

Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE: AL G/SO 214 (3-3-16)
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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers pursuant to Human Rights Council resolution 17/2.

In this connection, I would like to bring to your Excellency's Government's attention information I have received concerning a **draft law on the Advocacy and the Bar**, which, if passed in its current form, would jeopardize the independence of the legal profession.

According to information received:

In 2012, a working group was established to prepare a draft law on lawyers' activities and the legal profession. The working group was composed of representatives of the legal community, bar associations, the executive office of the President of the Republic, the Supreme Court, the Council of Justice, the office of the Prosecutor General and the Ministry of Justice. It is reported that, to this date, the draft law has been under the consideration of the Presidential Administration and has not yet been sent to the Supreme Assembly.

It is further reported that, while the draft law allegedly aims at creating a unified and self-governing bar, several provisions would undermine the independence of the legal profession. In particular:

Article 13 of the draft law provides that "the Qualification Commission is established under the Ministry of Justice of the Republic of Tajikistan in order to consider the issue of conferring or withdrawing a lawyer's status." The article further states that the Qualification Commission would include five representatives from the new Union of Lawyers, two representatives from the Ministry of Justice, one Member of Parliament, and one legal academic; the Commission would also be chaired by one of the Deputy Ministers of Justice. These provisions would reportedly give room to undue interference in the work of the Qualification Commission, as its chairman would be one of the Deputy

Ministers of Justice, thus enabling the executive branch of power to play a decisive role in regulating the entry to the legal profession, as well as lawyers' disbarment. According to the source, propositions to amend this provision have already been suggested by the legal profession. For instance, the legal profession suggested that the Qualification Commission be moved from the purview of the Ministry of Justice to the purview of the new Union of Lawyers.

Article 15 of the draft law details the examination process required for prospective lawyers to enter the profession; this examination process should comprise both a written and an oral examination. Notably, the Qualification Commission has been given the dual responsibility of developing the procedure for taking the qualification examination and assessing the level of knowledge of the applicants. Moreover, the composition of the Qualification Commission could allegedly allow for potential interference from the executive branch in the examination procedure and, consequently, in the entry into the legal profession. In this sense, according to the source, members of the legal profession have already recommended that the Ministry of Justice should not preside over the examination procedure.

Article 45(1) of the draft law stipulates that "lawyers who acquired their status in compliance with the laws of the Republic of Tajikistan, perform their activities on the territory of the Republic of Tajikistan as of the date when this Law becomes effective, and meet the requirements of article 12, Parts 1 and 2 of this Law, can continue their activity for one year after the effective date of this Law. If they plan to continue conducting advocacy, they shall acquire the lawyer's status in compliance with the requirements of this Law within the specified time frame." Reportedly, this provision would oblige all lawyers, including all current practitioners, to take the new examination as a condition to maintain their status of lawyers. According to the source, this would allow for undue interference, particularly in cases of lawyers deemed as controversial by the executive branch, as they might be denied re-entry in the legal profession. Thus, members of the legal profession have already suggested that the new qualification examination should not be retroactively applied and that, if needed, continuous legal education programmes should be provided to lawyers in order to improve the quality of the legal profession.

Without expressing at this stage an opinion on the facts of the case, I would like to appeal to your Excellency's Government to take all necessary measures to guarantee the independence of the legal profession and to ensure that lawyers are able to perform their professional functions without improper interference, pressure or threats.

The allegations, if confirmed, would raise serious concern in relation to the compliance of several provisions of the draft law with international human rights law and standards. In this context, I would like to urge the Supreme Assembly to consider amending the draft law on the Advocacy and the Bar, and including the establishment of a self-regulating independent bar association or committee to oversee the process of

admitting candidates to the legal profession and the enforcement of disciplinary measures.

In this view, I would like to refer your Excellency's Government to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, from 27 August to 7 September 1990. In particular:

-Principle 16, which states: "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; [...] and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics";

-Principle 24, which states: "Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference"; and

-Principle 28, which states: "Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review".

Moreover, I would like to highlight that the Human Rights Committee, in its concluding observations on the second periodic report of Tajikistan, expressed concern that "lawyers are harassed for carrying out their professional duties and are subject to external interference, particularly from the Ministry of Justice". On this occasion, the Human Rights Committee urged Tajikistan to ensure that "the procedures and criteria for access to and conditions of membership of the Bar do not compromise the independence of lawyers" (CCPR/C/TJK/CO/2, para. 18.).

In addition, I would also like to draw your Excellency's Government's attention to the fact that the draft law in its current form would be contrary to the recommendations contained in the report of the official visit to Tajikistan conducted by the former Special Rapporteur on the independence of judges and lawyers in September 2005 (E/CN.4/2006/52/Add.4). In particular, the Special Rapporteur suggested "the establishment of a single, self-governed body with compulsory membership, which would administer issues related to the bar such as access to the profession, removal from the profession, disciplinary measures, respect for ethical rules and continuing legal education. This body should be independent from the executive branch" (para.93).

It is my responsibility under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. Since I am expected to report

on these cases to the Human Rights Council, I would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the above summary of the case accurate?
2. Please provide information about the status of the draft law on Advocacy and the Bar and the steps still missing for its adoption.
3. Please indicate how the draft law is in compliance with international human rights law and principles, including the Basic Principles on the Role of Lawyers. Please explain in particular how the Qualification Commission could be considered a body independent from the executive branch.
4. Please give details about how the structural links between the Qualification Commission and the Ministry of Justice would be established.
5. Please indicate whether propositions and suggestions to modify the draft law were received from the legal profession and civil society; please also indicate if these propositions were considered by the Government, and if yes, explain through what process.

I would appreciate a response within sixty days. I undertake to ensure that Your Excellency's Government's response to each of these questions is accurately reflected in the report I will submit to the Human Rights Council for its consideration.

While waiting for your response, I urge your Excellency's Government to take all necessary measures to guarantee that the independence of the legal profession is respected.

In light of the potentially serious implications of this case, I am considering to publicly express my concerns in the near future.

Please accept, Excellency, the assurances of my highest consideration.

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers