

# The nature of sanctions: the case of Morocco's Equity and Reconciliation Commission

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## **Abstract**

*Using the case of Morocco's Equity and Reconciliation Commission as an example, this article analyses how transitional justice is by definition the place where ethics and reasons of state, the will to see justice done and the balance of power meet. Therein lie both the strength and the ambiguity of transitional justice. The sanction-free approach adopted in the specific case of Morocco limited the Commission's effectiveness by not establishing the truth about past human rights violations or creating an environment conducive to greater democratic reform.*

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The question of sanctions is one of the most complex issues facing transitional justice. Ultimately, sanctions aim to restore peace by punishing the perpetrators of massive human rights violations. The real difficulty, however, is to reconstruct society and recast national unity while at the same time stigmatizing a part of the population and the leaders who helped to commit crimes. How best simultaneously to punish and reconcile in divided, fragile and often battered societies?

Our consideration of this question starts with the heated debate on the nature of sanctions that divided the human rights community and public opinion between 1995 and 2000. The debate had the merit of clearly spelling out the positions and their respective strengths and weaknesses.

We then analyse a recent truth commission, Morocco's Equity and Reconciliation Commission (Instance Équité et Réconciliation, IER),<sup>1</sup> which was the first in the Arab-Islamic world and functioned from 2004 to 2006. For the purpose of our analysis, the Commission is interesting in that King Mohammed VI decided on a sanction-free approach. Given that the Commission had no means of constraint or capacity to mete out even non-penal punishment, what was its impact? In some cases, truth commissions have worked in tandem with the courts, as in Sierra Leone; in others, those who refuse to co-operate have been threatened with prosecution. The Peruvian Truth and Reconciliation Commission, for example, transferred about fifty of its political crime cases to the courts for prosecution.<sup>2</sup> In South Africa, amnesty for the direct or indirect perpetrators of crimes was conditional on their full and complete co-operation with the Truth and Reconciliation Commission, and the debate currently rages in South Africa whether or not to start penal proceedings against those who refused to co-operate, either in part or totally.<sup>3</sup> Morocco – and therein lies its interest – is a crystal-clear case in which there was no threat of sanction against those who refused to co-operate.<sup>4</sup>

## The debate on sanctions within the human rights community

The debate on the nature of sanctions that took place in the late 1990s between the partisans of international criminal tribunals and those who favoured truth commissions focused on two emblematic experiences of transitional justice, that of the International Criminal Tribunal for the former Yugoslavia (ICTY) and South Africa's Truth and Reconciliation Commission.<sup>5</sup> Basically, the partisans of the tribunals felt that the perpetrators of mass crimes had to be punished by penal sanctions. They held that without such sanctions it would be impossible to establish the rule of law, foster a human rights culture and, above all, promote reconciliation. Slaking the thirst for revenge and breaking the cycle of violence

1 IER report: the full report in Arabic, and a summary in French, are available on the website of the CCDH ([www.ier.ma](http://www.ier.ma)); see [www.ccdh.org.ma/spip.php?article552&var\\_recherche=IER](http://www.ccdh.org.ma/spip.php?article552&var_recherche=IER) (last visited 10 May 2008).

2 See [www.cverdad.org.pe/ingles/ifinal/conclusiones.php](http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php) (last visited 9 April 2008).

3 See [www.doj.gov.za/trc/](http://www.doj.gov.za/trc/) (last visited 9 April 2008). See also Dorothy Shea, *The South African Truth Commission. The Politics of Reconciliation*, USIP Press Books, Washington, D.C., 2000; Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, USIP Press Books, Washington, D.C., 1995; Desmond Tutu, *No Future without Forgiveness*, Doubleday, New York, 1999.

4 See [www.ier.ma/?lang=en](http://www.ier.ma/?lang=en) (last visited 9 April 2008). See also *Morocco's Truth & Reconciliation (IER) Commission*, Moroccan American Center for Policy (MACP), available at [www.moroccanamericanpolicy.com/upload/documents/IER\\_factsheet\\_102507.pdf](http://www.moroccanamericanpolicy.com/upload/documents/IER_factsheet_102507.pdf) (last visited 9 April 2008).

