

A Mémorandum to the President of the Republic about the penal reconciliation proposal

Policy brief
December 2021

1. Presentation

To the President of the Republic

As the guardian of respect of the constitution and following your statements made since July 25th, 2021 putting all the decisions made within the constitutional frame, we urge you to enforce the provisions of the constitution of January 27, 2014, especially the provisions related to transitional justice, stated in article 148, the ninth paragraph:

“The state undertakes to apply the transitional justice system in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of res judicata, and the prescription of a crime or a punishment are considered inadmissible.”

As stated in article 15 of organic Law No. 53- dated December 24, 2013, relating to the establishment and organization of transitional justice:

"Reconciliation aims to strengthen national unity, achieve social justice and peace, build the rule of law and restore citizens' trust in state institutions. Reconciliation does not mean impunity and failure to hold those responsible for violations accountable."

This article is in fact compliant with international standards, including in particular the recommendations of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff in the Report A/HRC/21/46 [A/HRC/21/46 - A - A/ HRC/21/46 -Desktop \(undocs.org\)](#)

Through this report, the Special Rapporteur stresses that reconciliation, even when we evoke comparative experiences, should not be seen neither as an alternative to the judicial process, nor as an objective that can be achieved in isolation from the comprehensive approach to the four pillars of the transitional justice process (truth, justice, reparation and guarantees of non-recurrence).

It was also stated in the “Scheme Plan for the Development of the National Territory Land” of 1996:

“...Internal regions are not useful in the context of the globalized economy, and the national interest excludes the development of these regions, because economic efficiency requires three poles in which all economic activities shall be based...”

It is indisputable that this shocking excerpt, which appeared on page 218 of the fourth part of the comprehensive final report of the Truth and Dignity Commission (IVD), proves that the real causes of the economic and social marginalization of the various regions in Tunisia is a systematic policy, which the Truth & Dignity Commission described as “deliberate” in its final report.¹

Following the President’s intentions to establish a penal reconciliation with those who robbed public money and committed financial and economic crimes, and for whom there is an existing criminal prosecution, we release the monitoring reports of the trials that include hundreds of the perpetrators of the abovementioned crimes. Suspicions of corruption and accusations are being leveled by the

¹ Page 184 of the Final Report of the Truth and Dignity Commission Report, Reparation and Rehabilitation Volume

criminal specialized chambers concerned with transitional justice². You can also find in the following a legal analysis of the proposed bill with our recommendations necessary to ensure that your proposal is in line with the principles of transitional justice and with the international standards and treaties ratified by the Tunisian state.

2. About the « National Reconciliation Commission » :

In the following analysis, we rely on the draft law that was released to the public, which included in its third provision the creation of a national reconciliation committee that represents the state and is under the supervision of the President of the Republic. Then, the ill-gotten public funds proposed by the reconciliation seeker shall be validated and valued by 10% for each year from the date of the initial crime or damage to the state, provided that the reconciliation seeker takes responsibility of a development project or development projects within the framework of the “Reconciliation Fund intended for regional of Development”, created by presidential decree.

As this transaction is in contradiction with the most prominent pillars of transitional justice, namely the truth revelation and the pillar of judicial accountability and prosecution, which came in many international agreements and treaties, most notably the United Nations Convention against Corruption:

https://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf

Corruption and other financial crimes are directly linked to human rights violations, as indicated in the same convention in its introduction:

“The States Parties to this Convention,

Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States”

in addition to the clear violation of Organic Law No. 53-2013 relating to the establishment and organization of transitional justice.

From this it follows that, if the demands for reconciliation are limited exclusively to cases in which the state is civil party, and given that political willingness did not support the work of the Truth and Dignity Commission, and deliberately hampered the work of the Arbitration and Reconciliation Commission within the IVD, by influencing businessmen and discouraging them to submit reconciliation requests, we do not see a legal opposition to re-creating a positive political circumstance aiming at concluding a penal reconciliation with businessmen and capital owners in order to return the ill-gotten funds to the state treasury, provided that the legal bylaws of the Presidential Committee imitate the legal standards and conditions of the Arbitration and Reconciliation Committee of the Truth and Dignity Commission. This way, we remain compliant with all the pillars of transitional justice such as truth revelation and accountability, which will ensure that national reconciliation is reached in a sound manner that does

