



The Role of Lawyers as Transitional Actors in Tunisia

August 2015

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Preface

This report was commissioned as part of the *Lawyers, Conflict & Transition* project – a three-year initiative funded by the Economic & Social Research Council.

The wider project explores the role of lawyers during conflicts, dictatorships and political transitions. Despite the centrality of the rule of law to the contemporary theory and practice of transitional justice, there is little emphasis in the relevant literature on the role of lawyers outside the courts – or indeed as ‘real people’ at work in the system.

Drawing on six key case studies (Cambodia, Chile, Israel, Palestine, Tunisia and South Africa) we set out to establish a comparative and thematic framework for lawyering at historic stages in conflicted and transitional societies. Taking a holistic approach to the role and function of law and lawyers, the project is intended as a bridgehead between transitional justice and the sociology of the legal professions.

Project staff members are based at the School of Law, Queen’s University Belfast, and the Transitional Justice Institute, Ulster University.

This project has at its core a ‘real-world’ dimension and seeks to make a difference both to theory and practice. In addition to academic outputs, we were determined to produce a body of work that will assist the societies we have researched. We were also conscious from the outset that academic fieldworkers are sometimes guilty of ‘parachuting in’ and then moving on, with little demonstrable benefit for participants. As part of our ethics policy we thus developed this series of practice-orientated reports, specifically tailored for each jurisdiction under scrutiny, as well as briefing papers for international audiences.

The individuals interviewed for the wider project (more than 120) were each invited to suggest research topics and themes that are of direct relevance to them and the organisations and networks with whom they work. The core team sifted and analysed these suggestions and commissioned two key reports per jurisdiction. In some instances the work was completed in-house; in other cases we drew on the resources and talents of our international consultants.

The reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We have made the texts available both in English and relevant local languages.

The anticipated readership mirrors the diverse range of interviewees with whom we engaged:

- A wide variety of cause/struggle lawyers and state lawyers
- National and international legal professionals
- Scholars interested in the role of lawyers as political and social actors (with a particular focus on transitional justice)
- Government officials
- International policymakers
- Civil society activists

- Journalists and other commentators

The entire series will be made available on our website (www.lawyersconflictandtransition.org) and will be circulated via our various networks and twitter account (@lawyers_TJ).

We hope that you will enjoy reading this report and encourage you to disseminate it amongst your networks.

For further information about the wider project please feel free to contact us at:

www.lawyersconflictandtransition.org/contact



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August 2015

Acknowledgements & Disclaimer

This report was prepared by Salwa El Gantri, in association with the *Lawyers, Conflict and Transition* project. El Gantri has worked in the human rights sector since 2007, in both Tunisia and Egypt. She is currently working on the gender justice programme at the Tunisia Office of the International Center for Transitional Justice. She is also a PhD candidate at Carthage University (focusing on Gender in the Transitional Justice Process in Tunisia) and was engaged as the consultant for Tunisia for the *Lawyers, Conflict & Transition* project.

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Executive Summary

This report seeks in the first instance to provide an overview of the role of lawyers in Tunisia in the lead up to and during the Revolution of 2010-2011. It then examines the role of lawyers during the transition, up to and including the parliamentary and presidential elections of November and December 2014. As one might expect, at no point in the transition did lawyers in Tunisia act as a homogenous group. That said, the collective mobilisation of an increasingly large swathe of lawyers during and after the revolution did provoke a fundamental re-evaluation of their role in Tunisian society, both in terms of how they view themselves and how they are perceived by the public. Considering both 'bottom-up' activism and key legislative and institutional reforms, the report seeks to illuminate the dynamics that brought about this sea change in attitudes towards lawyers. The report includes some discussion and analysis of the issues that either drew together or exacerbated divisions between leftist, liberal and Islamist lawyers as well as considering some critical realignments within the wider profession. The substantive analysis hones in on the events of the Revolution and the ensuing Transition. As such, we set out below a brief overview of the role of lawyers in Tunisian history since independence before introducing the structure of the report.

Lawyers in Tunisian History Since Independence

'*Ben Ali hrab*' ('Ben Ali has escaped'). It is in many ways fitting that a lawyer should utter this infamous 'victory' scream on 14 January 2011, the night after former President, Zine El Abidine Ben Ali, fled Tunisia.¹ From the period of French colonisation through to the present day, lawyers have been to the fore of political and public life in Tunisia. Their sphere of influence has extended from the official institutions of the State (the current President of the Republic is, for example, a lawyer) to the social and political impact of 'cause lawyers' on the ground.

Habib Bourguiba, the most prominent legal figure in Tunisian history, led the national movement to liberate Tunisia from French colonisation. Although credited with many positive developments in terms of public education, health and women's rights, his increasingly scant regard for political and civil liberties paved the way for a bloodless coup by Ben Ali on 7 November 1987.

Ben Ali's relationship with lawyers can best be described as a long and failed attempt to prevent them from developing organised political resistance to his regime. Indeed, it was suggested that, in the words of Napoleon, one of his regime's core desires was to 'cut out the tongue of a lawyer who would wag it against the government'.² His use of oppression against lawyers was ultimately counter-productive and in fact served to transform the justice arena into a site of political struggle.

According to Gobé and Ayari, many lawyers considered that supporting Ben Ali's regime would imply 'a renunciation of the values that underpinned their profession'.³ Some lawyers did, however, openly support the status quo and participated in

¹ See <www.youtube.com/watch?v=0J0_IqRzaCE> accessed 2 June 2015.

² 'Letters of Napoleon I - How He Dealt with Political Conspirators' *The New York Times* (New York, 14 November 1865).

³ Eric Gobé & Michaël Béchir Ayari, 'Les Avocats dans la Tunisie de Ben Ali: Une Profession Politisée?' (2007) 3 *L'Année du Maghreb*.

organisations such as *El Khaliyya* ('the cell'). This organisation was created under Bourguiba primarily to counteract and curtail the power of the Tunisian General Labour Union (UGTT). Ben Ali's Democratic Constitutional Rally (*Rassemblement Constitutionnel Démocratique / RCD*) insisted that it was maintained simply as a network of professional groupings designed to enable lawyers and others to work together for mutual benefit. Others took a more sinister view of *El Khaliyya* believing that its primary focus under Ben Ali was to curtail the influence of disloyal professionals. In the case of the legal profession, for example, many lawyers believed that *El Khaliyya* members collaborated to ensure that potentially hostile individuals were not elected to the board of the Bar or to the steering committee of the Tunisian Association for Young Lawyers (AJTA).

Lawyers & the Revolution

The politicisation of the legal profession intensified in the 2000s as reflected by the '18 October Movement for Rights and Liberties' (sparked by the arrest of leading human rights lawyer, Mohammed Abbou in March 2005) and reaction to the organisation of the World Summit on the Information Society in November 2005. The latter represented an attempt by Ben Ali to portray his regime as tolerant of freedom of speech and thus galvanised lawyers from different ideological backgrounds. To counter Ben Ali's tactics they sought to draw attention to the fact that the judiciary was being employed as a tool of repression, tasked in particular with silencing legal colleagues who dared to challenge the regime. As discussed in Part III, these tensions between lawyers and the judiciary gathered momentum and erupted nine years later in the crisis of February 2014.

It was events at the grassroots, however, that served to transform the stance of 'cause lawyers' from one of persistent opposition and occasional protest to more widespread and outright confrontation. The Mining Basin events in Gafsa in south-west Tunisia in 2008, in the course of which large numbers of workers and students mobilised publicly in opposition to the regime, are widely credited with spearheading the January 2011 Revolution. The subsequent trial of 38 trade union leaders and protestors marked the beginning of the end for Ben Ali, not least because an increasingly large number of lawyers began to work on behalf of and alongside ordinary citizens, as both co-professionals and co-activists.⁴

Lawyers & Transition

The various transitional phases after the revolution (2011-2014) propelled activist lawyers into the political arena. They were directly engaged in crucial political developments, particularly in the run up to the October 2011 election that produced the country's second National Constituent Assembly (NCA). Lawyers were also centrally involved in the various national commissions created by the interim authorities in 2011. Beyond the sphere of government, those involved in the 'Group

⁴ Le Comité pour le Respect des Libertés et des Droits de l'Homme, 'Procès des Leaders du Mouvement Social du Bassin Minier: Compte Rendu' (5 December 2008). <www.nawaat.org/portail/2008/12/05/proces-des-leaders-du-mouvement-social-du-bassin-minier-compte-rendu/> accessed 30 May, 2015. See also, Eric Gobé, 'Les Avocats, l'Ancien Régime et la Révolution. Profession et Engagement Public dans la Tunisie des Années 2000' (2011) 122 *Politique Africaine*.

of 25 Lawyers' emerged as an effective pressure group, campaigning tirelessly against corruption and endeavouring to confront and address the legacy of a deeply corrupted regime.