5 Robert Rotberg and Denis Thompson (eds.), *Truth versus Justice, the Morality of Truth Commissions*, Princeton University Press, Princeton, 2000; Reed Brody, *Justice: The First Casualty of Truth*, Human Rights Watch, 30 April 2001; Antonio Cassese, "A big step forward for international justice", *Crimes of War Project: The Magazine*, December 2003, available at [www.crimesofwar.org/icc\\_magazine/icc-cassese.html](http://www.crimesofwar.org/icc_magazine/icc-cassese.html) (last visited 10 April 2008).

implied punishment, even if that punishment paled in comparison to the crimes committed.<sup>6</sup> It was for this reason that when the UN Security Council adopted Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda (ICTR) it expressly defined “reconciliation” as one of the new institution’s objectives.<sup>7</sup>

The partisans of the truth commissions, on the other hand, in particular the key people behind South Africa’s Truth and Reconciliation Commission, asserted that holding out the promise of amnesty for those who confessed to their crimes produced a clearer picture of the truth and had a more effective social impact than the tribunals. From their point of view, it was the fact of seeing the criminals themselves publicly confess to their crimes that served to heal the scars of the past.<sup>8</sup> This policy of both ethical and strategic forgiveness is neatly expressed in the Commission’s slogan, “Revealing is healing”. Punishment in the form of public stigmatization (naming and shaming) was part of the process of nation building that allowed South Africa to be symbolically reborn and to move from the apartheid regime to the rainbow nation. A commission, they said, was more effective in reconstructing society and promoting social reconciliation than endless and costly trials of a handful of deposed leaders.<sup>9</sup>

Gradually, however, the debate petered out. To use an economic image, there was an excess supply of perpetrators that the tribunals could not absorb. The extreme example of the ICTR is striking: although it has a budget of several hundred million dollars, the Tribunal has handed down only a few dozen sentences in over twelve years of existence,<sup>10</sup> and yet hundreds of people played a major role in the planned killing of 800,000 Tutsis and thousands of Hutu opposition members. In Rwanda itself, some 120,000 people have been imprisoned on genocide-related charges.<sup>11</sup> Experience has shown that judicial systems that want to abide by the principles of fair trial are ill-equipped to try thousands of cases. It is hard to restore the rule of law and build a democratic state when the men who were the chief architects of mass crimes benefit from impunity. This dual difficulty resulted in the development of a comprehensive approach to sanctions involving both judicial and extrajudicial processes.

From the normative point of view, the 1998 Rome Statute of the International Criminal Court thus ratified a process by which amnesty for the (chief) perpetrators of international crimes was more narrowly defined. At a lower level of responsibility, the promoters of transitional justice came up with a mixed approach to sanctions that calls into play a variety of penal and non-penal

6 *Report of the International Criminal Court*, UN Doc. A/60/177, 1 August 2005, available at [www.icc-cpi.int/library/organs/presidency/ICC\\_Report\\_to\\_UN.pdf](http://www.icc-cpi.int/library/organs/presidency/ICC_Report_to_UN.pdf) (last visited 10 April 2008).

7 UN Doc. S/RES/955 (1994), 8 November 1994: “*Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace”.

8 See Rotberg and Thompson, above note 5.

9 *Ibid.*

10 For a list of cases see <http://69.94.11.53/> (last visited 9 April 2008).

11 See [www.preventgenocide.org/punish/domestic/index.htm#rwanda](http://www.preventgenocide.org/punish/domestic/index.htm#rwanda) (last visited 9 April 2008).

sanctions, such as stigmatization of the guilty if they are named by the commission (about thirty have been set up to date, mostly in Latin America and Africa), the enactment of screening and lustration legislation, and the opening of archives (in particular in the former communist countries), that are all part of the process of naming and shaming.<sup>12</sup>

There is nevertheless a point beyond which the principles of law and the recommendations for their application in a system of transitional justice can be compressed no further. By definition, transitional justice is the place where ethics and reasons of state, the will to see justice done and the balance of power meet. Transitional justice is wrapped up in political considerations, which largely determine the nature of the sanctions to be inflicted. Therein lie both its strength and its ambiguity.

