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Truth and reconciliation? Transitional Justice in Egypt, Libya and Tunisia

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>>> In societies emerging from authoritarian rule and/or conflict, measures of transitional justice should pave the way for national reconciliation. They should also help build new institutional and legal structures to consolidate democracy and human rights. Post-revolutionary Tunisia, Egypt and Libya have yet to properly embark on inclusive transitional justice processes. They need to do this not just to address their heavy legacy of human rights abuses during decades of authoritarian rule, but also to heal the deep divides caused by turbulent political transitions over the past three years. Unlawful killing, mass arbitrary detention and torture continue to occur under transitional governments, reaching alarming levels in Libya and Egypt. The widespread involvement of non-state actors in these crimes, particularly in Libya, is evidence of societal division, polarisation and a severe security deficit in these transitional settings.

An appropriate strategy to reach political reconciliation and build public confidence in the new political regimes should include measures like truth commissions, institutional reform, individual prosecution and reparation. Arab transitional governments have been put under tremendous public pressure to deliver justice for victims of previous regimes or violence during revolutionary upheavals. Furthermore, research also increasingly suggests that human rights and rule of law have improved in countries that followed such routes to truth and accountability (such as South Africa and Northern

HIGHLIGHTS

- Tunisia, Egypt and Libya have to embark on inclusive transitional justice processes to address human rights abuses of the past and heal the deep divides caused by turbulent political transitions.
- Truth commissions, institutional reform, individual prosecution and reparation are crucial for advancing towards national reconciliation.
- The record so far has been mixed due to political and security conditions, with Tunisia making some progress while Egypt and Libya lag very much behind.

»»»»» Ireland). At the same time, there is a case for delaying transitional justice for the sake of short-term national cohesion in order not to disrupt the transition process or the establishment of new democratic institutions. Nevertheless, the timing and sequence of transitional justice measures are contingent upon the success of the democratic transition, and the degree of political power held by conservative forces that consider transitional justice a threat to their political or economic status.

Tunisia, Egypt and Libya follow different paths. Tunisia is currently the only of the three countries in which there is a high prospect for a meaningful process of transitional justice. The new transitional justice law adopted in December 2013 lays the ground for a comprehensive accountability process. However, the law's success will depend on the ability of political forces to agree on key transitional issues, including the organisation of free and fair presidential and parliamentary elections. In Egypt, the democratic transition is at a critical juncture. Power shifts and the makeup of new political alliances since the ouster of the Muslim Brotherhood by the military in July 2013 inhibit at present any meaningful steps towards justice and institutional reform. In Libya, the transitional government has taken some important legal steps to embark on a process of transitional justice. But its efforts go largely in vain as long as the central state is weak and the real political and military power in the country rests with non-state armed brigades.

Despite political and institutional limitations, transitional authorities and civil society in the three countries could press for some small but strategic steps that can gradually open the space for further measures. At the same time, caution is due: transitions are still volatile and the political polarisation among different political groups is intense. Some measures, therefore, if adopted too quickly could also undermine the credibility of transitional justice and even destabilise the transition at large.

THE RECORD SO FAR: NEW LAWS, QUESTIONABLE APPLICATION

Over the past tumultuous three years, Egypt, Libya and Tunisia have adopted a number of measures of transitional justice and accountability. So far, however, these measures have had little impact and some of them have even proved counter-productive by exacerbating societal divides, insecurity and grievances. Successive transitional governments in the three countries have failed so far to initiate judicial and security sector reform, a crucial process for the stability of democratic transitions and the success of other justice-related measures, like truth-seeking and prosecution of individuals.

In Libya, the judicial system has not been able to ensure fair trials and basic legal rights for members of the former regime. Thousands of detainees have been held arbitrarily in prisons controlled by the state and militia brigades for up to three years. The state refuses to hand Muammar al-Gaddafi's son Saif al-Islam to the International Criminal Court (ICC), insisting that his trial should convene in Libya, although the ICC contends that the Libyan judicial system is not capable of handling this case. Libya has also failed to deliver justice for victims of ongoing abuses orchestrated by the transitional authorities or armed militias. Under pressure from a coalition of militias and Islamists, Libya's parliament, the General National Congress (GNC), adopted in May 2013 a Political Isolation Law (PIL) that bars al-Gaddafi-era officials from holding public, political or governmental posts for 10 years. The failure to limit the reach of the PIL to those accused of specific criminal acts allows for a selective, politically-motivated application of this law. The GNC also adopted, in September 2013, a Transitional Justice Law (TJL), thereby establishing a process of truth-seeking, reparation, accountability and institutional reform. According to the TJL, the Congress is entrusted with appointing a Commission of Inquiry and Reconciliation to investigate human rights abuses committed under the al-Gaddafi regime. No time plan has been declared yet for this process. The

commission will have some judicial powers to search for evidence and interrogate witnesses. Problematically, the TJL shields from prosecution all acts deemed 'necessary to the success of the revolution'. By a similar token, the TJL makes no reference to the criminal responsibility of non-state armed groups. Despite many promising provisions in the law, the prevailing security crisis and the lack of a functional judicial system will most likely obstruct the application of this law.

