

Submission for the 35th Session of the Universal Period Review

The State of Kuwait

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Submitted by:

International Association of Democratic Lawyers (IADL)

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The IADL is a non-governmental organization with consultative status to ECOSOC that was founded to defend and promote human and peoples' rights. Specifically, IADL aims to restore, defend and develop democratic rights and liberties in legislation and in practice, and struggle for strict adherence to the rule of law and the independence of the judiciary and legal profession.

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I. SUMMARY

1. This submission highlights important issues of liberty, due process, and fair trial during criminal proceedings in Kuwait that have arisen during Kuwait's third Universal Periodic Review (UPR) cycle.
2. It addresses a significant problem in Kuwait – the criminal justice system is failing to guarantee individuals' fair trial and due process rights. The independence, impartiality and motivations of judges and prosecutors involved in criminal investigations and prosecutions (including appellate proceedings) is being brought into question by erratic conduct and unjustifiable decision-making.
3. At the date of this submission, the ongoing mistreatment by Kuwait of Marsha Lazareva and Saeed Dashti is a troubling example of such fair trial and due process concerns.
4. Kuwait must commit to take all necessary measure to ensure the independence and impartiality of judges and prosecutors to avoid any such violations in the future.

II. CONSIDERED BACKGROUND: INTERNATIONAL LEGAL FRAMEWORK

5. The right to independent and impartial judicial proceedings is a fundamental human right and is acknowledged by international human rights instruments to which Kuwait is a party, including the International Covenant on Civil and Political Rights (ICCPR). This includes obligations on Kuwait in respect of: (i) the independence and impartiality of judges; and (ii) the independence of prosecutors.

Independence and Impartiality of Judges

6. International human rights instruments refer to a fair trial by "*an independent and impartial tribunal*". Of the most important treaties, Article 14(1) of the ICCPR states:

"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..."

7. Article 10 of the Universal Declaration of Human Rights (UDHR) provides:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

8. The Human Rights Committee has repeatedly taken the view that the right to an independent and impartial tribunal is "*an absolute right that may suffer no exception*".¹

9. The first and second principles of the UN Basic Principles on the Independence of the Judiciary (UN Basic Principles) set out the basic requirement:

"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary;

"2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".²

10. Principle 2.5 of the UN Basic Principles expands on the circumstances in which judges should recuse themselves from a case:

*“2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where... the judge has actual bias or prejudice concerning a party or personal knowledge”.*³

11. The participation of a judge who should have disqualified himself or herself renders a trial unfair.⁴
12. Individuals’ rights to an impartial tribunal cannot be separated from the existence and observance of procedural protections conferred on defendants. As the UN Human Rights Committee has stated:

*“[a]n essential element of this right [to an impartial tribunal] is that an accused must have adequate time and facilities to prepare his defence”.*⁵

Independence of Prosecutors

13. The UN Guidelines on the Role of the Prosecutor emphasise the critical role of prosecutors in ensuring proceedings are just and conducted in accordance with applicable rules and standard:

*“Prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime”.*⁶

14. Key elements of prosecutors’ duties are set out in Articles 13 and 14 of these guidelines:

“13. In the performance of their duties, prosecutors shall:

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;*
- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;*
- (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;*
- (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.*

“14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded”.

III. CONSIDERED BACKGROUND: FAIR TRIAL CONCERNS IN KUWAIT

15. The Kuwaiti Code of Criminal Procedure⁷ (the Code) has serious gaps with regard to the necessary safeguards to protect fair trial rights. For example, Article 75 of the Code allows a lawyer to be present during the preliminary investigation, but the lawyer may only speak if allowed to by the investigator, thereby significantly restricting an accused’s right to counsel. Likewise, Article 60 bis of the Code limits the right to counsel, stating that *“police officers must permit the accused to communicate with his lawyers or to inform a person of his choosing of his situation”.*

16. In many cases, accused individuals have been prevented from contacting their lawyers, and/or lawyers have not been allowed into police stations where investigations have been held.⁸ Non-Arabic speaking defendants are also often not provided with interpreters, contrary to what is required by law.⁹
17. Trial observation missions in other cases have identified significant due process concerns in high profile cases. For example, in November 2016, a Trial Observation mission was conducted on behalf of a coalition of rights groups¹⁰ to monitor the trial of Saraj Al-Drees. Ms Al-Drees, a Kuwaiti political activist and teacher, was arrested in November 2012 on allegations that she insulted the Amir (through tweets) and misused her phone. The report concluded that her trial “*fell short of fundamental fair trial standards*”.¹¹
18. On 17 July 2019, Amnesty International reported that “*the Kuwaiti authorities have arbitrarily arrested more than a dozen protesters in recent days... in a crackdown on peaceful protestors demanding greater rights for the stateless group known as Bidun*”.¹² The treatment of the Bidun was the focus of recommendations made to Kuwait during its second UPR.

