Transitional Justice in Tunisia

Innovations, Continuities, Challenges

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Introduction

In Tunisia, like in several other countries in the Middle East and North African (MENA) region, demands for economic and social justice were at the basis of the revolution that led to the ousting of the predecessor regime.[1] Indeed, the policies of former presidents Bourguiba and Ben Ali that marginalised and impoverished entire regions were among the main drivers of the revolution, and inspired demands focused on dignity, economic and social justice, corruption, and redistribution of wealth.[2] This concern over economic and social justice and rights was reflected in several early transitional justice initiatives, such as the National Commission for the Investigation of Corruption and Bribery, which functioned as a typical truth commission, but with a mandate focused exclusively on corruption and economic crimes.[3] The final report of the Truth and Dignity Commission (*Instance Vérité et Dignité*, IVD) and the reparation scheme also paid significant attention to economic and social rights.[4] This situation is often contrasted with the limited attention paid to economic and social rights in transitional justice processes in other countries[5] and has often led to the interpretation that the Tunisian transitional justice process has been responsive to the demands of the 2011 protesters and to victims' needs. But is this really the case?

While some elements of the Tunisian transitional justice process seem to be in line with victims' demands, it is uncertain whether this should, in and of itself, be understood as an indication of the transitional justice process being responsive to victims' needs and priorities. First, it has been observed that social justice and dignity demands of the revolution (which centred around unemployment, corruption, and inequality)[6] received some attention in the early stages of the process but were quickly moulded into more mainstream legal frameworks that did not easily accommodate the original demands.[7] It could, moreover, be argued that this judicialisation (and the narrow agenda that came with it) was reinforced when the international donor community focused much of its attention on working with a small section of Tunisian civil society that subscribed to pre-existing understandings of transitional justice.[8] Kurze et al. argue that transitional justice in Tunisia quickly became a largely top-down process,

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which smothered the political power of the revolution's initial driving force.[9] Second, while there was a certain degree of institutional responsiveness to the economic and social demand formulated by activists and victims, this responsiveness was not all encompassing. Many demands were left sidelined while key rights continued to be violated. A notable example of which was the pre-2011 Hijab Ban, or Circular 108. In this chapter, we focus in on this so called hijab ban and its role in the Tunisian transitional justice process.

Circular 108 was the second in a series of Circulars that sought to ban the hijab, a "sectarian dress", from public life.[10] It was issued in 1981 by the Bourguiba administration, banning the hijab in all institutions of higher education. Several further administrative by-laws were passed in December 1991 and February 1992, as the policy stiffened under Ben Ali.[11] Circular 108 became synonymous with the state's campaign against the hijab. This campaign had a vast impact on the daily lives of hijab-wearing women, who risked expulsion from schools and jobs, forced removal of their hijab, exclusion from social public life, regular harassment, and detention by the police,[12] as well as, in more extreme cases, imprisonment, torture, and rape. In practice, the hijab-ban policy deprived thousands of women of basic educational and professional opportunities, and subjected them to (the threat of) continuous physical and psychological harm.[13]

In this chapter, we rely on past fieldwork and a limited amount of new material as well as secondary sources to examine the way in which Circular 108 was dealt with in the transitional justice process. While the nature of the fieldwork does not allow for definitive findings, we explore and seek to open the debate about (a) the extent to which the transitional justice process was responsive to victims' demands; (b) the extent to which the division between civil and political rights, on the one hand, and economic, social, and cultural rights, on the other, has hampered an adequate treatment of violations related to Circular 108; and (c) how this pushed certain issues out of the public discourse on what constitutes a human rights violation.

Justice as discourse

We adopt a discursive understanding of justice because discursive frames shape experiences and give rise to certain understandings of social reality,[14] as well as to certain forms of legal consciousness.[15] They set the boundaries of what is or can be included into the dominant understanding of justice.[16] As such, they contribute to the recognition and legitimation of certain forms of injustice as rights violations. These understandings of (in)justice are shaped through media and other popular discourses that have the potential to direct public attention towards some – and away from other – injustices and thus, contribute to a specific rank ordering of social problems that demand public attention.[17] As Zinaida Miller points out, the issue of prioritisation and

visibility is as important here as the question of what remains invisible in the dominant discourse on justice.[18] As such, we see actors' – individual and collectively held – understandings of justice as being crucially shaped by (political) discourse. We adopt this discursive understanding of justice to open the conceptual space for analysing the social construction of justice claims and for understanding the effects of dominant justice frames on individuals' and collectives' understandings of what they are justly entitled to. A discursive approach to justice thus allows us to understand transitional justice interventions (and the discourses emerging within and around them) as boundary markers that set the framework for thinking about what is and is not considered a crime or a violation, what one can and cannot seek accountability for, and what does and does not generate a right to reparation and recognition as a victim. This focus on – the issue-shaping power of – discourses is particularly relevant when considering the importance of victim participation in transitional justice, which means that an increasing number of actors are (in)directly exposed to these discourses.[19] When certain issues are given prominence or acknowledged as a violation whereas others are not acknowledged, contested, or receive less attention, this might affect participants' understandings and experiences of justice and of what their rights are.

We position this chapter within the domain of vernacularisation studies, as proposed by Sally Engle Merry.[20] This prompts a focus on (a) how actors navigate and interact with dominant discourses (i.e. we acknowledge both their agency as well as the structural limitations they encounter), and (b) how the same discourse can affect different actors in different ways, which is particularly relevant when studying a phenomenon like the hijab ban (which was implemented in a more moderate way in the south of Tunisia, where covering the head was more prevalent and acceptable).[21] Drawing on recent scholarship on women's rights in North Africa,[22] we use an intersectional lens to discuss the ways in which women's complex realities have been presented in legal debates. In particular, we problematise the ways in which these multilayered intersectional realities were often flattened into a hegemonic discourse of women's rights in the legal and political process of transitional justice.[23]

To gain a better understanding of the ways in which the hijab ban has been dealt with by the IVD and in the reparation scheme, we rely on approximately 30 earlier interviews and the long-standing engagement with various elements of the transitional justice process of the second author.[24] In addition, we benefited greatly from the conversations held during a workshop organised in preparation of this volume. Furthermore, we conducted a limited number of expert interviews with gatekeepers of the transitional justice process (notably IVD commissioners and lawyers), as well as prominent members of civil society organisations who organised around the IVD, and international experts working on this matter.[25] We also engaged with Facebook groups, blogs, and forums on this topic to better gauge the popular narratives, and we examined

the public hearing testimonies on Circular 108 and communications about this case released by involved NGOs and other civil society organisations.[26] While we do not claim to offer a comprehensive analysis, the remainder of this chapter offers a preliminary discussion of three topics that emerged from our reading of these materials: responsiveness, indivisibility of human rights, and processes of erasure and invisibilisation.

