

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

Ref.: AL SYR 4/2022
(Please use this reference in your reply)

24 October 2022

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 44/8.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **the structure of the Judiciary that does not ensure its independence and the right to the guarantees of fair trial.**

In this communication, I do not aim at providing a comprehensive analysis of the 2012 Constitution and accompanying legislation. I seek to address some elements that fall within the scope of the mandate entrusted to me by the Human Rights Council.

According to the information received:

The Constitution of 1973 granted the President extensive powers, such as issuing legislative decrees, heading the Supreme Judicial Council, and appointing the judges of the Supreme Constitutional Court. It gives the President a great control over both the legislative and judiciary branches. The 1973 constitution forms the foundation for Syria's current 2012 Constitution.

Although the 1973 Constitution was accompanied by the state of emergency declared in Syria from 1963 to 2011, the information suggests that lifting the state of emergency did not lead to any fundamental change in the 2012 Constitution to limit the powers of the President and the scope of the Executive's authority in the judiciary. In addition, the President reportedly exercises the power of legislation by issuing legislative decrees that have the force of laws issued by parliament.

The 2012 Constitution establishes two prominent judicial frameworks. The first is the courts' judiciary, which is regulated by law in terms of identifying categories, levels, and jurisdiction. According to the Syrian law, two types of courts' can be distinguished: the ordinary judiciary, which is regulated by the Judicial Authority Law issued by Decree No. 98 of 1961 and the codes of Trials' Procedures; and the exceptional judiciary, which is regulated by special laws that identify its jurisdiction, hierarchy, and rules of procedures, such as the Law No. 22 of 2012 on establishing the Counterterrorism Court.

The second judicial framework in the Constitution is the administrative judiciary, which is handled by the State Council. It is responsible for adjudicating administrative disputes in which the state is a party, such as disputes related to taxes and salaries of public employees.

The Ordinary judiciary

According to the current 2012 Constitution, the President is the only one who has the power to appoint the Supreme Constitutional Court by decree. This court considers the constitutionality of laws and the appeals submitted against presidential and parliamentary elections. Moreover, this court is the one that tries the President exclusively in cases of great treason.

For instance, article 132 enacts that the judiciary is independent; however, the President guarantees this independence with the assistance of the Supreme Judicial Council. The Council consists of seven members: President of the Republic, the Deputy Minister of Justice, the Public Prosecutor, the head of the Judicial Inspection Department, the President of the Court of Cassation and his two senior vice presidents. Notably, the executive authority chairs the Supreme Judicial Council and occupies a direct membership position, the Deputy Minister of Justice; it supervises the Public Prosecutor and appoints the head of the Judicial Inspection Department. Therefore, the executive branch has the control over 4 out of 7 seats of the Council. As for the remaining three members, the Council itself appoints them to their positions by majority votes, dominated by the executive branch.

The Judicial Authority Law issued by Decree No. 98 of 1961 grants the Supreme Judicial Council the most significant authority over the judiciary, as article 67 grants this Council the powers to, inter alia, appoint, promote, discipline and dismiss judges based on the proposal of the Minister of Justice or the President of the Supreme Judicial Council (i.e. the President) or three of its members, as well as overseeing the independence of the judiciary.

In addition, decree 95 of 2005 states that the Council of Ministers may, within twenty-four hours and according to its discretion, decide to dismiss judges from service with no requirement to justify or include the reasons for the dismissal decision. The judge may be dismissed by a decree, which is not subject to any method of review or appeal before any administrative or judicial authority. The rights of the demobilised judges shall be liquidated following the provisions of the law in force.

The Exceptional judiciary

The Exceptional judiciary in Syria is regulated by special laws. The former Supreme State Security Court (SSSC) was established by Legislative Decree No. 47 of 1968, which granted the President the authority to decide the formation of the court and the appointment of its judges. Significantly, the sentences of this court were final and not subject to appeal. These verdicts could not be enforceable except with the approval of the President, who has the right to cancel the decision and order a retrial.

After lifting the state of emergency in Syria, the SSSC was abolished by Decree 53 of 2011; nonetheless, the information suggests that the Counterterrorism Court was formed as its successor. This court does not differ radically from the SSSC; it imposes its jurisdiction over civilians and military personnel and considers the presence of a military judge in its formation.

Moreover, the information alleges that it is not bound by due process, such as public hearing procedures. Article 2(b) of the Counter-Terrorism Court statute states that the investigative judge, in addition to his/her role, has the powers of the referral judge. The referral judge, according to the general principles of the Criminal Procedures Code, is an appellate level that reviews the decisions of the investigative judge and decides accordingly either to expand the investigation, or to conduct a new investigation. Thus, merging the powers of these two judges into one person results in the defendant losing an appellate level and supervision of investigation.

