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The Syrian Judiciary's Independence: Broader Constitutional Lenses

By the Syrian Legal Development Programme (SLDP)



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Abstract

In light of the international efforts aimed at a political solution in Syria led by Syrians themselves, negotiating the Syrian constitution amendments to preserve the rule of law remains one of the main concerns to ensure stability in the post-conflict phase.¹ According to the UN Secretary-General (UNSG), the rule of law should be premised on several elements, inter alia, an independent judiciary, and a separation of powers.² While the current Syrian constitution asserts the national judiciary independence and impartiality, the Commission of Inquiry (COI) does not recognise this independence as the Syrian government controls the judiciary through several legislations.³ Accordingly, this paper argues that negotiating the constitution should not be isolated from the broader context of the legislation and state practice. It argues that although the current Syrian constitution asserts the independence of the judiciary, this is not reflected in practice, which jeopardises the rule of law and any implementation of a new constitution in the post-conflict situation.

¹ 'Constitutional Committee Breakthrough Offers "Sign of Hope" for Long-Suffering Syrians' (*UN News*, 30 September 2019) <<https://news.un.org/en/story/2019/09/1048162>> accessed 24 November 2021; "Big Disappointment" over Lack of Syria Constitution Agreement' (*UN News*, 22 October 2021) <<https://news.un.org/en/story/2021/10/1103822>> accessed 24 November 2021.

² UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary General' (2004) S/2004/616 para 6.

³ UNGA, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2021) A/HRC/46/54 para 75.

Introduction

The unanimous United Nations Security Council (UNSC) resolution 2254 calls for the formation of a new and consensual constitution for Syria as a crucial requirement for a peaceful political transition and sustainable future determined by Syrians themselves.⁴ This - representing the UN and the international community's efforts to achieve peace and stability in Syria - is not isolated from their vision of the rule of law in post-conflict countries. The UNSG clarified in his report to the UNSC that the concept of the rule of law is the UN mission, which is based on an independent judiciary in line with international human rights standards and requires the separation of powers to ensure equality in the application of the law and transparency in legal procedures.⁵ Moreover, the UN High Commissioner of Human Rights asserted that national courts should play a pivotal role in post-conflict societies.⁶ Therefore, the national judiciary should be the first resort to establish the rule of law in post-conflict countries.⁷

While the current Syrian constitution of 2012 asserts the national judiciary independence and impartiality,⁸ the Commission of Inquiry (COI) does not recognise its independence as the Syrian government controls the judiciary through several legislations. Therefore, it is pivotal to study and then negotiate a Syrian constitution according to its existing or future Articles whilst comparatively analysing their implementation within the national legal system and the extent they guarantee a meaningful rule of law in the country.⁹

This paper will outline the Syrian constitutional guarantees of judiciary independence by analysing the Syrian constitutional text and the relevant legislation and some state practice compared to international law standards. The paper argues that although the Syrian constitution asserts the independence of the judiciary, this is not reflected in practice. While focusing on this aspect of the constitution, the paper will highlight the necessity of reform of national legislation in accordance with international law standards to guarantee the rule of law in the future Syria while negotiating a new constitution that meets the expectations of Syrians.

The paper will be divided into two main sections. First, it will address the international legal framework of judiciary independence and impartiality. Second, it will analyse the related Syrian constitution sections/articles and the relevant legislations and state practice according to the international legal standards addressed in the first section.

⁴ UNSC, 'Res 2254 (2015)' UN Doc S/RES/2254 (2015) para 4.

⁵ UNSC (n 2) para 6.

⁶ Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2006) 5.

⁷ UNSC (n 2) para 40.

⁸ The Syrian Constitution of 2012 Art 132,134.

⁹ UNGA (n 3) para 75.

