Al-Haq’s Comments on the Justice Sector Development Committee’s Report and Draft Law by Decree Amending the Judicial Authority Law

Al-Haq follows with concern recent developments in the justice sector. A Draft Law by Decree Amending the Judicial Authority Law No. 1 of 2002 has been in circulation. A report issued by the Justice Sector Development Committee was also published on 28 November 2018 in conjunction with the circulated Draft Law by Decree. Both developments have a bearing on judicial independence and the justice sector.

A focus should be paid on the contents of the Justice Sector Development Committee’s report (hereinafter the Committee’s report), which was kept secret when it was presented to the President in September 2018 regardless of civil society organisations’ demand to access and comment on it before its submission. Attention needs to be also paid on the contents of the recently circulated Draft Law by Decree Amending the Judicial Authority Law (hereinafter the Draft Law by Decree) and its interrelation with the Report, taking into account the current approach to discussing and approving laws by decrees without community discussions. Cases in point include the Law by Decree on Cybercrimes, Law by Decree on the High Criminal Court, Law by Decree Amending the Law on the Supreme Constitutional Court, and Law by Decree Amending the Law on Charitable Associations and Non-governmental Organisations. Of particular concern, the Draft Law by Decree Amending the Judicial Authority Law would follow in the footsteps of the aforementioned laws by decrees. It could be published in the Official Gazette and enter into force without qualifying comments or positions.

Al-Haq is of the view that the Committee’s report and Draft Law by Decree vest the executive with overbroad and unconstitutional powers over the judiciary and administration of justice. Both involve a clear conflict of interests, a deviation from legislative requirements, and cause a further deterioration in the judiciary and justice system.

Al-Haq confirms that deficiencies in the judiciary and justice system are structural and manmade. These flaws are not intrinsic in the law itself. The Judicial Authority Law is one of the most advanced laws, which protect judicial independence. The continued deterioration of judicial practice is attributed to violations of the principle of the rule of
law and separation of powers and the Judicial Authority Law. In addition to an absent will for reform, the executive and its agencies have encroached on the Judicial Authority and justice system. Successive boards of the High Judicial Council (HJC) (i.e. the judicial administrations) have collaborated with the executive to undermine independence of both the Judicial Authority and the judges. Bearing witness to this is the fact that, since the Palestinian Authority was established, all three HJC boards have been formed in contravention of the Judicial Authority Law. Successive presiding judges of the High Court and HJC chairs have been appointed in a manner that also violated the Judicial Authority Law. Contrary to the said Law, High Court judges have been referred to investigation for exercising their right to free expression and criticising the deteriorating situation of the judicial system. Also in violation of the Law, HJC chairs submitted resignations to the executive even before exercising their functions. Judicial appointments and transferences contradict the Law. Many decisions issued by the judiciary have not been implemented by the executive and its agencies, and the list goes on. This means that the real problem lies with disrespect of the Judicial Authority Law and principle of the rule of law, not with the Judicial Authority Law itself. Recommendations of the Justice Sector Development Committee and the Draft Law by Decree Amending the Judicial Authority Law give the executive broad influence over the judiciary and justice sector. These unlawfully distort the Judicial Authority Law and lead to further deterioration and disintegration of the judiciary and justice system.

Against this background, Al-Haq calls for a serious community dialogue to examine ways to halt the continued deterioration of the judiciary and justice apparatus, discuss reform mechanisms and requirements, and draw lessons from reform processes that have failed over the past years. Below are key comments on the interconnected and concurrent report of the Justice Sector Development Committee and Draft Law by Decree Amending the Judicial Authority Law. These comments are ensued by relevant conclusions.

I. Report of the Justice Sector Development Committee

1. On 6 September 2017, a Presidential Decision on the establishment of the Justice Sector Development Committee was promulgated. Article 1 of the Decision assigns the Committee to reach “a comprehensive vision to develop the justice sector and judiciary.” However, the report ignores the deteriorating situation of the judiciary and justice sector in the Gaza Strip as well as court judgements and decisions rendered during the internal Palestinian political divide. In the context of the reform process, the report does not stress
the need for unifying the judicial system in the West Bank and Gaza Strip as a prelude to restore institutional unity and promote the justice sector.

