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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

LEBANON

OPINION

ON THE DRAFT LAW ON THE INDEPENDENCE OF JUDICIAL COURTS

Adopted by the Venice Commission
at its 131st Plenary Session
(Venice, 17-18 June 2022)

on the basis of comments by

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I. Introduction

1. By letter of 6 September 2021, Ms Marie Claude Najm, Minister of Justice of Lebanon, requested an opinion of the Venice Commission on the draft Law on the Independence of Judicial Courts, which would replace legislative decree no. 150/1983 on the organisation of the judiciary (CDL-REF(2022)014, hereinafter "the draft Law"). In March 2022 the text of the draft Law in Arabic has been transmitted to the Venice Commission and the new Minister of Justice, Mr Henri El Khoury, reconfirmed the request made by his predecessor.

2. Ms N. Bernoussi (member, Morocco), Mr M. Frendo (member, Malta), and Mr B. Mathieu (member, Monaco) acted as rapporteurs for this Opinion. On 26 and 27 April a delegation of the Commission composed of Ms Bernoussi and Mr Frendo, accompanied by Mr G. Dikov from the Secretariat visited Beirut and had meetings with the Minister of Justice, the Supreme Council of Magistracy, members of the Parliamentary committee on administration and justice, representatives of the judiciary, the President and members of the Constitutional Council, as well as with the representatives of civil society. On 5 June 2022 the Ministry of Justice provided written comments on the draft Opinion. The Commission is grateful to the Ministry of Justice of Lebanon for the excellent organisation of this visit and for their comments.

3. This opinion was prepared in reliance on the English translation of the draft Law prepared by the Venice Commission. The translation may not accurately reflect the original version on all points.

4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 26 and 27 April 2022. The draft opinion was examined at the Joint Meeting of Sub-Commissions on the Rule of Law, the Judiciary and the Mediterranean Basin on 16 June 2022. Following an exchange of views with Mr Henri El Khoury, Minister of Justice of Lebanon, it was adopted by the Venice Commission at its 131st Plenary Session (Venice, 17 June 2022).

II. Background

5. The organisation of the judiciary in Lebanon[1] is governed by Decree-Law no. 150/83 of 16 September 1983, with later amendments. In 2018 a coalition of several Lebanese NGOs proposed a comprehensive reform of the legislation on the organisation of the judiciary, which aimed at strengthening the guarantees of independence of judges and improving transparency of judicial governance. This proposal was supported by several MPs who introduced before the Parliament a draft Law replacing Decree-Law no. 150/1983. Following discussions in the competent parliamentary sub-committee within the parliamentary committee on administration and justice the bill has undergone considerable changes and was communicated to the Minister of Justice, who, in 2021, decided to request an opinion of the Venice Commission on this bill. In parallel, the Ministry of Justice continued consultations with the relevant stakeholders, and in particular with the Superior Council of Magistracy (the SCM), about possible improvements of the draft Law. It is understood that the involvement of the Ministry in the process did not transform the draft Law into a government-sponsored bill. As transpires from the written comments submitted by the Ministry, it does not support some of the proposals contained in the draft law (such as, for example, the election of seven judicial members of the SCM by their peers, or the creation of a separate Evaluation Commission). This Opinion is based on the text of the draft Law as communicated to the Venice Commission by the Ministry of Justice of Lebanon in March 2022.

6. While in Parliament the original draft Law has been significantly modified, its main thrust has remained: the draft Law changes the composition and powers of the SCM, which is a central

[1] Excluding administrative and some other specialised jurisdictions.

body of judicial governance in Lebanon, and also redefines the role of the executive in the matters of judicial governance.

7. At the meetings in Beirut representatives of the NGOs which were implicated in the preparation of the original draft complained that they had not been sufficiently involved in the discussions on the draft Law in the sub-commission in Parliament, and that the content of those discussions and of the amendments proposed and incorporated in the text had not been made public. The Venice Commission will not enter into examination of the details of the legislative process. It only reiterates its well-established position that important institutional reforms should always be accompanied by a meaningful discussion both within and outside Parliament, involving civil society, experts, and relevant stakeholders (in this context – judges, prosecutors, and lawyers).[2] Prior to adoption of this new law, further engagement with civil society would be desirable in the interest of having a law which is widely "owned" by society in Lebanon and which therefore furthers the building of trust in the judiciary as an independent institution of the State. In their written comments the Ministry of Justice stressed that the civil society was and will be kept informed about the developments in the process of adoption of the draft Law. To be meaningful, it is important that the civil society is also able to submit their comments before the draft Law is finalised and submitted to voting.