Responsiveness of the justice process

Circular 108 affected the lives of thousands of Tunisian women and soon became a central concern for many activists mobilising in the run up to and after the revolution of 2011. These activists and civil society organisations often had close relations with the main ruling party that came to power after 2011, *Ennahda*, because of their shared ideological and religious background. In addition, they also had significant support from international organisations, like the International Center for Transitional Justice, to push for a gendered approach. Because of this, there was momentum civil society organisations (like Tounissiyet, Nisaa Tounissiyet, and the Transitional Justice is also for Women Network)[27] to advocate gender sensitivity, establish a women's committee in the IVD, and open up the debate on what constituted a crime or rights violation for which women could come forward. Their activism, along with the fact that several of the first files submitted to the IVD by women concerned the hijab ban eventually led the IVD to acknowledge violations related to Circular 108 as violations of women's rights, under the banner of violations of freedom of dress. The four IVD commissioners interviewed for this chapter concurred that this decision was preceded by vigorous debates. Some commissioners refused to recognise the Hijab ban as a violation in and of itself, while others were willing to understand it as a systematic violation of women's rights. Some commissioners even went a step further, claiming the ban amounted to a gross violation of human rights.[28] Interviewees, moreover, alluded to a block mentality that characterised much of the transitional process[29] and shaped the discussions within the IVD. Commissioners who are typically perceived as belonging to the Ennahda block blamed commissioners typically perceived to belong to the leftist or secular block of wanting to push any issue related to freedom of religion off the table, and vice versa.[30] Eventually, the General Council of the IVD acknowledged Circular 108 as a systematic human rights violation, understood to be a compromise between the aforementioned block approaches.[31]

Interviewees also referred to this block mentality and politicisation with regard to the way in which the reparations scheme was developed.[32] In this instance, commissioners perceived to have an Ennahda affiliation blamed others of not wanting to allocate any reparations at all to this violation, whereas the others accused the allegedly Ennahda commissioners of seeking more extensive reparations for these violations. Eventually, systematic violations such as

the violation of the right to education, forced divorce, or freedom of dress were allocated a reparation order of 15%. This was a percentage that could – formally – be granted both to women who came forward *only* for this violation as well as be added onto a reparation order issued for other kinds of violations.[33] For example, if a woman had been a victim of rape in a context that related to her wearing of the hijab, this would entitle her to 70% of a reparation order based on the rape claim and an additional 15% based on the hijab component. Similarly, if a woman was denied the right to education because she wore the hijab, she was entitled to 15% of a reparation order based on the claim related to her right to education[34] and an additional 15% based on the hijab-dimension. If a hijab-wearing woman would come forward to make a claim about a rights violation *only* related to her wearing of the hijab, she would – formally – be entitled to a reparation order of 15%. However, several disclaimers are in place.

First, hijab-wearing women who preventively took off their hijab because they did not want to take risks were not entitled to financial reparation under this interpretation. Second, while it was formally possible to come forward with a claim only related to the hijab, in practice, several women lamented in Facebook victim-groups[35] and during earlier informal conversations with victims which took place in 2019 and 2020 that despite providing all the required evidence, they received a reparation order of 0%. Also, a researcher in the committee of women in the IVD interviewed for this paper stated that while she provided all the necessary proof about the impact of the hijab ban on her education and employment, she still received a material reparations order of 0% and that she had never seen orders approximating 15%.[36] Third, the entire regulation is cloaked in uncertainty and opacity. Even interviewed commissioners themselves all cited different percentages, indicating that they were not fully aware of how this violation was weighed. Moreover, earlier interviews, online forums, and Facebook victim-groups suggest that victims are often entirely unclear about which elements of their victimisation were taken into account to calculate the height of the reparation order. One of the women active in one of the online victim groups shared with us her reparations order which reads: "The victim benefits from the amount of 66.75% times the unit 2000TND", without an elaboration on how that percentage was reached or decided. The document also mentions that the victim will receive a personal certificate of the apology of the president. However, she and others in the group were doubtful that financial, or even symbolic, reparations would ever take place. This brings us to our fourth point: at the time of writing, the reparation orders have all been issued, and a reparation fund has been opened, but no money has been transferred to this fund yet. This means that no reparations at all have materialised so far, and it is uncertain where the money would come from and when it would be transferred. Particularly given the government's position and reluctance of international donors to supplement the fund.

Moreover, only 5% of all file submissions up until 2015 were made by women.[37] Doris Gray cites fear of social stigma, pressure from family members,

and lingering trauma as reasons for women's reluctance to come forward, along with the confusion over who was considered a victim by the IVD.[38] Many women believed that the IVD was only for prisoners and those who received General Amnesty in 2011 after the revolution.[39] This low representation of women led the IVD and several women's groups, like Tounissiyet, to set up outreach campaigns to raise awareness of the kind of violations that would be considered by the IVD and the kind of measures that were in place to ensure anonymity and protection for victims. At the same time, the IVD established eight regional offices and sent mobile units to remote areas to facilitate access. This increased the number of files submitted by women to 23%. Eventually, 23,717 violations were registered after conducting private hearings with women, in which 13.02% were violations of the freedom of dress and appearance.[40] This was the second-highest percentage of registered violations after the violation of the right to household and house integrity, with 22.18%. In terms of number of files, 37% (3,099) of the files submitted by women included the violation of the freedom of dress.[41]

The process was organised so that women, and victims in general, could have their testimony registered for the formal report without providing any evidence. Then, to move the case to the investigation stage, women were requested to provide a picture of themselves wearing the hijab in the period they testified about or, in case of other violations, the testimony of two eyewitnesses not related to the victim. However, for underprivileged women who were victim of the intense anti-hijab campaigns of 1991/2, this burden of proof constituted a significant hurdle: often, they had no cameras available, and all official photos or photos in educational or professional contexts would not show the woman wearing a hijab. This means that, unless they happened to have been at a social event, like a wedding where they had their picture taken, it was unlikely that they would have a photo wearing the hijab.[42] Moreover, many violations were virtually impossible to prove: for women who were fired from their job, for example, their termination letter would unlikely mention the hijab but instead mention other issues. Similarly, women who would apply to educational programmes would not get rejection letters explicitly mentioning the hijab. This means that these kinds of violations that disrupted the daily lives of many hijab-wearing women were prone to being pushed off the table as the process moved to the investigation stage.

