Effects of Reconciliation in the Administrative Field Law on combating corruption in Tunisia

Mr. Sharaf al-Din Al-Kaleel
Lawyer and human rights activist - Tunisia

General preview

This study falls within a series of legal and political approaches, which " DAAM's Periodical" - issued and reviewed by DAAM Center for Democratic transition and Human Rights- have been regularly addressing, and this study discusses and analyzes the entitlement of combating corruption and its relation to democratic transformation policies in Tunisia and Libya with an almost absolute focus on the role of Reconciliation in the Administrative Field Law (Organic law n ° 2017-62 of 24 October 2017, relating to reconciliation in the administrative field, published in the Republic of Tunisia's Official Gazette in edition No. 85 of October 24, 2017, p. 3625), this law cleared a lot, and the vast majority of civil, political and legal actors have interacted with, and for over two years has been the main focus of the various political, and legal debate and approaches that are concerned with the issue of anti-corruption .

In order to respect DAAM's officials faith and trust that they put in me as this study's writer, and in order to follow the right tools and rules of scientific and methodological analysis, I view the importance of addressing for the readers the difficulties that encountered me during carrying out this study which can be summarized in adhering to scientific neutrality when analyzing a law that me and my colleagues at " Manich Msamah Movement" (We Would Not Tolerate) considered as a law for " Cleaning the corruption's reputation and retaining the corrupt" and we have always struggled, along with thousands others of different age, profession, social, civil and political groups of the Tunisian people, to bring it down.

However, despite the magnitude of this difficulty, I have tried as much as possible to respect the scientific integrity and to accomplish this work, which, like all human work has some

defects which I apologize for in advance, and it will always remain subject to criticism and discussion, and that exactly what I wish for when debate and interaction about it occur.

Introduction

The entitlement of ending tyranny and the past's scourges which was adopted by the revolution of freedom and dignity has always been a common and public aim for all successive governments since that date, and it was always regarded by both experts and civil and political activists as an indispensable prerequisite for a sound democratic transition and responsible initiation for building a democratic State that is based on rule of law, well-established institutions and respect for citizens' rights and human rights.

To achieve that high end, there were numerous official and non-official, legislative and institutional, political and civil initiatives, which all engaged in examining ways and mechanisms to ensure that successful and effective mechanisms of ending the past's scourges that was full of gross human rights violations of various types of corruption offenses against public and private property that illegitimately wasted the nation's resources.

Despite these initiatives' multiplicity, most of these initiatives have agreed on the fact that the best way to address that past fairly, democratically and decisively with all revenge, exclusion and selectivity we have here is through a transitional justice system.

And despite the numerous reservations, misgivings and political polarization that have marred the work of the Constituent National Assembly while drafting the Transitional Justice Law, which was overshadowed by - as many Tunisian and international experts and many organizations of national and international civil society testified- partisan struggles over quotas, but regardless, the Assembly's work resulted in ratifying Organic Law No. 53 of 24 December 2013 on Establishing and Organizing Transitional Justice and also in electing the members of the public authority that supervised that matter which is the Truth and Dignity Commission, by order No. 1872 of 2014/ 30 May 2014.

Since then, the Truth and Dignity Commission's mandate started, the Commission which was been entrusted by law to address serious human rights violations and offenses since July 1955 until the promulgation of Law No. 53, which has not excluded offenses relating to "electoral fraud, financial corruption and violations related to public money" (Chapter 8).

Despite the shaky performance of the Truth and dignity Commission and the accumulation of differences and arguments whether among some of its members, or between them and some other state institutions, such as the Presidential Office, the Administrative Court and the Military Justice Department, and despite the significant change that has stigmatized the political scene during the 2014 legislative and presidential elections, which re-introduced many known political figures who were affiliated to the former regime and who were strongly supported by money from many businessmen and high rank state employees suffering from trials and legal precautionary measures such as travel ban, freezing their bank accounts, and confiscation of their money, and there was some sound voices and initiatives that emerged to back up those businessmen and statesmen which was promoted by various audio, visual and electronic media and they stressed the urgent need to get a resolution and find a solution for to liberate them and their money "because it is of positive value to the economic and financial cycle of the country", it even got to the point of publicizing clear demands for issuing a legislation to provide them amnesty, and so, the President issued his first legislative initiative in accordance with his constitutional authority (it was the only one after nearly four years in office) concerning the "draft law on economic and financial reconciliation" which the Cabinet approved on 14 July 2013.The bill was then submitted to the Assembly of the Representatives of the People for deliberation and approval.

