissioner on Human Rights is the lead agency within the UN on transitional justice.

and non-financial structural incentives for a further broadening of discourse under the policy label of 'transitional justice'. For instance, the strong international standing of transitional justice and the availability of donor financing motivates both international and domestic actors to label their organisations and/or their activities such as fighting corruption or memorialisation as pertaining to 'transitional justice' in order to access donor financing and to derive non-financial benefits from belonging to the field of 'transitional justice', like greater political leverage.

## 1.2 Key concepts and tensions within the evolving field of 'transitional justice': 'Transition', 'Justice', 'Reconciliation' and 'Victimhood'

This institutional expansion and transformation of 'transitional justice' as a field of practice, which has been described in the previous section, has been matched by high interest in academic research. There is increasingly multidisciplinary research on a variety of country experiences with transition from authoritarian rule and violent conflict with the objective to analyse central mechanisms including trials, truth commissions, vetting, and reparations (cf. e.g. Kritz 1995; Olsen, Payne & Reiter 2010; Teitel 2003). In fact, since the term emerged in the 1990s, expanding academic enquiry has traced back the historic roots of 'transitional justice' to at least the end of World War II, thus furthering its acceptance. At the same time,

“A mixed process of colonization and decolonization can be seen in transitional justice discourse with reference to its two central concerns, namely justice (implicating law in particular) and transition (implicating political science in particular). (Bell 2009, p. 22)<sup>23</sup>

A thicker understanding of these meta-level discursive dynamics in the 'transitional justice' field of intellectual inquiry is a good place to start thinking about the logics of policy discourse on transitional justice in Tunisia. To gain a better understanding of the field, the following section explores key conceptual dynamics in the 'transitional justice' literature to the extent that they exhibit conceptual relationships and tensions that are particularly pertinent to my empirical case study of transitional justice policy discourse formation in Tunisia.

To this aim, I examine in particular the relevant Anglo-Saxon literature that has critically engaged with the notion of 'transitional justice' from a discursive perspective in recent years. To examine relevant conceptual tensions in 'transitional

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23 This dissertation project is equally implicated in this process of colonization and decolonization between academic disciplines in 'transitional justice' discourse as noted here. Because my research is conducted from within the social sciences, the conceptual focus is on the political implications of 'transitional justice' discourse formation in Tunisia. Hence, for example, my review of the notion of 'justice' in transitional justice discourse focuses on the function of justice in transition from a normative and political perspective, leaving aside legal analyses.

justice' research, I proceed by unpacking the term into its two core conceptual components, first, 'transition' and secondly, 'justice'. Third, the notion of 'reconciliation', which is increasingly presupposed to be the ultimate goal of successful 'transitional justice', is presented. Fourth, this section engages with the notion of 'victimhood' and "victim-centred"-ness of transitional justice policy processes and measures. The chapter concludes on the gaps in the academic literature, which the study at hand aims to address.

### *1.2.1 Unpacking the notion of political 'transition' in 'transitional justice'*

As noted earlier, the notion of 'transitional justice' emerged in the context of the 'third wave' in general and with reference to transitions from authoritarian regimes to democracy in Latin America and Eastern Europe in particular (Paige 2009, pp. 337-347; Huntington 1993). It was from there, that the notion of 'transitional justice' advanced and expanded in scope to be ascribed to measures in other transitioning contexts, namely from violent conflict (Teitel 2008).<sup>24</sup> For the purposes of my research on Tunisia, the focus here is exclusively on a review of the transitional justice literature on transitions from and within authoritarian rule. The inherent duality of the notion of transition as a movement on a continuum between two opposites appears constitutive of the overall structural logic of 'transitional justice' discourses in the literature, mirroring this study's findings on Tunisian policy discourse formation.

At core then, 'transitional justice' in states transitioning from authoritarian rule, denotes the results of political bargains on how to deal with past human rights violations as part of a country's journey from 'lack of democracy' or a state of 'regime illegitimacy' to 'democracy/regime legitimacy'. In addition to the normative aim of achieving 'justice' for victims of human rights violations as noted above, the notion of 'transition' represents the normative claim to achieve a "more just, democratic order" (Page, 2009, p. 358). This creates enormous expectations on 'transitional justice' measures. It also glosses over the fact that human rights violations may continue in political contexts that satisfy formal institutional requisites of a liberal democratic system, such as free and fair elections (Linz & Stepan 1996, pp. 3-15; Lundy & McGovern 2008, p. 273). At the same time, by implying closure ('democracy') where there may well never be, this conception of transition enables the partial fixation of meaning in the process. As a consequence, political bargaining can take place within an ideal-typical frame of reference that ascribes antagonistic meanings to the former authoritarian pre-transition versus a future post-transition steady state of affairs.