The October 2011 election brought an Islamist party – *Ennahda* (the Renaissance) – to power for the first time in Tunisian history. Together with secular party, *Ettakatol* (Democratic Forum for Labour and Liberties), and the Congress for the Republic, they created a coalition known as the 'troika'. In the aftermath of these first post-revolution elections, socio-economic conditions in Tunisia deteriorated and terrorist threats intensified (most notably in 2013 which witnessed two successive political assassinations). To address the growing crisis, a National Dialogue was established, led by a quartet of representatives of key organisations, including the Bar Association. It set out to find consensus on an independent national figure who could lead and nominate a new technocratic government within three weeks. A further four weeks were set aside to finalise: the drafting of the constitution; the composition of the High Instance for Elections; and the electoral law.

Throughout this period, lawyers were again engaged at the level of policymaking, lobbying to highlight and combat torture, and drafting legislation to help advance a transitional justice process. A central focus for the profession during this time was resistance to what they perceived as attempts to dilute their independence. Their efforts in this regard were rewarded in January 2014 when Article 105 of the new Tunisian constitution stipulated that the legal profession is a 'free independent profession that contributes to the defence of rights and liberties' and that 'lawyers enjoy legal guarantees that protect them and enable them to fulfil their functions'.

Structure of the Paper

As noted, this paper takes as its starting point the revolution of 2010-2011. Part I considers in brief the key events of this period and draws attention to the transformation of the role of many lawyers - from that of mobilisers and facilitators to active partners in revolution. Part II considers the immediate post-revolutionary period (Jan-Oct 2011) and examines the role of lawyers in three key arenas – the national commissions, the High Authority for the Achievement of the Revolution's Objectives, and the Group of 25 Lawyers. Part III then focuses on the second phase of transition, and the role of lawyers in shaping the second Republic. Here we look in turn at efforts to: combat torture, establish a framework for transitional justice, recalibrate the relationship between the judiciary and lawyers, develop the concept of a fair trial, and to advance the 'national dialogue' of 2013. A short conclusion summarises the main points and highlights some contemporary challenges.

I. Lawyers & the Revolution: From Mobilisation to Partnership

Different elements of the roots of Tunisia's uprising have been examined elsewhere including: the importance of social, political and economic oppression; the role of social media; youth culture; the trade union movement; and the significance of chance.⁵ With the benefit of hindsight it has become clearer how these underlying tensions and dynamics transformed the 2008 protests in the mining basin of Gafsa into a more concerted campaign for social and economic justice and, ultimately, a revolution.

The self-immolation of Mohamed Bouazizi, a vegetable vendor from Sidi Bouzid in the centre-west of Tunisia, on 17 December 2010, is popularly regarded as having ignited the largely unexpected country-wide rebellion. With approximately 40 per cent of the population under the age of 25, unemployed college graduates were among the first to organise themselves in the aftermath of Bouazizi's death. Protests spread throughout the central and western regions and to the capital, Tunis.

The day after Bouazizi's death a large number of lawyers clothed in black robes participated in a sit-in protest. Their subsequent role – like that of the other protestors – was galvanised by the reaction of the authorities. The Tunisian government responded by unleashing the state security forces on the demonstrators, sending 2,000 police to quell the riots in Sidi Bouzid. As protests against the regime spread across Tunisia, the numbers of lawyers openly engaging in political activism grew rapidly. In the course of a sit-in at the Justice Palace on 31 December 2010 (at which lawyers had been asked to wear a red ribbon as a sign of support for the movement initiated in Sidi Bouzid), a huge police presence was mounted to prevent lawyers wearing the ribbon from entering the court. Police officers were also deployed within the precincts of the court to prohibit lawyers wearing the ribbon there. Those who refused to remove it were assaulted, some were injured by police and some had their black robes torn.⁶

The Bar reacted by calling for a general strike on 6 January 2011 to protest against what they described as an 'unprecedented use of force against lawyers' designed to 'silence them'.⁷ Pro-Democratic Constitutional Rally (*Rassemblement Constitutionnel Démocratique / RCD*) lawyers, not surprisingly, opposed the strike,

⁵ See, for example, Habib Ayeub, 'Social and Political Geography of the Tunisian Revolution: the Alfa Grass Revolution (2011) 38 (129) *Review of African Political Economy*; Mehdi Mabrouk, 'A Revolution for Dignity and Freedom: Preliminary Observations on the Social and Cultural Background to the Tunisian Revolution' (2011) 16 (4) *The Journal of North African Studies*; Yousri Marzouki et al., 'The Contribution of Facebook to the 2011 Tunisian Revolution: A Cyberpsychological Insight' (2012) 15 (5) *Cyberpsychology, Behavior, and Social Networking*.

⁶ In a prior sit-in on 28 December 2011 lawyers again protested in their black robes and red ribbons. On this occasion lawyers Chokri Belaid and Abdel Ayadi were arrested and held for several hours.

⁷ See Bar Association communiqué of 6 January 2011.

suggesting that it was an act of political manipulation.⁸ The strike went ahead and attracted much attention across the Republic. In the aftermath of the bloody repression of protestors in Thala and Kasserine on 8-9 January 2011, lawyers, again in their black robes, were at the head of a major protest in Sfax in southern Tunisia and other protests at Mednine, Kasserine and Sidi Bouzid. Eventually, in desperation, Ben Ali attempted to shuffle his cabinet and offered to create 300,000 jobs, but it was too little too late. The protests and violence escalated, and by 14 January, the president and his family were on an airplane to Saudi Arabia.

The President of the Bar Association declined at the last minute to lead the procession on 14 January but hundreds of lawyers nonetheless proceeded to march to the front of the Ministry of Interior in Habib Bourguiba Avenue, where they proclaimed '*Ben Ali, Dégage!*' (Ben Ali, Get Out!).⁹ The choice of venue was deliberate as this particular Ministry had functioned as the main machine of repression during Ben Ali's 23-year reign.

The proposed takeover by Prime Minister Mohamed Ghannouchi was rejected by Tunisian General Labour Union (UGTT) who declared that he was too closely associated with the old regime.¹⁰ On 20 January 2011, the General Legislative Amnesty was announced and the ban on the activities of the Tunisian League of Human Rights was lifted. Marches on the capital, Tunis, then ensued to ensure that the old regime, represented by Ghannouchi, was effectively dismantled. The normally serene square known as the Casbah was transformed in the course of two successive 'sit-ins' into what looked like a squatter's camp as protestors co-ordinated a round-the-clock vigil at the office of the Prime Minister to demand the resignation of Ghannouchi.

In view of the suspension of the constitution and parliament, a meeting was scheduled for 11 February 2011 at the Bar Association. It was attended by representatives of the Bar, the UGTT, the Judges Association, the Journalists Union, some NGOs and other political parties and aimed to establish a 'National Authority for the Protection of the Revolution'. On 27 February, as a result of pressure generated by the two successive sit-ins, Ghannouchi effectively resigned. Lawyer, El Béji Caied Essebsi, was nominated as prime minister and on 15 March,

⁸ See 'Sidi Bouzid: Grève Très Suivie des Avocats' (*Jeune Afrique*, 6 January 2011) <www.jeuneafrique.com/Article/ARTJAWEB20110106182803> accessed 14 June 2015.

⁹ According to Gobé the prime minister, Mohamed Ghannouchi, invited the President of the Bar (Abdelrazzek Kilani) to a one-to-one meeting on the date of the strike to discuss the lawyers' grievances. The President accepted the invitation and attended the meeting instead of leading the procession (as had been requested by Chawki Tabib and other members of the Bar board). Eric Gobé '*Les Avocats, l'Ancien Régime et la Révolution. Profession et Engagement Public dans la Tunisie des Années 2000*' *Politique Africaine* (2011) 122. Abdelrazzek Kilani was at that point President of the Bar. Between 2011-2013 he served as Minister Delegate to the prime minister, with responsibility for Relations with the National Constituent Assembly and the government. In 2013-2014, he was Ambassador and Permanent Representative of Tunisia to the United Nations in Geneva. He was also a candidate in the presidential elections of November 2014. On 27 candidates, he came 13th, with 10,077 voices (0.31%). For further biographical information see <www.en.wikipedia.org/wiki/Abderrazak_Kilani> accessed 12 June 2015.

