

Tunisian Forum for Economic and Social Rights

IN SEARCH OF DIGNITY



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An Access to justice or a search for dignity.

Hela Meddeb

Introduction

If I'm guilty it should be remembered that I am also inviolable and that truth doesn't answer to falsehood... if there's justice, it should be clear that my inviolability is greater than my mistakes and my rights are well known, recognized by all, sane men and ignorant people.

"Barrani...and Barrania"⁴³ (meaning the foreigner); Tunisian words that reflect an ancient mindset and belief of a population, built and maintained through successive civilizations. These words carry with them an xenophobic view of the other, full of rejection and racism. The concept is very similar to the Nazi and Arian schools of thought, aiming to protect a unique group, a unique culture and a single element that doesn't tolerate plurality.

These words, born out of the Tunisian culture, are nothing but some expressions that are concealing a social situation and a legal background. Based on this observation we can begin to read correctly all the legal provisions which have nothing to do with reality and are nothing but the translation of international interests and nationalistic concerns.

⁴³Souheima Ben Achour : individual freedoms of foreigners in Tunisia: Republic Foreigners

Studying law today refers us to the fears of the Tunisian legislator of losing his inner security and not being able to keep the existing or the so-called balance and preserving the interests of certain groups. This created a legal issue that affected Tunisian citizens in general and irregular migrants who chose to settle in Tunisia in particular. When reflecting on this legal challenge we conclude that we are faced by a bigger issue, which is the access to justice.

Our research will be based on an analytical human rights approach, and will be related to the migrants' rights to access to justice regardless of whether they migrated regularly or irregularly.

The Tunisian legislator didn't define migration or migrants and this can be considered as a failure on his part because in the absence of a legal definition the situation of the migrants can't be adequately framed. This leads to dropping legislations in an effort to fill the existing legal gap.

Immigration is commonly defined, in its most basic sense, as a movement of individuals or groups from one place to another looking for a safer and a better economic and social situation. Irregular immigration deviates from this concept only in its contravention to the legal texts legislated by the state to control the entrance and exit at its borders⁴⁴. Historically, immigration contributed in repopulating lands with different people having diverse cultures and it was considered as a natural reflex of an individual to preserve his life.

⁴⁴ Informative human rights definition

Nowadays things have taken another turn and irregular immigration became a complex case. The evolution of the concept of the state and the efforts to control borders subjected mobility to a number of conditions which led to the emergence of the irregular immigration phenomenon. Irregular immigration developed to be an international phenomenon and became a source of concern to the international community. European countries which welcomed irregular immigrants in the past since they filled their need for low cost workforce are now focused on regulating the immigration process and are externalizing their borders as a first step. Despite the immense efforts made by the different states to deal with the phenomenon of immigration, the severe security approach failed to eradicate irregular immigration and the main reason is the disparity in the level of development between the countries.

The legal explanation of irregular immigration is based on the use of this concept in legal treatment since it violates laws and systems related to immigration and to the freedom of individuals' circulation between the countries.

All of these factors pushed a big number of young people to engage in irregular immigration despite the deadly nature of the journey, since this process implicates the use of illegal forms of travel without going through regular immigration procedures.

Therefore, the irregular immigration concept implies a legal content since it involves the entry of an individual to the border

of a foreign state without legal documents. Mostly, immigrants infiltrate across desert, mountainous or sea borders. Also, entering a state for a predefined period and extending the stay without legal approval, like for example traveling as a tourist or to visit relatives and then settle down in the host state, is a form of irregular immigration.

This common legal presentation is very limited and it doesn't cover all the factors of immigration.

From a human rights point of view, the international conventions define immigration as follows:

According to the Universal Declaration of Human Rights, everyone has the right to freedom of circulation and residence within the borders of each State, as well as the right to leave any country, including his own, and to return to his country. The International Covenant on Civil and Political Rights of 1966 also stipulated that everyone who lives legally in a state has the right to move and to choose his/ her place of residence and has the right to leave any country including one's own. The European Convention on Human Rights of 1950, and the American Convention on Human Rights of 1969, and the African Charter on Human and People's Rights of 1986.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 defined the migrant worker as the person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. The convention also provided conditions and disciplines to be

applied in favor of the migrant worker to guarantee his rights and the rights of the members of his family. The United Nations Convention against Transnational Organized Crime and its protocol of the year 2000 aimed to consolidate cooperation in fighting transnational organized crime. Its protocol insisted on treating migrants humanely and highlighted the necessity of fighting the activities of organized criminal groups in the area of smuggling immigrants⁴⁵.

