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AL-HAQ

Al-Haq's Comments on the Law by Decree on the High Criminal Court of 2017

(20 January 2018)

Having reviewed the 2017 Law by Decree on the High Criminal Court (hereinafter Law by Decree), which was approved by the President on 30 December 2017, it is clear that it was the same draft, which had been referred by the Council of Ministers to the President in its Session No. 130/17 of 13 December 2016. Just like the Law by Decree approved by the President, the draft was not subject to public consultation. This reflects the Executive Authority's insistence on monopolising the legislative process, without public review. Given its continued inaction, it is clear that the Palestinian Legislative Council (PLC) does not exercise its law-making function and oversight of the Executive's performance.

At the time, the draft Law by Decree was met with widespread opposition from civil society organisations because it impinged upon the competences and independence of the Judicial Authority as well as guarantees of a fair trial. The draft Law by Decree also violated provisions of the Basic Law, the International Covenant on Civil and Political Rights (ICCPR), the Judicial Authority Law, the Law on the Formation of Regular Courts, and the Penal Procedure Law. From a constitutional perspective, the issuance of the Law by Decree does not satisfy the prerequisite of necessity that would require its enactment without delay. Hence, immediate action needs to be taken to halt the publication of the Law by Decree in the Palestinian Official Gazette.

At first glance, a difference seems to exist between the version approved by the President and the previous draft in relation to the broad powers vested in the Attorney General or one of his assistants. During interrogation, the Attorney General or an assistant of his can issue a reasoned order, preventing the accused from travelling or include him/her on pre-arrival screening lists "for a period of one renewable year". Although this is provided for under Article 11 of the previous draft, this power is not included under the Law by Decree endorsed by the President. According to the approved Law by Decree, this power is bestowed upon the Public Prosecution, and not only the Attorney General or one of his assistants, under Article 7 of the Law by Decree. Article 7 provides that the Public Prosecution will be granted the power to take "all necessary precautionary measures in relation to the incident" in the course of a preliminary investigation, without specifying the nature of such measures nor the guarantees relating to them. The power to issue orders on travel bans and pre-arrival screening lists therefore remains in the hands of the

Public Prosecution, and is unrestricted and beyond judicial oversight as such orders are considered "precautionary measures" falling within the scope of this overly broad and loosely defined provision. As a result, with this provision in place, the powers of the Public Prosecution have been broadened, involving decisions on travel bans and the inclusion on pre-arrival screening lists, which infringes upon the rights and guarantees of the accused during the preliminary investigation stage.

On 10 January 2018, Al-Haq sent letters to President Mahmoud Abbas, Prime Minister Rami Hamdallah, and Minister of Justice Ali Abu Dayyak. These letters were enclosed with Al-Haq's detailed comments on the Law by Decree on the High Criminal Court in addition to Al-Haq's demands that the Law by Decree not be published in the Palestinian Official Gazette.

Below are Al-Haq's main comments emphasizing the importance of not publishing the Law by Decree in the Palestinian Official Gazette:

1. The Law by Decree was deliberated and approved by the Council of Ministers. On 1 August 2017, based on a decision of the Council of Ministers, the Law by Decree was referred to the President for promulgation. On 30 December 2017, the Law by Decree was issued by the President without being presented to the public for review. The fact that the Law by Decree was not subject to public consultations is inconsistent with the *National Policy Agenda (NPA) 2017-2022: Putting Citizens First*, which reaffirms in National Policy 9, "Strengthening Accountability and Transparency", that "[b]eing transparent means that the decisions and actions of government do not remain behind closed doors and public access to information is facilitated rather than blocked." The lack of community engagement also contravenes the Government's Legislative Plan, which stresses the need to apply a "broad participatory approach" in developing and implementing the Government's Legislative Plan and its legislative policy.