In addition to this criticism about the burden of proof, there was criticism over the timeline.[43] The IVD first collected all the testimonies and only moved to the investigation stage after this. This meant that someone who had testified in the first month after the IVD started its work might have had to wait until the last year of its operations before receiving a request for proof to open the investigation phase and would then have to provide this proof within months. Former president of the committee of women, Ibtihal Abdellatif, criticised this approach for the short notice, inadequate outreach and failure to contact all women concerned, and placement of the burden of proof on the victims. She

argued that this last-minute change that resulted in barring most of the files from moving on to the investigation stage added to women's experience of victimisation as their expectations remained unmet.[44] She illustrated this perception by referring to a video clip that was posted in June 2019 in one of the Facebook victim-groups, showing a group of Circular 108 victims protesting outside of the IVD's headquarters. It shows a woman saying: "No one recognized our rights. They took and took and took files. Then on May 31st, they gave us back empty files".[45] During another interview, the former president of the research and investigation committee argued that women were unable to provide this evidence because it was either unavailable, time was too short, or the request for evidence never reached them (in time). As a consequence, the majority of the files concerning the hijab ban never reached the investigation phase.[46] This created impressions of mismanagement and was even perceived by some women as an intentional attempt to push hijab-wearing women's stories and victimisation off the table.[47] Such intentionality, however, is hard to prove, and the former president of the research and investigation committee asserted that they tried to keep the burden of proof as light as possible but needed to install some sort of measure because, unlike with other more manifest violations, violations related to Circular 108 were more difficult to cross-check with other testimonies that were already in the system and, therefore, could not easily be confirmed in that way. "When a woman comes forward and tells us that she was expelled from her studies because of this circular, do we have a way to prove this? No", reiterated the commissioner. She contrasted this with the example of someone being arrested in a public place; in which case, often, there were eyewitnesses and stories could be cross-checked with testimonies that were already in the database, rather than asking the victims for further evidence. She also cited the immense scrutiny which the commission was already under and which made allocating reparations based on empty files inconceivable. Irrespective of whether this was an intentional strategy or not, the commissioner confirmed that many women had the perception that the process was not responsive to their lived realities and led many to set up organised protest actions, like sit-ins, in response.[48]

Zind Ahmed Zaki argues that another dimension regarding the issue of responsiveness is the fact that, for many women, their claims were rooted in, and illustrative of, a newly emerging subjectivity which combined references to Muslim and conservative identities with a discourse of feminism and women's empowerment as an act of resistance against the violence committed against them.[49] These claims were often so genuinely complex and intricate that they defied classical transitional justice approaches and categorisation, and were nearly impossible to capture within the categorisation implicit in the managerial blueprints that often characterise transitional justice interventions. They showed the limitations of judicialisation which, worldwide, has narrowed women's rights into an agenda of prosecuting sexual violence above a contextual understanding of the setting within which this happens.[50] As Boesten and

Wilding argue: "Even when women's voices are included, as is increasingly the case, the fact that they speak to a different messier agenda, means that they are often not heard".[51] This reality is also relevant when studying other transitional justice processes in the MENA region.[52]

In sum, our enquiry suggests that initially, there was indeed a degree of responsiveness (in terms of acknowledging the economic and social rights violations and violations of women's rights under the hijab ban) but that far-reaching levels of politicisation at the IVD and beyond, as well as the more general constraints of judicialisation of chronic long-term violations, seem to have derailed the process. In the next section, we zoom in on *how* the violations related to Circular 108 were dealt with by the IVD.

Circular 108 and the indivisibility of human rights

The perception that the IVD was not responsive to women's lived realities when it came to Circular 108 seems remarkable at first sight, given the amount of attention that has been given to Circular 108 violations. These violations however, were almost always discussed in relation to the violation of another right (e.g. women's rights to education, employment, or housing being violated because they wore the hijab, or women experiencing physical violence, such as torture or rape, after being arrested for wearing the hijab). Thus, only women who persisted in wearing the hijab, and as a consequence thereof had other rights violated, were de facto considered victims of Circular 108. On the contrary, the situation of hijab-wearing women who were pressured into removing their hijab daily, occasionally, or when stopped by the police, in order *not* to have other rights violated or to access other rights, was not given due attention. While several commissioners confirmed during interviews that women in such situations did not qualify for material reparation, their reasoning differed. Some cited financial and logistical reasons for this decision,[53] while others believed that having to remove the hijab to enter the school and have access to education was not in and of itself considered a violation by the IVD.[54]

Since the IVD determined the reparations based on damages, this also means that the reparation of 15% for Circular 108–related violations was not awarded if there was no proof that wearing the hijab also led to the violation of one or more other rights. While a compound violation approach is potentially useful, this way of linking the hijab ban to other rights violations reduced the lived realities and multilayered experiences of women to the one "spectacular and recognizable" moment (e.g. of detention).[55] Moreover, the fact that the interviewed experts and commissioners contradicted each other and the reparations order (which is in itself formulated in an ambiguous manner) with regards to what qualifies as a violation, is indicative of the opacity of the process and the extent to which women were navigating an uncertain and unpredictable environment if they chose to come forward.[56]

This linking of Circular 108 to other rights – rather than seeing it as a rights violation in itself – was not only visible in the IVD but also in organisations mobilising in its orbit. For instance, the collective file of 140 testimonies compiled with the support of the International Center for Transitional Justice and the Transitional Justice is also for Women Network, made important steps towards linking the hijab ban with economic, social, and cultural rights (ESCR), and encouraging women to come forward. However, by casting the loss of work and education as proof of the gravity of the hijab ban, this violation remained itself a background for other violations that were considered more important and it became difficult to see it as a stand-alone violation.[57] This framing and focus on compound violations are, to some extent, in line with scholars and commentators arguing for (a) a more expansive understanding of rights violations in transitional justice (most notably for paying more attention to economic and social rights) and (b) a more encompassing understanding of how certain rights violations tend to reinforce one another. Both seem to have happened in the Tunisian case, where a broad range of rights violations were considered and certain rights violations were explicitly linked to others. However, the unforeseen effect of this specific way of organising this more expansive and encompassing understanding of rights violations has been the emergence of a hierarchy of victimisation experiences: the more types of violations suffered, the more boxes a woman could – quite literally – check on the IFADA form used to register testimonies and the higher the reparation order applying to her case. Thus, even when adopting a compound understanding of rights violations, certain violations can still end up being foregrounded and others invisibilised; indivisibility can still produce victim hierarchies if applied in this way.