1 The Framework of the Independence and Impartiality of the Judiciary in International Law

The International Bill of Rights protects the right to a fair trial before an independent and impartial tribunal. Article 10 of the Universal Declaration of Human Rights (UDHR) stipulates that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal".¹⁰ Moreover, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) obliges state parties to respect, protect, and fulfil the right to a fair trial by ensuring a variety of safeguards, inter alia, the right of everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law, and the equal entitlement of minimum guarantees, such as the full right of defence, appeal, and in-person litigation.¹¹

In this regard, General Comment No.32 of the Human Rights Committee demonstrates the dimensions of the independence and impartiality of the competent tribunal by referring first and foremost to the principle of separation of powers by stating that the tribunal must be "independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature".¹² Furthermore, the Committee asserts that the independence and impartiality of the judiciary is a right with an absolute nature, and therefore, it is not subject to any exception.¹³ In that respect, the Committee considers the independent procedures of appointment, protection, promotion, transfer, suspension, and cessation of judges from any executive and legislative interference are essential requirements of the judiciary independence.¹⁴ Therefore, the executive branch shall not unilaterally strip judges of such guarantees without substantial justification such as clear grounds of misconduct or incompetence.¹⁵ Moreover, the judiciary should be impartial; thus, a judge cannot pronounce the verdict based on prejudice, bias, or any other practices that indicate the judge's potential partiality to a reasonable observer.¹⁶

It is worth noting that the Basic Principles on the Independence of the Judiciary, which were adopted by General Assembly Resolutions 40/32 and 40/146, refer to a set of principles, including that the state should guarantee, by virtue of its constitution and domestic laws, the independence of the judiciary. Moreover, the judiciary should have jurisdiction over all issues of judicial nature, that there should be no improper or unjustified interference with judicial

¹⁰ Universal Declaration of Human Rights 1948 (UNGA Res 217 A) Art 10.

¹¹ International Covenant on Civil and Political Rights 1966 (UNTS vol 999, p 171) Art 14.

¹² Human Rights Committee, 'General Comment No. 32' (2007) CCPR/C/GC/32 para 18.

¹³ *Gonzalez del Rio v Peru*, [1992] Human Rights Committee Decision on Communication No. 263/1987, para 5.2.

¹⁴ Human Rights Committee (n 12) para 19.

¹⁵ *ibid* 20.

¹⁶ *ibid* 21.

proceedings, and that everyone has the right to be tried before ordinary courts or tribunals following the applicable legal procedures. Therefore, courts that do not abide by legal procedures may not be established to replace ordinary judicial courts.¹⁷ These principles are also reflected in the Bangalore Principles of Judicial Conduct adopted by the United Nations Economic and Social Council resolution 2006/23, which outlines international standards for ethical judicial conduct. According to the Bangalore Principles, "judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial", and impartiality does not only apply to the sentence itself but also the judicial process.¹⁸

2 The Independence and Impartiality of the Judiciary in the Syrian Constitution

2.1 General background on the Syrian constitutional development

The post-monarchical 1920 constitution influenced by the Ottoman rule took a parliamentary form after being subject to the French mandate.¹⁹ Consequently, the Syrian constitutions of 1930 and 1950 gave the President the power to head the executive authority and command the army, while neither the parliament nor the judiciary was constitutionally allowed to relinquish their powers to the President. Thus, the President did not have any power to enact legislative decrees or authority over the judiciary.²⁰

The *Ba'ath* regime seized power and declared the state of emergency in 1963, then institutionalised itself initially by three temporary constitutions: 1964, 1969, 1971, and finally, the permanent constitution of 1973.²¹ By virtue of this constitution, Syria became a one-party ruling democratic, popular, and socialist state.²² Moreover, the 1973 constitution granted the President extensive powers, such as issuing legislative decrees,²³ heading the Supreme Judicial

¹⁷ Basic Principles on the Independence of the Judiciary (UNGA Res 40/32 of 29 November 1985 and 40/146 of 13 December 1985) paras 1–7.

¹⁸ Strengthening Basic Principles of Judicial Conduct 2006 (E/RES/2006/23) Annex, Value 1,2.

¹⁹ 'Constitutional History of Syria' (*ConstitutionNet*) <<https://constitutionnet.org/country/syria>> accessed 15 November 2021.

²⁰ The Syrian Constitution of 1930 (Proposed by the Constituent assembly in 1928) chs 2, Section 1,2,3,4; The Syrian Constitution of 1950 Art 59, 83, 95, 109, 123.

²¹ Karim Atassi, *Syria, the Strength of an Idea: The Constitutional Architectures of Its Political Regimes* (Cambridge University Press 2018) 252.

²² The Syrian Constitution of 1973 Art 1,8.

²³ *ibid* Art 107,111.

Council, and appointing the judges of the Supreme Constitutional Court.²⁴ Therefore, *Ba'ath's* constitution gave the President a great control over both the legislative and judiciary branches.