¹⁰ A definitive vacuum was left once the President had fled the country. See <www.youtube.com/watch?v=EMKh0JTo52s> accessed 12 May 2015.

he established The High Authority for the Achievement of the Revolution's Objectives, for Political Reform and Democratic Transition. On 20 March 2011, the 55th commemoration of the Independence Day, President Mbazaa then announced National Constituent Assembly elections for July 2011.¹¹

¹¹ The elections finally took place on 23 October 2011.

II. Lawyers in the Immediate Aftermath of the Revolution: Strategic Planning for Transition (14 Jan – 23 Oct 2011)

The 14 January – 23 October 2011 period was marked by exceptional revolutionary intensity as the apparatus of the former regime was gradually dismantled.¹² The contribution of lawyers was most notable in the following arenas: national commissions; the Higher Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition; and the Group of 25 Lawyers.

National Commissions

On 17 January 2011, three independent national commissions were created by the interim authorities: 1) the High Commission for Political Reform;¹³ 2) the National Commission for the Investigation of Bribery and Corruption (referred to as the 'Ben Amor' Commission);¹⁴ and 3) the National Commission to Investigate the Abuses Recorded during the Period of 17 December 2010 to the end of its mandate (led by lawyer Taoufik Bouderbala).¹⁵ The latter two commissions had a direct relationship with lawyers, either because they were led by lawyers or because lawyers were centrally engaged in their work (for example, to verify and process accusations of corruption). A fully fledged truth commission was not established until 2014 but, in the interim, these bodies effectively constituted a preliminary truth-seeking process.

The 'Ben Amor' Commission (report published, November 2011) focused on the identification of sources of corruption during the previous two decades, including that within the legal community. For example, they reviewed the practice of awarding public contracts to lawyers known to be loyal to the regime and the myriad ways in which Ben Ali and his family influenced the work of the judiciary. In spite of clashes with the judiciary and other obstacles, the commission succeeded in transferring several cases to the public prosecutor. In the process it unveiled a complex structure of corruption through which Ben Ali and his associates had controlled private enterprises and evaded tax and custom duties.

The 'Bouderbala Commission' documented dozens of human rights violations during the uprising and, where relevant, established state responsibility. The final 1,040-page report, issued in early May 2012, was mainly based on fieldwork in those regions that had witnessed the most brutal repression during the revolution. It recommended the establishment of comprehensive transitional justice programme, including a truth commission and a reparations programme for victims. This report on cases relevant to the wounded and martyrs of the

¹² Upon the instructions of Judge Farhat Rajhi, then Interim Minister for Interior Affairs, Faouzi Ben Mrad was appointed to bring a case in the name of the Tunisian State against the *Rassemblement Constitutionnel Démocratique* [RCD] party, in order to dissolve what had been the ruling party for some fifty-five years.

¹³ This subsequently merged with another body to become the High Commission for the Protection of the Objectives of the Revolution, Political Reform and Democratic Transition.

¹⁴ The full title of the president of this commission is Professor Abdel Fatah Amor.

¹⁵ This date was formally established by decree - law 8 (2011) as 18 February 2011.

revolution was submitted both to the President of the Republic and the Military Courts.

The Higher Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition

The Higher Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition (HAARO) was established in March 2011.¹⁶ It was charged with preparing legislation of relevance for political organisation and with proposing reforms that might help to further the revolution's objectives and the process of democratisation. It was also invited to monitor government activities and to engage in dialogue with the Prime Minister.¹⁷ Headed by Professor Yadh Ben Achour, one of Tunisia's sharpest legal minds, it included representatives of twelve political parties, eighteen civil society organisations, and the families of the martyrs of the January 2011 revolution. The Bar Association also had four representatives, including one woman, Saida El Akremi.¹⁸ In addition to these Bar Association nominations, lawyers were included among the representatives of the Tunisian League for Human Rights (for example, Mokhtar Trifi and Anouar Kousri). Lawyers Chokri Belaid and Samir Dilou and a former Bar Association president, Abdeljalil Bouraoui, were also numbered among those representing political parties.

Whilst lawyers actively engaged in 'deliverables', particularly in relation to electoral law, funding of political parties, and the associations and information sector decree laws, their major achievement in 2011 was the promulgation of decree number 79 regulating the Legal Profession. Article 1 of this text upgrades the status of a lawyer from that of a partner in the administration of justice to one of 'defending freedoms and human rights'.¹⁹ This unusual pronouncement on the role of lawyers within a justice system gave official recognition to the *de facto* status that Tunisian lawyers had cultivated before and during the revolution.

The Group of 25 Lawyers

Unlike the above-mentioned initiatives, the 'Group of 25 Lawyers' was not sponsored by the government. It was established in February 2011 by a group of

¹⁶ In the immediate aftermath of Ben Ali's departure numerous committees were established to fill the political vacuum. Two of these – the High Commission for Political Reform and the National Council (or High Commission) for the Protection of the Revolution – merged to form the Higher Authority for the Achievement of the Revolution's Objectives, Political Reform and Democratic Transition (HAARO).

¹⁷ Article 2 of the 18 February 2011 decree law n°6 created the Higher Authority for the Achievement of the Revolution Objectives, the Political Reform and the Democratic Transition.

¹⁸ The four representatives of the Bar Association were: Saida El Akremi, Ahmed Seddik, Fethi Laayouni and Rached Barghech. Saida El Akremi, an Islamist activist, was a member of the 'International Association for Political Prisoners Support' (banned under Ben Ali). She is also the spouse of the Ennahda Justice Minister who served in the government formed after the October 2011 election.

¹⁹ This article upgraded Article 1 of law number 89-87 (7 September 1989) which regulates the legal profession. It stipulated that: 'The legal profession is free and independent in its pursuit of the administration of justice'.

lawyers who wanted to investigate corruption under the old regime and to help build a judicial system that could meet the transitional justice aspirations of the Tunisian people. On many occasions, the group has reiterated its commitment to refuse to defend or negotiate with representatives of or those associated with the former regime, stressing that any lawyer who violated this commitment would be automatically excluded from the Group's membership.²⁰

In its submission to HAARO, the Group recommended 'the establishment of a joint commission to establish a list of the symbols of corruption that should be investigated, in addition to the establishment of a list of judges and lawyers known to be corrupt'.²¹ The group began with a core of ten lawyers whose work was coordinated by Anouar El Bassi and Amor Safraoui. They attempted to create a comprehensive chart, drawing lines between powerful individuals in government, business and Ben Ali's political party (RCD) and then embarked upon strategic litigation styled as 'complaints filed by citizens'.²² Legal expertise was thus employed to challenge the prevailing apathy within successive provisional governments with regard to prosecuting offenders from the former regime. Cases were filed against ex-President Ben Ali, his two former Ministers of Interior, Rafik Bel Haj Kassem and Ahmed Friaa, his former Defence Minister, Kamel Morjen, and many prominent figures of the RCD.²³ In August 2011, following the release of Ben Ali's former Justice Minister, Bechir Takkari, and the escape from Tunisia of a senior RCD official, Saida Agrebi, the group intensified its efforts and challenged the government to establish a list of judges specialising in the prosecution of financial and commercial cases. The scheme was considered by the cabinet of Prime Minister Beji Caied Essebsi.

The early dynamism of the 'Group of 25' as a pressure group in the immediate post-revolution period was not, however, sustained. Seven of the original members resigned in protest at what they considered to be 'non-democratic practices' in the management of the group as well as deviation from its stated objectives. Conflict within the group also arose from the fact that one of the members agreed to defend an official who had been close to Ben Ali. The group has not been officially dissolved and a current member, Anouar Bassi, insists that 'the most important thing for us is that our work moves forward'.²⁴

²⁰ Olivier Metzner, lawyer for Ben Ali's nephew, Imad Trabelsi, claimed that some of his fellow lawyers had been threatened with ostracisation should they persist in defending representatives of the former regime. See: 'Tunisie, Ben Ali: Les Avocats "Menacés"' *Le Figaro* <www.lefigaro.fr/flash-actu/2011/02/17/97001-20110217FILWWW00455-tunisieben-ali-les-avocats-menaces.php> accessed 12 June 2015.

²¹ See 'Group of 25 Expresses Concerns With HAARO' www.tunisia-live.net/2011/08/12/group-of-25 accessed 4 May 2015; Aymen Allani, 'Qu'est ce qui Fait Courir le Groupe des 25 Avocats?' (*La Tunisie Vote*, 13 September 2011). <www.latunisievote.org/fr/politique/item/251-le-groupe-des-25-avocats-des-justiciers-qui-derangent-> accessed 13 February 2015.

²² Maryam Mnaouar, 'Tunisie: Les Avocats de la Révolution' (*Afric*, 23 May 2011) <www.afrik.com/article22911.html> accessed 3 May 2015.