8. The draft Law under consideration covers a wide range of topics related to the status of judges and governance of the judiciary. Rather than commenting on every and each provision of the draft Law, the Venice Commission will concentrate on those elements which attracted attention in the domestic discussions and which, in the opinion of the Commission, are key to finding a proper balance between the independence of the judiciary and its accountability. Mainly, the Opinion will focus on the bodies of judicial governance and their powers. Absence of remarks on other elements of the draft Law does not necessarily mean that the Venice Commission endorses them.

9. The Lebanese judiciary suffers from the general problems faced by the Lebanese State: deep economic crisis, political instability, severe budgetary cuts, lack of public trust in the State institutions, etc. In parallel with the institutional reform of the judiciary, it may be necessary to increase its efficiency and capacity by allocating additional financial and human resources to the courts system, revising procedural codes, increasing computerisation, putting in place training programs, etc. The specific development and, even more so, the implementation of such measures goes far beyond the competency and remit of the Venice Commission. However, in order to be successful, institutional reforms should be accompanied by material resources and by the deployment of supporting programs.

10. Finally, as explained to the rapporteurs in Beirut, together with the draft Law under examination (on "judicial courts"), a draft Law on the administrative courts and on the Council of State (the highest instance resolving administrative disputes) is now pending before Parliament. The present Opinion will only deal with the organisation of the "judicial courts", but the Venice Commission invites the authorities to consider these two draft Laws as part of the same comprehensive judicial reform. Some of the remarks of the Venice Commission made in this Opinion may be relevant *mutatis mutandis* to the organisation of the administrative judiciary as well.

[2] See, for example, Venice Commission, CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service, paras. 32 and 33

III. Analysis

A. Applicable standards

11. The international law (both hard law and soft law) and regional instruments applicable to Lebanon enshrine the fundamental principle of independence of the judiciary. Most importantly, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to be tried "by a competent, independent and impartial tribunal established by law". The concept of judicial independence was developed in the case-law of the UN Human Rights Committee, which explained, *inter alia*, that protecting judges from political influence requires "adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary".[3] Some additional details on the institutional framework guaranteeing judicial independence may be found in the 1985 UN Basic Principles on the Independence of the Judiciary, which require, for example, that decisions in disciplinary proceedings against judges should be subject to an independent review, or that the State has to provide adequate resources to the judiciary.[4] At the regional level, Article 12 of the Arab Charter on Human Rights provides that its Member States shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. Lebanon is a party to these international instruments.

12. International or regional instruments remain relatively general on the institutional models of organisation of judicial governance. By contrast, European standards in this field are more detailed. The most important source of the European law in this respect is the jurisprudence of the European Court of Human Rights (ECtHR) under Article 6 of the European Convention on Human Rights which guarantees the right to fair trial by an independent tribunal established by law.[5] The European standards are also codified in the recommendations of the Committee of Ministers of the Council of Europe,[6] and further developed in the opinions and reports of the Venice Commission[7] and the specialised bodies of the Council of Europe, such as the Consultative Council of European Judges (the CCJE),[8] which contain detailed recommendations on the composition of the bodies of judicial governance, procedures before them, substantive rules on promotions and discipline, etc.

13. Lebanon is not a Member State of the Council of Europe and, therefore, is not formally bound by the European standards in the area of independence of the judiciary. However, it is the conviction of the Venice Commission that there are elements of the European constitutional heritage which have a more universal relevance, and which may be useful in interpreting and applying provisions of the international law applicable to Lebanon. Therefore, the Venice Commission's recommendations will be based both on the international and on the European standards and best practices.

B. Confessional principle in the organisation of the judiciary – preliminary remarks

14. The political system of Lebanon is characterised by power-sharing between three main religious communities: Sunni Muslim, Shia Muslim, and Christians. The confessional principle

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[3] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.
[4] See points 20 and 7 respectively
[5] See, for a useful summary of the ECtHR case-law on judicial independence ECtHR, a case-law guide under Article 6 prepared by the Registry of the ECtHR, pp. 57 et seq.
[6] See in particular Recommendation CM/Rec(2010)12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, on judges: independence, efficiency and responsibilities.
[7] See in particular CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, and the opinions cited further in the text of the present Opinion.
[8] See in particular CCJE Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems). Position of international and European associations of judges, lawyers and judicial councils (such as the ENCJ, for example

follows from the Constitution of Lebanon, adopted after the end of the French mandate, and modified following the Taif Agreement, concluded at the end of the civil war of 1975-1990. The Constitution provides for the parity between representatives of the Christian and Muslim communities in Parliament and for the proportional representation of confessions in the Government. Traditionally, the President of the country is a Christian, the Prime Minister is a Sunni Muslim, and the Speaker of Parliament is a Shia Muslim.