Despite its limits, the legal characterization of irregular immigration doesn't forbid irregular migrants of claiming their rights, regardless of their nationality or situation. Based on this fact, we developed this research to analyze the irregular migration phenomenon following a human rights approach and to study the right of the migrant to access to justice and to claim its rights. The study refers us to a legal issue related to the texts criminalizing irregular immigration and their implication of legal barriers to the right to access to justice and in that case to the extent of its respect to the migrants' rights.

To fully explain this legal issue, the study will be divided in two chapters. The first chapter will cover with an analytical approach the legal barriers to the right to access to justice and the second chapter will be about the procedural barriers to the right to access to justice.

⁴⁵SarrahHafi « human rights indicators with relation to migrants and their families in Tunisia »

I. THE ANALYTICAL APPROACH OF THE IMPEDIMENTS FACED BY THE MIGRANT TO ACCESS TO JUSTICE:

Violated rights are restituted by law, as law is the best guarantee for upholding human rights and fundamental freedoms. But when the law deprives people from their rights enshrined in international agreements, access to justice becomes only possible when the international community and civil society organizations interfere to provide redress for the victims.

I. The conditions for obtaining a residence permit are burdening the migrants:

All migrants are entitled to enjoy their fundamental rights; social security, health care, education, full and productive employment in decent conditions, access to justice on equal terms... they are also entitled to have their rights protected as workers and to enhance safety in the workplace.

The Tunisian law didn't provide any specific text or system to defend the rights of irregular migrants. The law of 1968 regulates the foreigners' situation⁴⁶, the specific terms of their residence in Tunisia and describes sanctions for cases of contravention. According to this law, every foreigner who lives in Tunisia for more than three months should obtain a permit that authorizes residence. According to the National Institute of Statistics, every person who lives or intends to live in Tunisia for more than six months is considered a foreigner.

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The concept of the resident foreigner in Tunisia allows us to differentiate this category from the broader category of international migrants which includes every person who changes the country of his habitual residence. Accordingly, migrants in Tunisia are foreign citizens residing in Tunisia temporarily or permanently, for any reason (job seekers, university students, asylum seekers...), to settle in or to transit from, including regular and irregular migrants.

We can thus identify two categories of migrants: regular and irregular migrants in terms of residence and/or employment. The regularization of the foreigners' situation in Tunisia is subject to two interlaced conditions: respecting the rules organizing residence in Tunisia and respecting the condition of providing a pre – certified work contract.

Acquiring residence is severely restricted. The residence permit contains a permit to work and has similar power as the document it justifies and does not exceed one year.

The National Observatory on Migration defines the migrant as follow: “there is no common internationally accepted terminology for this term. It is used when someone chooses maritime migration or immigration for private motives and without any external pressure. This term applies to people who move to another country to seek improvement in their material and social conditions or to seek better future possibilities for them and their families⁴⁷”.

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Getting a residence permit and the difficult conditions that need to be filled to obtain it are considered as the main obstacle faced by the migrant to access to justice. The main problems that face Sub-Saharan African university students are related to the difficulty of getting a residence card and its late delivery. The administration doesn't deliver the permits to the migrants in time and when the police request to check their documents they end up being deported since their circulation is considered irregular. The student pays the price of the administration's fault. "Nadia" a university student from Cameroon is exhausted of the long, complicated procedure of renewing her card especially with the reluctance of the administration's employees. She confirmed that "this is the major problem of all foreign students in Tunisia".

Under these difficult conditions, sub – Saharan African students can't claim their rights, enshrined in international conventions, for fear of deportation or eviction.

In addition to the passivity of irregular migrants in demanding their rights, most of them are unaware of their right to access to justice. The few who know about these rights prefer to remain silent and not to file complaints.

In addition, sub – Saharan African students are faced with the problem of fictitious universities and registrations. Many fraud networks from the students' countries coordinate with other in Tunisia to market these institutions through social media. Many students who sign up via these networks, discover as soon as they come to Tunisia that they were victims of fraud and are

then forced to peruse certain fields of study that are not within their competence.