²³ They included Hamed Karoui, Mohamed Ghariani, Abdallah Kallel, Ridha Chalghoum, Abderrahim Zouari, Zouheir M'dhaffer, Chédli Neffati, Abdelaziz Ben Dhia, Kamel Morjane and Abdelwahab Abdallah.

²⁴ See Chawki Rouissi, Tunisie Numérique, 'Conflit au Sein du Groupe des 25 et Démission de 6 Nouveaux Avocats' <www.tunisienumerique.com/conflit-au-sein-du-groupe-des-25-et-demission-de-6-nouveaux-avocats/47228> accessed 24 June 2015.

III. Lawyers & the Shaping of the 2nd Republic (23 Oct 2011-August 2015)

The October 2011 election ushered in a new National Constituent Assembly (NCA) and for the very first time in Tunisian history, an Islamist party (Ennahda) came to the fore. In this second phase of the transition, the contribution of lawyers was most clearly seen in campaigns to combat torture, develop a framework for transitional justice, and most especially, to establish the independence of their profession. Two high-profile political assassinations in 2013 (including that of a human rights lawyer) galvanised their role.²⁵

Combatting Torture

The absence of the right to access a lawyer during pre-charge detention in Tunisia naturally removes an important safeguard against the possibility of torture.²⁶ Instances of torture were widespread under the Ben Ali regime but, if anything, the phenomena intensified in the post-revolution period. During a visit to Tunisia in May 2011, for example, the UN Special Rapporteur on Torture noted that torture and other ill-treatment was continuing. He highlighted the need for immediate in-depth investigations, for those responsible to be prosecuted, and for victims to be provided with access to effective remedies and reparation.²⁷

Prominent human rights lawyer and activist, co-founder and head of the Tunisian Association Against Torture, Radhia Nasraoui, has been a tireless campaigner on this issue.²⁸ Her Association denounces torture, provides legal and medical aid to

²⁵ Chokri Belaid was a lawyer and founder of the Patriots Democrats Movement (Mouvement des Patriotes Démocrates), a Marxist-Leninist movement, associated with Arab nationalism. It became legal after the January 2011 revolution and merged with the Democratic Working Patriot Party to become the leftist counterpart to the Islamist Ennahda party. According to the Tunisian Ministry of Interior, Belaid was killed on 6 February 2013 by 'extremist salafists' because of his radical stance on Ennahda and his vocal criticism of its performance in government.

²⁶ See Chapter 2 of the joint report of ACAT France in collaboration with Liberté et Équité and the Tunisian Organization Against Torture "Vous Avez dit Justice? Etude du phénomène tortionnaire en Tunisie" (June 2012).

<www.unmondetortionnaire.com/IMG/pdf/Rapport_Tunisie_ACAT_Juin_2012_FR_Vous_avez_dit_justice_Etude_du_phenomene_tortionnaire_en_Tunisie.pdf> accessed 12 June 2015. Under Tunisian law, detainees do not have the right to access a lawyer during the period of pre-charge detention. This right is only granted when they first appear before an investigative judge, which can be up to six days after arrest. By that time many suspects have already signed (without a lawyer present) a statement that may have been coerced out of them and which is admissible as evidence during their trial. See Human Rights Watch report 'Cracks in the System: Conditions of Pre-charge Detainees in Tunisia' (November 2013) <www.hrw.org/reports/2013/12/05/cracks-system-0> accessed 4 July 2015.

²⁷ UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E/ Méndez, Mission to Tunisia, A/HRC/19/61/Add.1 (2 February 2012).

<www.ohchr.org/Documents/Issues/SRTorture/A-HRC-19-61-Add-1.pdf>

²⁸ Katalin Wrede, Roland Berger Stiftung, 'Radhia Nasraoui. Leading the Fight Against Torture in Tunisia', (18 November 2011) <www.human-dignity-forum.org/2011/11/radhia-nasraoui-leading-the-fight-against-torture-in-tunisia>

victims, and liaises with international human rights networks to raise awareness about torture in Tunisia. It was proscribed under Ben Ali and she herself was subject to police brutality (including physical assault in the street) and attempts to intimidate herself, her clients and her children. The Tunisian Association Against Torture became legal in the aftermath of the revolution, however, and it was thus finally possible for Nasraoui to align with the World Organisation Against Torture (OMCT) and to establish in March 2013 SANAD (support) centres in both Le Kef (in the north-west) and Sidi Bouzid (in the centre).²⁹ These centres aim to provide both legal and medical aid for victims of torture and ill-treatment and their families. The centres' staff include experienced lawyers who play a vital role in reaching out to victims outside Tunis.³⁰

Tunisia ratified the Optional Protocol to the Convention against Torture (OPCAT)³¹ on 19 February 2011 but later that year decree-law number 106 was passed, amending and supplementing the Criminal Code and the Code of Penal Procedure. This included an article that stipulated that: 'public action resulting from a crime of torture is prescribed after fifteen years'.³² This affected three cases that had been brought against then Prime Minister, Béji Caied Essebsi, by the Committee for the Defense of Victims of Torture of the Youssefist Movement.³³ Essebsi's defence committee maintained that he had not set out to evade accountability but simply wished to legally define the concept of torture and to clarify the timeframe for investigations of human rights violations.³⁴ The timing of the legislation nonetheless fuelled accusations that he was acting in self-interest.³⁵ The text was subsequently abrogated and the Transitional Justice law of 24 December 2013

accessed 12 July 2015. It is noteworthy that Radhia Nasraoui was appointed on 23 October 2014 to represent Tunisia on the OPCAT's Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See further: www.ohchr.org/EN/HRBodies/OPCAT/Pages/Elections2014.aspx, accessed 2 August 2015. Such a move would, of course, have been unthinkable prior to the revolution.

²⁹ See 'Opening of the counselling centers SANAD in Kef and Sidi Bouzid', (in Arabic) <www.omct.org/files/2013/09/22380/cp_ouverture_sanad_ar.pdf> accessed 12 June 2015.

³⁰ See Human Rights Watch report 'Tunisia: Suspicious Death in Custody' 13 October 2014 <www.hrw.org/news/2014/10/13/tunisia-suspicious-death-custody-0> and Amnesty International's report <La nécessaire réforme pour l'éradication de la torture en Tunisie>, 10 November 2013 <www.youth-for-change.blogspot.com/2013/11/la-necessaire-reforme-pour-leradication.html> accessed 14 June 2015.

³¹ Tunisia ratified the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment in September 1988 and outlawed torture by article 101 of its Criminal Code, added in 1999.

³² See Article 5, section 4 at <www.legislation-securite.tn/fr/node/30461> accessed 2 August 2015. Tunisian law previously set the statute of limitation for torture crimes at ten years.

³³ The cases relate to the repression of the followers of Salah Ben Youssef, a rival of former president, Habib Bourguiba, during Essebsi's time as Minister of the Interior and Director of National Security under Bourguiba. For biographical information on Ben Youssef see <en.wikipedia.org/wiki/Salah_ben_Youssef> accessed 12 February 2015.

³⁴ Hicham Guesmi, 'The Decision to Cancel the Subscription of Torture Crimes: a Step to Ensure the Right of Victim' (in Arabic) (*Jadal*, 17 November 2012).

³⁵ See 'The Defence Committee of Torture Victims of the Youssefist Movement Acts in Justice against El Béji Caied Essebsi' (in Arabic) (15 March 2012, *El Mashad Ettounsi*) <www.machhad.com/8456> accessed 30 June 2015.

included torture as one of the key themes for investigation by the specialised judicial chambers. This law also stipulated that violations under Article 8 'shall not be subject to prescription'.³⁶

The ratification of OPCAT also required the establishment a National Prevention Mechanism (NPM) to monitor places of detention. The technical committee that led the drafting process comprised civil society and international experts specialising in the prevention of torture. It was chaired by past President of the Tunisian League for Human Rights and lawyer, Mokhtar Trifi, and human rights lawyer, Saida Akremi, also served as a member. On 9 October 2013 Tunisia's National Constituent Assembly finally adopted a law to create a National Authority for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The body consists of sixteen full-time experts who have authority to visit any site where people are deprived of their liberty to document torture and ill-treatment, to request criminal and administrative investigations, and to issue recommendations for measures to eradicate torture and ill-treatment. Tunisia is the first country in the Middle East and North Africa region to establish such an independent domestic mechanism for the prevention of torture.³⁷

Creating a Framework for Transitional Justice

Following the election of October 2011, politicians could no longer ignore the calls of victims and civil society organisations for transitional justice legislation. Article 24 of the Organic Law for the Provisional Organisation of the Public Authorities stipulated that the National Constituent Assembly must enact an organic law regulating Transitional Justice, setting its remit and range of competence.³⁸

A Ministry for Human Rights and Transitional Justice was created in January 2012 and the following April, the National Dialogue on Transitional Justice was officially launched in the presence of Prime Minister, Hamadi Jebali, the speaker of the NCA, Mustapha Ben Jaafar, and the President of the Republic, Moncef Marzouki. The Ministry was headed by Samir Dilou, an activist lawyer from the Islamist party, Ennahda, who was well known for defending political activists. He was also co-founder of the International Association for Political Prisoners Support and was himself a former political prisoner under Ben Ali.³⁹ A Technical Committee was created in May 2012 to supervise the dialogue and to draft the first transitional justice law in Tunisian history. Coordinated by lawyer Mohsen Sahbani, a member of Ennahda and attaché to the Dilou ministry for transitional justice, it included

³⁶ Unofficial translation of the International Center for Transitional Justice. See Articles 8 and 9 at <www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf> accessed 2 August 2015.