Although the Counterterrorism Court separates the Public Prosecution from the investigative judge, both positions are still appointed pursuant to the Supreme Judicial Council nomination, dominated by the executive authority, as mentioned previously. Thus, the emergency powers and the accompanying exceptional judiciary have been normalised in the ordinary laws, and the executive branch became able to use this exceptional power regularly.

Military courts

Military field courts were established by Legislative Decree No. 109 of 1968 in light of the state of emergency. Although the President lifted the emergency state in 2011, these courts are still active. These courts have jurisdiction over crimes committed during wartime and military operations; they are formed by a decision of the Minister of Defence, who appoints sentencing judges and the special Public Prosecutor from military commands. Public Prosecution of these courts have all the powers and authorities granted to the investigative judge; its decisions are final and not subject to appeal. Thus, the supervision and appellant role of the referral judge does not exist. Likewise, the sentencing judge's decisions are final and not subject to appeal; it becomes enforceable only upon the President's ratification of death sentences and the Minister of Defence of the rest of the sentences. Thus, it is ultimately subject to the approval of the executive branch.

Without prejudging the accuracy of the allegations received, I would like to express my concern about the structure described and the information received on the alleged dominance of the Executive in the Supreme Judicial Council, on the appointment and dismissal of judges, and also on decisions related to the judiciary. If proven to be accurate, the information would reveal the violation of international standards regarding the independence of the judiciary.

I am also concerned that civilians may be brought before a military tribunal. As you know, the Human Rights Committee has indicated that such a procedure can raise serious concerns about the fair, impartial and independent nature of the administration of justice.

The principle of independence of the judiciary refers to the conditions that should govern the appointment of judges and the criteria that could lead to a removal from the position held. The right to a fair trial stipulated in article 14 of ICCPR, stipulates procedural guarantees that include the right of appeal, and the right of equality before the courts.

Finally, I take this opportunity to highlight that the described status quo in the Syrian Judiciary may constitute a violation of the right to fair trial for the people of Syria in general, as the lack of procedural guarantees, such as the right to appeal and to appear before an impartial tribunal, may limit their access to justice.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As 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, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned concerns.
2. Please indicate the measures taken to guarantee the independence of judges and magistrates in the country, in compliance with the Principles of Independence of the Judiciary, described in the annex.
3. Please provide detailed information on the cases of civilians tried by military tribunals and on the measures taken to guarantee the right to a fair trial in these cases.
4. Please provide information on the measures taken to ensure that the guarantees of due process included in article 14 of ICCPR are available to all people in the Syrian Arab Republic.

I would appreciate receiving a response within 60 days. Past this period, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

I would like to refer to article 14 of the International Covenant on Civil and Political Rights (ICCPR), acceded to by Syrian Arab Republic on 21 April 1969, taking into account the Human Rights Committee (HRC) general comment No. 35 32 on fair trial.

Article 14 of the ICCPR, which states that ‘all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.

In its General Comment N° 32, the Human Rights Committee notes that article 14, paragraph 1, guarantees access tribunals to all who have criminal charges brought against them. These tribunals should be established by law, is independent of the executive and legislative branches of government or enjoying in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. Furthermore, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 (paragraph 18).

As affirmed by the Human Rights Committee: “The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”. (General Comment No. 32, para.19).

According to the Committee, the provisions of article 14 apply to all tribunals and courts of justice included in its scope, whether ordinary or exceptional courts, civil or military. Although the ICCPR does not prohibit the trial of civilians by military or special tribunals, it requires that such trials fully comply with the requirements of article 14 and that the safeguards provided for in this article are not limited or modified. by the military or exceptional nature of the court in question. The

Committee further notes that the trial of civilians by military or special courts can raise serious problems with regard to the fair, impartial and independent nature of the administration of justice. This is why it is important to take all the necessary measures to ensure that such trials take place in conditions that truly guarantee the full guarantees provided for in article 14. The trial of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can demonstrate that recourse to such tribunals is necessary and justified by objective and serious reasons and where, in relation to the specific category of persons and offenses in question, ordinary civil courts are not able to undertake these trials (CCPR/C/GC/32, paragraph 32).

The Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, establish that all governmental and other institutions must respect and conform to the independence of the judiciary (Principle 1) and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason" (Principle 2).

The UN Basic Principles on the Independence of Judges also provide that: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.....Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists (Principles 11 and 12)."

The Basic Principles mentioned above also establish that "[n]o undue or unwarranted interference shall be made with the judicial process" (Principle 3), and that everyone has the right to be tried by the ordinary courts of justice in accordance with the procedures legally established (Principle 5).

In 2009 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that "[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency" (A/HRC/11/41, para. 18). Furthermore, in the 2017 report to the Human Rights Council, the Special Rapporteur on that mandate highlighted that "respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy" (A/HRC/35/31, para. 16).

Moreover, the right to a fair trial and due process is also recognized in the Arab Charter on Human Rights, in particular, in articles 12 and 13 (1) and (16).