### **Morocco's Equity and Reconciliation Commission**

It is in the general context of post-cold war globalization of public policies of reconciliation that we have elected to consider the case of Morocco. As we said earlier, the functioning of the Equity and Reconciliation Commission seems particularly pertinent when considering the question of sanctions. The Commission is an extreme case, because neither the torturers nor their leaders were made to appear in public or behind closed doors or obliged to justify their acts in any way. The main question, therefore, is to determine what impact the commission had in the absence of penal or extrajudicial sanctions. Was it the successful means of democratizing Moroccan society that its promoters in the human rights community envisaged? Or was the absence of sanctions not an indication, as its detractors affirmed, that the Commission was essentially a political marketing tool aimed at lending credibility to the new king, at seducing Western governments with its human rights discourse and at co-opting a part of the Moroccan left-wing opposition and civil society, at the price of stifling political life?<sup>13</sup>

Before taking the analysis any further, let us go back over the context and very special process by which the Commission was established, and its stated objectives.

#### **Context**

After forty-four years as a French protectorate, Morocco gained independence in 1956 during the reign of King Mohammed V. His son, King Hassan II, took power in 1961 and ran the country with an iron fist until his death in 1999. His reign can

12 Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York, Routledge, 2001.

13 For an evaluation of the Commission's work see also "Morocco's Truth Commission: honoring past victims during an uncertain present", *Human Rights Watch*, Vol. 17 (11(E)) (November 2005), [www.hrw.org/reports/2005/morocco1105/morocco1105.pdf](http://www.hrw.org/reports/2005/morocco1105/morocco1105.pdf) (last visited 10 May 2008).

be divided into two distinct periods. During the *années de plomb* (years of lead), the country suffered a climate of repression marked by the torture of real or suspected opponents. The Equity and Reconciliation Commission would later speak of 10,000 people tortured and several hundred killed.<sup>14</sup> The second period started when the cold war came to an end in 1989, and was marked by a slow process of liberalization reflected in particular in the founding of the Consultative Council on Human Rights (CCDH), the ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and successive amnesties for political prisoners.

### The Commission's origins and objectives

The Commission originated in a specific set of circumstances that gave it the equivocal character it would have until its dissolution. It was established on 10 April 2004 by royal decree, without the intervention of parliament, the outcome of a deal between King Mohammed VI, who had succeeded his father in 1999, and civil society members, in particular former left-wing opponents of Hassan II's regime who had in most cases spent many long years in prison before joining human rights organizations.<sup>15</sup>

The Commission's ambiguity resided in the fact that Morocco is constitutionally an executive monarchy. All real power – political power, spiritual authority and military power – lies with the king, and much of the country's economic power is controlled by the royal family. The process of change in Morocco is therefore at the very least ambivalent, although there is no disputing that the regime has become more liberal since Mohammed VI's accession to the throne. The ambivalence is even more marked when it comes to the Equity and Reconciliation Commission, which, unlike its South African forebear, provided absolutely no incentive for the leaders and henchmen of the apparatus of repression to come forward or even to co-operate with it. Indeed, no agents of repression ever testified at any of the seven public hearings the Commission organized and before the public hearings took place the victims had to sign a pledge that they would not name those who had arrested and tortured them.

The royal decree founding the Commission gave it a three-pronged mandate: (i) to shed light on all cases of forced disappearance and "arbitrary detention"; (ii) to "compensate" and "ensure reparations are made for all the harm suffered by the victims"; and (iii) to prepare a report "analysing human rights violations ... and making proposals and recommendations that serve to preserve the record, to make a definite break with the practices of the past and

14 Equity and Reconciliation Commission, *Résumé du rapport final*, Rabat, IER, 2005, available at [www.ier.ma/\\_fr\\_article.php?id\\_article=1496](http://www.ier.ma/_fr_article.php?id_article=1496) (last visited 10 April 2008).

15 Veerle Opgenhaffen and Mark Freeman, "Transitional justice in Morocco: a progress report", International Center for Transitional Justice, New York, November 2005, available at [www.ictj.org/images/content/1/9/197.pdf](http://www.ictj.org/images/content/1/9/197.pdf) (last visited 9 April 2008). See also "Morocco's Truth Commission", above note 13.

resolve the consequences of the suffering caused to the victims, and to restore and bolster confidence in the rule of law and respect for human rights”.<sup>16</sup>

The Commission’s mandate covered a period longer than that of any other truth commission: the forty-three years between independence in 1956 and the death of King Hassan II in 1999, the same year that the Indemnity Commission was established to compensate the victims of “disappearances” and torture.