But while all that was going on, various popular groups, that are different in their affiliation and interests, many civil and political society organizations, various initiatives and activities took it to the streets in the form of multiple focused and direct movements, and in the forefront was the

representatives of "Manich Msamah Movement" (We Would Not Tolerate) who raised a slogan for all of their movements "No reconciliation before accountability", and all these movements condemned this presidential initiative and considered it a "presidential pardon" for the favor of the corrupt, a clear normalization with the past's corruption, and a cleansing of its different manifestations, practices and images.

They based their rejection on many legal, economic and constitutional studies and proposals issued by many organizations, experts and community researchers that proved that this initiative is an unconstitutional that violates several laws in force and unfeasible financially and economically, and thus, they all demanded withdrawing this initiative.

However, nearly two years later, winds did not blow as the rejecters' vessels wish, as pressures on the legislative initiator increased which was accompanied by an economic and social explosive crisis, and that's why when many elections especially the municipal elections with its important needed financial provisions, the President's initiative returned to the scene with taking into account some requests and modifications, namely:

- The initiative now includes public officials and their likens in article 82 and article 92 of the Penal Code, and thus these articles no longer applies to businessmen and others.

- The initiative now does not include bribery and seizure of public funds, even if the perpetrators are public officials or holding similar positions.

- The authority supervising the implementation of this initiative provisions is no longer a mixed one and subject to the supervision of the Prime Minister, but it has become a purely judicial one that is supervised by head of Court of Cassation and the representative of the Public Prosecution participate in its deliberations.

Despite this apparent retreat form the executive authority in the content of this initiative, which has become called the "reconciliation in the administrative field bill", this did not satisfy its opponents who continued their different form protests whether on field or on media, and through courts before the Provisional Authority Responsible for Checking The Constitutionality of Law Bills. The new draft was approved by 115 votes in the plenary session of the People's Assembly, while most members refused to attend the voting process during the 13th September 2017 session.

Indeed, 38 members sought refuge in this Authority, which was entrusted according to the Constitution with monitoring the constitutionality of bills

(while the Constitutional Court jurisdiction is in applying Article 115 of the Constitution). However, this Authority, in a serious precedent, in its decision No. 8/2017 of 17 October 2017, decided to "refer the bill to the President of the Republic because of the absolute majority didn't occur to pass the decision, as required by Organic Law No. 14 of 18 April 2014.

And accordingly the law was referred to the President of the Republic who is the initiator to be signed on 24 October 2017!! And it is the same day where it was signed and published in Tunisia's Official Gazette, which clearly demonstrates the determination of the Presidency to end any discussion about this law and pass it.

Today, nearly a year after this Organic Law's entry into force, we have the right to question the credibility of this bill's preparatory draft which included the reasons of its issuance, as it stated that: "this law aims to end the past's corruption, and face the spread of misappropriation of public money manifestations, nepotism and sabotaging the administration". We also have the right to question the practical productivity of "creating an appropriate environment that encourages, in particular, the liberalization of the spirit of initiative in the administration, the promotion of national economy and the strengthening of confidence in the State's institutions in order to achieve national reconciliation". Just as we also have the right to question the financial and economic success of this law and the extent to which it contributes to economic advancement and facilitating the Tunisian administration management, as alleged by advocates of this law?

These are all legitimate questions that I think this researcher should address to answer the following:

- Has the Law the Law of Reconciliation in the Administrative Field contributed to understanding the phenomenon of corruption, curbing its scope and addressing its various forms, or has it, on the contrary, increased its spread and granted immunity for those who are responsible for it from being tracked and punished?

- Was the Law of Reconciliation in the Administrative Field a mechanism of eliminating the past's corruption or a way of replicating that past?