2. The approval of the Law by Decree shows that all substantive comments raised by civil society organisations about the draft Law by Decree, were indeed discarded. The comments provide that the formation of the High Criminal Court violated the provisions of the Basic Law, the Law on the Judicial Authority, and the Law on the Formation of Regular Courts. Any amendment to the formation and levels of courts requires that an authentic law be passed by the PLC. An amendment cannot be introduced by means of an extraordinary regulation. The majority of cases heard by Courts of First Instance in their penal capacity will be remitted to the High Criminal Court, causing an ever-increasing backlog. Cases examined by criminal panels will also be dispersed, defeating the declared purposes of establishing these panels. The previous explanatory note stresses the need for

specialised judges to examine serious criminal cases. This announcement is thwarted by the absence of any principles or criteria relating to judges of the High Criminal Court under the Law by Decree. Therefore, approval of the Law by Decree is neither justified nor necessary. Earlier, the PLC repealed the Law by Decree No. 7 of 2006 on the High Criminal Court, which was promulgated by the President on 15 February 2006. In addition to infringing on the guarantee to a fair trial, this regulation does not fulfil the narrow condition of necessity, which would under limited emergency circumstances permit the enactment of a Law by Decree by extraordinary legislation. This further highlights the importance and need for the present Law by Decree not to be published.

3. Article 2 of the Law by Decree provides that a specialised court, to be called the "High Criminal Court", will be established within the structure of the regular courts. Its permanent seat will be in the capital, Jerusalem. Clearly, the High Criminal Court, which is established in accordance with a law by decree, contravenes the provisions of the Basic Law. In particular, Article 97 of the Basic Law provides that the *law* determines the way courts are constituted and their jurisdiction. The constitutional legislator assigns the power to form and set the jurisdiction of courts to the law; that is, an authentic legislative act that is passed by the parliament. Thus, the High Criminal Court may not be formed by means of an extraordinary regulation, contrary to the constitutional legislator's will as prescribed by Article 97 of the Basic Law. Essentially, the court should be formed by means of an amendment to the Law on the Judicial Authority, and the Law on the Formation of Regular Court through an amending law, which is enacted by the parliament.

4. Article 3 of the Decree Law prescribes that "[t]he Court shall temporarily convene in the city of Ramallah. It may convene by a decision from its Presiding Judge, *proprio motu*, in any of the governorates of the homeland whenever necessary, or based on the request of the Attorney General." This article vests the Attorney General with the power to request, albeit in a binding manner, that the court convene in any governorate of the homeland. It derogates from the rules of *ratione loci* of the court. According to the Law on the Judicial Authority and Law on the Formation of the Regular Courts, such a decision is made by the Presiding Judge of the High Court. The power vested in the Attorney General is an encroachment by the Public Prosecution on the powers and jurisdiction of the Judicial Authority. Under such circumstances, the latter is entitled to either accept or reject the Public Prosecution's request. The Public Prosecution is an adversary party to *actio popularis* cases against the defendant. An adversary party does not elect its judge!

5. Article 4 of the Law by Decree states that "[t]he Court shall be comprised of a sufficient number of panels. Each panel shall be formed of three judges, the grade of whom is not less than a judge of the Court of the First Instance. The most senior judge shall be the presiding judge." According to this article, judges of the High Criminal Court may be judges of the Court of Appeal or the High Court. Article 4 provides that the grade of the court judges "is not less than a judge of the Court of First Instance". As such, the provision violates the double-hearing principle and hierarchical structure of the Judicial Authority.

6. Article 5 of the Law by Decree provides that "[t]he Public Prosecution shall be represented before the Court by a member, whose grade is not less than a Head of a Prosecutor's [District] Office. This article is inconsistent with the Penal Procedure Law, which requires that a prosecutor represent the Public Prosecution before the Court of First Instance and Court of Appeal. In this respect, it is problematic that the Public Prosecution is represented by the Head of a Prosecutor's [District] Office before the High Criminal Court (first instance court), and then by the Prosecutor before the Court of Appeal (second instance court).

7. Article 6 of the Law by Decree bestows broad powers on the High Criminal Court. Most notably, Article 6(3) vests the Court with the power to examine "crimes against the internal and external security of the State". The broad powers which this article gives to the High Criminal Court effectively refers most of the crimes, which fall within the jurisdiction of the Courts of First Instance in pursuance of the Penal Procedure Law to the High Criminal Court. This raises questions about the role of the Courts of First Instance in their penal capacity after this Law by Decree enters into force. It also raises other questions about the significance of concentrating most jurisdictions of the Courts of First Instance in the High Criminal Court. According to the explanatory note of the Law by Decree, the problem to be regulated resides in the absence of specialised judges who examine serious criminal cases. This is not provided for by the Law by Decree, which does not prescribe any "principles or criteria" concerning membership of the Court. Contrary to what the explanatory note suggests, judges of the Courts of First Instance cannot examine criminal cases if they do not possess the adequate experience.