Significantly, the 1973 constitution forms the solid foundation for Syria's current constitution of 2012. Although the 1973 constitution was accompanied by the state of emergency declared in Syria from 1963 to 2011,²⁵ lifting the state of emergency did not lead to any fundamental change in the constitution of 2012 that limits the powers of the President and the penetration of the executive authority into the judiciary.

2.2 The constitutional and structural penetration of executive power in the judiciary

The Syrian constitution considers the rule of law to be the basis of the state's ruling.²⁶ Therefore, the three authorities, including the judiciary, are subject to this principle. Article 51 of the Syrian constitution stipulates the dimensions of the rule of law, which are: 1) There is no crime or punishment except by law, 2) Every accused is innocent until proven guilty by a fair trial, 3) The right to litigation, appeal, review, and defence before the judiciary is guaranteed by law, and 4) It is prohibited to legalise the immunisation of any administrative act or decision from judicial oversight.²⁷ However, the structure of the judiciary and the laws regulating its work do not correspond properly to these constitutional rule of law principles, as will be explored below.

The Syrian constitution clarifies two prominent judicial frameworks.²⁸ The first is the courts' judiciary, which is regulated by law in terms of identifying categories, levels, and jurisdiction.²⁹ According to the Syrian law, two types of courts' judiciary 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 clarified by 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

²⁴ The Syrian Constitution of 1973 Art 91, 132, 139; For further reading on the Syrian president's constitutional extensive power over the Judiciary see IBAHRI, 'Human Rights Lawyers and Defenders in Syria: A Watershed for the Rule of Law' (International Bar Association's Human Rights Institute 2011) ch 4.

²⁵ BBC, 'Syria Protests: Bashar al-Assad Lifts Emergency Law' *BBC News* (21 April 2011) <<https://www.bbc.com/news/world-middle-east-13161329>> accessed 15 November 2021.

²⁶ The Syrian Constitution of 2012 Art 50.

²⁷ *ibid* Art 51.

²⁸ See The Syrian Constitution of 2012 chs 3, section 3 (1,2).

²⁹ *ibid* Art 135.

disputes related to taxes and the salaries of public employees.³⁰ However, this paper will only focus on the first judicial framework, because it is more related to the type of violations committed in Syria and documented by the relevant stakeholders.

2.2.1 The ordinary judiciary in Syria and its dependency and partiality

The ordinary judiciary is the originally competent judiciary with comprehensive jurisdiction over all disputes except what the legislator has assigned to the exceptional judiciary by a particular law. Generally, the constitution indicates that the judiciary is independent, and there is no authority over judges except the rule of law.³¹ However, examining the constitutional guarantees of judiciary's independence in Syria cannot not be isolated from the President's powers granted by the constitution of 1973 and preserved by the current constitution of 2012; thus, understanding these extensive powers is essential to grasp the dimensions of judicial independence.

According to the current constitution of 2012, the President is the head of the executive authority,³² the head of the Supreme Judicial Council,³³ and the only one who has the power to appoint the Supreme Constitutional Court judges by a decree.³⁴ 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.³⁵ In addition, the President exercises the power of legislation by issuing legislative decrees that have the force of laws issued by parliament.³⁶

The power of the President is evident in the constitutional articles that organise the judiciary. For instance, Article 132 enacts that the judiciary is independent; however, the President guarantees this independence with the assistance of the Supreme Judicial Council. Interestingly, this article gives the President and the Supreme Judicial Council, headed by the President, the power to guarantee the independence of the judiciary, rather than the constitution itself protecting this independence.

³⁰ *ibid* Art 139; Law 32 on Establishing the State Council 2019 Art 8-14.

³¹ The Syrian Constitution of 2012 Art 134 (1).

³² *ibid* Art 83.

³³ *ibid* Art 133.

³⁴ *ibid* Art 141.

³⁵ *ibid* Art 141, 146.

³⁶ *ibid* Art 113.