Additionally, we should refer to the exorbitant costs of studying in private colleges. “Joseph”, one of the interviewees told us that he was obliged to sign up in an expensive private university when he came to Tunisia for fear of being a victim of these fictitious universities fraud networks.

2. Violations against migrants:

Violations against irregular migrants are registered at every level; economic, social and even ethical.

3. Human Trafficking and violations against irregular migrants:

Tunisia endorsed the Convention against Transnational Organized Crime by the law n°63 of the year 2002 dated July 23, 2002 and ratified it by order n° 2101 of the year 2002 dated September 23, 2002⁴⁸. Tunisia also endorsed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of the year 2000, supplementing the Convention against Transnational Organized Crime by the law n° 05 of the year 2003 and ratified it by order n°698 of 2003 dated March 25, 2003⁴⁹.

Legally, dangers and difficulties experienced by irregular migrants in Tunisia can only be described as an organized crime

⁴⁸ Salma Abida, a presentation of the Organic Law of 03 August 2016 related to the crimes of human trafficking

⁴⁹ Ditto

as defined by the Tunisian legislator in the law of 2016 related to human trafficking and the national observatory of migration and that is :” attracting and recruiting people, and transfer or divert or harbor them by force or arms or by threat or any other form of coercion or kidnapping or fraud, or an abuse of power or of a position of vulnerability, or delivering or accepting cash or gifts to control a person and abuse him.⁵⁰”

If we apply this description to the reality in which the irregular migrant lives, we notice that these laws are merely words on paper, since the state always remains silent in the face of the violations of the migrants’ rights and the right to access to justice on equal terms.

Violations to which irregular migrants are subjected are numerous, especially in terms of economic rights’ violations, related to work and to the way they entered Tunisia to find a job. Some migrants were deluded by mediators who promised them jobs, and offered them falsified work contracts. Once arrived to Tunisia, the migrant finds himself homeless and jobless and that’s how he becomes prone to exploitation and ends up working in houses, hangars and coffee shops.

“Conny”, an Ivoirian migrant was a victim of exploitation as soon as he arrived to Tunisia. He worked in a factory in Sfax and his boss didn’t pay him for six months. “Conny” didn’t react for fear of being deported and even when I asked him why he didn’t file complaints against his boss, he was afraid to talk

⁵⁰ Ministry of social affairs, the national observatory of migration, the dictionary of terms related to immigration, migration and asylum

freely and finally he just told me: “We, irregular migrants, don’t have the right to claim any of our rights. If we do, the Tunisian state will deport us...Also, I can’t file complaints, I can’t press charges against my boss because he took my passport in exchange for giving me work, and I have to work for him every day, all day while he provides me shelter, food and drinks”.

It should be mentioned that « Conny » lived with his wife and has a two years old daughter who doesn’t enjoy any of her rights, not even those related to health care. “Conny” confirmed that he was obliged to take her to private clinics. He also told us that his wife is working as a maid in a Tunisian household.

The sufferance of irregular migrants goes beyond the harsh working conditions, the physical and psychological mistreatment during work hours and the difficulties in receiving treatment and medication. Women migrants are suffering the most since they are more vulnerable and more subject to sexual harassments. Many women come to Tunisia under falsified work contracts and as soon as they arrive the mediator confiscates their passports and asks to be paid. They discover, too late, that they were victims of a human trafficking network.

“Alice”, an illiterate Ivoirian migrant was one of these victims. She is a mother who left her daughter with her grandmother and came to Tunisia thinking that she signed a work contract and that her situation is going to finally improve. She has no choice now except working anything to pay the mediator and get her passport back so she can fly back home to her daughter.

“Alice” was so afraid when I interviewed her; she kept looking left and right as if there’s someone watching her. When I told her to relax she answered: “I am shocked! I am always afraid since I came to Tunisia. Everyday people harass me, every day I get insulted because of the color of my skin; every day my employer rapes me... I have no choice. Either I give him what he wants or he will hand me over to the police.” And she added: “people here are racist. When I talk to people they avert their eyes because I’m black, they loath me.”

Alice wasn’t only abused physically and economically. The Tunisian state forbade her to leave the country until she pays back her dept without giving any consideration to her critical situation or to the fact that she lost both her father and her sister without being able to assist to their funerals.

Despite the fact that Tunisia is the only Arab country that legally criminalizes racism, the road to its eradication is still far.