³⁷ See Human Rights Watch report 'Cracks in the System: Conditions of Pre-charge Detainees in Tunisia' (November 2013) <www.hrw.org/reports/2013/12/05/cracks-system-0> accessed 4 July 2015 <www.hrw.org/reports/2013/12/05/cracks-system-0> accessed 3 July 2015.

³⁸ See Organic law n°6 dated 16 December 2011, which deals with the organization of the public authorities, Tunisian Official Gazette n° 97, 20 & 23 December 2011, pp. 3111-3115.

³⁹ For further biographical information see 'Samir Dilour' (15 August 2011, *TunisiaLive*) <www.tunisia-live.net/whoswho/samir-dilou> accessed 31 May 2015.

twelve representatives from the five main networks working on transitional justice in Tunisia, three of whom were lawyers.⁴⁰

The final draft was presented to the NCA in January 2013. The debate on the legislation took place during a raging controversy concerning the political exclusion draft law (known as 'revolution immunisation')⁴¹ and the political assassinations of human rights lawyer Chokri Belaid and elected representative, Mohamed Brahmi. Basma Khalfaoui, the widow of murdered human rights lawyer, Chokri Belaid, subsequently set up the 'National Committee to Reveal the Truth About the Chokri Belaid Murder'. In so doing she intensified calls for progress on wider transitional justice issues.⁴² Further pressure was generated by the online publication of President Moncef Marzouki's book *The Propaganda Apparatus Under Ben Ali: The Black Book*.⁴³ The legislation was eventually adopted in December 2013 as Organic Law 2013-53 on 'Establishing and Organising Transitional Justice'.

To feed into the parliamentary process, the Bar Association established in February 2012 its own Working Group on Transitional Justice. This they described as reflective of their 'traditional and natural role in defending rights and liberties' and their 'commitment to the transitional justice process'.⁴⁴ The Working Group issued its own draft version of Transitional Justice legislation, focusing in particular on

⁴⁰ The networks were: Tunisia Center for Transitional Justice, Al Kawakibi Democracy Transition Center, The Tunisian Network for Transitional Justice, Tunis Center for Human Rights & Transitional Justice, the National Coordination on Transitional Justice. Those members who were lawyers: Habib Chelbi from the Tunisian Network on Transitional Justice, Oula Ben Nejma from Tunis Center for Human Rights & Transitional Justice & Emna Sammari from the National Coordination on Transitional Justice.

⁴¹ Whilst the transitional justice legislation was being developed one of the members of the government coalition, the Congress for the Republic Party (CPR), proposed a law on 'political immunization of the Revolution'. It proposed to bar former RCD members from running for office. Human rights groups welcomed the proposal to restrict the political participation of those responsible for torture and human rights abuses under Ben Ali but questioned the proposed blanket exclusion of those who had held minor clerical positions in the previous government. This, they argued, potentially violated international treaties such as the International Covenant on Civil and Political Rights to which Tunisia is party. See <www.hrw.org/news/2013/06/15/tunisia-sweeping-political-exclusion-law> accessed 28 July 2015.

⁴² On 30 March 2014 the investigating judge put a seal on Belaid's murder files. The rationale offered was that some of the accused had already been killed in an armed confrontation with the police whilst others, in custody, had exceeded the maximum period of 14 months arrest. In June 2015 the first public hearing in the Chokri Belaid murder case opened at the Court of First Instance in Tunis. The trial of twenty-four defendants has, however, been deferred until October 2015 at the request of the plaintiff, the defence committee and one of the defendants.

⁴³ See David Tolbert 'Tunisia's Black Book: Transparency or Witch-hunt?' <www.aljazeera.com/indepth/opinion/2013/12/tunisia-black-book-transparency-witch-hunt-2013128517156923.html> accessed 12 May 2015. The book lists the names of journalists, outlets, TV channels, news agencies, opinion makers, university professors and academics, who allegedly collaborated with the previous regime to help improve Ben Ali's public image, both nationally and internationally. These claims are allegedly based exclusively on the archives of the former president.

⁴⁴ See 'General Introduction of the Working Group on Transitional Justice: Composition, Members, Goals, Work (January 2013) 3 *Bar Association Magazine* 13.

the creation of a Supreme Commission for Truth, Justice and Reconciliation. Although the initiative put forward by the official technical committee tasked with developing the transitional justice legislation naturally took precedence, it is clear that the Bar Association's suggestions had an influence, particularly in relation to arbitration and reconciliation techniques.

Lawyers were also actively engaged in the work of the Defence Committee of the Martyrs and Wounded of the Revolution – a committee established in the immediate aftermath of the revolution to provide *pro bono* legal services to the families of the martyrs and wounded, many of whom come from poor and historically marginalised regions. Many of the same lawyers worked with the National Coordination of Transitional Justice, presided over by lawyer Amor Safraoui.

In general, however, lawyers have tended to have little confidence concerning the prospects of achieving justice before the military courts, which had jurisdiction over the cases relating to the martyrs and wounded. The verdicts of 12 April 2014, in which the military court of Tunis reduced the sentences for senior officials accused of leading the killing of citizens during 2010-2011 Revolution (with *nolle prosequi* [formal dismissal of charges] entered for some of them), confirmed the view of many that the government should proceed to create the specialised judicial chambers and officially launch the Truth & Dignity Commission.⁴⁵

These verdicts provoked chaos in the legislative chamber. Instead of activating the specialised chambers provided for under the new Transitional Justice law (the actions of which cannot be opposed by the principle of *res judicata*), the NCA deputies reverted to an old draft of 2012 and called for the setting up of courts to deal with cases related to the families of the Martyrs and Wounded of the Revolution who had embarked on a collective hunger strike. The Tunisian Association of Judges meanwhile voiced their opposition to the proposed exceptional courts and the activation of the specialised chambers. The Bar declined to take a public stance at this point.

In June 2014, Tunisia finally saw the launch of the Truth and Dignity Commission. The appointed commissioners include two lawyers and, for only the second time international in the history of truth commissions, it is headed by a woman: journalist and human rights activist Sihem Ben Sedrine.⁴⁶

Vetting of Lawyers and the Judiciary

In May 2012, in the midst of various challenges concerning transitional justice initiatives, a controversial bill was brought before the NCA. It called for the

⁴⁵ Article 148-9 of 27 January 2014 Constitution stipulates: 'The state undertakes to apply the system of transitional justice in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of *res judicata*, and the prescription of a crime or a punishment are considered inadmissible.'

⁴⁶ The first woman to chair a Truth Commission was sociologist, Françoise Boucard, who chaired the Haitian National Truth and Justice Commission (1995-1996). See <en.wikipedia.org/wiki/The_Haitian_National_Truth_and_Justice_Commission>; <en.wikipedia.org/wiki/Sihem_Bensedrine> accessed 3 June 2015.

illustration of the judiciary and the legal profession. The proposed 'vetting' measure was designed to achieve a measure of institutional reform for both sectors. It was preceded by the decision of then Minister of Justice, lawyer Noureddine Bhiri, to dismiss 82 judges in an effort to purge the profession of its 'corrupted elements'.⁴⁷ While the measure was intensely criticised as a violation of the principle of the separation of powers, the draft law resurfaced in January 2013 and was circulated for discussion within the NCA.

The bill comprises eight articles designed to hold accountable lawyers or judges including those who misappropriated public funds in the period between 7 November 1987 and 14 January 2011.⁴⁸

Article 5 refers specifically to lawyers and stipulates that the committee shall investigate the suspected financial corruption in the legal profession by examining the files on: fraud; engaging clients illegally; mediation in bribery and treason; and involvement in the appropriation of public funds. The committee was also tasked with the investigation of crimes linked to efforts to defend the former regime.⁴⁹ The powers proposed for the committee were wide-ranging including their access to key documents. For example, there is no provision for the refusal of information or documents by reference to client confidentiality, a presidential or court injunction, or the confidentiality of financial information.

Deputies were reluctant to debate the bill mainly because the content was connected to the wider transitional justice draft law (in May 2013, the government effectively abandoned the proposed 'revolution immunisation' legislation).⁵⁰ The Bar Association issued an official statement on 17 January 2013 expressing grave concerns that these initiatives fell outside the natural process of transitional justice and were based rather on partisan and political instrumentalisation by vested interests within the political establishment. It called on the NCA to assume its 'historic responsibility' to 'protect the process of transitional justice from populism'.⁵¹ Some lawyers within the NCA were, nonetheless, in favour of the legislation, insisting that it was necessary to allow the legal profession to effect meaningful reform and to deal with a legacy of corruption. Indeed the legislation provoked division within the Bar itself with some lawyers arguing that it had been too slow to take an official stance. Representatives of the Tunisian Association of Young Lawyers further demanded that vetting should not be limited to lawyers who engaged in overtly corrupt practice but rather should include those who

⁴⁷ Thirty of the eighty-two dismissed judges succeeded in challenging the unilateral decision to dismiss them before the Administrative Tribunal. The Tribunal ordered that they be reinstated by December 2013 but that ruling has not to date been implemented, not least because some of the judges were reallocated to remote regions, far from their original placement.

⁴⁸ Unofficial translation of the International Center for Transitional Justice.

⁴⁹ The timeframe for qualifying crimes was set to run from the date of the original crime to the date of this law being promulgated.

⁵⁰ It is worth mentioning that General Legislation Committee within the NCA had already held a hearing with the Minister of Justice who expressed concerns about the text and claimed that it contained several gaps.

⁵¹ Bar Association communiqué, 17 January 2013.

colluded with the political police during the dictatorship and those who used their influence to ensure that the regime controlled state institutions.⁵²

The final report of the [Ben Amor] fact-finding commission on bribery and corruption demonstrated that Ben Ali had supervised the designation of individual lawyers who were deemed loyal to the regime. This included 1) lawyers who openly supported the regime and in return were awarded cases relating to state institutions; and 2) those who were publicly opposed to the regime but secretly complicit, for example, gathering intelligence on colleagues. This crisis regarding the appropriate means of dealing with past corruption within the profession was to some extent addressed when in June 2012 the Bar concluded a memorandum in conjunction with the Ministry of Justice to safeguard against the practice of awarding contracts on the basis of political loyalty.

Tensions between Lawyers and Judges

Strikes had been employed by lawyers intermittently under Ben Ali, and generally signalled critical junctures in their relationship with the regime. After the revolution they were employed more routinely as a 'call to order' within the profession. The strike of November 2013 following the illegal arrest of lawyer Slaheddin Hajri and his enforced disappearance for three days is a case in point. Hajri had been arrested by the police as a result of a relatively trivial dispute with his neighbour. He was beaten and abused in front of his wife and children and taken to a police station. He presented his Bar affiliation card, referred to article 46 of Decree Law No. 79-2011 regulating the legal profession, and requested that the lawyers immunity clause be applied.⁵³ His demands were rejected and his wife received no information about her husband until he appeared in custody three days later. In response to Hajri's disappearance, the Bar Association issued a communiqué on 11 November 2013 calling for a strike in all courts throughout the country on 13 November to protest against what it described as acts of aggression against lawyers. It denounced the violation of the immunity clause in the Hajri case and initiated procedures to try to determine who was responsible for the attack. The strike, led by the President of the Bar, was a major success in the sense that lawyers from across Tunis were supported by colleagues from right across the regions.⁵⁴

The deteriorating relationship between lawyers and judges in the winter of 2014 again resulted in lawyers resorting to strike action. On 20 February 2014, the investigative judge of the Tunis Court of First Instance ruled against lawyer Fatma

⁵² This organisation represents approximately one quarter of young lawyers. These young lawyers had been particularly disadvantaged by corrupt practices. To an extent these concerns had been addressed by the Prime Minister's circular n°4 of 9 February 2011 which allowed the heads of the public institutions to freely choose their lawyers.

⁵³ Article 46 of decree 79-2011 regulating the legal profession stipulates that: 'If a criminal investigation is in place against a lawyer, the competent head of the regional branch has to be informed immediately. The lawyer is referred by the Solicitor General at the Court of Appeal on the investigative judge who questions him in the presence of the President of the relevant branch or his designee for the purpose.'

⁵⁴ Photographs can be seen on the Bar Facebook page (text in Arabic): <www.facebook.com/media/set/?set=a.732049750158402.1073742180.452653971431316&type=3> accessed 12 July 2015> accessed 4 June 2015.

Mejri in a civil litigation with Mejri's client. The Bar Association claimed that the ruling had not respected proper legal procedures and that Mejri had been denied representation by a member of the Bar Association. According to the judiciary, lawyers inside the court subsequently assaulted the investigative judge and prevented the police from taking their colleague out of the court.⁵⁵ This resulted in violent confrontations with the police and the use of teargas against the protesting lawyers.⁵⁶ The ATJA immediately issued a crisis call and asked lawyers to engage in an open strike in all courts across the Republic pending the release of their colleague.⁵⁷ In particular they accused the investigative judge of failing to respect article 46 of Decree Law No. 79-2011 regulating the legal profession. This stipulates:

If a criminal investigation is in place against a lawyer, the competent head of the regional branch has to be informed immediately. The lawyer is referred by the Solicitor General at the Court of Appeal on the investigating judge who questions him in the presence of the President of the relevant branch or his designee for the purpose.

The Judges insisted that the article had been respected and that all necessary procedures had been followed by their colleagues. The Union of Tunisian Judges in turn initiated their own strike on 24 February in protest at what they described as a serious assault on the investigative judge in the Fatima Mejri case.

The President of the Bar intervened to ensure the release of his colleague and proceeded to convene an extraordinary general assembly on 2 March 2014.⁵⁸ Three days later a major protest march, headed by the President of the Bar, was staged to demonstrate that Tunisian lawyers were not prepared to tolerate unfair and inappropriate treatment of lawyers by either judges or the police.⁵⁹ Mediators included the Arab Lawyers Union, the Minister of Justice, the Speaker of the NCA and several members of parliament who were qualified lawyers. The crisis was temporarily abated on 28 March 2014 with the issuing of a statement on behalf of the Bar and the judiciary, in which they jointly condemned the violence that had erupted, reiterated the necessity for calm dialogue, pledged to exercise mutual respect and to agree to establish a joint committee to work on the resolution of disputes arising, and to consider the possibility of justice reform.

The crisis reignited in February 2015 with a clash between security forces and those associated with a Sfax lawyer who was allegedly beaten and detained by police.⁶⁰

⁵⁵ Communiqué of the Independent Observatory of the Judicial Independence, 21 February 2014.

⁵⁶ Supporting communiqué to the Bar Association from the Tunisian League for Human Rights (headed by lawyer Abdel Sattar Ben Moussa), 21 February 2014.

⁵⁷ ATJA communiqué, 21 February 2014.

⁵⁸ Bar Association communiqué, 27 February 2014. See photographs on Bar Association Facebook page (text in Arabic):

<www.facebook.com/media/set/?set=a.798905983472778.1073742228.452653971431316&type=3>, accessed 4 May 2015.

⁵⁹ Again, see photographs on Bar Facebook page (text in Arabic):

<www.facebook.com/media/set/?set=a.800609133302463.1073742230.452653971431316&type=3> accessed 4 May 2015.

⁶⁰ Bar Association communiqué, 5 February 2015.

Another wave of mutual recriminations ensued as judges accused lawyers of assaulting their comrade in order to influence the judge's decision in this case.

The Bar again called an extraordinary general assembly and this time scheduled a full week of activities including wearing the red ribbon for three days as well as convening a further extraordinary general assembly to discuss the draft law relating to the Supreme Council of the Judiciary and the various recent assaults on lawyers. This culminated in a national march, with lawyers again wearing their black robes. The crisis resulted in the resignation of the head of the Bar section in Sfax who was accused of acting unilaterally without the support of the Bar Council when he issued a letter of apology to local judges as a 'peace initiative'.⁶¹

Underlying these various disputes was a fundamental disagreement about the proposed draft law on the Supreme Council of the Judiciary. This cornerstone legislation proposed to map out the future legal landscape of Tunisia. The draft law (still being considered by the Assembly of the Representatives of the People⁶²) reflects the fact that, although nominally independent, the judicial system had not been systematically overhauled in the aftermath of the Revolution. A major challenge for the current deliberations is how to enshrine the fundamental principle of the separation of powers in practice.

