



ELIAS MOUKHEIBER INSTITUTE FOR LEBANON

Policy Research Paper N°3

February 24th, 2021

EMIL LEGAL ANALYSIS AND POSITION STATEMENT

ON THE COURT OF CASSATION RECENT DECISION TO REMOVE JUDGE FADI SAWWAN, LEAD INVESTIGATOR OF THE AUGUST 4, 2020 BEIRUT BLAST

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Within days of the blast that devastated large swaths of the capital, Judge Sawwan was named lead investigator to determine responsibilities in events leading to this man-made catastrophe. He proceeded to summon several individuals for depositions, including the caretaker prime minister, Hassan Diab, the former minister of Public Works and Transport Ghazi Zeaiter and the former minister of Finance Ali Hassan Khalil (sanctioned by the Magnitsky Act). He also issued an arrest warrant for former Public Works and Transportation minister Youssef Fenianos (sanctioned by the Magnitsky Act). While the prime minister refused to accept the summons and the arrest warrant for Mr. Fenianos did not take effect, Mr. Zeaiter and Mr. Khalil filed a complaint in December 2020 asking for the removal of Judge Sawwan on the basis of a “legitimate suspicion” of his impartiality in dispatching his duty and invoking their parliamentary and attorney immunities. In February, Judge Sawwan was removed as lead investigator.

Before refuting the legitimacy of the arguments underlying the request to remove Judge Sawwan, it must be stressed that inherently independent judicial process never scares one who has nothing to conceal. In this case, the two ministers deliberately chose to ask for the judge’s removal instead of confronting justice.

The discrepancy inherent to the two ministers’ request further calls into question their intentions: simultaneously asking for the appointment of another judge to the Judicial Council, while claiming not to be subject to the Court’s jurisdiction but rather to Parliament (within the High Court for the Judgment of Presidents and Ministers)¹. In addition to being legally unfounded, this is a contradictory maneuver, presented in bad faith, designed to waste time. Beyond being counter-productive and needlessly obstructive, this argument, having sadly been accepted by the Court of Cassation, will create a dangerous precedent, thereby legitimizing the same course of action for any summoned person to request a trial transfer by invoking this Court’s incompetence.

The implications of this decision go beyond the direct impacts to the integrity of the legal system. In the case at hand, the most tangible impact will be further delays in the investigation of the Beirut blast, and by extension denial of justice for the victims and their families. Adding to the injustice already faced by the victims of the blast in the lack of answers about the blast to date, the decision to remove Judge Sawwan from overseeing this existential case will cast doubt on the process of obtaining justice for the country as a whole. Such institutional failures of the justice system are likely to contribute to further unrest: as relatives of the victims stated to reporters in televised testimonies, delaying the probe in this case might also push them to seek justice through their own

¹ On the alleged incompetence of the judicial council: The plenary assembly of the Court of Cassation in a 2000 decision concerning Prime Minister Sanioura clarified that the competence is shared between the judicial justice and the high court for the judgment of presidents and ministers. Therefore, the judicial council is legally competent in judging ministers.

extra-judicial means, including resorting to violence. This would further discredit the integrity of the judiciary as a guarantor of justice, not to mention add to the volatility currently facing Lebanon.

The criminal chamber of the Court of Cassation upheld Mr Zeaiter and Mr Khalil's demand to remove Judge Sawwan from investigating the case on February 18, 2021. A new appointee, Judge Tarek Bitar, was nominated on February 20, 2021 by the Minister of Justice after approval of the Supreme Council of the Magistracy. While the appointment process complied with the code of criminal procedure, the nomination by the Ministry of Justice raises questions about the integrity and impartiality of the nomination. Given the fact that the Minister of Justice was included in the list of officials deemed suspect and investigated by Judge Sawwan, this raises an ethical question about the appropriateness of the Ministry's nomination of a judge that would then be in charge of ruling on the possible guilt of those officials on the list of suspects.

Having been appointed, Judge Bitar will have to delve into thousands of pages of documents reviewed by his predecessor over the past six months, which will waste far too valuable time given the seriousness of this case and further delay justice for the victims of the blast and answers to the legitimate questions of the entire nation.