4. Ethical violations and the difficulty of integration:

Tunisian children still yell and throw rocks at sub Saharan, black people passing by in the streets, like “Conny” told us. He said: “Me and and sub Saharan friends feel so sad when children do that. It’s like we have committed a crime or a sin for having a black skin... everybody humiliates us.”

One of the factors that further complicate the integration of migrants in the Tunisian society is that they don’t speak Arabic language. It’s the main obstacle that faces migrants either

when they have to contact administrative administrations or when they want to use public transport means.

An Ivoirian migrant was raped by a collective taxi driver when she left the house where she works as a maid. The driver deposited all the passengers and drove to an isolated field to rape his victim. He knew that she doesn't speak Arabic and can't call for help. The victims told me: "I tried to defend myself; I tried to stop him with all my force until I lost consciousness."

5. Access to Justice from a humanitarian approach, based on the law of 2004 related to passports and travel documents:

The discrepancies found in the legal and penal texts are creating a trust crisis especially at the level of the Tunisian state's treatment of the irregular migrants on one hand and its clear adulation for her European partner on the other hand.

Tunisia has enacted several provisions to face irregular migration and immigration waves, which kept increasing to reach the peak lately. The summit "5 plus 5"⁵¹ that was held in Tunisia in December 12, 2003 had a major role in the emergence of new laws, since the Maghreb countries were harshly criticized by the European countries and urged to review their policies regarding irregular immigration⁵².

The new draft legislation issued by Tunisia came as a courtesy to the countries of the European Union in order to maintain

⁵¹ Mohamed Ridha Temimi, papers on laws and policies : irregular immigration in national provisions and international conventions

⁵² Ditto

diplomatic relations especially with France and Italy. Despite the opposition of human rights organizations in Tunisia and some members of the House of Peoples Representatives to the law, which they considered as a threat to personal freedoms and to the right of free circulation, the House of Peoples Representatives ratified the draft legislation related to passports by the end of the year 2003. The legislation tried to fill gaps found in laws dating back to 1975. The Tunisian legislator criminalized all the elements of the irregular immigration project, including the captains of vessels, the owner of the houses or places where they hide before they embark in the journey etc... the legal text criminalizes all the organizations or groups of people who conspire to organize an operation of irregular immigration.

By ratifying this law, the Tunisian legislator gave more space to the criminal court judge to interpret the omissions of the law of 2004 while he deprived the irregular migrant the possibility of claiming his rights, although granted by international conventions that were signed by Tunisia and therefore considered as part of the national legal texts in force⁵³.

The gaps and omissions of the law of February 2004, especially in its chapter 38 with the punitive character deprive irregular immigrants of their basic rights such as the right to live, the right to equality, the right to physical integrity, the right to freedom and the right to security and it should just be remembered that these rights are guaranteed by international conventions ratified by Tunisia⁵⁴.

⁵³RebahKhrayfi – Chepter1 : Irregular immigration in the Tunisian court system

⁵⁴Souheima Ben Achour - Ditto

Constitutionally, the Tunisian legislator hasn't specified any texts for refugees or migrants. However, he acknowledged access to fundamental rights for every person regardless of his nationality. Moreover, many texts have been ratified after the promulgation of the Constitution of 2014 to provide protection for the most vulnerable categories.

Despite all these laws and legislations, there were no specific procedural or practical solutions to defend the right of irregular migrants to access to justice. Complicated residence procedures are the major problem of all irregular migrants, who fail to obtain the permit and become a victim of abuse and mistreatment. Even the judicial police agents have never wavered to mistreat and judge migrants in general and especially irregular migrants.

Joseph, a sub Saharan university student was a victim of fraud and is now living in Tunisia undocumented. When he was on his way to the Cathedral to pray, a police officer threatened him and forbade him to enter the Cathedral before clarifying his legal status.

Fear becomes the major factor that is depriving irregular migrants to access to justice. They all fear from being deported.

II. THE JURISDICTIONAL LIMITS TO ACCESS TO JUSTICE:

“*To name things wrongly is to add to the
misfortune of the world*”

⁵⁵

Individuals don't have an international legal identity recognized by international law. That's why they should claim their rights in national courts, which decide appropriate penalties and compensation for the abuse they suffered⁵⁶.