In May 2015 the Tunisian parliament approved the creation of the constitutionally mandated Supreme Judicial Council (SJC) to oversee judicial appointments, discipline and the career progression of judges. The new law and the judicial oversight body it proposes were welcomed by Human Rights Watch but they emphasised that much more must be done to guarantee the independence of the judiciary. A key concern they argue is the composition of the council: only a minority of its 45 members will be judges who are elected by their peers. The rest will be appointed by the executive, giving it significant influence over the functioning of the council. Human Rights Watch have also emphasised that the general prosecutor of military justice should not exercise authority over civilian courts [he is listed as an ex-officio member].⁶³

The Judges Association succeeded in mounting a challenge to the constitutionality of the bill. This debate resurrected much of the traditional animosity between the Bar Association and the Judiciary, with the former contending that the judges' petition was primarily focused on diluting the representation of lawyers on the SJC.⁶⁴ The legislation is due to be debated again by parliament in the late summer of 2015.

The Concept of a Fair Trial

The post-revolution period in Tunisia marked significant changes in lawyers' understanding of the concept of a fair trial. As revolutionary euphoria subsided, many lawyers' attitudes were changed by firstly the success of Islamist politicians

⁶¹ Bar Association communiqué, 15 April 2015.

⁶² The new designation for the Tunisian Parliament after the legislative elections of November 2014.

⁶³ See <www.hrw.org/news/2015/06/02/tunisia-law-falls-short-judicial-independence> accessed 5 May 2015.

⁶⁴ See <www.legal-agenda.com/article.php?id=1137&folder=articles&lang=ar> accessed 5 May 2015.

following the 23 October 2011 elections and secondly the deterioration in social and economic conditions across Tunisia.

As noted, the Group of 25 lawyers was unequivocal about its commitment to refuse to defend or negotiate with representatives of or those who symbolised the former regime, stressing that any lawyer who violated this commitment would be automatically excluded from its membership. Other groups of lawyers drew the line at defence of those accused of acts of terrorism and particularly those accused of membership of the salafist movement. This in turn prompted the emergence of a new category of Islamist lawyers who fulfilled this task. These divisions are in marked contrast to the pre-revolutionary period when a sub-section of 'cause lawyers' from a variety of religious and ideological backgrounds united in defence of those accused of terrorism-related charges. These tensions between 'Islamist' and 'secular' lawyers not surprisingly deepened in the aftermath of the two political assassinations of 2013 and the various terrorist attacks on soldiers and civilians in Tunisia.⁶⁵ Some lawyers (for example, Anouar Ouled Ali and Rafik El Ghak) who defended salafists were subjected to physical assaults from the police, threatened and accused of supporting terrorism. This prompted the Bar Association to call on the Chief Prosecutor to help ensure the safe exit of these lawyers from the court. The Bar subsequently issued a communiqué in which it deplored these acts as a threat to lawyers who attempted to defend civil rights and liberties; they also brought a case against the aggressors and called on the authorities to fulfil their responsibilities with regard to the protection of lawyers.⁶⁶

An ongoing challenge for lawyers who choose to defend those accused of terrorism is the legal obligation under the terms of Law No. 75 of 10 December 2003 to disclose facts, or information relating to terrorism to the relevant authorities.⁶⁷ Failure to do so can result in between one and five years' imprisonment and a fine of 1-5000 dinars, even if bound by professional secrecy.⁶⁸ In practice, many lawyers categorically refused to comply with these demands as they feel that this inevitably comprises client-confidentiality and the right to a fair trial.⁶⁹

⁶⁵ The victims were generally young men from marginalised regions who left behind wives and children with no other means of support.

⁶⁶ See Bar Association communiqué, 20 February 2014, available on the Bar Association Facebook page <www.facebook.com/OrdreNationalDesAvocatsDeTunisie> accessed 14 May 2015.

⁶⁷ This legal obligation was linked to wider international efforts to fight terrorism and financial crime.

⁶⁸ Article 22 of the law further stipulates that only family members are exempt. The amendment of the law in 2009 and the draft submitted to the NCA on 28 January 2014 maintained the same formula. See Human Rights Watch report 'An Analysis of Tunisia's Draft Counterterrorism Law' (*Human Rights Watch*, 7 July 2014). <www.hrw.org/news/2014/07/07/analysis-tunisia-s-draft-counterterrorism-law> accessed 24 June 2015.

⁶⁹ See Human Rights Watch report 'Tunisia's Repressive Laws. The Reform Agenda' (*Human Rights Watch*, November 2011) <www.hrw.org/reports/2011/12/16/tunisia-s-repressive-laws-0> accessed 24 June 2015 and <www.hrw.org/news/2015/07/31/tunisia-counterterror-law-endangers-rights> accessed 3 August 2015. In a communiqué dated 5 August 2015, the Bar Association insisted that the standards for a fair trial must be upheld in the prosecution of terrorist offences. The new legislation has been promulgated by parliament and was signed by the President on

A related and significant development was the establishment in August 2012 of the Observation Network of Transitional Tunisian Justice (*Réseau d'Observation de la Justice Tunisienne en Transition*, ROJ) by the Bar Association, the Tunisian League for Human Rights and the international NGO Lawyers Without Borders (*Avocats Sans Frontiers*, ASF). It aimed to gather comments and information on the operation and administration of justice, and on this basis to make recommendations for justice reform.⁷⁰ Mobilising 282 observers, including lawyers and human rights activists trained in international standards of fair trial, it sought to observe and establish gaps and failures in the administration of justice. The Network activities included observation of military court trials relating to the martyrs and wounded of the revolution, trials related to Ben Ali, his family and members of the former regime, and torture crimes.⁷¹ Their work of observation in the context of international best practice constitutes a vitally important test for ability of the Tunisian justice system to deliver on transitional justice, both in terms of its capacity to handle cases relating to widespread crimes such as torture and in terms of the implementation and operation of key transitional justice mechanisms. The network thus put a critically important spotlight on the transition of the justice system itself.

The National Dialogue of 2013 and the Second Constitution

The assassination of Deputy Mohamed Brahmi on 25 July 2013, on the 56th anniversary of the establishment of the Republic had profound political and social consequences in the second transitional period. Coming soon after the murder of Chokri Belaid, it exposed serious shortcomings in the state security apparatus and intensified calls for real progress on transitional justice issues.⁷² In October 2013, a road map was finally agreed between the various signatories to the Troika and the opposition. They agreed to appoint 'an independent national figure' to lead and nominate a new technocratic government and a 'quartet' was subsequently appointed to oversee the National Dialogue. It comprised the Secretary General of the Tunisian General Labour Union (UGTT); the chair of the Tunisian Industry, Trade and Handicrafts Union (UTICA); the chair of the Tunisian Human Rights League (LTDH); and the chair of the Bar Association. They were asked to finalise within four weeks: a draft of the constitution; the composition of the High Instance for Elections; and the electoral legislation.

On 13 December 2013, following intense debate, Mehdi Jomaa, Minister of Industry in the Troika government, was chosen to form a caretaker government to lead the country into presidential and legislative elections. The same day the Organic Law on Transitional Justice was passed (after a full year of blockages) and on 27 January 2014, the NCA promulgated the second constitution of the Republic,

7 August 2015 but at the time of writing it has not yet been published in the Official Gazette.

⁷⁰ For further information see www.rojtunisie.com accessed 4 May 2015.

⁷¹ The trials list is composed of eight types of trials. See page 14 of the first ROJ report issued in December 2012 (in French) www.roj-tunisie.com/details-deuxieme-conference-de-presse-du-reseau-d-observation-de-la-justice-tunisienne-en-transition-relative-a-la-publication-du-premier-rapport-du-roj,47,fr.html accessed 30 June 2015.

⁷² At a press conference on the 28 August 2013 a representative of the Ministry of the Interior stated that the shot which killed Deputy Brahmi had been issued from the same gun used to kill Chokri Belaid on 6 February 2013.

including Article 105 which, as noted, stipulated that the legal profession is 'a free and independent profession'. This affirmation of the role of lawyers in safeguarding rights and liberties offered *de facto* recognition of the role that 'cause lawyers' played during the dictatorship and the course of the revolution and transition. It built on Article 1 of the Decree-Law on the Profession (2011) which established the legal profession as 'free and independent profession that participates in establishing justice and defends freedoms and human rights' and on article 47 of the same decree-law which granted immunity to lawyers in the course of fulfilling their professional duties.⁷³ In practical terms, these developments will enhance the ability of lawyers to engage with the specialised chambers created by the Transitional Justice Law and with the new Constitutional Court.⁷⁴

Conclusion

From the foundation of the Republic through to the post-2011 revolutionary period, lawyers have played a key role in political and public life in Tunisia. A dedicated cohort of 'cause lawyers' fought to defend civil, political and religious liberties under Ben Ali. The revolution of 2011 swelled their ranks and propelled activist lawyers to the centre-stage of political life. The Bar Association was galvanised into action during and after the revolution, most notably in the aftermath of two political assassinations. As a member of the National Dialogue Quartet, Mohamed El Fadhel Mahfoudh, the President of the Bar Association, played a central role in the shaping of Tunisia's transition. This long tradition of defending human rights and liberties and the collective interests of the legal profession was formally acknowledged in Article 105 of the January 2014 Constitution.