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24 Transition derives from the latin term "transire" = "to cross over", so that etymologically, 'transition' denotes a journey from a starting to a finishing point.

Based on a review of analyses of ‘transitional justice’ in formerly authoritarian country contexts. Aoláin & Campbell (2005) have unpacked this conception of transition (which they label the ‘paradigmatic transition’)<sup>25</sup> into sets of antinomies. These provide useful orientation for my research on the formation ‘transitional justice’ discourse in post-revolutionary Tunisia (see tab. 1 below).

*Table 1:* Unpacking transition in analyses of ‘transitional justice’ in post-authoritarian settings

<b>Post-transition</b>	<b>vs.</b>	<b>Pre-transition</b>
Democratic	vs.	Undemocratic
Governmental legitimacy	vs.	Regime Illegitimacy
Rule of law respected	vs.	Rule of law absent or degraded
Acknowledgement of human rights violations	vs.	Denial of human rights violations
Transformed institutions	vs.	Repressive institutions

(Aoláin & Campbell 2005, p. 184 tab. 1)

Note however, that tab. 1 does not purport to provide an exhaustive listing of the antinomies that govern discourse on transitional justice. Rather, it has been a useful starting point in thinking about the boundaries and dynamic structure of transitional justice discourse when analysing and interpreting antagonisms as part of Tunisian discourse on ‘transitional justice’. This research has found further subsidiary or lower level polar debates such as “revolutionary” vs. “counterrevolutionary” in the Tunisian case, as part II of this study goes on to show (cf. chapters 6-8 in particular).

### 1.2.2 *Unpacking the notion of ‘justice’ in ‘transitional justice’*

If the legal sciences can be considered the original intellectual home of ‘transitional justice’, based on the notion of ‘justice’ in terms of legal accountability for past human rights abuse, the conceptual boundaries of transitional justice research have transformed since, in tandem with the growing multidisciplinary of the field (Teitel 2008). As explored below, conceptual debates on the role of law and justice in times

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25 “In the paradigmatic transition, there is one “transitional moment”, or at least a singular transitional process, can be identified [...] Notably, whether realistically or not, the paradigmatic transition sees itself as a process of closure. There is typically a “deal” followed by a period of constitutional and institutional change, and possibly ‘reconciliation’. At that point the transition ends. While the reality is more complex, the ideal type, paradigmatic transition is a finite and contained affair. Conceptually, this links to the pervasive “ideal” type distinction between the normal and extraordinary in legal regulation.” (Aoláin & Campbell 2005, p. 181f)

of political transition derive in large part from the paradoxical function of law in the context of transitional justice: “caught between the past and the future, between backward looking and forward looking, between retrospective and prospective, between the individual and the collective.” (Teitel in: Aoláin & Campbell 2005, p. 198). The following explores resulting key dilemmas and dichotomies of ‘justice’ in times of transition.

At core, the notion of ‘justice’ in the field of transitional justice centres on the normative claim to achieve justice in terms of legal accountability for victims of past human rights violations (Page, 2009, p. 358). Following regime change, legal procedures are the first and primary vehicle for dealing with crimes of the previous regime. The sheer volume of cases would overwhelm even well functioning justice systems. At the same time, the justice sector experiences a legitimacy crisis to the extent that it used to bolster the earlier regime (and may still). The role of law in time of transition is therefore caught in a paradox as the same institutions and laws that may have served to bolster the past regime are now asked to judge its remnants and reform their own ranks: “Law must be both the subject and object of change.” (Bell, Campbell & Ní Aoláin 2004, p. 309)

This paradoxical situation gives rise to “tension[s] between procedural and substantive justice” (Leebaw 2008, p. 100n), in the sense that there is a conflict between the need of the justice system to demarcate itself from the practices of the prior regime on the one hand (by upholding the principle of non-retroactivity, for example) and strong public demand on the justice system to punish former regime loyalists quickly and as severely as they “deserve”, on the other. Also, the paradox situation of justice as both subject and object of change in times of transition has fuelled a debate in the literature on whether transitional justice should continue to be considered a distinct, exceptional kind of justice or whether transitional justice is really nothing but ‘ordinary justice’ under special circumstances (Posner & Vermeule 2004). The implications of this broader conceptual debate are also manifest in technical level debates over the question to what extent justice should be delivered from within or without the ‘ordinary’ justice sector, giving rise to debates over the benefits or not of judicial versus extrajudicial means (such as truth commissions) of delivering transitional justice.

