



## **ICTJ Comments on Draft Organic Bill Number 49/2015 Pertaining to Reconciliation in the Administrative Field**

### **Draft Organic Bill Number 49/2015 Pertaining to Reconciliation in the Administrative Field**

#### ***Comment on the draft title:***

*What this bill does is to assume without any factual basis that one big group of people [current and former administrative officials of the dictatorship] did not gain anything at all from abusing their power or position during the dictatorship and then give them amnesty without any investigation and call it “reconciliation.” It does not even ask that group to do anything (there is no procedure for applying for this amnesty). It does not ask that group to offer truth (whether before the Truth and Dignity Commission or the National Anti-Corruption Commission). It does not require anyone to testify against any other person linked to the dictatorship. It does not offer the State or the Tunisian people anything in exchange for the impunity that this group is being given.*

#### **Article One:**

This law has been designed to create an appropriate atmosphere that is likely to instigate a stronger sense of initiative on the part of the civil government in order to promote the national economy and consolidate trust in the institution of the state for the ultimate sake of national reconciliation.

#### ***Comment:***

*From the start, it should be said that the purpose of these bills—including this latest version—is not reconciliation but impunity. We can clarify that in some countries and cases, amnesties are offered because the crime’s gravity (ordinary citizens avoiding payment of taxes) is not particularly egregious or its political objective (rebellion) is seen more sympathetically. But certain offenses that are committed during periods of repression or under a dictatorship are of a different scale or type—such as torture, extrajudicial killings, enforced disappearances, and large-scale corruption, for example—because they are committed systematically and to maintain repressive rule or to profit from it. It is wrong to speak of reconciliation between two “sides” that are not close to being equal in terms of power or accountability. Tunisia experienced dictatorship, not armed conflict. In any case, “reconciliation” must begin with justice and accountability, instead of preventing them.*

**Article two:**

Civil servants and their likes shall not be subject to penal liabilities as per articles 82 and 96 of the Penal Code as regards the commission of acts pertaining to breach of the procedures and policies or abuse of administration for the achievement of undue gains provided that such undue gains are not reaped by mentioned civil servants. Consequently, the prosecutions and trials thereof shall be terminated.

This immunity from prosecution granted to mentioned civil servants shall not apply to acts of bribery or embezzlement of public funds.

**Comment:**

Paragraph 1:

1. *If the intention of the civil servant was to provide undue gains to others, why should he/she be treated as less complicit (and entitled to an amnesty)?*
2. *The distinction between civil servants who benefited from their own abuse of administration and those who did not will be arbitrary and indistinguishable and reward those civil servants who can conceal their ill-gotten wealth (such as through money laundering).*
3. *In some countries, civil forfeiture laws give the state the power to recover (“forfeit”) ill-gotten wealth from civil servants if they cannot establish how they acquired their assets, afford their lifestyle, and obtained other symbols of wealth based on their legal income. In other words, the burden of proof is on suspected corrupt civil servants to prove that their assets are legitimate. That is a better way of determining whether civil servants have committed abuse of power (and whether they gained from it) than to simply make an arbitrary distinction between corrupt civil servants who gained and those who did not that may not have a factual basis.*

Paragraph 2:

*This assumes a narrow notion of “bribery” as merely offering money or some financial incentive to act unlawfully. Offering promotions and providing benefits other than money can be bribery. The distinction is false. In other words, civil servants who gave undue gains through bribery can simply say that a businessman or politician did not bribe them—which, of course, those businessmen or politicians will readily agree with.*

**Article Three:**

Civil servants and their likes as referred to in the first paragraph of the Law herein, found guilty by final court decision for the commission of acts as per the first paragraph of mentioned Article 1, shall benefit from general amnesty with due regard to the derogation in the same article.

The general prosecutors in appellate courts, each according to their competence, shall be handed certificate to this effect.

The amnesty shall also include sums in material and moral reparation levied against the individuals as per the first paragraph of Article 1 and ordered by ruling for the benefit of the State, local governments, or public facilities.