On the other hand, according to the Penal Law, crimes against the internal and external security of the State are overbroad and loosely defined. These are difficult to grasp and imply many constructions and interpretations. For the most part, they are not fit to be penal provisions, which are grounded in clearly defined incrimination and penology. The said provisions violate the principle of legality, which provides the backbone of penal provisions. These include the crimes of "weakening the national sentiment" (Article 130),

"disseminating news that affect the morale of the nation" (Article 131), "disseminating news that undermine solemnity of the State" (Article 132), and "instigating confessional or racial bigotry" (Article 150). These and other crimes are drafted in loosely defined terms and can be construed on a selective basis, which violates rights and freedoms, particularly the right to freedom of expression. In addition to potentially politicising functions of the Court, these crimes are inconsistent with international standards, particularly Article 19(3) of the ICCPR and General Comment 34 of the Human Rights Committee. These loosely defined terms impinge on the right to freedom of expression and derogate from relevant recognised restrictions.

It is worth noting that Article 46 of the Law by Decree on Cybercrime No. 16 of 2017 provides that "[e]ach person who commits, takes part, intervenes in or instigates an act, which constitutes an offence under any applicable piece of legislation, using the electronic network or any information technology tool shall be punished by the same penalty prescribed for such an offence under such legislation." According to the said provision, crimes against the internal and external security of the State, which extensively use loosely defined terms and prejudice the right to freedom of expression, are deemed to be cybercrimes if they are committed by means of an electronic network. Consequently, these crimes will fall within the jurisdiction of the High Criminal Court. It should be taken into account that this Law by Decree violates the guarantees of a fair trial. As demonstrated below, the Law by Decree provides for an examination on appeal with the relevant parties *in abstentia*.

By contrast, crimes against the internal and external security of the State under the Penal Law, also covers a number of misdemeanours, rather than crimes. In such cases, the High Criminal Court should not have jurisdiction. For example, how can the High Criminal Court be competent to examine the crime of broadcasting news that undermines the solemnity of the State, punishable under Article 132 by confinement for a period of not less than six months? Also, how can the Court hear the crime of instigating confessional or racial bigotry, which is punishable under Article 150 by confinement from six months to three years? Such misdemeanours, which are now included within the crimes against the internal and external security of the State, are supposed to be beyond the jurisdiction of the Court.

8. Under the guise of "precautionary measures", Article 7 of the Law by Decree vests the Public Prosecution with broad and unrestricted powers in the course of preliminary investigation. To this effect, the Law by Decree provides that the "Public Prosecution shall be entitled to take all necessary precautionary measures in relation to the incident" when it conducts the preliminary investigation as soon as it is aware of the crime.

However, the Law by Decree does not make clear the nature of these precautionary measures and the guarantees associated with each precautionary measure. Without any guarantees, these measures are subject to the whim of those who initiate investigation procedures. Hence, under the slogan of precautionary measures, the Public Prosecution has come to possess broad powers over persons and properties in the course of preliminary investigations. The nature, time limit, and guarantees associated with these measures are never stated. According to Article 7 of the Law by Decree, in the course of the preliminary investigation, the Public Prosecution has the power to issue orders on travel ban and pre-arrival screening lists without restriction, beyond judicial control, and under the guise of precautionary measures. Contrary to the provisions of the Amended Basic Law, ICCPR and Penal Procedure Law, this means a flagrant violation of the guarantees of a fair trial, particularly in the pre-trial stage.

9. Article 8 of the Law by Decree permits the Prosecutor to detain the accused following interrogation for "four days" if the investigation procedures so require. This is an unjustified derogation from the guarantees of the accused during the preliminary investigation stage. According to Article 108 of the Penal Procedure Law, following interrogation by the Prosecutor, the accused may not be detained for a period of more than 48 hours. It is worth noting that the Law by Decree on the High Criminal Court No. 7 of 2006, which was repealed by the PLC, does not include a similar provision, but refers all the matters related to detention and extension of detention to the provisions of the Penal Procedure Law (Article 8(a)).