III. CONSIDERED BACKGROUND: THE INDEPENDENCE OF JUDGES AND PROSECUTORS IN KUWAIT

19. There are systemic issues regarding the independence of judges and prosecutors in Kuwait and in particular the interference by the executive branch in matters such as the appointment, promotion and disciplining of judges. International human rights bodies and NGOs have regularly expressed concern about the professionalism and independence of the Kuwaiti judiciary.¹³
20. Kuwait’s judiciary is only partially independent as judges are appointed by the Emir acting on the advice of the Supreme Judicial Council and as the executive has broad powers over the judiciary. These executive powers of the executive can be seen in provisions of Decree Law No. 23 of 1990 – Regulation of the Judiciary Law:
 - a) Articles 17, 20, 32, 41, 61 and 62 – providing the Minister of Justice with the ability to have influence on appointing, promoting, punishing, firing and transferring judges. The same applies to members of the Attorney General’s office;¹⁴ and
 - b) Articles 67-69: depriving the judiciary of its financial and administrative independence and makes it dependent mostly on the Minister of Justice.¹⁵
21. Kuwait law imposes no specific code of conduct on public prosecutors beyond the basic protections provided under the Code.
22. Pressure from the executive on the judiciary has been reported, and huge bribes and irregular payments have allegedly been exchanged in return for favourable decisions.¹⁶
23. Lawyers have also been the targets of regular attacks that have undermined their ability to uphold defence and human rights. For example:
 - a) Mohammad Al Jassem, a Kuwaiti lawyer who has observed trials on behalf of human rights organisations and a prominent writer and blogger, was arrested for insulting the Amir and ‘spreading false news’ that could harm Kuwait’s national interests;¹⁷ and

- b) Earlier, the Special Rapporteur on the Independence of Judges and Lawyers sent a joint urgent appeal with the Special Representative of the Secretary-General on the situation of human rights defenders, regarding Osama Ahmed Al-Munawer, who was arrested and detained in connection with his work as a human rights lawyer.¹⁸

IV. CASE STUDY ON THE LACK OF INDEPENDENCE AND IMPARTIALITY OF JUDGES AND PROSECUTORS RESULTING IN BREACHES OF FAIR TRIAL AND DUE PROCESS RIGHTS

24. Concerns regarding the erosion of the independence and impartiality of judges and prosecutors in Kuwait in practice appear to be exemplified by the ongoing case of Marsha Lazareva and Saeed Dashti.

25. IADL calls the attention on the following:

- a) Prior to their arrest in 2017, Ms Lazareva and Mr Dashti were senior business executives at KGL Investment Company KSCC (KGLI).
- b) The Government of Kuwait has pursued a number of allegations against Ms Lazareva and Mr Dashti in respect of the management of their investment business. These allegations have not been substantiated by credible evidence.
- c) Ms Lazareva was imprisoned for 472 days before being released on bail. Mr Dashti remains in prison.
- d) Ms Lazareva and Mr Dashti were convicted on 6 May 2018 of embezzlement relating to the provision of advisory services. This conviction was based on three transfer requests for payments from the KPA that Ms Lazareva is alleged to have signed. In separate proceedings, the Kuwaiti civil courts have ruled that these documents were forgeries.
- e) One year later, the Court of Appeal quashed their convictions on the basis of multiple errors and ruled that a verdict of not guilty should have been returned. It ordered a retrial.
- f) The proceedings have been marred by unexplained and erratic judicial decision-making and fair trial violations, including:
 - i. Denying the defendants the opportunity properly to understand the case against them or to present defence evidence;
 - ii. Refusing bail in circumstances where other accused were granted bail, including effectively denying bail by imposing extortionate bail bond conditions;
 - iii. Permitting the questioning of prosecution witnesses in a separate location away from the defendants;
 - iv. Refusing to provide defence counsel with a record of court hearings;
 - v. The recusal of a judge presiding over the appeal proceedings, and the reversal of this recusal, all without giving reasons;

- vi. A bail demand of KWD 20 million (approximately USD 65 million) from each of Ms Lazareva and Mr Dashti, after their convictions were quashed. This unprecedented bail amount was tantamount to a denial of bail;
 - vii. After Ms Lazareva's bail demand was substantially reduced, the Attorney General of Kuwait failed to release her despite a greater amount already having been paid into court. Ms Lazareva was subsequently released on bail when an anonymous donor made an additional payment into court; and
 - viii. Ms Lazareva and Mr Dashti were belatedly permitted to present expert evidence at a hearing on 23 June 2019. The next hearing was scheduled for 30 June 2019, but was delayed until 15 September 2019 without justification.
- g) There are still further concerns regarding the conduct of the Prosecutor, including:
- i. Failing to disclose details of the allegations;
 - ii. Threatening behaviour and undue pressure during pre-trial detention;
 - iii. Failing to facilitate adequate consultations with defence counsel;
 - iv. Pursuing charges against Ms Lazareva and Mr Dashti without properly assessing the evidence and without reassessing when key prosecution evidence was proved to be unreliable; and
 - v. Unlawfully leaking information about the investigation and prosecution to the media.

V. RECOMMENDATIONS

26. Kuwait must commit to take all necessary measures to respect and ensure the independence and impartiality of its judges and prosecutors and the right to a fair trial. In particular Kuwait should:
- Undertake a full review of its judicial system in accordance with international law and best practices including the appointment, tenure and independence of the judiciary and prosecutors.
 - Develop a code of conduct for judges and prosecutors in line with international standards, including the UN Basic Principles on the Independence of the Judiciary and the Bangalore Principles on Judicial Conduct, to strengthen the integrity of the Judiciary and improve the accountability of judges.
 - Invest in training judges and lawyers to ensure that procedural rights are understood and upheld in the future, particularly but not exclusively in the criminal justice context.
 - Ensure that the prosecution of Ms Lazareva and Mr Dashti, as well as the prosecution of everyone else, respect basic principles of international human rights law and in particular the right to a fair trial and the independence and impartiality of the proceedings.
 - Amend its legislation and regulations with a view to bringing them in line with international law and standards and guarantee that everyone charged with a criminal offence is entitled to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him or her; to have adequate time and facilities for the preparation of his or her

defense and to communicate freely with counsel of his/her own choosing; to be tried in his/her presence and without undue delay; to examine, or have examine, the witnesses against him and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her.

- Become a party to Optional Protocol I to the ICCPR to recognise the competence of the UN Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by Kuwait of any of the rights set forth in the ICCPR.

- 1 Communication N° 263/1987, Case of Miguel González del Río v. Peru, doc. cit., para. 5.2.
- 2 UN Basic Principles on the Independence of the Judiciary, GA Res 30/32, Annex dated 29 November 1985.
- 3 Adopted by the round table meeting of Chief Justices, held in The Hague on 25 and 26 November 2002, which was attended by senior judges of the civil law tradition as well as judges of the International Court of Justice. See Bangalore Principles of Judicial Conduct (2002), http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.
- 4 UN Human Rights Committee, *Karttunen v. Finland*. Communications No. 387/1989, U.N. Doc. CCPR/C/46/D?387/1989 (1992), para. 7.2.
- 5 UN Human Rights Committee, Communication No. 451/1991, *Barry Stephen Harward v. Norway* (Views adopted on 15 July 1994), UN document CCPR/C/51/D/451/1991, para. 9.4.
- 6 Guidelines on the Role of the Prosecutor, 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.
- 7 Kuwait, Criminal Procedure Code, Law No. 17/1960.
- 8 U.S. Department of State, Kuwait 2018 Human Rights Report, available at <https://www.state.gov/documents/organization/289460.pdf>.
- 9 Ibid.
- 10 Gulf Centre for Human Rights, the Arabic Network for Human Rights Information, International Service for Human Rights, International Federation for Human Rights and the World Organisation Against Torture within the framework of the Observatory for the Protection of Human Rights Defenders.
- 11 Gulf Centre for Human Rights and others, Trial Observation Report dated 8 December 2016, available at file:///H:/downloads/Kuwait_Sara_Al-Drees_TOR_8.12_2016_.pdf
- 12 Amnesty International, *Kuwait: Authorities crackdown on protesters demanding citizenship rights*, 17 July 2019, available at <https://www.amnesty.org/en/latest/news/2019/07/kuwait-authorities-crackdown-on-protesters-demanding-citizenship-rights/>. Emphasis added.
- 13 Human Rights Committee, Concluding observations on the third periodic report of Kuwait, CCPR/C/KWT/CO/3 dated 11 August 2016 [30]; Compilation prepared by OHCHR in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the Annex to Council resolution 16/21, QA/HRC/WG.6/21/KWT/2 dated 12 November 2014.
- 14 Kuwait Society for Human Rights, Shadow Report on: The Second Periodic Report of the State of Kuwait dated August 2011, p.5.
- 15 Kuwait Society for Human Rights, Shadow Report on: The Second Periodic Report of the State of Kuwait dated August 2011, p.5.
- 16 The GAN Business Anti-Corruption Portal, Kuwait Corruption Report, available at <https://www.business-anti-corruption.com/country-profiles/kuwait/>; Middle East Monitor, A renewed Kuwaiti opposition rises to fight corruption dated 11 June 2014, available at <https://www.middleeastmonitor.com/20140611-a-renewed-kuwaiti-opposition-rises-to-fight-corruption/>.

- 17 IDHAE World Observatory for Defence Rights and attacks against lawyers, Attorney Urgent Alert dated 10 May 2010, available at <http://www.idhae.org/observatoire-uk-page4.1.moyor.kow1.htm> and International Federation for Human Rights, Kuwait: Detained blogger released on bail dated 30 June 2010, available at <https://www.fidh.org/en/region/north-africa-middle-east/kuwait/Detained-blogger-released-on-bail>.
- 18 Commission on Human Rights, Report of the Special Rapporteur on the Independence of Judges and Lawyers, E/CN.4/2006/52/Add.1 dated 27 March 2006.