**Comment:**

Paragraphs 1 and 2:

*This does not make sense because the state has already procured a conviction. In other countries, a pardon, instead of an amnesty, can be given. The main difference is that a pardon takes away the punishment but not the guilt. An amnesty says in effect that the crime was not committed at all.*

Paragraph 3:

*As stated above, an amnesty is not the correct concept to apply; “reparation” in this case is really a fine—which should be part of the penalty. This also then contradicts the assumption that there was no “undue gain.” If the “reparation” or penalty will not be based on that “undue gain” (because there is an assumption that there is not any), what will it be based on? In such cases, presumably Tunisian criminal law already has a scale of penalties and fines and this law is unnecessary.*

**Article Four:**

The measures as per Article 2 and 3 shall not apply to those who are not civil servants and their likes pursuant to Article 82 and 96 of the Penal Code.

**Article Five:**

Any disagreement or dispute arising from the enforcement of the Law herein shall be submitted to the attention of a panel composed of the chief justice of the Cassation (Upper Appellate) Court and two of the most senior judges of the circuits thereof, in the presence of the representative of the public prosecution office thereof.

Anyone concerned shall be entitled to lodge a lawsuit by means of a written petition accompanied with supporting documents and evidence.

The president of the mentioned panel is required to submit the file immediately to the state's Advocate General at the Cassation (Upper Appellate) Court to submit his/her motions within a maximum period of ten days. The panel shall adjudicate the matter within a period of one month from submission of petition.

The panel shall examine petitions to challenge the certificate of amnesty.

The decisions handed down by this panel shall be final and irrevocable and in no way subject to any appeal or challenge whatsoever.

**Comment:**

Paragraph 2:

*First, this entire law (like its previous versions) does not create any process for determining and verifying whether the person seeking amnesty obtained undue gains or has likely concealed them. In fact, the law does not outline any process involving how the “certificate of amnesty” is obtained. There is no transparency or clear public involvement in how the bill describes the amnesty process so that there is no way of determining when or how anyone who “disagrees with” or “disputes” the amnesty can do so. More importantly, it is the state that should in fact be investigating the civil servant involved before considering any amnesty, because it is the state that can determine whether “undue gains” were made or whether there was bribery, embezzlement, or concealment of other facts. That burden of the state should not be passed on to ordinary citizens.*

**Article Six:**

In the event of a dispute as per Article 5 of the law herein before a judicial jurisdiction, the submission of the petition in writing shall suspend adjudication of the substance pending the examination of that dispute before the mentioned panel.

**Article Seven:**

The provisions of this law shall be in force from July 1, 1955, to January 14, 2011.

**Additional Article:**

Should it be established that the bearer of an amnesty certificate has knowingly concealed the truth or stopped short of revealing the entirety of what he/she had unduly received, prosecution, trial, or penalty shall be resumed.

**Comment:**

- 1. This is confusing and contradictory. No process of truth seeking is done before amnesty is given (that is why this article refers to the “bearer of the amnesty certificate,” meaning it has already been given to him or her). No investigation is mentioned in any of the articles. Even the cases that have already been investigated and resulted in a conviction are set aside.*
- 2. In other countries, a public official who is accused or implicated in corruption can either be 1) a “whistle-blower” who reports corruption or 2) a suspect in a corruption case who agrees to be a witness, supply information, and testify for the state against corrupt officials, businessmen, or political leaders who are guiltier than him or her. In other words, the state and society gets something out of the immunity—not amnesty—offered.*

3. *What is the difference between offering immunity and offering amnesty (as it is in this bill)? In some countries, such immunity is given in exchange for information that has led to asset recovery abroad, which has provided bases to prosecute higher officials and political leaders and allowed businesses implicated in corruption to be rehabilitated while its records and transactions are opened on the basis of the information that implicated officers or investors offer.*
4. *This draft does not create a system that offers incentives for witnesses to come forward to testify on corruption. A better law would be one that seeks to protect whistle-blowers and creates an independent institution that can pursue and recover assets obtained through corruption during the dictatorship—beyond the term of the Truth and Dignity Commission.*