The two main arguments presented by the summoned ministers were based:

1. On the parliamentary immunity of the plaintiffs, who are current members of the Lebanese Parliament. According to article 40 of the Lebanese Constitution, members of Parliament cannot be tried while Parliament is in ordinary session. Judge Sawwan clearly noted that he was summoning them as former ministers, not as members of Parliament.
2. On the claim that Judge Sawwan is not impartial because his house was damaged by the August 4 Beirut blast and that he has received - like many other Lebanese citizens affected by the destruction - monetary compensation from the Lebanese Armed Forces for damages incurred.

The plaintiffs used the second argument to claim their "legitimate suspicion" regarding Judge Sawwan's impartiality and anchor their demand to remove him from the case. The Criminal Chamber of the Court of Cassation validated this argument, accepting that the incurred damages to his house indeed form a reason to legally confirm the "legitimate suspicion" allegation. According to the Court's decision (2 in favor, 1 against), Judge Sawwan cannot at the same time be the judge and victim of the massive disaster.

EMIL is appalled by the frailty of this second thesis. Over three hundred thousand persons were directly affected by the horrific and devastating Beirut blast. All Lebanese are affected as well, because of significant and long term economic, physical and material damage and/or the enduring collective moral damage they are suffering from six months after the blast. With this decision, the Court created legal precedent for the removal of any judge who would have suffered from this blast that shook the whole country. In other words, any Lebanese judge could be further dismissed on these grounds at any point of the investigation, by virtue of this decision.

The two judges who drafted and issued this decision by majority (Judge Jamal Al-Hajjar, president of the chamber, and Judge Yvonne Bou-Lahoud - the third, Judge Fadi Al-Aridi opposed their

decision), could have very well seen things in a more logical and at least equally legal way, as brilliantly illustrated by judge Al-Aridi's laudable and honorable dissenting opinion.

This trial is eminently political because the investigation is looking into many Lebanese former and current officials and politicians, who were in place during the years leading to the blast and/or in positions where it is reasonable to think that they should know the facts. Indeed, let it be reminded that some senior figures knew, via briefings and written documents sent to them by various officials, that the ammonium nitrate was 1) stored at Beirut Port, 2) represented a major danger to the public and 3) should be removed safely. From a legal point of view, the criminal chamber could have very well maintained Judge Fadi Sawwan in his investigative function. From a civic point of view, denying the request to remove him could have at least signaled to the Lebanese people that the relatives of the victims and the wounded have a chance to obtain justice in this country. Instead, the reality of the lack of independence of our institutions was highlighted by the decision and creates unwelcome precedent. The result: politically motivated trampling on the fundamental principle of independence of the judiciary.

To conclude, this decision raises a number of reasons to develop "legitimate suspicions" (pun intended) over the impartiality of the two high court judges who approved the decision... and there is no way whatsoever to form an appeal against it, as it was granted by the Lebanese judiciary's highest court.

EMIL's summary position:

I. A triple diagnosis

1- Risk of impunity for the perpetrators and risk of denial of justice for the victims and their relatives.

2- Right to a fair trial blatantly violated.

3- Justified concerns about the independence of the judiciary in Lebanon. In a country that has lost its sovereignty, justice cannot be independent.

II. Recommendation

Time is pressing to preserve the rights of the direct and indirect victims, identify and hold accountable those responsible for the Beirut blast which took place more than six months ago and whose investigation was supposed to uncover responsibilities 'within five days', dixit minister of Interior Mohamad Fahmi².

For EMIL, the only conceivable solution to this immense injustice, given recent developments, is obtaining a fair investigation and trial from a competent international tribunal placed under the auspices of the United Nations which would take in consideration the high stakes that this historic case represents for the Lebanese people. EMIL applauds and joins the increasing and diverse voices exhorting national and international bodies in support of this recommendation. Chief among these are local Patriarch Rai, in frequent national appeals from Bkerke and echoed by international organizations such as Human Rights Watch, Legal Action Worldwide and Amnesty International.

² Source: LBCI