To respond systematically to these questions and problems far away from the logic of the fanaticism and prejudices, we should initiate this research by reviewing the most important critics of combating corruption (first) and then addressing the reasons for the entry into force of this law, despite the importance and magnitude of the opposition that the law has

witnessed in (second) The success of this law at various levels (Third)

First: The Law on Reconciliation in the Administrative Field: Numerous critics and detailed judicial appeals

"A vague arrangement made during the darkness of night" this was the phrase which was used by one of the members who rejected the law to describe the ratification of the law by the president and its entry into force.

In fact, this was neither an exaggeration no in crier a misleading description, as whoever reflects on this law's procedures would found various violations since it was just a bill, it was full of substantial constitutional violations, as an example of that, the law violates the principles of equality established in the constitution as it exempted 0.05% of the Tunisian people exclusively from crimes committed by them against the nation, while 5.2% of adult rational Tunisian people are under punitive surveillance in crimes that are less serious than violations of corruption related to public money. Another example is ignoring to what was stated in the Constitution's preamble and Article 10 "The state shall ensure the proper use of public funds and take the necessary measures to spend it according to the priorities of the national economy, and prevents corruption and all that can threaten national resources and sovereignty." As impunity of public officials and their likens and not holding them accountable for their crimes can only be described as cleansing their image which is a clear violation by the state for its obligation to address and combat corruption.

In the same context, the law guarantees in its general philosophy and procedure, an explicit violation for rules of transparency, integrity and accountability set forth in Article 15 of the Constitution, which states: "Public administration is at the service of the citizens and the common good. It is organized and operates in accordance with the principles of impartiality, equality and the continuity of public services, and in conformity with the rules of transparency, integrity, efficiency and accountability" as the amnesty granted by law to public officials involved in crimes of abuse of power, disrespecting procedures and causing damage to the administration would eventually contribute to promoting illegal practices which were already spread in the former Tunisian administration, and it would also contribute to concealing the whereabouts of the looted public money and the means of stealing it.

In addition to these obvious constitutional violations that marred this law in various chapters, the method in which this law was ratified by the Assembly was unconstitutional that led some to talk about "legislative

corruption" based on manipulating and misinterpreting or even ignoring clear legal texts and provisions, an example of that is that the Assembly deliberately ignored the constitutional requirement imposed by Article 114 of the Constitution and Article 42 of Organic Law No. 34 of 28 April 2016 concerning the Supreme Judicial Council which states that draft laws related to justice and administering judiciary should be addressed by the Supreme Judicial Council so as to provide their opinion about it, an obligation which Head of Parliament decided to ignore for unknown reasons.

This law was also in violation to the spirit and explicit requirements of the United Nations Convention against Corruption of 31 October 2003, which was ratified by the Tunisian State by Act No. 16 of 25 February 2008. The Convention, like all treaties was ratified by the Parliament, and it is considered to have status superior to laws as set out in Article 20 of the Constitution.

The United Nations Convention against Corruption included a set of obligations that bind States in combating corruption especially what was stated in Article 1 "To promote and strengthen measures to prevent and combat corruption more efficiently and effectively" and also the obligation that was stated in Article 5 "Each State Party shall endeavor to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption." In addition to other duties as the duty to establish and promote effective practices aimed at the prevention of corruption, and adopting appropriate legislative and administrative measures to criminalize abuse of functions and position by public officials in order to gain directly or indirectly an undue

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In addition to these constitutional and international treaties violations, the Reconciliation in Administrative Field Law also included grave risks as it tends to fortify corruption and clean its image instead of legally addressing and combating it, particularly through its clear violation of the Transitional Justice Law and its philosophy, which, as mentioned above, was issued in order to get rid of the past's scourges such as corruption and tyranny and to guarantee its non-repetition so as to achieve a comprehensive national reconciliation.

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And although paragraph 9 of Article 148 of the Constitution stipulates that "The state undertakes to apply the transitional justice system in all its domains", and despite the fact that the Venice Commission (European Commission for Democracy through Law) has stressed the importance of ensuring that the reconciliation law achieves the transitional justice system's lofty goals when the "Truth and Dignity Commission" requested their opinion on the draft law on financial and economic reconciliation in its issued opinion No. 818/2015 of the 104th meeting, which is dated 27 October 2013, (point no.36) but the law in its final version completely ignored the constitutional immunization of the transitional justice system, just as it ignored pursuing the transitional justice's lofty goals.