In Tunisia, only days after the fall of Ben Ali, the transitional government established a commission of inquiry into crimes committed during the uprising. Ben Ali, his minister of interior and other high-ranking officers were convicted for complicity in killing protesters during the uprising. However, the courts have failed to identify the perpetrators of these killings. Moreover, these trials did not address atrocities committed prior to the 2011 uprisings. Following the fall of

the regime, political forces and civil society engaged in extensive consultations on possible approaches to deal with the past. By the end of 2011, the newly-elected government led by the Islamist movement

Ennahda established a Ministry of Human Rights and Transitional Justice to examine possible routes and launch consultations with different stakeholders. These efforts, however, were constrained by the increasing mistrust between Islamists and secularists. As the Islamist-led government took no meaningful steps to reform the security apparatus and the judiciary, non-Islamist forces accused them of attempting to control these institutions. However, a few months after the ouster of the Muslim Brotherhood in Egypt, rivaling political forces in Tunisia succeeded in concluding a deal, leading to the adoption of a new constitution in January 2014, and the Ennahda-led coalition stepped aside for a caretaker government. In December 2013, the Con-

stituent Assembly (Tunisia's interim parliament) passed the Transitional Justice Law and is due to select the members of the Truth and Dignity Commission, to investigate grave violations of international human rights law committed between July 1955 and December 2013 – including manipulation of elections, corruption, looting public money, and forced political exile.

In Egypt, there are conflicting narratives on crimes committed during the 18 days of the revolution and afterwards in 2011. Mubarak and his minister of interior were convicted for failing to stop the killing of protesters. Other high-ranking officers were acquitted and the court failed to identify the perpetrators of the killings. Human rights defenders blame the prosecution and security agencies for failing to present evidence. Extra-judicial killing and torture have continued in Egypt under successive transitional governments, reaching a peak after the 2013 ouster of the Muslim Brotherhood. Three official Fact Finding Commissions were established in 2011, 2012 and December 2013 to investigate fatal incidents since the revolution, but none of the transitional rulers, including President Morsi and the military-backed Interim President Adli Mansur, took steps to strengthen these commissions or make their reports public. This suggests that the commissions were created merely to circumscribe public pressure. While prosecutors and the ministry of interior have shown less willingness to investigate atrocities allegedly committed by the state, they are now keen to present evidence in cases involving Muslim Brotherhood leaders. The new military-backed regime has taken far-reaching repressive measures over the past six months against Brotherhood members, with the objective of breaking this powerful political competitor. The 2014 Constitution obliges the new parliament – to be elected by the end of this year – to pass a comprehensive transitional justice law that ensures 'revealing the truth, accountability, national reconciliation and compensating victims'.

Taken together, the current political and institutional obstacles in the three countries suggest that a genuinely comprehensive process

Transitional justice is an urgent priority in post-revolutionary Arab states



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»»»»» of transitional justice is more likely to take place in Tunisia than in Egypt or Libya in the near future.

CURRENT POLITICAL AND INSTITUTIONAL OBSTACLES

Different approaches are needed to address transitional justice in Egypt, Tunisia and Libya, which face very different political and institutional challenges. For example, the path of transitional justice in Egypt faces immense political and institutional constraints. Instead of engaging in a process of institutional reform, Egypt's transition has empowered the military in an unprecedented way. Leading the transition after the fall of Mubarak, the Supreme Council of the Armed Forces (SCAF) shielded the military and security forces from accountability or reform, which have committed serious human rights crimes with impunity. Following the 2012 presidential elections, President Morsi missed a precious opportunity to build a wide political and social coalition to engage in a drastic reform of Egypt's security sector, because he was more concerned with using these forces to repress his opponents and back his partisan agenda. Following Morsi's removal, popular support for the Egyptian military, already traditionally strong, reached new heights. A poll on Egyptians' voting intentions in upcoming presidential elections released by the Egyptian Center for Public Opinion Research in March 2014 found that 51 per cent of participants would support the military's candidate Field Marshal Abdel Fattah el-Sisi, 45 per cent remain undecided and the rest would vote for other liberal and Islamist candidates. Against a backdrop of increasing violence and disorder, the new military-backed government has been able to build popular support for its repressive measures against the Brotherhood and secular opposition. Moreover, members of the military enjoy *de facto* immunity, since military justice is controlled by the military leadership. Furthermore, the political map has changed with the rise of pro-Mubarak forces and the

retreat of the revolutionary coalitions. Most political parties have gone silent on accountability issues, with only a few liberal, leftist and Islamist political groups insisting on transitional justice.

In Tunisia, the influence of the military is not significant like in Egypt. A coalition of different political and civil society forces has jointly devised the transitional roadmap. This is partly because the dramatic 2013 fall of the Muslim Brotherhood in Egypt prompted its equivalent in Tunisia, Ennahda, to conclude a political agreement with the non-Islamist opposition, a deal widely regarded as having secured the transition process in Tunisia. Before new parliamentary and presidential elections are held in 2014, an agreement among political forces on the nature of judicial and security sector reforms needed, including safeguards for the newly-established truth commission, is crucial for the success of the new Transitional Justice Law.