This hierarchisation is the consequence of a rather counterproductive understanding of compound violation in which every single violation is understood to constitute a separate category, and several categories can be added on to one another, checkbox-style. The suffering of women whose right to wear the hijab – and only that right – was violated on a daily basis in this understanding only makes it to the lowest rung of the ladder of compound violations, as it only concerns one type of rights violation: a type that is deemed to be less impactful than other more recognisable violations. As the commissioner in charge of research and investigation argued when discussing the reparations: "There is a big difference between someone who continued their work and someone who was deprived of everything, between someone who continued their studies and someone who was imprisoned, so we looked at this difference". This strategy of categorisation fails to fully account for the impact of structural violence suffered on a daily basis and continues to prioritise "spectacular and familiar" harm over structural violations.[58] Moreover, even in those cases where a woman would check several boxes on the IFADA form, this checkbox approach does not genuinely examine how these violations relate to each other or what the *nature* of a compound violation is. It does nothing to

expose the underlying dynamics of marginalisation and broader socioeconomic injustices that would explain the compound nature of the violations. To this end, a more intersectional understanding of indivisibility would be needed that not only addresses the indivisibility of ESCR and CPR but also that of religious rights and secular rights, of the spectacular and the everyday, of the public and the private, and so forth.

This intersectional approach of indivisibility is also crucial in gender-sensitive analyses of transitional justice which critiqued mainstream transitional justice approaches for failing to pay sufficient attention to gendered harms. To the extent that gendered harms have received significant attention at all, it has mostly been about harms such as wartime rape and conflict-related sexual and gender-based violence, which neatly fit transitional justice's scope. As Elise Ketelaars argues, "[t]his scope has been contested by feminists, as it has been constructed around patriarchal conceptions of what constitutes harm [. . .] prioritizes politically motivated bodily harms inflicted on victims in the public sphere".[59] In response, several scholars have advocated for more attention to violations of ESCR, which tend to disproportionally affect women.[60] What this case shows though, is that more attention to ESCR does not, in and of itself, lead to a more gender-sensitive approach, as there was actually significant attention for ESCR here.

This relates to the fact that an entire section on the rape and sexual torture of women was omitted from the final report of the IVD.[61] This is striking in light of transitional justice's tendency to foreground what Randle DeFalco calls 'spectacular and familiar' crimes: crimes that follow the pre-established tropes of being both spectacular (such as torture, murder, disappearings, etc.) and familiar (i.e. fitting engrained beliefs and expectations about what a crime looks like).[62] However, in this case, it is exactly these 'spectacular and familiar' crimes that were omitted from the report. The former president of the reparations committee argued during an interview that this happened in order to protect women,[63] while other IVD employees and researchers who worked on the report challenged that argumentation,[64] stating that the chapter was anonymised in a way that would make even mosaic identification impossible. By removing the section about sexual torture and rape – which disproportionally affected hijab-wearing women – the issue of Circular 108 remained more low-profile and was considered to be less shocking than other sections of the report, which did describe 'spectacular and familiar' rights violations in detail.

Transitional justice has often been critiqued for prioritising CPR over ESCR.[65] In this case however, two major instances that would neatly fit this predilection for CPR were sidelined: the hijab ban was almost exclusively discussed as the background condition explaining other types of – mostly ESCR – violations[66] and accounts of rape and sexual torture were mostly erased from the final report. This shows the importance of approaching both transitional justice and its critiques in a context-specific manner. The improper treatment of these issues meant that a pervasive kind of rights violations, which constituted a

structural injustice affecting the daily lives of thousands of women, was pushed to the sideline if it did not result in the violation of another kind of right. This specific interpretation of compound victimisation risks being counter-productive and overlooks the structural violence and injustice experienced by these women on a daily basis. The choice for this interlinking of rights seems to have been – at least partially – inspired by a legitimate concern of human rights advocates with the indivisibility of human rights. However, in this case, its effect has been to partially brush over certain rights violations that greatly affected the daily lives of women and risked rendering these experiences invisible. In the next section, we zoom in on the issue of invisibility.

Invisibilisation or erasure?

Our enquiry underlines the importance of seeing justice discourses as systems of classification, selection, certification, and appropriation: and thereby, also of contestation, rejection, and struggle. The question of which harms make it into the justice discourse is, in essence, a question about framing something that would otherwise be considered normal as a crime or a rights violation. This also means that that which does not fit the discourse becomes invisible.[67] As Benno Herzog argues, the acknowledgement of "social suffering is only possible because individuals – often unconsciously – have claims involving recognition".[68] Here, invisibility should be understood not only as the literal absence of something from the discourse but also as the tendency to mention a problem "and then to ignore it or to background structural factors in favor of more obvious concerns".[69] In this section, we address visibility and recognition through a discursive lens by focusing on dynamics of invisibilisation and erasure. This allows for focus on both actors as well as structures and socio-political context.[70]

We conceptualise *invisibilisation* as the communicatively or discursively produced process whereby something comes to be considered as irrelevant (as a group of actors, an issue, or a story) in public processes of communication and deliberation.[71] Through this implicit social process, a discourse emerges in which certain issues are not mentioned or seen. As Herzog posits, some kind of *invisibilisation* is inevitable in any social context where one has to make sense of a multitude of phenomena with high degrees of complexity.[72] Yet, what becomes invisible is not a neutral process or casual occurrence and in many ways reflects existing power dynamics that are shaped by, and shape, the actions and discourses of those who are invisibilised as well as of the rest of society. In that sense, we argue that invisibilisation follows broader tendencies of marginalisation and structural violence, as described by Galtung.[73] We thus see it as a process of omission that warrants a focus on social structures and dynamics, rather than on actors.