The Tunisian approach to transitional justice is based on five sequential and reliable phases, namely, revealing the truth of violations, accountability, and then the reparation and rehabilitation of victims, institutions reform, and finally reconciliation, which is the culmination of that integrated course.

But, quite the contrary, the procedures approved by the reconciliation law have completely ignored the fact-finding phase, since the law requires from whoever wants to benefit from its to provisions to only reveal the

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total sum of money which he/she gained for his benefit or for others benefit without obliging him/her to reveal how they used it or how they gained it.

The law also did not include even an implicit reference to victims of corruption, including citizens, private institutions and other parties, and they all were not provided by a mechanism to compensate and rehabilitate them which confirms that the only beneficiaries of this law are the perpetrators accused of corruption and not victims and this of course contradicts with different transitional justice experiences, which considered victims its cornerstone and foundation.

Thirdly, and judging from what the experts in the field of combating corruption approved, corruption is a complicated phenomenon and there is no way it could be dismantled and confronted without understanding and analyzing the various human, administrative and legislative factors that are contributing to its existence, spread and development, and thus, this law is not only considered a hide out that can cover practices of corruption but also a real obstacle that stands in the way of understanding, dismantling those practices and clearing the public administration of it and its causes.

Thus, we may affirm that the law is violated the most important concept -in our discretion- of transitional justice which is combating the past's corruption, getting rid of it and guaranteeing its non-repetition and institutional reform as Article 14 of the Transitional Justice Law That "Institutional reform aims at dismantling and rectifying the system of corruption, oppression and tyranny so as to guarantee the non-repetition of the violations, the respect of human rights as well as the establishment of a State of Law. Institutional reform namely includes revising the legislations, vetting State institutions and utilities where responsibility for corruption and violations has been proven as well as updating and restructuring their methodologies and rehabilitating their staffs", Which contradicts with what the Reconciliation in Administrative Field law stated, as it replaced eradicating corrup

tion which marred the State's institutions with granting it legitimacy and allowing it to spread even more, and instead of trying to understand the mechanisms of corruption within the State's institutions so as to prevent if rom spreading as a precaution , it offered to cover-up for the perpetrators and their networks, it also chose to honor them and give immunity for them against all trials, tracking forms and penal punishment instead of clearing the institutions of their existence, and the same could be said for the administrative laws and legislation regulating the public administration, as the law chose through adding provisions to provide impediments for combating corruption and making it easier for it to spread more instead of clearing the former texts that was already forming impediments for such a process, the same legislation also is contributing to emptying the transitional justice system from its content of serious productive tools of combating corruption, it is making the entitlement of combating the past's corruption and guaranteeing its non-repetition just an imprisoned slogan existing in the Constitution's and the Transitional Justice Law's pages, a slogan that is unable to be applied practicality.

These are all critics and deficiencies that there's no study related to the Reconciliation law that didn't include or mention them, but -despite their importance and seriousness and despite popular protests against it-they never found any one to consider them in the Representative's Assembly and never convinced the political majority members in it to abandon this law which leads us to question the real reasons of passing such a law.

Second: the reasons for approving the Reconciliation law despite the existence of a consensus on its inability to deal with the past's corruption

Most democratic transition periods which people go through are usually characterized by fragility that is reflected on both the institution's performance and the political actors performance, this fragility requires to overcome and avoid the return of the system's tyranny through managing issues in accordance with the principles of reconciliation, unity and consensus, and it is a set of conditions that wasn't fully taken into account since the beginning of the debate on the Reconciliation law bill, as the bill sponsor didn't launch any effective national dialogue that aims to end all scourges of the past -which was full of corruption and tyranny- and establish a safer ground for a democratic state, and he didn't also promote his initiative to be a comprehensive national dialogue that would include all actors especially state institutions and the Truth and Dignity Committee which entrusted according to the constitution with managing the transitional justice system.

But on the contrary, the initiator chose to ignore objective criticism and popular protests against his initiative, channel the debate going around it to the parliament and to resort to the logic of parliamentary majorities in decision making, a policy that is completely compatible with democracy values but does not serve democratic transition purposes especially in countries that have a limited experience in modern democracy, such as Tunisia. And according to that and because of reasons that are purely related to self-interests, the parliamentary majority supported the President's initiative despite being sure that it impedes implementing the constitutional obligation of the state to combat corruption and despite their conviction that this kind of initiatives should be passed by an the Assembly of the Representatives of the People's absolute majority, and not through a voting that was boycotted by a number of significant members with different affiliations.