15. The first paragraph of Article 95 of the Constitution lays out a process thereby "the Chamber of Deputies […] shall take the appropriate measures to bring about the abolition of political confessionalism according to a transitional plan". The same idea is reflected in the preamble to the Constitution which states that "the abolition of political confessionalism shall be a basic national goal and shall be achieved according to a staged plan". However, the third paragraph of Article 95 makes an important reservation: during the transitional period top-level posts within the judiciary "should be equally divided between Christians and Muslims without specifying any job to a specific confession, taking into consideration the two principles of jurisdiction and efficiency". Thus, while the strategic goal of the Constitution is to abandon the confessional principle, temporarily a parity should be preserved, but "without specifying any job to a specific confession".

16. As explained to the rapporteurs, in reality the confessional principle permeates the whole judiciary, and many posts in the judiciary have a confessional "label".[9] This practice has attracted significant criticism, particularly from some of the NGOs. According to some interlocutors, the confessional principle favours clientelism: appointment to judicial positions therefore does not only depend on the merits, integrity, and competencies of candidates, but also on their endorsement by the political leaders of the respective communities. The critics of the confessional principle argue that the appointment to key judicial positions is used as a token in broader political negotiations related to tax, budgetary and other matters not related to the judiciary.

17. Other interlocutors stressed the positive role played by the confessional principle in the post-colonial and post-civil war history of Lebanon. They see the confessional principle as a guarantee of the continuity of the Lebanese State, which endured despite long periods of inter-communal violence, political assassinations, repeated economic crises, foreign occupation, etc. As explained to the rapporteurs by the Minister of Justice, before the civil war the governance of the judiciary based on the confessional principle functioned relatively well. Any radical change in this respect is risky. According to proponents of the *status quo*, the confessional principle is an integral part of the constitutional identity of Lebanon and cannot be easily abandoned, without a deep change in the political, social, and religious culture.

18. For the Venice Commission, there is a certain tension between the confessional principle and the principle of merit-based appointments within the judiciary, which is enshrined both in international law[10] and in the European standards.[11] The Constitution of Lebanon envisaged moving away from the confessional principle to a system of appointments based on competence, integrity, and experience. However, the Constitution did not lay out any specific timeframe within which this transition should take place (though, of course, the lack of a timeframe does not diminish the validity of the constitutional objective).

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[9] Thus, "as a matter of established practice, the First President of the Court of Cassation is Maronite Christian, the Public Prosecutor of the Court of Cassation and President of the Judicial Inspectorate are Sunni Muslim, and the Director of the Institute of Judicial Studies is Shia Muslim" – see the 2017 ICJ briefing paper "The Lebanese High Judicial Council in Light of International Standards", p. 8.

[10] See p. 13 of the EU Basic Principles, mentioned above, which proclaims that "promotion of judges […] should be based on objective factors, in particular ability, integrity and experience".

[11] See p. 44 of Recommendation CM/Rec(2010)12, mentioned above.

19. Another difficulty is that while the idea of confessional parity stems from the Constitution, the law does not set out any specific legal mechanism for its implementation. Rather, this parity is seemingly achieved through bargaining amongst main political players. Any reform in this area will have to address those currently existing legal mechanisms which make such political bargaining possible.

20. In the opinion of the Venice Commission, in order to comply with the general direction indicated in the preamble to the Constitution of Lebanon and in Article 95 thereof, in the context of ascertaining the primacy of the secular law of the State, any legislative reform of the judiciary should aim at introducing such mechanisms that help a change of direction from the continued assiduous application of the confessional principle in practice towards a system of appointments which is essentially based on the merits of candidates, without, at the same time, perturbing social cohesion and inter-communal peace. A reform which simply entrenches the *status quo* would be represent a lost opportunity in addressing the spirit of the above-mentioned constitutional provisions. That being said, the Venice Commission understands that the total abandonment of the confessional principle in the milieu of the Lebanese social and political construct may be a matter of a more distant future requiring a wide and deep consensus of the community as a whole.