Another connected set of debates centers on the value of different international versus domestic legal regimes. Transitional justice tends to be delivered in a context of ‘legal pluralism’, through multiple legal and institutional mechanisms that often operate simultaneously or sequentially in an *ad hoc* manner. By virtue of its externality to domestic legal discourse, international norms are frequently drawn upon in debates on how to fill gaps in domestic rule of law and legal norms in order to help ‘achieve’ transitional justice (Bell, Campbell & Ní Aoláin 2004, p. 308; Teitel 2002). The range of applied legal mechanisms includes variants of truth commissions and/or other commissions of inquiry, domestic criminal and/or military trials,

and in some cases even international or hybrid criminal trials. Their proceedings can be considered as narrative platforms of conflicting transitional justice discourse. Although they are generally portrayed as complimentary, these mechanisms are located within different legal regimes with no clear legal hierarchy to refer to. They may serve conflicting objectives, which reach beyond legal accountability and into the political realm. According to Bell (2009, pp. 19-21), domestic criminal law, international human rights law, humanitarian law and international criminal law are the four competing legal regimes, which provide the normative foundation of the legal aspects of transitional justice. Because their standards for and means of delivery of accountability are distinct, they come to different conclusions on the (il-)legality of individual transitional justice measures. Namely, this situation of legal pluralism is constitutive of conflicting discourse on the benefits of retributive versus restorative justice<sup>26</sup> mechanisms in the pursuit of transitional justice with the goal of national reconciliation in the sense of social peace.<sup>27</sup>

More recently, contributions have critiqued the focus of transitional justice instruments on the redress of direct injustices against individual victims as opposed to collective justice approaches in order to help address structural causes of human rights abuse (Lundy & McGovern 2008, p. 274). One consequence of this critique has been an increasing openness to engage with the redress of socio-economic injustices under the banner of 'transitional justice'. The focus is in particular on addressing corruption and economic crimes as part of truth commission work, although the risk of "watering down" effects are also well noted (Carranza 2008). This conceptual development is no doubt fed by domestic bottom up demand in transition countries like Tunisia to address the root causes of structural socio-economic injustices, which have been either directly or indirectly committed by the former regime against certain groups within society. But it is also and perhaps primarily driven by the increased focus of the international human rights movement on socio-economic rights and their justiciability. That greater engagement with socio-economic wrongs is grafted onto the recognised frame of 'transitional justice' may in part be attributed to the increased role of development assistance in the field. In order to alleviate competition over donor funds key stakeholders tend to highlight complementary linkages between transitional justice and development assistance, rather than their trade-offs (Waldorf 2012, p. 174n).

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26 'Restorative justice' is a concept within the legal sciences, which is based on a range of alternative dispute resolution practices, including truth commissions. It centers on the argument that prosecution is not necessarily the only or the best means to address harm caused by a wrongdoing. It postulates dialogue between victims, perpetrators and the larger community to address underlying causes of the wrongdoing. As such, it has significant overlaps with 'transitional justice' (Clamp & Doak 2012, p. 342).

27 On the notion of reconciliation and connected 'justice vs. peace' and 'truth vs. justice' debates in the literature, cf. next section below.

To summarize this section, my review of the notion of justice in transitional justice literature has identified several debates pertaining to the effective and/or imaged role of law in countries undergoing political transition, which are of particular relevance for my empirical case study of Tunisia. These debates on how transitional justice should best deliver justice under conditions of absent or degraded rule of law can be located on a continuum between polar opposites as follows:

- Substantive versus procedural justice
- Retributive versus restorative approaches
- Judicial versus extra-judicial approaches
- Domestic versus international legal regimes
- Individual versus collective justice

### 1.2.3 *Towards 'Reconciliation'?*

The notion of 'reconciliation' as the ultimate goal of 'transitional justice' has emerged and evolved with growing international experience of an expanding range of available approaches to transitional justice. The shift in international attention away from regime change in Latin America and Eastern Europe of the 1980s and early 1990s towards fragile and conflict-affected country settings on the African and Asian continent may have contributed to this development. Consequently, the view has taken hold that many of the dilemmas or trade-offs previously associated with transitional justice can be transcended with the right context-specific mix of "complementary" transitional justice tools – with the ultimate goals of "reconciliation" serving as a yardstick of success.

A significant part of the earlier comparative literature has dealt with dilemmas as captured by the dichotomies of 'justice vs. peace' and 'truth vs. justice'. Whereas the 'justice vs. peace' (or 'punishment vs. impunity') debate centred primarily on the discussion of the respective merits of prosecution or amnesties (or a combination thereof) in advancing peace and stability, the 'truth vs. justice' debate discussed the merits of trials compared to other accountability mechanisms, most notably truth commissions' work in achieving national reconciliation (cf. e.g. Aukerman 2002). Given increasing disillusionment with the promise of truth commissions (Austin, Fischer & Gießmann 2011, p. 409n) and the increasing role of international actors in framing transitional justice approaches, however, discourse has broadened to treat the different objectives of various transitional justice mechanisms (as described above) as complementary and mutually reinforcing. International norms and standards provide the frame of reference to help transcend case-specific trade-offs (Leebaw 2008, pp. 102-106).



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