We further follow Galtung, who opposes the notion of structural violence with that of direct violence in which an actor can actually be identified. We

build on this notion of direct violence to contrast the process of invisibilisation with the process of *erasure*, arguing that issues and actors do not disappear from public discourse through dynamics of invisibilisation (like structural violence), but also through direct acts and choices of actors (such as direct violence). For these instances where the act of omission and the actor committing the act are important, we use the term *erasure*.[74] Transitional justice entrepreneurs with privileged access to decision-making structures, formal processes, and the media should be considered as central norm-entrepreneurs in shaping these processes of erasure. Also, when we acknowledge that erasure is an active choice of omission, we do not imply claims about intentionality: choices could be driven by strategic calculation as much as by feasibility or efficiency considerations. And, while we acknowledge that there might be justifiable reasons to prioritise certain issues over others, we also stress the need to examine the extent to which certain issues are more or less likely to be erased from the justice discourse and emphasise the need to examine the extent to which these issues are more or less relevant to certain groups in society, in ways that might – again – reflect certain power relations.[75] This is particularly relevant if we consider that both invisibilisation and erasure can have a direct effect on actors, in the sense that they can lead to a socially produced kind of self-selection or self-restraint on the side of actors that could legitimately claim to have a stake in the matter from seeking attention for their realities. They can also impede consciousness formation and mobilisation.[76]

In the Tunisian case, both dynamics can be observed. The fact that only 5% of the initial testimonies were given by women can be read as an outcome of invisibilisation processes in which women's issues were so absent from the mainstream public discourse on justice that even women themselves did not consider their own experiences to be relevant to this process and did not come forward, which further invisibilised their lived realities. On the contrary, the fact of asking women shortly before the deadline to provide a kind of evidence that could not easily be collected in due course has, by many stakeholders, been interpreted as a conscious decision aimed at pushing these stories out of the official discourse and could, as such, be understood as erasure.[77] Also the last-minute choice to omit the section on sexual violence against women can be understood as an act of erasure – irrespective of its intent. This analysis does not overwrite the agency that victims or invisibilised groups have in terms of contesting this and pushing for a counter-visibilisation.[78] In this case, the outreach campaigns that took place after 2015 and sought to boost the number of women coming forward, as well as the successful push to foreground Circular 108 violations in one of the 14 public hearings organised by the commission, can be understood as attempts to counter both invisibilisation and erasure.[79]

The consequences of this invisibilisation and erasure of certain human rights violations is particularly important when considering the expressive function of transitional justice processes. As Zinaida Miller puts it: "Ultimately, transitional

justice is a definitional project, explaining who has been silenced by delineating who may now speak, describing past violence by deciding what and who will be punished".[80] We therefore need to carefully consider what is identified as a rights violation in the transitional justice process because, as Miller goes on to argue, it shapes the vocabulary for redress and the stories we tell about past – and ongoing – harm.[81]

In this case, victims have, by and large, been presented with the story in which the violation of their right to religious freedom and freedom of expression does not constitute a valid human rights violation in itself but only becomes relevant when, and to the extent that, it affects other rights.

By focusing on these processes of invisibilisation and erasure, we seek to draw attention to the discursive and epistemic violence that happens when a range of lived experiences of injustice are invisibilised and erased from the debate on the one hand, and the need to analytically distinguish between them in a way that shows openings for interventions and improvements in the process on the other.

Conclusion

Circular 108, or the hijab ban, is a case in point of the complex social and legal realities that transitional justice processes have to navigate. While it concerns a violation of freedom of religion and freedom of expression in the first place, it also resulted in a multitude of other rights violations such as movement, education, housing, and employment. Moreover, because of the wide scope of its implementation over a period of thirty years, and because of the vastly different lived experiences of victims, the hijab ban is an issue that defies easy categorisation, judicialisation, or straightforward integration into existing transitional justice frameworks. In this chapter, we used the hijab ban to highlight three broader issues related to the Tunisian transitional justice process.

First, we argued that even if the Tunisian transitional justice process is sometimes described as one that has been responsive to victims' justice needs, as issues like the hijab ban and ESCR violations were addressed by the IVD, the story is more complex. Victims, as well as truth commissioners themselves, raised questions about the extent to which the process has indeed responded to victims' needs and, in particular, about the extent to which elite capture, politicisation, and block mentality soon started to derail the work of the IVD, leaving untapped some of the promising potential that was there at the outset.

Second, we argued that the hijab ban constitutes an interesting case to think about the indivisibility of human rights and the issue of compound perpetration: even though the hijab ban, as well as the section on physical and sexual violence, falls neatly within transitional justice's oft-described focus on CPR, neither of these issues were foregrounded in the final report of the IVD. The hijab ban in particular, despite being formally referred to in the report as a

systematic violation of human rights, was mostly treated as a background violation (much like ESCR in many other cases): it was mostly mentioned in relation to the other violations it led to, receiving validation and attention mainly when it could be linked to a more spectacular rights violation. We therefore argue that in that sense, the lived realities of hijab-wearing women continued to be overlooked. More specifically, we contend that more attention for ESCR and compound violation is only likely to result in a more gender-sensitive approach if it is conceptualised in a context-specific manner and in a way that approaches the indivisibility of rights from an intersectional perspective.

Third, we touched upon the issue of invisibilisation and erasure, arguing that both structures and broader societal processes, as well as the conscious decisions by actors, need to be considered to understand why the issue of Circular 108 received the kind of attention it did. We focused on the role of judicialisation in explaining this invisibilisation/erasure and encourage further research into how the dynamics of politicisation presented in the introduction to this volume affect this. Due to formal constraints, we did not examine the effects of this erasure and invisibilisation. Yet, in light of the expressive functions of transitional justice interventions, it is relevant to investigate how the erasure and invisibilisation of this issue affected more long-term dynamics surrounding the justice process, such as activists' legal consciousness and their mobilisation priorities and strategies.