2. The Justice Sector Development Committee’s report ignored and never made reference to the Supreme Constitutional Court (SCC), even though the SCC formation process was in conflict with the Basic Law and SCC Law. The Court independence and impartiality are clearly flawed. In addition to inadequate performance, women are not represented on the Court panel. The Court has further breached the provisions of the Basic Law and SCC Law. Relevant explanatory judgements and decisions have been the subject of considerable debate among the Palestinian society. These include the first SCC decision, which imposes trusteeship over the High Court and judicial system to the last decision, which puts civilians on trial before military courts, obviously violating the Palestinian Basic Law and relevant international conventions and standards. As a result, in its concluding observations on the initial report of the State of Palestine, the Committee on the Elimination of Discrimination against Women (CEDAW) directly criticised the SCC performance.

3. In its introduction and methodology, the Committee’s report indicates that the Presidential Decision allows the Committee, in the course of carrying out its duties, to consult with experts, specialists, and civil society organisations to ensure widest possible participation. It should be noted that, over the full year of its mandate, the Committee only held one meeting with civil society organisations on 15 July 2018. In that meeting, the Committee confirmed that its draft final report would only be submitted to the President following community discussion. Civil society organisations repeatedly called for initiating such a consultation process. Regardless of the Presidential Decision, which provides for consultation with the civil society, and the fact that judicial reform is a community right, the Committee ignored all these demands, impinged on the principles of transparency and disclosure, and submitted the report to the President without agreement with the civil society.

4. In the context of judicial evaluation, the report indicates that a national committee for the evaluation of judges and prosecutors be established. The committee should comprise nine members, who are appointed by the President. These include the HJC Chair, Chair of the Palestinian Bar Association, the Minister of Justice, the Attorney General and five national figures with longstanding competence, integrity and impartiality. This proposal duplicates experiences that failed in the past. It neglects the society’s right to judicial reform and makes reform hostage to the executive. Without criteria and guarantees, it entrusts the evaluation of judges to official bodies within the justice sector, which should equally be subject to an evaluation process. This procedure
undermines trust and confidence in the Committee and can result in further decline of the judicial apparatus.

5. The report recommends that the retirement age for judges be reduced from 70 to 65 years, with the exception of the current HJC Chair. This proposal causes a deviation from legislative requirements because it is tailor-made for a particular person. It also leads to a conflict of interests since the targeted person (i.e. the current HJC Chair) is a member of the Justice Sector Development Committee, which drafted this proposal. It also runs counter to the key components of a legal rule, namely, generalisation and abstraction.

6. In reference to judicial inspection and accountability, the Committee’s report states that the Director of the Judicial Inspection Department (First Inspector) is appointed for a period of four years, and his services are terminated, by a decision of the President based on a nomination from the HJC. This proposal is also one more item that vests the executive with further primacy and control over the judicial power. Under the Judicial Authority Law, the Judicial Inspection Department is established by the force of law, rather than by a decision of the executive. The Law does not vest the President with any powers of appointment or termination of services. Additionally, the proposal is in conflict with the civil society’s perception, which calls for independence of the Judicial Inspection Department. The proposal provides that every person who holds judicial office should be subject to judicial inspection, except for the HJC Chair and Attorney General. Whereas both are members of the Justice Sector Development Committee, a conflict of interests is at hand once again. The proposal is even more serious as it vests the HJC with the power to recommend to the President to dismiss a judge or a prosecutor if a negative evaluation is produced by the Judicial Inspection Department. In this case, the affected judge or prosecutor has the right to file a complaint to the HJC only. Contrary to the Judicial Authority Law, the proposal abolishes the right of judges and prosecutors to challenge the HJC decision before the competent court. As a result, the HJC decision is immunised. Selective measures might also target certain judges and prosecutors through the Judicial Inspection Department and HJC.