## The Moroccan debate on the absence of sanctions

The absence of sanctions deeply divided the Moroccan human rights community.

The militants who played an active part in the Commission accepted the absence of sanctions as a pragmatic solution that dovetailed with their strategic interest. They based their arguments on the potential to transform and democratize society inherent, in their view, in the deliberations of a truth and reconciliation commission.

Salah El-Ouadie, himself a former political prisoner and a member of the Commission, explained his position thus:

We put the following historic deal before the Monarchy: it is up to the State to recognize its wrongs, to engage in an in-depth process of reform comprising constitutional guarantees so as to avoid the risk of reoccurrence, to promote a genuine culture of human rights by founding a democracy worthy of the name. In exchange, we forgo judicial proceedings. This is a strategic pardon. I do not believe in the law of retaliation, for, as Desmond Tutu says, with an eye for an eye and a tooth for a tooth, everyone ends up blind and toothless.<sup>17</sup>

The Commission’s supporters took account of three points:

1. They considered that the Moroccan judicial system’s lack of independence precluded the holding of fair trials in the short term.
2. They bet that a process of transitional justice would shed light on the crimes of the past and further the process of democratization. From their point of view, the Commission had to help leverage the democratic transformation of Moroccan society.
3. They believed that a process of transitional justice would result in time in the mobilization of civil society, a new balance between the country’s political forces and the introduction of sweeping institutional reform conferring true independence on the judiciary and paving the way for penal prosecutions. They wagered that a truth commission would stir civil society to act and reconfigure the political environment, suddenly making

<sup>16</sup> Decree No. 1.04.42 of 10 April 2004, approving the Commission’s statutes, available in French at [www.ier.ma/article.php?id\\_article=221&var\\_recherche=Journal+Officiel+N%B0+5203](http://www.ier.ma/article.php?id_article=221&var_recherche=Journal+Officiel+N%B0+5203) (last visited 9 April 2008).

<sup>17</sup> In Pierre Hazan, *Juger la guerre, juger l’Histoire*, PUF, Paris, 2007, p. 146 (translated from the French).

previously unimaginable activities possible. Their arguments were based in particular on the Argentine precedent, where the laws of amnesty (of Punto Final) had been recently abrogated and judicial proceedings undertaken. What counted most for them was not punishment of the guilty, but the transition from an authoritarian regime to a constitutional monarchy.<sup>18</sup>

The Commission's opponents, on the other hand, raised the following points:

1. They deemed it unacceptable that transitional justice should serve as a pretext, with the blessing of some of the former victims, if not to exonerate, at least to spare from all punishment those who had run the apparatus of repression. They saw the Commission as a veiled attempt to rehabilitate, to confer impunity on the repression's leaders and their underlings.
2. They denounced the operation as a political whitewash by the palace at a time when those responsible for years of repression still held key positions in the army and police forces.
3. They also denounced the fact that human rights continued to be violated, in particular within the context of the "anti-terrorist struggle" that was launched after the Casablanca attacks in 2003 and that led to the arrest of 3,000 Islamists under a law adopted in the heat of the moment.<sup>19</sup>

### **Amnesty versus pardon**

The clash between the Commission's partisans and opponents within the Moroccan human rights community on the issue of punishment was coupled with diverging views between the king and pro-Commission human rights militants. The dispute was semantic: the king referred to the absence of punishment as "pardon", whereas the pro-Commission militants spoke of "amnesty".<sup>20</sup> The lexical difference was not neutral. The pro-Commission human rights militants had clear political goals: the democratization of society – that is, greater power for parliament and government, an independent judiciary and less power for the monarchy. They acted as a pressure group on the political authorities. They agreed to the principle of an amnesty for pragmatic reasons, knowing that it could one day be revoked.