² Trials’ monitoring Reports carried by Avocats Sans Frontières within the Laroujou3 project:

<https://laroujou3.com/wp-content/uploads/2021/05/OBS-Corruption35-AM-A4-AR-220421.pdf>

<https://laroujou3.com/wp-content/uploads/2021/04/OBS-Corruption-31-AM-A5-AR-220421.pdf>

<https://laroujou3.com/wp-content/uploads/2021/05/OBS-AFFAIRE-25-30521-A5-AR.pdf>

<https://laroujou3.com/wp-content/uploads/2021/08/OBS-AFFAIRE-27-05-03-21-AM-A5-AR.pdf>

<https://laroujou3.com/wp-content/uploads/2021/06/OBS-El-Karama-Holding-A2-FBG-AR-020320-.pdf>

<https://laroujou3.com/wp-content/uploads/2021/07/OBS-AFFAIRE-07-RS-31-05-21-A7-AR.pdf>

not abuse the large groups' right to know the truth and to achieve reparative justice through the judiciary, as one of the fundamental rights.

It is only via the truth revelation principle and the principle of judiciary accountability that we can guarantee the non-repetition of the human rights' violations, especially in light of the deepening practice of widespread impunity, its embedding by state agencies and its anchoring in the prevailing mentalities. And since that penal settlement to be concluded in financial crimes where the state is civil party will only benefit the group, this latter has the ultimate right to know how those public funds were looted and how economic experts during the despotic regime made financial, legal and judicial arrangements and schemes to weigh down public banks and reach personal interests. Moreover, these operations and arrangements shall be exposed to the public by standing before the courts during public sessions, or by recording public videos if verdicts are pronounced against the reconciliation seekers (similarly to the testimony video of Mr. Imed Trabelsi in light of truth revelation and public excuse initiative), which will certainly ensure that abuses are not repeated.

Based on this, and in order to respect the principle of penal accountability within the intended reconciliation plan, we present the following recommendations:

- Not to abolish the ongoing judicial process by the simple fact of submitting reconciliation requests, and not to confuse the judges who are already in charge of criminal files, and to guarantee the principle of accountability by bringing the reconciliation seekers before the judiciary (before the criminal specialized chambers of transitional justice in the files where the public commissioner of state has previously exercised the personal right, or even before the ordinary criminal chambers of the economic and financial pole) in order to reveal the violations committed in a public session according to the international fair trial standards.
- Letting the judiciary in charge of financial abuses files finish their work and communicate their verdicts, especially that those accused of the violation enjoy the presumption of innocence principle.

And in order to ensure that the principle of truth revelation and peace achievement are not contradictory, we recommend to the President of the Republic to:

- Disclose to the public the details of the public funds looting and the legal texts that were violated with the participation of influential public servants, by recording public videos that must include a public apology of the reconciliation seeker, provided that the National Reconciliation Committee publishes it before concluding the final reconciliation transaction (similarly to the testimony video of Mr. Imed Trabelsi in light of truth revelation and public excuse initiative), which shall preserve the philosophy of transitional justice and to ensure the non-repetition of abuses.

3. About the « National fund for regional development » :

In Chapter 18 of the draft bill, it is stated that a "Reconciliation Fund aiming at Development" is created by a presidential decree, and Article 27 stipulates that the "Local Coordination Committee" shall study the submitted projects therein, deliberate on them, and decide on them in coordination with representatives of associations and heads of local authorities.

What is noteworthy in this provision is the drastic break with the transitional justice process and its organic Law N°53-2013, and the exclusion of the internationally recognized Truth and Dignity Commission's work, as well as with the testimony of the Special Rapporteur of the High Commissioner for Human Rights in charge of promoting truth, reparation, justice, and guarantees of non-recurrence:

[AL TUN \(2.2021\) \(ohchr.org\)](#) (from page 3)

This rupture comes especially with the idea of collective reparations for the victim areas that have been marginalized and excluded over decades for political and economic reasons, knowing that major national organizations such as the Tunisian Forum for Economic and Social Rights (FTDES), and many other social organizations partook in national consultations that were established by Truth and Dignity Commission throughout the territory of the Republic, and several regional associations have submitted demands to include their areas as ‘victim areas’ alongside with their proposals for development projects in line with the specificities of every region (a ‘region’ could be a province, a delegation or a district, according to the definition adopted by the TDC) which led to the recognition of hundreds of areas obtaining the label of ‘victim regions’, all of which are published in the final report of the Truth and Dignity Commission³.