The two consecutive crises that erupted as a result of the dispute between lawyers and the judiciary in the winter of 2014 and 2015, however, had a significant impact on public opinion. Although accepting the historic achievements of many lawyers and the fact that they had suffered under Ben Ali (not least as a result of corruption within the judiciary), many citizens now sensed that lawyers were attempting to place themselves above the law and to demand special and privileged treatment. Dissatisfaction was particularly high in the regions where ordinary people (from primarily poor backgrounds) had to wait for the crisis to subside to see their courts functioning again.

The post-revolutionary period also witnessed the development of factions within the ranks of 'cause lawyers'. Most such lawyers were adamant that representatives of the former regime should not have a right to a fair trial (this was, as noted, a founding principle of the 'Group of 25'). The failure of the Troika to manage religious extremism (as demonstrated by successive terrorist attacks and two political assassinations in 2013) fuelled scepticism, animosity and a

⁷³ Article 47 stipulates that no action shall lie against a lawyer in respect of pleadings, acts and reports completed in the course of or in connection with his / her professional duties.

⁷⁴ A Constitutional Council had been established under Ben Ali but with only consultative prerogatives. Exclusive rights of referral were reserved by Ben Ali and as such it had no binding legal legitimacy. The draft law issued by the Ministry of Justice on 16 July 2015 includes reference to the necessity of including a lawyer amongst the twelve members that compose the new Constitutional Court.

growing tendency for secular lawyers to refuse also to defend those accused of terrorist offences.

Ex-regime officials capitalised politically on these divisions and on the general discontent arising from deteriorating socio-economic conditions and were thus able to reorganise and 'recycle' their representatives across a number of political parties. The 'Constitutional Movement', for example, comprised almost exclusively of former RCD members was strong enough to compete in the elections of autumn 2014.⁷⁵ Nidaa Tounes (Tunisia's Call), a secularist party founded in 2012, secured a parliamentary majority under the leadership of founding member and lawyer, Béji Caied Essebsi, and he subsequently became the first elected President of the Republic.⁷⁶

Vital challenges remain for the current government. Many victims, for example, are increasingly concerned for the future of transitional justice processes. Although the Truth and Dignity Commission is now operational, Nidaa Tounes initially expressed concerns about its purpose, suggesting that it may function simply as 'a machine to settle accounts'.⁷⁷ In his investiture speech, the President spoke of the need to support 'national reconciliation' but did not refer to transitional justice.⁷⁸ In view of the concerns of victims and others he was prompted to clarify matters in a speech at the official ceremony of the celebration of the fourth anniversary of the Revolution of Freedom and Dignity. Here he openly pledged his 'support and attachment to transitional justice as a means to ensure that past mistakes cannot happen again, by unveiling the abuses committed, by rendering justice to the victims and holding authors of violations accountable to then lead to reconciliation.' This was nonetheless qualified by a suggestion that 'there is nothing to fear about the Revolution, except from those who appoint themselves as guardian of Tunisians and their conscience' and he went on to stress the need to protect the country from violence, organised crime and terrorism.⁷⁹

The fears of victims were further heightened a public announcement on 20 March 2015 (the 59th anniversary of Tunisia independence). Here the new government stressed the need for 'a national reconciliation' and suggested that the country could no longer tolerate 'grudges'.⁸⁰ It furthermore suggested that 'all obstacles'

⁷⁵ Due to the absence of a political exclusion law, five of Ben Ali's former ministers were candidates in the presidential elections of 2014 (although none succeeded in gathering a significant number of votes).

⁷⁶ For further biographical information see <en.wikipedia.org/wiki/Beji_Caid_Essebsi> accessed 29 April 2015.

⁷⁷ See 'Béji Caïd Essebsi: L'Instance Vérité et Dignité est une Machine à Régler des Comptes' (*Business News*, 11 June 2014) www.businessnews.com.tn/beji-caid-essebsi--linstance-verite-et-dignite-est-une-machine-a-regler-des-comptes,520,47104,3 accessed 14 June 2015. The Commission began officially to receive victims' files on 15 December 2014.

⁷⁸ See <www.tap.info.tn/en/index.php/politics2/23657-president-elect-beji-caid-essebsi-takes-oath> accessed 14 July 2015.

⁷⁹ See <www.tap.info.tn/en/index.php/politics2/23945-caid-essebsi-urges-consensus-national-unity-at-ceremony-marking-4th-anniversary-of-revolution> accessed 14 July 2015.

⁸⁰ See 'Notre Pays ne Supporte Plus les Rancunes' (*Kapitalis*, 20 March 2015) <www.kapitalis.com/politique/28290-beji-caid-essebsi-aux-tunisiens-notre-pays-ne-supporte-plus-les-rancunes.html> accessed 14 July 2015.

confronting the business community must be removed in order to facilitate a meaningful process of nation building. This in turn paved the way for the introduction of the 'economic national reconciliation' draft law on 14 July 2015. This bill includes measures concerning violations relating to financial corruption and the misappropriation of public funds. In an official statement, the President suggested that the initiative was designed to avoid the negative economic impact of prolonged deliberations on such violations, and thus to ensure the successful completion of the transitional justice process as soon as possible.⁸¹ These various pronouncements were designed on the one hand to associate the transitional justice law, and in particular calls for accountability, with backward looking revenge and, on the other hand, to enable Nidaa Tounes to stake a claim to be the party of 'reconciliation'.

In June 2015, the Association of the Families of the Martyrs and Wounded of the Revolution (led by lawyer, Lamia Farhani) renewed their calls for 'truth seeking, accountability and rehabilitation' by forming a 'coalition of equity for the martyrs and wounded of the revolution'. This was inspired by profound disappointment at the rulings of the military justice courts in the cases that came to light in April 2014 and their sense that there have been no positive developments for the wounded and families of martyrs in the period since then. The organisation also contends that public attention is now more focused on police and military victims of recent terrorist attacks than on the victims of the revolutionary period.

The historic Transitional Justice legislation passed by the Tunisian National Constituent Assembly in December 2013 established a comprehensive roadmap for addressing past human rights abuses and for the provision of reparations, accountability, institutional reform, vetting and national reconciliation. Specific mechanisms proposed included a Truth and Dignity Commission (with special consideration for violations against women and children), a dedicated 'Fund for the Dignity and Rehabilitation of Victims of Tyranny' and special chambers with trained judges to deal with cases of human rights violations. In many respects this legislation was considered ground-breaking in the Arab world. Article 2, for example, which stipulates that 'Revealing the truth about violations is a right guaranteed by law to every citizen' was particularly distinctive.⁸² The Tunisian constitution that came into force the following month was also widely regarded as one of the most progressive in the Maghreb.⁸³

In June 2015 the Bar Council issued a communiqué outlining the ways in which lawyers might help to develop and implement the proposed Truth and Dignity Commission. They emphasised the importance of close collaboration between the Bar and the Commission in three key areas: training lawyers in participation and advocacy within specific mechanisms such as the specialised committees and chambers; assisting and enabling the truth seeking process; and contributing to

⁸¹ See TAP communiqué of 14 July 2015 confirming approval of the draft law by Cabinet <www.tap.info.tn/en/index.php/politics2/28385-draft-law-on-reconciliation-in-economic-and-financial-areas-approved-by-cabinet-meeting> accessed 15 August 2015.

⁸² After Guatemala, Peru and Brazil, Tunisia became the fourth state in the world to establish such a right in its transitional justice legislation.

⁸³ In a statement welcoming the constitution, the UN secretary general, Ban Ki-moon, said that Tunisia could be a model for other peoples who are seeking reforms. <www.thetunistimes.com/2014/01/ban-ki-moon-congratulates-tunisia-on-new-constitution-45075/> accessed 1 August 2015.

the arbitration and reconciliation committee by pleading on behalf of clients in relation to the files being examined. Lawyers are thus primed to continue their long-standing contribution to transitional justice in Tunisia but recent political developments would suggest that they will continue to face significant challenges in their efforts to defend civil, religious and political liberties.

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