The king's situation was different. He had his own concept of the Commission's role in modernizing Morocco, but he also had to cope with countervailing pressure from, on the one hand, human rights activists and, on the other, the armed forces, the police and the security services that helped him keep his grip on power. What is more, he had a policy of more or less distancing himself from his father's reign while positioning himself as part of its continuation. In that

18 Ibid.

19 Ibid.

20 Ibid.

respect, it is symptomatic that the Commission was mandated to examine human rights violations up until 1999, the year in which Hassan II died.

The fact that King Mohammed VI used the discourse of pardon resulted from this complex set of givens. On the strength of the spiritual authority he embodies as the Commander of the Faithful, he invoked God to justify the absence of sanctions. In the speech he delivered when the Commission's mandate came to an end he told an audience of victims, "I am sure that the sincere work of reconciliation we have accomplished ... is, in fact, a response to the divine injunction "Forgive with a gracious forgiveness". It is a gracious gesture of collective pardon."<sup>21</sup>

The second argument put forward by the king was the restoration of national unity. He advocated forgiveness as the means of "reconciling Moroccans with their past" while they built a modern society. In order to release energies, there had to be an end to the political and legal wrangling over "mistakes" of the past:

The goal is to reconcile Morocco with its past ... Some say this initiative is not enough, because the witnesses cannot reveal the names of their torturers. Obviously, again, I do not agree. This is not an initiative, as some would have it, that will divide Morocco in two. There are no judges and no defendants. We are not in court. We must examine this page of our history without complex or shame. This is the start of the path to better conditions.

## The Commission's results in the light of the absence of sanctions

The absence of sanctions had many effects.

- The co-operation of the security services, the armed forces and the police proved to be difficult. Because there were no sanctions for refusal to co-operate, the bodies that had been the active agents of repression largely forbore to work with the Commission. As a result of their hostility, no light was shed on a number of disappearances and killings, and yet in some cases the witnesses were still alive and documentary evidence was available. The most emblematic case is that of the former Moroccan opposition leader, a powerful Third World voice, Mehdi Ben Barka, who was kidnapped in Paris in 1965 and most likely killed by Moroccan agents in circumstances the Commission was unable to clarify, even though most of the facts were already in the public domain. The IER report clearly states the responsibility of the state to clarify the case of Ben Barka and others, which has not happened so far.
- The absence of sanctions also made the Commission exercise prudence in its final report. Repression during Hassan II's reign was not the work of

21 Translated from the French; available in French at [www.ier.ma/article.php3?id\\_article=1531](http://www.ier.ma/article.php3?id_article=1531) (last visited 9 April 2008).

individuals or isolated services. It was a structured system that went right up to the sovereign. The Commission's report was nevertheless careful not to go up the chain of command or to cast doubt on the very nature of the regime or the father of the current king. It would have been foolhardy to do so. Article 23 of the Moroccan Constitution states that the person of the king is sacred and inviolable. The Commission's work nevertheless allowed people to speak in public for the first time about the massive human rights violations perpetrated during the "years of lead". The witnesses' public testimony was undoubtedly a watershed in the political history of modern-day Morocco.

- As we have seen, the absence of sanctions divided the Moroccan human rights community. This unexpectedly prompted the Commission's detractors to organize alternative public hearings in which the torturers were named. In other words, the Commission opened a space for speech which the Moroccan Human Rights Association (AMDH) quickly filled, using "alternative" public hearings publicly to stigmatize those responsible for the "years of lead".

Ultimately, the absence of threats of punishment for refusing to cooperate limited the Commission's effectiveness in shedding light on cases of disappearance. It also reflected the ambivalence of the Commission's objectives and the diverging points of view of its promoters, whose often incompatible objectives ranged from the rehabilitation of the former regime to the introduction of a constitutional monarchy. The absence of sanctions also hampered Moroccan society's interpretation of the Commission's work and the limits to its scope.

In its final report the Commission advocated measures of substantial political and institutional reform.<sup>22</sup> Whether or not the political authorities are willing to implement them will show whether the pro-Commission human rights militants have won their wager that a commission, even one with no power of constraint or punishment, can further the process of democratization. If such proves to be the case, they will have been right to go against the stream of traditional truth commissions, which come in the wake of, rather than preceding, major institutional change.

22 See [www.ier.ma/rubrique.php?id\\_rubrique=307](http://www.ier.ma/rubrique.php?id_rubrique=307) (last visited 9 April 2008).