Moreover, the superiority of the President and the executive power over the judiciary is also reflected in the judiciary's structure and hierarchy. 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 (as seen, i.e. the President) or three of its members, as well as overseeing the independence of the judiciary.³⁷

It is worth noting that this Council, which has significant powers over the judiciary, is formed chiefly by the executive authority. The Council consists of seven members: the 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.³⁸ 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.³⁹ 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 the majority votes, which is dominated by the executive branch. So, the executive branch dominates the highest judicial authority in Syria, which is responsible for appointing and dismissing judges and ensuring their independence. Perhaps the clearest example of this domination is Decree No. 95 of 2005, which explicitly states the following:

"A- Contrary to the legal provisions in force, particularly Article /92/ of the Judicial Authority Law No. /98/ dated 11/15/1961 and its amendments, 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.

B - The judge who is to be dismissed from service shall 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."⁴⁰

This decree is a legislative decree issued by the President under his legislative powers. Notably, the decree violates article 51 of the constitution by giving the Presidency of the Council of

³⁷ Decree 98 of 1961 on the Judicial Authority Law and its Amendments Art 67.

³⁸ *ibid* Art 65.

³⁹ *ibid* Art 11, 56, 71.

⁴⁰ Legislative Decree No. 95 of 2005 Authorising the Council of Ministers to Dismiss Judges Art 1.

Ministers the power to dismiss judges, as well as its inadmissibility for appeal or review. However, the Constitutional Court did not object to this decree. In this regard, it must be recalled that the judges of the Constitutional Court are appointed by the President, which makes their independence and impartiality questionable.⁴¹

Another example of the penetration of executive power into the judiciary is Legislative Decrees No. 14/1969 and 64/2008. According to these decrees, police and security officials will not be prosecuted for their crimes committed on duty without their directors or the Presidents' approval.⁴² Therefore, these decrees grant the executive branch the authority to suspend prosecutions and thus the judiciary in an explicit violation of the constitution and the rule of law.

2.2.2 The exceptional judiciary in Syria and its dependency and partiality

The exceptional judiciary in Syria is regulated by special laws that distance it from the general principles followed in the ordinary judiciary. In this regard, the *Ba'ath* Party established the former Supreme State Security Court (SSSC) 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.⁴³ Significantly, the sentences of this court were final and not subject to appeal. These verdicts should not be enforceable except with the approval of the President, who has the right to cancel the decision and order a retrial.⁴⁴ Thus, the executive authority was directly interfering with the consent and enforcement of the court's rulings, which contradicts the principles of judicial independence.

It is noteworthy that the procedures of the SSSC and its jurisdiction over a set of vague crimes were contradicting the basic principle of legality of criminal law, *nullum crimen sine lege*. The crimes that fall under the jurisdiction of the SSSC were broad and ambitious, such as any act that results in "*awakening sectarian strife*".⁴⁵ These broad articulations of crimes did not make

⁴¹ The Syrian Constitution of 2012 Art 141.

⁴² Legislative Decree No. 64 on The Prosecution of Police Officers, Customs and Political Security Personnel, Before the Military Court 2008 Art 1; UNHRC, 'Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic' (2016) A/HRC/31/CRP.1 para 15 See footnote 3.

⁴³ Legislative Decree No. 47 of 1968 on Establishing Supreme State Security Courts 1968 Art 2.

⁴⁴ *ibid* Art 8.

⁴⁵ Syrian Penal Code No.148 1949 Art 285,307; See more in this regard, Razan Zaitwina, 'Is There a Justice in Exceptional Judiciary?: The Case Study of the Supreme State Security Court' (Damascus Centre for Human Rights Studies 2007) Available in Arabic at <<https://www.asharqalarabi.org.uk/huquq/c-huquq-qadaia-3.htm>> accessed 19 November 2021.

the defendant aware of what actions form such crimes. Precedent cases show a botched process – such as insufficient evidence being used as well as no interpretation where needed.⁴⁶

Moreover, the SSSC was not bound by the Code of Criminal Procedure in prosecution, investigation or trial; its decisions were not subject to any form of appeal.⁴⁷ One of the most critical consequences of non-compliance with the rules of due process was the merging of the prosecution and the referral judge's roles. In other words, the Public Prosecutor of the SSSC had the powers of the referral judge, who checks the sufficiency of evidence and investigations, issues the indictment, and refer the case to the sentencing judge.⁴⁸ In this regard, it should be mentioned that the UN Guidelines on the Role of Prosecutors assert that the office of prosecutor shall be strictly separated from judicial functions to ensure impartiality.⁴⁹ However, the accused before SSSC had no chance to challenge the impartiality of the investigations, as the party who investigate and brings charges was the same one who issues the indictment and refers the case to the sentencing judge without having an impartial supervision upon investigation process. Significantly, the failure to adhere to the rules of due process was also evident in the court's violation of the public hearing principle and exclusion of evidence obtained under torture.⁵⁰