The article 108 of the Tunisian constitution guaranteed the right to a fair trial for all individuals. The legal text didn't specify that the individual should be a citizen but made the right to fair trial constitutional in accordance with the requirements of article 10 of the Universal Declaration of Human Rights and the article 14 of the Universal Convention of Human Rights⁵⁷.

The legislator and the drafters of the constitution's commitment to respect international conventions is illustrated in all legal texts related to the principles of fair trial, which confirms what was written in the introduction of the constitution about the commitment and respect for human

⁵⁵ Albert Camus

⁵⁶ RaoudhaAbidi, Media statement of the president of the High Commission against Trafficking in Persons

⁵⁷ The Practical dictionary of the humanitarian law: Doctors without borders

rights principles. However, the final provisions of the constitution as stated in the articles 143 and 144 reveal that the legislators violated their commitment to respect human rights by themselves, before anyone else does.

Guarantees for irregular migrants to fair trial:

“Truth if the ultimate purpose of all penal procedures. However truth doesn’t come out easily, it only comes out with research and investigation. Looking for truth is like digging in rocks⁵⁸.” If penal protection of the public interest decides according to the judicial law and procedural penal law, protecting rights and freedoms should be decided according to constitution and there must be a set of principles that guarantee protection for individuals whose freedom is threatened by law.

I reached this conclusion when I interviewed the previously mentioned sub Saharan irregular migrants. All those who filed complaints in court were denied their rights, especially regarding the rights to a lawyer and the right to fair trial. Even if a lawyer was appointed, his lack of competence was another problem to face. Judicial guarantees offered for irregular migrants are very limited whether regarding lawyers and judicial representation or regarding judges who are poorly trained in migration’s legal system.

In procedural terms and regarding the pre-trial detention periods in the Tunisian law, many questions are

⁵⁸ P. Mahmood Daoud, P. Hager HichriYaakoob : guarantees for fair trial in Tunisian Law

raised in the absence of deadlines. The pre-trial detention period is set for three days renewable one time but the decision is made by judicial officers. The legislator didn't specify any system to determine the types of crimes necessitating extension. This gave the way to judicial officers to abuse their power, which was the case with "Aissa", a regular Guinean migrant who was arrested not for committing a crime or an offense or even a contravention, but just for playing ball on the beach. The gaps in the legal texts opened the door to racism and segregation.

Another major issue that faces the migrants is the slowness of judicial procedures and their expensive cost. This delay is caused by many factors related to laws and legislations, to the law enforcement officers in courts such as lawyers and judges and assistants of judges (experts and officers) and to the procedures and means of implementing provisions. Problems related to lawyers are mostly about their lack of competence and their ignorance of the rights of irregular migrants.

The limited deadlines to lodge an appeal to the Court of Cassation are another violation of human rights especially migrants' rights since it doesn't respect the complex situation of the migrants and the long time it takes them to regularize their situation and to complete all the procedures to get their residence permit.

CONCLUSION

Access to justice is the dream of every migrant living in Tunisia. Sadly, this dream is far from being reached because of the policies adopted by the Tunisian government, which are based on repression.

The silence of migrants and their subordination to the violations of their right enabled the state to further repress and abuse them. The situation worsened to the point that we are talking today of cases of human trafficking.

In February 2019, a mediator sold an Ivoirian woman to a Tunisian family⁵⁹.

Without having a residence permit, migrants in Tunisia have no rights and their right to access to justice is then compromised on the procedural level.

These violations are the outcome of a policy of repression, whether practiced by society or by judicial agents. We conclude in this research that access to justice is access to dignity and that the state is responsible for granting the migrants their rights, by working hand in hand with civil society and international community. In order for that to happen, we formulated some recommendations:

⁵⁹ Raoudha Abidi, Media statement of the president of the High Commission against Trafficking in Persons

- Repeal the law of 03 February 2004 concerning passports and travel documents
 - Signing the UN convention about the rights of migrant workers and the members of their families
 - Mandating commissions of human rights activists and experts working on migration and international law to develop a draft of law that protects regular and irregular migrants
 - Training lawyers and judges to specialize in migration and establishing Chambers within the existing court structure to try migrants' cases
1. Intensifying efforts and cooperation between civil society organizations to validate the law project relative to fictitious employment offices (on which the High Commission against Trafficking in Persons is currently working)

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