In addition to that, the Provisional Authority Responsible for Checking The Constitutionality of Law Bills' decision to refer this constitutionally impugned law to the President to take what he sees fit as a consequence for not being passed by an absolute majority of the Authority's members which is considered to be by some scholars a judicial and legislative mess, while others consider it a denial of justice crime, this decision represented a real assessment for the judiciary's independence and its ability to withstand various forms of politicization and political influence in Tunisia.

Accordingly, it had become clear after the President's ratification of the Reconciliation law despite knowing that it was drafted and issued without any real parliamentary and popular common and collective will and

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consent and this incident also illustrated the country's need for an attentive Constitutional Court that acts as a guardian for respecting the law, makes sure it is properly applied and addresses all attempts to misinterpret or circumvent its provisions, it also illustrated that evident that there is no way to fight corruption in our country and address all these kind of legislation and procedures without speeding up establishing real guarantees for respecting the Constitution and fair procedures for electing the Constitutional Court's members.

But while waiting for this bet which is governed by political inducements and disputes over quotas to come true, we should discuss the

Reconciliation in the Administrative Field's results after nearly a year of its entry into force.

Third: the extent of the law on Reconciliation in the Administrative Field's contribution in the fight against corruption: productivity

1. On the Judicial level:

- There are practical difficulties that encounter investigators in financial cases, especially in cases that include public officials or those whoever stands in the same position, and these cases even include some who

don't qualify as such.

- There are clear contradictions in judicial interpretations for chapter 2 of the law on Reconciliation in the Administrative Field which refers to chapter 96 of the Penal code which in turn does not only apply to public officials but also to whoever stands in the same position and anyone who is involved in such crimes regardless of their capacity.

- the backlog of applications to acquire amnesty certificates submitted by non-officials and their likens as accomplices in crimes committed to general prosecutors of Court of Appeal according to Chapter 32, which states that the accomplices are subject to the same punishment of the perpetrator.

- The multiplicity of archived files in investigation offices and public rights courts before even making sure of the violations credibility being tracked, an sometimes even before reaching results through investigations or assessments.

2. On the institutional level:

- The return of various former employees to their previous jobs with all the privileges and promotions which they were deprived from during their trials.

- An increase in the sense of frustration and disappointment among the employees that refrained from committing acts of corruption or being involved in it, despite the various offers they had, temptations they were exposed to and threats that targeted them.

- The prime ministry still holds the first position in the most institutions that are vulnerable to corruption according to Transparency International's Corruption Perceptions Index (CPI) even more than security, media and judiciary.

- The total deficiency of the Arbitration And Conciliation Commission especially at the level of the Truth and Dignity Commission's missions as a result for the reluctance of former regime members who were involved in corruption crimes to deal and communicate with the Commission, and because of the Authority in charge of public disputes' rejection to let the commission get hold of the perpetrators files

3. On the Economic level: Lack of economic feasibility:

- The state's inability to recover the money that is estimated at 22 billion dollars which the former president and his family looted, stole and smuggled is continuing.

- There is a significant decline in the rates and volume of foreign investments in Tunisia.

- There is not any figures or numbers that show the real value and amounts

For the money collected from those who were granted amnesty, even though nearly one year passed since the law entered into force and despite what the Presidential Advisor said in 2016 about expectations of achieving revenues that range between 500 and 700 million.

4. On the Political level:

Internally:

- There is a strong return for the former regime's symbols and men to the political scene to hold high rank posts and responsibilities

- There is an invasion of corrupted political money that invades the political life and even the parliamentary that turned into a very specific target for them through spending in elections.

- The issue of corruption has turned into a political card that the government and some politicians hold and play with in order to serve bargaining logic and political retaliation.

Externally:

- The Tunisian State's rank in combating corruption is continuing to decline according to Transparency International's Corruption Perceptions Index (CPI).

- The foreign investors' influence continue to increase.

- The faith of major international organizations that are interested in transitional justice as well as Venice in the democratic path's credibility continue to get shaken.