In sum, the Tunisian IVD can be lauded for its attention to ESCR and socioeconomic injustices that affected large swaths of the population, as well as seeking to acknowledge compound violations. However, as several commentators have already warned, widening of the transitional justice paradigm poses challenges with potentially harmful consequences for women victims as well as the women's rights agenda more generally.[82] In the Tunisian case, expanding the IVD's mandate resulted in the framing of certain violations (such as the hijab ban) as background conditions for other more spectacular violations, rather than addressing the broader dynamics of – socioeconomic – marginalisation that explain compound violation. This specific interpretation of compound violation and of the indivisibility of rights, which was meant to provide more holistic responses, still produced hierarchies, and certain harms were foregrounded whereas others elided. This demonstrates the complications of taking seriously the indivisibility of human rights and attention to structural injustice and compound violation. We believe that part of the remedy – for other contexts and future truth commissions – lies in a more context-specific approach as well as in an approach that defines indivisibility in a more expansive multifaceted way (e.g. the formal indivisibility of ESCR and CPR, but also the factual indivisibility of religious and secular rights, and of the spectacular and the everyday) and that genuinely considers interrelatedness between various harms in an intersectional way. However, we also believe that this case demonstrates that there is a conversation to be had about whether only classic transitional justice

interventions with their focus on judicialisation can ever really achieve a sense of justice among those most affected by harm.

Notes

1 Pablo de Greiff, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc. A/HRC/21/46, August 9, 2012, para. 17. Note that we do not equate demands for economic and social *justice* with attention to economic and social *rights*, which are analytically different, but we do posit a link between the two.

2 The ACLED database shows that protests over economic and social rights were already important in 2010 and massively gained importance in 2015–2016. See Jan-Philipp Vatthauer and Irene Weipert-Fenner, *The Quest for Social Justice in Tunisia: Socioeconomic Protest and Political Democratization Post 2011*. Hessische Stiftung Friedens- und Konfliktforschung: PRIF Reports (Frankurt am Main: Peace Research Institute, 2017).

3 Kora Andrieu, "Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011", *Human Rights Quarterly* 38(2) (2016): 261–93.

4 Final Report, part 3: Financial corruption and the violation of public funds (IVD, 2018); Final Report, part 4: Reparation and recognition (IVD, 2018), 170–8.

5 Louise Arbour, "Economic and Social Justice for Societies in Transition", Emilio Mignone Lecture, New York, 2007.

6 Also see Han, in this volume.

7 See Christopher Lamont and H. Pannwitz, "Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia", *Global Policy* 7(2) (2016): 278–81.

8 Anna Antonakis-Nashif, "Contested Transformation: Mobilized Publics in Tunisia Between Compliance and Protest", in Heiko Wimmen and Muriel Asseburg (eds.) *Dynamics of Transformation, Elite Change and New Social Mobilization: Egypt, Libya, Tunisia and Yemen* (London: Routledge, 2018).

9 Arnaud Kurze, Christopher Lamont, and Simon Robins, "Contested Spaces of Transitional Justice: Legal Empowerment in Global Post-Conflict Contexts Revisited", *International Journal of Human Rights* 19(3) (2015): 260–76, 269.

10 The first circular, Circular 22, was issued by then prime minister Mouhammed El Mzali on 17 September 1981, and addressed the appearance of employees in public institutions. Circular 108 was issued one day later by the minister of national education and was addressed to schools. Circular 108 was widely distributed to all women pupils and students, as well as their parents. This led to public unrest and protests, but did not result in a policy change. Because of the omnipresence of Circular 108, it became synonymous with the hijab ban policy in general. We, thus, use Circular 108, the most infamous and known of the different by-laws, to refer to the hijab ban policy in general. See Final Report, part 2, section 3: Violations against women, IVD, 2018, 14–19.

11 Hind Ahmed Zaki, "Resisting and Redefining State Violence: The Gendered Politics of Transitional Justice in Tunisia". *Journal of the Middle East and Afric*a 9(4) (2018): 359–77.

12 Hijab-wearing women risked detention at any moment just for the act of wearing the hijab, regardless of political activities or location. A classified internal document from the Ministry of the Interior dated 2009, reads: "I am honoured to let you know that on 18/03/2009, a girl wearing a headscarf was detained [. . .] after investigation it became clear that she practises her religious duties regularly. She was warned about the necessity to remove the sectarian dress and she showed willingness to do so". *Sectarian clothing* was the term used by the government to describe the headscarf at that time, www.facebook.

com/kachf.elmastoor/photos/a.1604753176297295/2502064033232867/?type=3&theat.

13 International Center for Transitional Justice, "'It Was a Way to Destroy Our Lives': Tunisian Women Speak Out on Religious Discrimination", www.ictj.org/news/tunisia-women-speak-out-religious-discrimination-TDC (Accessed March 21, 2020). To date, the Circular, although no longer implemented, has not been revoked, annulled, or overruled. This lack of legal action and clarity led to a few incidents, such as the 2015 Tunisair dismissal of a hijab-wearing flight attendant, where it was argued the headscarf reduces the employees hearing. Despite de jure still being in effect, the Circular has taken on a life of its own, and even lawyers litigating cases concerning this Circular have trouble identifying it and retrieving the exact wording.

14 Jerome Bruner, "The Narrative Construction of Reality", *Critical Inquiry* 18(1) (1991): 1–21.

15 Ellen Barton, "The Construction of Legal Consciousness in Discourse: Rule and Relational Orientations Toward the Law in a Disability Support Group", *Journal of Pragmatics* 36(4) (2004): 603–32.

16 Zinaida Miller, "Effects of Invisibility", *International Journal of Transitional Justice* 17(2) (2008): 266–291; Carranza, supra n. 11.

17 Dorota Lepianka, *Justice in European Political Discourse – Comparative Report of Six Country Cases: Political, Advocacy and Media Discourse of Justice and Fairness* (Utrecht: ETHOS Justice, 2018); Maxwell McCombs and Amy Reynolds, "How the News Shapes Our Civic Agenda", in Jennings Bryant and Mary Beth Oliver (eds.) *Media Effects: Advances in Theory and Research* (New York: Routledge, 2008), 1–16.

18 Miller, supra n. 16.

19 de Greiff, supra n. 1; also see Tine Destrooper, "Accountability for Human Rights Violations in Cambodia: Mapping the Indirect Effects of Transitional Justice Mechanisms", *Asia-Pacific Journal on Human Rights and the Law* 19(2) (2018).