In General Comment 35 on Article 9 of the ICCPR, the Human Rights Committee confirms that: "[…] any person arrested or detained on a criminal charge shall be brought promptly before a judge […] That requirement applies in all cases without exception […] The requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity. […] It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. Accordingly, a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3." In the view of the Committee, the period of 48 hours is ordinarily sufficient to transport the individual and prepare them for the judicial hearing. For example, in Mexico, the UN Committee Against Torture (CAT) concluded that cases of systematic torture were evident. In its concluding observations on the Report on Mexico, the CAT recommended that the Penal Law be amended so that detainees are brought before the court within 24 hours and that judges be available all the time for this purpose (CAT, Report on Mexico under Article 20, CAT/C/75).

10. Article 10 of the Law by Decree provides that the "Prosecutor shall be entitled to interrogate the accused before his lawyer is summoned in cases of *flagrante delicto*, necessity, urgency and fear for the loss of evidence, provided that the requirements of urgency are included in the record. The lawyer shall be entitled to have access to the statements of the accused when the interrogation ends." Although it is copied *verbatim* from Article 98 of the Penal Procedure Law, this article is inconsistent with international human rights standards. In its Resolution A/HRC/RES/13/19, the Human Rights Council highlights that all suspects and accused persons, whether in custody or otherwise, have the right to have access to and consult with a legal counsel. These must receive assistance from a legal counsel during investigation by the police or examining judge even if they exercise their right to remain silent.

The European Court of Human Rights considers that the right to a fair trial requires, as a general rule, that the accused is allowed to receive legal aid as soon as they are held in custody, including in the initial stages before the police. In this context, the Court confirmed that defence rights have been irretrievably affected when the statements made by the accused during interrogation, and by which he incriminated himself, were used against him without allowing him to have access to a legal counsel (Salduz v. Turkey – 36391/02). Additionally, Principle 1 of the 1990 Basic Principles on the Role of Lawyers stresses that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."

In addition to the Basic Principles on the Role of Lawyers, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that the "right of a detained or imprisoned person to be visited by, and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order." In its concluding observations on the third periodic report of Jordan, the CAT criticised the provisions of Articles 63(2) and 64(3) of the Code of Criminal Procedure, which allow the interrogation of detainees without the presence of a lawyer "in cases of necessity, urgency, and fear for the loss of evidence". These are the same exceptions provided for under the Law by Decree and Penal Procedure Law. The Committee is of the view that these exceptions contradict international standards and guarantees of a fair trial (CAT/C/JOR/CO/3).

11. Article 14(3) of the Law by Decree states that "[i]n case the accused attends a trial session, then withdraws from it for any reason whatsoever or is absent from a trial session after he attended one of the sessions, the Court shall continue to hear the case as if he were present. The decision may not be reconsidered unless the Court is convinced that his absence is attributed to a *force majeure*." It is noted that this clause does not allow the Court to reconsider a judgement, which was rendered in the absence of the accused, unless the court is convinced that the cause of absence is attributed to *force majeure*. The provision is too stringent at the expense of guarantees of a fair trial. It effectively violates the guarantees of the accused, particularly their right to self-defence against the court decision rendered in their absence. In this vein, according to General Comment 32 of the Human Rights Committee, limitations on self-representation of the accused should not exceed what is necessary to ensure the proper administration of justice. Laws may not, under any circumstances, provide for preventing the accused from representing themselves in criminal proceedings.

12. Article 16 of the Law by Decree provides that "[t]he competent Court of Appeal may, based on the request of the Attorney General, decide in the cases which fall within the jurisdiction of the Court to transfer the case from the court panel, which is competent to hear it, to another panel of the same grade, when its review in the circuit of the competent court panel could lead to a breach of public security. The provisions of this article shall apply to the investigation stage." This article vests the Attorney General with the power to request that the case be transferred from a court panel to another of the same grade. The provision is quoted from Article 182 of the Penal Procedure Law. However, in relation to the request for transferring the case, the phrase "investigation stage" is added to that provision quoted from the Penal Procedure Law.

In the context of loosely defined criteria of public security, Article 16 of the Law by Decree involves intervention by the Public Prosecution in judicial functions as well as a grave violation of the powers and independence of the Judicial Authority. It vests the Public Prosecution – an adversary party to the criminal case – with the power to determine the competent court to examine that case. The adversary party does not elect its judge. Also, under the guise of public security, the addition which gives the Attorney General the power to request that the case be transferred during the investigation stage, can undermine the rules of *ratione loci* under the Penal Procedure Law. Additionally, it can be construed as an attempt to look for judges who are on the same footing with the Public Prosecution, accepting requests to extend the detention of the accused!