7. To ensure qualitative representation on the HJC (expanded membership), the Committee’s report recommends that the HJC membership should not be restricted to members from within the Judicial Authority alone. A number of community figures should also be included as members of the HJC. In the same paragraph, the report backs off and proposes that only one community legal personality with longstanding competence, integrity and impartiality be included from outside the judicial, legislative and executive powers. Such a personality will be appointed for a term of two years by a
decision of the President based on a nomination from the HJC. Of note, the only community legal personality on the HJC from beyond the three powers is appointed by the President following the same mechanism used to appoint “judges”; i.e. based on a nomination from the HJC. It is not clear why such a community legal personality is nominated by the HJC (the judicial administration) to the President, nor are the principles and criteria which the Council adopts when it nominates that personality to the President for appointment on the HJC.

II. 2018 Draft Law by Decree Amending the Judicial Authority Law

1. A three-page report has been in circulation with the Draft Law by Decree Amending the Judicial Authority Law. The report does not state the body which wrote it. However, the content shows that the drafters are clearly experienced in addressing laws by decrees as well as the legislative plan and policy. At its outset, the report explains that the Draft Law by Decree is a “literal translation” of the minutes of the workshop, which the Justice Sector Development Committee held in Bethlehem between 30 August and 1 September 2018, as well as the recently published Committee’s report (The workshop was criticised by civil society organisations at the time). The report is clear in its approach in dealing with the Committee’s outcomes at the legislative level. It indicates that the Committee’s recommendations were incorporated into the Draft Law by Decree. A number of recommendations were not included because a relevant draft law by decree could be enacted, such as the committee for the evaluation of judges, which the President establishes. The Judicial Inspection Department, the director of which is appointed by the President, can carry out the tasks of the evaluation committee. The report also reveals that some recommendations are more befitting of other laws than the Judicial Authority Law, such as the Penal Procedure Law and Civil and Commercial Procedure Law. Other recommendations are fit for regulations and organisational structures of the HJC and Council of Ministers.

2. Additions are introduced to the Justice Sector Development Committee’s recommendations regarding the Draft Law Amending the Judicial Authority Law. On page 3 of the report enclosed with the Law by Decree, these additions are justified by the executive’s powers to enact laws by decrees, provided that these are presented to the HJC for consultation in accordance with Article 100 of the Basic Law. It is indicated, at the beginning of the report, that the Draft Law by Decree is a “literal translation” of the Committee’s recommendations. The most significant additions will be laid out in the comments on the Draft Law by Decree Amending the Judicial Authority Law.
3. The Draft Law by Decree entitles the executive to exercise comprehensive control over the judiciary and justice system. Article 5 of the Draft Law by Decree provides that the Presiding Judge of the High Court is appointed, and his services are terminated, by a decision of the President based on a nomination from the HJC. The Deputy Presiding Judge of the High Court is appointed by a decision of the President based on a nomination from the High Court Presiding Judge and approval of the HJC. This provision encroaches on judicial independence and violates the Basic Law and Judicial Authority Law. It allows the executive to dismiss judges and interfere with the administration of justice. The mechanism for appointing the HJC Deputy Chair infringes on the Basic Law and Judicial Authority Law, further debilitating the HJC as an institution in favour of the HJC Chair, who has been playing an increasingly pivotal role in selecting the Deputy Chair by means of nomination (a substantial measure) to the President for appointment. This provision is quoted from the Justice Sector Development Committee’s recommendations. However, it changes the word “recommendation” in the report into “nomination” of the HJC Chair under the Draft Law by Decree. Originally, the Judicial Authority Law entrusts the HJC, not the HJC Chairman, with the nomination.

4. Article 21 of the Draft Law by Decree provides that the Attorney General is appointed, and his services are terminated, by a decision of the President based on a nomination from the HJC. Vesting the executive with the power to terminate services of the Attorney General, this provision is also in conflict with Article 107 of the Basic Law, which does not authorise the executive to dismiss the Attorney General. It also violates the procedures laid out by the Judicial Authority Law for the appointment of the Attorney General.