20 Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle", *American Anthropologist* 108(1) (2006): 38–51; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006); Peggy Levitt and Sally Merry, "Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide", in Dorothy Hodgson (ed.) *Gender and Culture at the Limit of Rights* (Philadelphia: University of Pennsylvania Press, 2011); Tine Destrooper and Sally Engle Merry (eds.), *Human Rights Transformation in Practice* (Philadelphia: University of Pennsylvania Press, 2019).

21 Final Report, part 2, section 3: Dismantling the dictatorship regime, violations against women (IVD, 2018).

22 Maha Abdelhamid et al., *Etre noir, ce n'est pas une question de couleur* (Tunisia: Nirvana, 2017); Doris Gray and Terry Coonan, "Notes from the Field: Silence Kills! Women and the Transitional Justice Process in Post-Revolutionary Tunisia", *International Journal of Transitional Justice* 7(2) (2013); Doris Gray and Nadia Sonneveld, *Women and Social Change in North Africa: What Counts as Revolutionary?* (Cambridge: Cambridge University Press, 2018).

23 Zaki, supra n. 11 at 4.

24 Safa Belghith worked as a research assistant on projects involving victims with King's College London, Resisting State Crime (2013), and Every Casualty Worldwide (2014). She also regularly organised meetings with the Truth Commissioners and victims organisations as part of the academic Tunis Exchange programme and engaged in many informal conversations with victims of the hijab ban in the months before writing this chapter. Tine Destrooper is external to the Tunisian context and participated only in the discussions and interviews that took place in 2020.

25 Interviews took place in Tunis and Sousse, and were carried out in a combination of English, French, and Arabic. Transcripts were generated in English.

26 We foregrounded those materials that interviewees referred to as having critically shaped people's understandings of the transitional justice process. Tim Rapley, *The Sage Qualitative Research Kit: Doing Conversation, Discourse and Document Analysis* (London: Sage Publications, 2007).

27 Tounissiyet and Nisaa Tunissiyet where both founded in 2011, after the revolution. Both are concerned with women's issues and rights, economically, socially, and politically; and both share an Islamic background, which made them particularly focused on religious issues that were not a priority for more secular associations, such as the hijab ban. Both associations joined the Transitional Justice is also for Women Network, which submitted a collective file about Circular 108 violations.

28 Interview with IVD commissioner 1, 9 February 2020; interview with IVD commissioner 2, 10 February 2020; interview with IVD commissioner 3, 10 February 2020; informal conversation with IVD commissioner 4, 14 February 2020.

29 The block mentality runs deep in the Tunisian political history and decisively came to the surface after 2011; for example, during the constitution drafting process, the equal inheritance law debate, and the transitional justice process. Although the blocks seem clearly defined on the surface, alliances can change depending on the topic. Most Tunisian leftist parties are, for example, in regular opposition with Ennahda over economic policies, allocation of amnesties, or reparations; but in terms of voting and pushing the TJ process forward, their positions aligned in several instances. For detailed analyses of the secular-leftist-Islamist divide in Tunisia, see Rory McCarthy, "Re-Thinking Secularism in Post-Independence Tunisia", *The Journal of North African Studies* 19(5) (2014): 733–50; Amel Boubekeur, "Islamists, Secularists and Old Regime Elites in Tunisia: Bargained Competition", *Mediterranean Politics* 21(1) (2016): 107–27; Brandom Gorman, "The Myth of the Secular – Islamist Divide in Muslim Politics: Evidence from Tunisia", *Current Sociology* 66(1) (2018): 145–64.

30 According to Lamont and Pannwitz, elite capture and intra-elite compromise explain both the success of Tunisia's largely nonviolent political transition as well as the failure to eventually effectively address many of the grievances, such as unemployment, that brought about the 2011 revolution in the first place. Lamont and Pannwitz, supra n. 7 at 278–81.

31 To date, most interviewees adhered to this block logic when describing the position of other commissioners. The narrative that Ennahda hijacked the transitional justice process to appease and even buy off its own backbench is a pervasive one throughout the work of the IVD.

32 On politicisation, also see the introduction to this volume.

33 One percent equals 2,000 Tunisian dinar (624 euros, based on the exchange rate at the time of writing). Final Report, part 4, supra n. 6 at 115.

34 It should be noted that violations were rarely standalone. Often, one type of violation would entail another (e.g. imprisonment would lead to 'administrative monitoring' afterwards, which would affect the right to work, to have an education, etc). In case of multiple violations, the second/third violation percentage would be adjusted following the Balthazard rule, ensuring that the total percentage does not exceed 100%. See Zouhir Khemakhem, "La Reparation Juridique Du Dommage Corporel En Droit Tunisien", *Journal de l'Information Médicale de Sfax* 26(2017): 6–12, 15.

35 The national coordination for those concerned with transitional justice (التنسيقة الوطنية للمشمولين بالعدالة الإنتقالية); the national coordination for monitoring the implementation of reparations orders (التنسيقية الوطنية لمتابعة تنفيذ قرارات جبر الضرر ومخرجات العدالة الإنتقالية); the national federation for the continuation of the transitional justice path (الرابطة الوطنية لإستكمال مسار العدالة الإنتقالية. الصفحة الرسمية); followers of the national network of transitional justice (متابعي الشبكة التونسية للعدالة الانتقالية).

36 Interview, IVD researcher, 11 February 2020.

37 This meant that the issues put forward in the beginning often followed established tropes of what constitutes a crime in international criminal justice. Unspectacular atrocities

received scant attention. See Randle Defalco, *Unspectacular Atrocities and the Visibility Politics of International Criminal Law – an Interactional Account* (New York: Center for Human Rights and Global Justice, 2016).

38 Doris Gray, *"Who Hears My Voice Today?" Indirect Women Victims in Tunisia* (New York: ICTJ, 2018).

39 Final Report, part 2, section 3, supra n. 21 at 5. In February 2011, a General Amnesty was issued to release political prisoners of the Ben Ali regime.

40 Final report, part 2, section 3, supra n. 12 at 8.

41 Ibid., 14.

42 This would be different for younger generations, where smartphones were much more present.

43 Informal conversation with IVD commissioner 4, supra n. 28.

44 Ibid.

45 www.facebook.com/oumyahya.makhlouf/videos/2515724638451760/.