In Libya, the main problem is that neither the state military nor the security apparatus has been able to impose order or to monopolise the legitimate use of force. Armed militias have been powerful enough to hamper the work of the democratic institutions, decrease state control over territory and access to natural resources, creating lawlessness in many parts of Libya. As a result, there have been massive extra-judicial killings, torture, arbitrary detentions, forced-displacements of ethnic minorities and political assassinations (including judges, lawyers, military officers and foreigners). Armed militias are organised along ideological, political, ethnic or tribal lines, and some have purely criminal ends. The state has not been able to disband these armed groups, not just because it lacks capacity, but also because there is no agreement among political forces on the need to do so. On many occasions, some political groups have appeased these armed militias to advance their agendas. The state pays salaries to some militias to impose order in certain regions, but its control over them is marginal.

THE PROSPECTS FOR TRUTH AND RECONCILIATION

Under present conditions, prospects for comprehensive transitional justice in the near future in Egypt are losing ground. In order to change this, domestic and international efforts should focus on ending the ongoing government clampdown on pluralism, civil society, freedom of expression and assembly, and rule of law. The far-reaching measures taken against the Muslim Brotherhood and its allies have transformed the judiciary into a platform for breaking political opponents. The upcoming presidential and parliamentary elections in Egypt, in the midst of a repressive political climate, risk undermining rather than supporting reconciliation and inclusive democracy. Unless the political setting changes radically, the initiation of truth-seeking initiatives cannot succeed. The popularity of those parts of Egypt's revolutionary forces that support this process is currently low. The military and other conservative forces aim not only to protect their interests or themselves from accountability, but also to consolidate their grip on power and undermine the democratic transition itself. These forces, therefore, would probably not take the risk of establishing a truth commission that could de-legitimise their rule. Even if they decided to establish a truth commission in the present climate, it would most likely be a political tool to discredit competitors and legitimise a flawed political process.

In contrast, in Tunisia, despite various political obstacles, there is an opportunity to build on recent progress. It should be a top priority that the selection process of the members of the Truth and Dignity Commission is not driven by partisan considerations. Ideally, the Constituent Assembly would engage with civil society to make sure that the most competent and credible candidates are selected. The state – with the support of international donors – should provide the Commission with sufficient financial resources. The cooperation of state authorities with the Commission will be decisive

for its success and this requires strong political support from the government and parliament. All this will depend on the results of the upcoming parliamentary election and the configurations of political alliances formed before and after it. The work of the truth commission can also be seriously constrained if the main security and justice institutions are left unreformed.

Further steps in transitional justice in Libya cannot proceed under the current political and security conditions. The beginning of the solution lies in building consensus among different political forces on the management of the state and its institutions, including addressing the grievances of certain regions and tribal and ethnic groups. This process should start quickly as signs of popular frustration are growing and the country could easily slide into protracted civil war. The technical support provided by the international community to help build security, military and justice institutions in Libya deserves credit and needs to be further consolidated. But as pointed out this month at the Rome conference of the 'Friends of Libya' – which involved the five permanent members of the United Nations (UN) Security Council and a number of countries from Europe, the Middle East and Africa, as well as the UN, the European Union (EU), NATO, the African Union and the Arab League – 'a comprehensive and inclusive process of national dialogue and reconciliation is key to the stabilisation process'. A pro-active diplomatic engagement by major international and regional actors, especially the US, the EU and Qatar, is needed to push key Libyan rival factions towards agreeing on a transparent plan to integrate the militias into the state army and security apparatus and form a strong and inclusive government until the constitution is completed and the new parliament is elected.

In order to reduce polarisation, members of the former Libyan regime should not be excluded from political or public posts unless they were involved in concrete crimes. The United Nations



Support Mission in Libya can provide technical support to the Libyan judiciary to review the status of the detainees to make sure that no one is kept in prison without charge. International justice does not replace domestic accountability processes in Libya, but the government should cooperate with the ICC until the security situation improves and the institutions of justice become capable of handling high profile cases. The Transitional Justice Law adopted in Libya is a good start, but the law should be clear that it does not only aim to target the members of the former regime but also to deliver justice for all including the victims of the transitional authorities and the armed militias. Current political divisions question the credibility of the selection process for the members of the Commission of Inquiry and Reconciliation, especially since the law tasks the GNC with selecting its members without any guarantees to ensure inclusivity.

CONCLUSION

Transitional justice is an urgent priority in post-revolutionary Arab states. At present, transitional settings make this undertaking more feasible in Tunisia than in Libya and Egypt. As long as a fundamental consensus among key

political players is absent, justice and accountability measures can easily turn to vengeance and destabilise the new political order. To the extent that the political context allows, pressing priorities of transitional justice include engaging in judicial and security sector reform, as well as the establishment of impartial investigation into abuses. Their fulfilment can eventually open space for more holistic transitional justice programmes. A transparent and inclusive transitional justice would help build public confidence in the transition and heal the wounds caused by decades of repression.

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