13. Article 17(3) of the Law by Decree prescribes that judgements rendered by the High Criminal Court are subject to "expedited enforcement" unless the judgement provides for

capital punishment. This clause violates the presumption of innocence safeguarded for the accused before a final and definitive judgement is rendered against them. It also breaches guarantees of a fair trial and contravenes the provisions of Article 14 of the Basic Law, which emphasises the principle of presumption of innocence. Furthermore, it violates the provisions of Article 340 of the Penal Procedure Law, which prescribes that "[t]he court may postpone enforcement of the judgment under appeal until the appeal has been adjudicated if the party against whom it was rendered expresses his/her wish to appeal it." Pursuant to General Comment 24 of the Human Rights Committee, presumption of innocence is a rule of customary international law. It applies in all cases, under all circumstances, and may not be subject of reservations under international treaties or restricted by law even during wartime or in times of emergency. It is a fundamental element of the right to a fair criminal trial by virtue of the law.

14. Article 19 of the Law by Decree states that "[a]ppeal trials shall be conducted in the presence of both parties in the event the judgement rules for the capital punishment or hard labour for life. In other criminal and misdemeanour judgements which fall within the Court jurisdiction, cases shall be heard without summoning the parties unless the Court is of the view of conducting the trial in the presence of both parties or if the sentenced person thus requests and it approves the request or if the Attorney General thus requests. With the exception of the judgement ruling for the capital punishment and imprisonment for life, it shall not be a condition precedent that evidence is heard anew in the pleading unless the Court deems it necessary." This article gravely violates the double-hearing principle and infringes on the guarantees of the accused in the trial stage, depriving them of a certain judicial instance. It transforms the Court of Appeal into a court of law, providing that it examines appellate objections "without summoning the parties" with the exception of judgements ruling for the capital punishment and hard labour for life. By contrast, these objections used to be heard in the presence of both parties by instituting the case before the Court of Appeal in accordance with the Penal Procedure Law.

Article 19 can be further challenged when it addresses penalties of a criminal character. It provides for "hard labour for life" and "imprisonment for life" in the context of the same provision, which relates to appeal trials in the presence of both parties. This deficient legislative drafting violates the principle of legality.

According to General Comment 32 on Article 14 of the ICCPR: Right to equality before courts and tribunals and to a fair trial, the Human Rights Committee highlights that appellate proceedings, as a general rule, should be open and public. They should, be attended by relevant adversary parties. This is an additional guarantee of justice in favour

of the accused and is of utmost significance to maintain public trust and confidence in the justice system. The Committee concludes that limiting judicial review to legal aspects does not fulfil the ICCPR requirements of providing an adequate assessment of evidence and conduct of the trial proceedings.

15. Article 20 of the Law by Decree provides that "[i]n accordance with the provisions of this Law by Decree, all the cases which have fallen within the jurisdiction of the Court shall be remitted to it unless the pleadings were closed in them." This article derogates from a well-established principle of the plenary of the Court of Cassation: exercising jurisdiction is an inherent designation of the court from the moment the court is determined. In other words, if a competent court examines a case and a regulation is passed to the effect of transferring jurisdiction to another court, the new regulation does not affect the jurisdiction of the court which had the jurisdiction when at the time it was examining the case.

In conclusion, the Law by Decree on the High Criminal Court, which was approved by the President on 30 December 2017, violates the provisions of the Basic Law, ICCPR, the Law on the Judicial Authority, the Law on the Formation of Regular Courts, and the Penal Procedure Law. Lacking a necessity that cannot be delayed so as to justify its promulgation, the Law by Decree involves misuse of powers, violates the independence of the Judicial Authority, as well as rights of the accused to a fair trial in both pre- and post-trial stages. The Law by Decree also sparked wide-ranging opposition among civil society organisations when it had been referred to the Council of Ministers. Against this background, Al-Haq demands that President Mahmoud Abbas and Prime Minister Rami Hamdallah take necessary actions to halt the publication of the Law by Decree in the Palestinian Official Gazette.