5. Article 8 of the Draft Law by Decree provides that no one beyond the age of 65 should be allowed to remain in the position of a judge or be appointed thereto, with the exception of the Presiding Judge of the High Court who may not be above the age of 70. This provision implies a deviation from legislative requirements because it is tailor-made to serve a particular person, namely, the current HJC Chair. As mentioned above, it is copied verbatim from the Justice Sector Development Committee’s recommendations. It implies a conflict of interests because the HJC Chair is a member of the Committee. In addition to the Committee’s recommendation, it provides that, on an exceptional basis, the term of a judge who is above 65 years of age may be extended for a period of not more than five years, if necessary. As previously noted, the report enclosed with the Draft Law by Decree justifies such additions to the Committee’s report by the fact that the executive has the power to issue forth laws by decree. Given that the principles and
criteria of these “exceptions” are lacking, retirement can be selective and targets particular judges.

6. Article 8(3) of the Draft Law by Decree provides that the “Presiding Judge of the High Court shall be entitled to a pension calculated at 20 percent for each year he spends in the judicial service, provided that it is not less than 50 percent and not more than 80 percent of the total of the last salary he earned.” Of all judges, the Presiding Judge of the High Court (i.e. the HJC Chair) exclusively has pension benefits. In this case, the status of the Presiding Judge of the High Court is completely equal to ministers in terms of pension benefits, provided for by Article 8 of the Law on the Remuneration and Salaries of Members of the Legislative Council, Government and Governors of 2004. Accordingly, the Presiding Judge of the High Court is like ministers, members of the Palestinian Legislative Council, governors, SCC justices, and Chair of the State Audit and Administrative Control Bureau, who receive such pension benefits under respective legislation, indicating deep flaws in the concept of “social justice” on a legislative level.

7. Article 10 of the Draft Law by Decree is entirely identical to recommendations of the Justice Sector Development Committee, literally incorporating the phrase “one legal personality” with longstanding competence, integrity and impartiality, who is appointed by the President based on a nomination from the HJC for a non-renewable period of two years. That legal personality will be the only one from outside the three judicial, executive and legislative powers. Beyond the Justice Sector Development Committee’s recommendations, no addition have been introduced to this legal provision. Feedback on this provision has already been provided in the comments on the Committee’s report.

8. Article 11 of the Draft Law by Decree provides that the Director of the Judicial Inspection Department (First Inspector) is appointed, and his tasks are terminated, by a decision of the President based on a recommendation from the HJC for a non-renewable period of four years. According to Article 20(1) of the Judicial Authority Law, the person appointed as a Director of the Judicial Inspection Department is required to be a High Court judge or to meet the conditions for appointment as a judge of the High Court. In reference to Article 11, a lawyer who has served for at least ten years can be directly appointed as a Director of the Judicial Inspection Department by a decision of the President at the HJC recommendation. The provision is also quoted from the Justice Sector Development Committee’s recommendations. The only difference is that, according to the Committee’s proposal, the Director of the Judicial Inspection Department is appointed by a decision of the President based on a nomination from the HJC. Under the Draft Law by Decree, the appointment is based on the President’s decision and HJC recommendation. The same conditions are applicable in both cases. In
this context, comments have already been provided on the Justice Sector Development Committee’s recommendations. Both the Committee’s report and Draft Law by Decree demonstrate how dominant the executive is over the judiciary.

9. Article 12 of the Draft Law by Decree provides that, with the exception of the HJC Chair and Attorney General, judges and prosecutors are subject to judicial inspection. This is exactly the same proposal cited by the Justice Sector Development Committee. As noted above, the provision implies a conflict of interests and violates the principle of equality in performance audit. Exceptions are unjustified.

10. Article 13 of the Draft Law by Decree vests the HJC with the power to recommend to the President to dismiss a judge or a prosecutor, who receives a negative evaluation in judicial inspection. In such case, a complaint can only be filed to the HJC. The President’s decision is definitive and is not subject to appeal before the competent court. This is the same proposal made by the Justice Sector Development Committee, which recommends that the HJC Chair be given the power to recommend to the President to dismiss a judge or a prosecutor, who receives a negative evaluation. The right to complaint is also strictly circumscribed by the HJC. It revokes judges and prosecutors’ right to challenge the HJC decision before a court. Immunising the HJC decision can potentially result in selective measures that target certain judges and prosecutors.