46 Interview with IVD commissioner 3, supra n. 28.

47 Conversations with victims in dedicated Facebook groups.

48 Interview with IVD commissioner 3, supra n. 28; informal conversation with IVD commissioner 4, supra n. 28.

49 Also see Zaki (supra n. 11), who argues that this kind of mobilisation has been inspired by the IVD itself.

50 Fionnuala Ni Aolain, "Gendered under-Enforcement in the Transitional Justice Context", *Minnesota Legal Studies Research Paper* (2009): 9–33.

51 Jelke Boesten and Polly Wilding, "Transformative Gender Justice: Setting an Agenda", *Women's Studies International Forum* 51 (2015): 75–80, 77.

52 See also Ketelaars on how a focus on some notable victories in the field of women's rights, and the use of a limited number of gender-friendly policies, risks hiding more structural problems. Elise Ketelaars, "Gendering Tunisia's Transition: Transformative Gender Justice Outcomes in Times of Transitional Justice Turmoil?", *International Journal of Transitional Justice* 12(3) (2018): 407–26.

53 Interview with IVD commissioner 3, supra n. 28.

54 Ibid.

55 Defalco, supra n. 37.

56 Several interviewees contradicted each other and the report when it came to this violation. The reparations percentage for freedom of dress mentioned in most interviews was 5%, which cannot be found in the final report, and is, in reality, 15%. While some interviewees mentioned that Circular 108 was stated in the IFADA from the beginning, others denied this.

57 www.ictj.org/news/tunisia-women-speak-out-religious-discrimination-TDC.

58 It is important to note that the absence of a clear or striking ESCR violation (e.g. being fired from work or suspended from school) does not necessarily mean women had full access to their ESCR: hijab-wearing women would often not be considered for scholarships, internships, promotions, or certain jobs while never being told verbatim that this was because of the hijab.

59 Ketelaars, supra n. 52 at 409. Also see Robins, in this volume.

60 Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge: Cambridge University Press, 2015).

61 Interview with IVD commissioner 2, supra n. 28; interview with IVD commissioner 3, supra n. 28; informal conversation with IVD commissioner 4, supra n. 28; interview with IVD researcher, supra n. 36.

62 Defalco, supra n. 37.

63 Interview with IVD commissioner 2, supra n. 28.

64 Interview with IVD researcher, supra n. 36; informal conversation with IVD commissioner 4, supra n. 28.

65 Evelyn Schmid and Aoife Nolan, "'Do No Harm?' Exploring the Scope of Economic and Social Rights in Transitional Justice", *International Journal of Transitional Justice* 8 (2014): 362–82; also see Fionnuala Ni Aolain, "Learning the Lessons: What Feminist Legal Theory Teaches International Human Rights Law and Practice", *Minnesota Legal Studies Research Paper* 9–18 (2009). One explanation given by our interviewees for the initial low involvement of women in transitional justice in Tunisia is precisely the assumption of many women that transitional justice was a men's issue.

66 See Human Rights Committee General Comment 22 par. 4 regarding Article 18 of the ICCPR on the right to freedom of thought, conscience, and religion.

67 Rolando Vázquez, "Translation as Erasure: Thoughts on Modernity's Epistemic Violence", *Journal of Historical Sociology* 24(1) (2011). Also see Johannes Waldmueller, "Lost Through Translation: Political Dialectics of Eco-Social and Collective Rights in Ecuador", in Tine Destrooper and Sally Engle Merry (eds.) *Human Rights Transformation in Practice* (Philadelphia: Pennsylvania University Press, 2018), 101–27.

68 Benno Herzog, "Suffering as an Anchor of Critique: The Place of Critique in Critical Discourse Studies", *Critical Discourse Studies* 15(2) (2017): 111–22.

69 Miller, supra n. 16 at 273.

70 Also see Brigitte Herremans and Tine Destrooper, "Stirring the Justice Imagination: Countering the Invisibilization and Erasure of Syrian Victims' Justice Narratives", *International Journal of Transitional Justice* (2021), doi:10.1093/ijtj/ijab025.

71 Also see Herzog, supra n. 68.

72 Ibid.

73 Johan Galtung, "Violence, Peace and Peace Research", *Journal of Peace Research* 6(3) (1969): 167–91. With this conceptualisation, we deviate from other frameworks for understanding invisibilisation (e.g. Honneth's), as we seek to move beyond the communicative realm and focus on the societal, rather than the micro- and meso-levels described by Honneth. Also see the introduction of this volume.

74 Also see Tine Destrooper and Brigitte Herremans, Stirring the Justice Imagination, 2019, paper on file with the author.

75 Note that both kinds of narrative silencing can potentially cause further harm or even be retraumatising for victims. Ulrika Andersson, "Communications of Autonomy and Vulnerability in Criminal Proceedings", *International Journal of Law, Language and Discourse* 6(1) (2016): 37–44. We do not unpack the reasons for justification in this chapter but privilege judicialisation as a factor in explaining this process. Other chapters in this book zoom in on the link between politicisation and invisibilisation/erasure.

76 This, then, is related to Galtung's notion of cultural violence, which he defines as any aspect of a culture that can be used to legitimise violence in its direct or structural form. Symbolic violence built into a culture does not kill or maim like direct violence or the violence built into the structure. However, it is used to legitimise either or both. Johan Galtung, "Cultural Violence", *Journal of Peace Research* 27(3) (1990): 291–305.

77 On the contrary, they managed to foreground issues, like economic inequality and redistribution, which have traditionally been rather invisible in transitional justice processes (see Miller, supra n. 16).

78 Also see Saerom, in this volume, on counter-visibilisation strategies.

79 The seventh public hearing was on 10 March 2017, with the theme "violations against women". Two out of the five testimonies presented concerned Circular 108. In addition to the testimonies, the hearing included a short documentary about the different circulars related to the ban of the hijab.

80 Miller, supra n. 16 at 266. Also see Carsten Stahn, *Justice as Message. Expressivist Foundations of International Criminal Justice* (Oxford: Oxford University Press, 2020).

81 Ibid., 287.

82 For example, Catherine O'Rourke, "Feminist Scholarship in Transitional Justice: A De-Politicising Impulse?", *Women's Studies International Forum* 51 (2015): 118.