The work of the Reparations Committee at the TDC was based on Article 10 of the Transitional Justice organic law, stipulating that “The area that has been subjected to marginalization or systematic exclusion is considered a ‘victim-region’.”

Although the legislator did not provide a direct definition of these terms within the Transitional Justice Law and did not use the term “region” in any of the development plans in which we find the term “region” referring to the geographic location, such as the northwest, or when Tunisia was divided into administrative sections, delegations and deanships, in which the term “wilayat” was adopted, it remains incomplete for the region to witness economic alienation or exclusion as a result of external circumstances related to geographical factors such as climate or location. Rather, marginalization or exclusion has to be proved systematic, meaning that it is a result of a specific plan or alienation that implemented it systematically. On these grounds, the TDC relied on development indicators showing poor basic and vital needs when looking into the state’s intention to exclude one region or another, indicators without which a human group cannot lead a decent living.

Based on the foregoing, the ‘victim-regions’ were approved according to a number of scientific indicators and criteria (page 228 of the volume on reparations for the victim areas of the Truth and Dignity Commission report). By the TDC definition, an intentionally marginalized area is economically impoverished, politically oppressed, socially stigmatized, and culturally excluded, and when the region claims its demands and needs for reparation, it is ignored.

On this basis, we make the following recommendation:

- The ‘Local Coordination Committee’ and the ‘National Conciliation Committee’, within the continuity of the state principle, and in order not to repeat the same violations previously observed by state agencies, should implement the comprehensive reparation program for the ‘victim-regions’ prepared and published by the Truth and Dignity Commission, which already contains development projects and measures to reduce disparities in the short, mid and long term, which also embodies a material and a symbolic reparation, and that would achieve development and justice for marginalized regions, in line with the idea of a penal reconciliation targeted for development and proposed in the draft bill.

³ Page 228 of the Final Report of the Truth and Dignity Commission Report, Reparation and Rehabilitation Volume

4. Recommendations :

Avocats Sans Frontières proposes to the President of the Republic the following recommendations:

1. That penal reconciliation does not cancel the principle of judicial independence and accountability

- Not to abolish the ongoing judicial process by the simple fact of submitting reconciliation requests, and not to confuse the judges who are already in charge of criminal files, and to guarantee the principle of accountability by bringing the reconciliation seekers before the judiciary (before the criminal specialized chambers of transitional justice in the files where the public commissioner of state has previously exercised the personal right, or even before the ordinary criminal chambers of the economic and financial pole) in order to reveal the violations committed in a public session according to the international fair trial standards.
- Letting the judiciary in charge of financial abuses files finish their work and communicate their verdicts, especially that those accused of the violation enjoy the presumption of innocence principle; and once charged guilty, even if it is in the first instance phase, they can submit a written request for reconciliation and follow the presidential reconciliation path proposed in the draft law.

2. The penal reconciliation should not overtake the principles of revealing the truth and guaranteeing non-repetition

- Disclose to the public the details of the public funds looting and the legal texts that were violated with the participation of influential public servants, by recording public videos that must include a public apology of the reconciliation seeker, provided that the National Reconciliation Committee publishes it before concluding the final reconciliation transaction (similarly to the testimony video of Mr. Imed Trabelsi in light of truth revelation and public excuse initiative), which shall preserve the philosophy of transitional justice and to ensure the non-repetition of abuses.

3. Acknowledgment of the 'victim-regions' rights for reparation and positive discrimination according to the constitution provisions

- The 'Local Coordination Committee' and the 'National Conciliation Committee', within the continuity of the state principle, and in order not to repeat the same violations previously observed by state agencies, should implement the comprehensive reparation program for the 'victim-regions' prepared and published by the Truth and Dignity Commission, which already contains development projects and measures to reduce disparities in the short, mid and long term, which also embodies a material and a symbolic reparation, and that would achieve development and justice for marginalized regions, in line with the idea of a penal reconciliation targeted for development and proposed in the draft bill.