11. Article 16 of the Draft Law by Decree provides that the HJC establishes the “disciplinary council”, which is in charge of holding judges of all levels to account. The disciplinary council is formed biennially on the basis of merit, taking seniority into consideration. This is the same proposal made by the Justice Sector Development Committee. However, institutional structure and performance are lacking, giving way to personal discretion which affects the HJC functions. This is one key institutional and human challenge to judicial functions and performance of High Court judges as indicated by many papers published by civil society organisations on flawed judicial performance. Both the said provision and the Committee’s report give absolute powers to the HJC to form disciplinary councils, which hold to account judges of all instances. It should be noted that a disciplinary council is established “by force of law” in accordance with Article 48 of the Judicial Authority Law. It is not formed on the basis of HJC decisions. Consequently, disciplinary councils can be established on a selective basis in order to target particular judges, further worsening the judicial situation.

12. Articles 6 and 23 of the Draft Law by Decree provide for granting judges a monthly risk premium of USD 300 as well as an exemption of personal means of transportation from respective fees. These also provide for an increase in the base salary
of judges and prosecutors according to the structure of employment, salaries, increments and grades enclosed with the Draft Law by Decree. The increase amounts to 50 percent as per the mechanism determined by the Council of Ministers. It will also be effective as from the issuance of a regulation by the Council of Ministers. The Draft Law by Decree copies the provisions on the risk premium, customs exemptions and increase in the base salary from the recommendations of the Justice Sector Development Committee. It also adds the last paragraph, which associates “entry into force” of the increase in judges and prosecutors’ salaries with the mechanism and regulation made by the Council of Ministers. Hence, financial benefits are linked to the mechanism determined by the executive. They are also inextricably linked to the said regulation. Judges and prosecutors’ grades, which lack any basis in the Basic Law and Judicial Authority Law, are added together with structures of employment, salaries, and increments.

III. Conclusions and recommendations

1. The Justice Sector Development Committee’s report is intrinsically and integrally associated with the 2018 Draft Law by Decree Amending the Judicial Authority Law, which has been circulated recently. The philosophy and substance of the Committee’s report is clearly visible in the Draft Law by Decree and in the report enclosed with it. The latter shows how the Committee’s report and minutes are reflected in the provisions of the Draft Law by Decree as well as in the relevant legislative plan and policy.

2. Both the Justice Security Development Committee’s report and the Draft Law by Decree Amending the Judicial Authority Law violate the provisions of the Basic Law and allow the executive to exercise substantial control over the judiciary and justice system. Some proposed recommendations and provisions involve a clear conflict of interests. As the decline in the judiciary and justice sector continues, these would result in selective measures that target particular judges and prosecutors without clearly defined, professional and objective principles and criteria, especially in relation to judicial inspection, dismissal, and retirement. Further tightening control over the justice sector, increments and increases in the salaries of judges and prosecutors are determined by the executive by means of mechanisms and regulations set by the Council of Ministers.

3. Al-Haq calls on the President to stop promulgating laws by decree, which violate the Basic Law, international conventions which the State of Palestine acceded to, and relevant international standards. A process needs to be launched to revamp the disintegrated political and constitutional systems and enforce the international conventions, to which the State of Palestine acceded without reservations. In addition to
promoting public rights and freedoms, citizens will be empowered to exercise their constitutional and legal right to select their representatives in free and fair general elections, paving the way to establish a democratic system and safeguard independence of the judiciary and justice sector.

4. Al-Haq stresses that justice sector reform is the right of the society as a whole. It must be established on transparent and independent grounds, remotely from the executive’s monopoly, quotas, and conflict of interests. Past experiences which have proved to be a failure and did not bring about a meaningful breakthrough towards judicial and justice sector reform should not be reproduced. Reform should be comprehensive, while at the same time consolidating judicial and justice functions in the West Bank and Gaza Strip. Reform will be a first step towards restoring institutional unity and readjusting the political and constitutional system. The process must not leave aside the Supreme Constitutional Court, which has played a significant role in violating the Basic Law, encroaching on public rights and freedoms, and impinging on international human rights conventions and standards.

5. Al-Haq reiterates the need to maintain, promote and consolidate community efforts in the West Bank and Gaza Strip to ensure a comprehensive reform of the judiciary and justice sector. These efforts will be grounded in respect for the rule of law, separation of powers, and international human rights conventions and standards. Lessons should also be learnt from past reform experiences.