After lifting the state of emergency in Syria, the SSSC was abolished by Decree 53 of 2011; nonetheless, the Counterterrorism Court was formed as its successor.⁵¹ This court does not differ radically from its predecessor (SSSC); it imposes its jurisdiction over civilians and military personnel and considers the presence of a military judge in its formation.⁵² Moreover, it is not bound by due processes, such as public hearing procedures.⁵³ This is clear from Article 2(b) of the Counter-Terrorism Court statute; it states that the investigative judge, in addition to his/her role, has the powers of the referral judge.⁵⁴ It should be noted that 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. The referral judge may decide to prevent trying the defendant in case the act does not constitute a crime, or the evidence is insufficient to charge; this judge is the one responsible for issuing the indictment and referring the defendant

⁴⁶ Human Rights Watch, *Far from Justice: Syria's Supreme State Security Court* (Human Rights Watch 2009) 4.; Zaitouneh (n 45).

⁴⁷ Legislative Decree No. 47 of 1968 on Establishing Supreme State Security Courts Art 7 (A).

⁴⁸ *ibid* Art 7(b); Syrian Code of Criminal Procedure No. 112 1950 Art 145-149.

⁴⁹ Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 para 10.

⁵⁰ Human Rights Watch (n 46) 27–28.

⁵¹ Low No. 22 on Establishing the Counterterrorism Court 2012.

⁵² *ibid* Art 2(A), 4.

⁵³ *ibid* Art 7.

⁵⁴ *ibid* Art 2(b).

accordingly to the competent court.⁵⁵ Thus, merging the powers of these two judges into one person results in the defendant losing an appellate level and supervision of investigation. Moreover, although the Counterterrorism Court separate the Public Prosecution from the investigative judge, both positions are still appointed pursuant to the Supreme Judicial Council nomination, which is dominated by the executive authority, as mentioned previously.⁵⁶ 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.

Another example of the exceptional judiciary's dependence and partiality is the so-called military field courts, 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.⁵⁷ It is worth noting that the Public Prosecution of these courts has all the powers and authorities granted to the investigative judge; its decisions are final and not subject to appeal.⁵⁸ 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.⁵⁹ Thus, it is ultimately subject to the approval of the executive branch. In other words, it is the army that occupies the role of public prosecution, investigation, indictment, and sentencing.

Conclusion

The Syrian constitution discussions must not be isolated from its implementation procedures. Analysis should be made on state practice through the lenses of the constitutional paper/text, legislations, courts procedures, and political context. This paper tried to critically analyse the judiciary independence in the Syrian constitution from these lenses by exploring the surrounding political developments, the structure of the judiciary in the Syrian constitution and regulatory legislation, in addition to providing examples of the exceptional judiciary procedures. It concludes that the executive authority has a severe penetration into the

⁵⁵ Syrian Code of Criminal Procedure No. 112 Art 143-149.

⁵⁶ Law No. 22 on Establishing the Counterterrorism Court Art 2 (b-c).

⁵⁷ Legislative Decree No. 109 of 1968 on the Establishment of Military Field Courts 1968 Art 1,3,4.

⁵⁸ *ibid* Art 4 (b-c).

⁵⁹ *ibid* Art 5,6,7,8.

judiciary's structuring and decisions. Moreover, the exceptional judiciary in Syria constitutes a clear violation of the principles of judicial independence and a fair trial, which undermines the appropriate applicability of the rule of law and international standards. The exceptional judiciary itself and many other unilateral decrees issued by the President, prohibits the articulation of the principle of legality, the presumption of innocence, the right to defence and appeal before an independent judicial formation and a fair trial, and the immunisation of any decisions from judicial review, pillars that are stipulated in the current constitution.⁶⁰ Therefore, any discussion about constitutional reform, change, or maybe preservation of some articles in the context of any transition in Syria should be holistic and comprehensive, considering not only the mere constitutional texts but also its implications and integration in the political and legislative aspects.

⁶⁰ The Syrian Constitution of 2012 Art 51.

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