C. Possible constitutional entrenchment and further revisions of the law

21. Article 20 of the Constitution of Lebanon proclaims that judges are independent.[12] However, the Constitution is silent on the method of appointment of judges, their security of tenure, and other institutional and procedural arrangements which may ensure this independence in practice. Similarly, the Constitution does not regulate the organisation of the prosecution service and the status of the prosecutors.

22. It is positive that the draft Law will be adopted as a law, and not as a decree-law (as the current Decree-Law no. 150/1983). However, certain basic parameters of the composition and powers of the SCM (on these see below) should be entrenched in the Constitution, in order not to expose the system of judicial governance to the imperatives of the prevailing politics. Otherwise, any new political majority could be tempted to change the system, which may be detrimental to the independence and efficiency of the judiciary. While a constitutional reform may not be currently on the agenda, if it is to be envisaged in a foreseeable future, the Venice Commission would strongly recommend entrenching some basic rules on the judicial governance at the constitutional level. Procedures before the SCM, discipline and performance evaluations, administration of the judicial process, etc. may be regulated by the ordinary legislation.

23. The constitutional entrenchment will have another benefit: it would remove any ambiguity about the powers of the executive *vis-à-vis* the judiciary. Thus, for example, currently all judicial appointments and transfers are to be endorsed by a government's decree on the basis of a proposal by the Minister of Justice. The draft Law gives to the reformed SCM important powers in this area, but a governmental decree seems to be still needed to validate a decision of the SCM. Article 77 of the draft Law provides that the SCM, by a qualified majority, may overrule the objections of the Minister in the matters of appointments and transfers, and such decision of the SCM would be directly enforceable. It is unclear, though, whether this decision of the SCM will have to be approved by the Government. During the meetings in Lebanon the rapporteurs heard different views as to whether the role of the executive in this process will be essentially a ceremonial one or whether the Government will keep a discretion to appoint or not to appoint judges, as a part of its constitutional role to appoint all State employees which is stipulated in

[12] The Constitutional Council over the years expanded on the meaning of the notion of independence of judges - see the collection of decisions of the Constitutional Council (in French).

Article 65 (3) of the Constitutions.[13] In the opinion of the Ministry of Justice, the direct enforceability of the decision of the SCM under Article 77 of the draft Law is not contrary to Article 65 (3) of the Constitution, but may be incompatible with Article 56 thereof which deals with a situation when a decree of the Government may become directly enforceable without the approval of the President of the Republic. The Venice Commission does not see a direct contradiction between Article 77 of the draft Law and Article 56 of the Constitution, but admits, following the remarks of the Ministry, that the question of constitutionality of the proposed arrangement may arise. A constitutional provision giving the SCM powers in these areas, without any need of an endorsement by a Government decree, would remove this ambiguity.

24. Finally, in the specific Lebanese context, where informal mechanisms often supersede written rules, it may be appropriate to introduce a "sunset clause" which provides for a formal review of the workings of the new mechanism within several years of its entry into force and, in the light of its practical application, to review possible amendments to the Law which may be required to ensure that it meets is objective of providing a strong and independent judiciary. This would introduce a dynamic in the Law which stimulates further evolution. To avoid the risk of regression of the legislation, the sunset clause should be accompanied by the constitutional entrenchment of the most basic requirements to the institutional structure of the judiciary.

25. That being said, the Venice Commission is aware that the process of constitutional amendment may be a politically difficult endeavour, as stressed by the Ministry in their written comments. It may be more realistic, in the current context, to expect a gradual approach by defining, first, functioning and organisation of key institutions of the justice system at the legislative level and, once there is a political will and consensus prospects, including a package of amendments regarding the judiciary into the Constitution.

D. Bodies of judicial governance

26. The independence of judges may be guaranteed at different levels. First of all, it is important that the law proclaims that judges are free in their decision-making in the sense that they cannot receive instructions from anyone.[14] However, proclaiming that the judge is independent is not sufficient to ensure the real independence, which should be guaranteed by a whole set of arrangements related to his or her appointment, conditions for dismissal, security of tenure, guaranteed level of salary and other benefits, etc.

27. An essential question in this context is who decides on the appointments, transfers, and promotions of judges and who can discipline them. The Venice Commission will therefore start with the examination of the institutional structure of the bodies of judicial governance and their powers.

28. The key element of the draft Law is the reorganisation of the SCM, which is the central body of judicial governance in Lebanon.

29. The current SCM is composed of ten members. All of them are magistrates; however, only two are elected by the magistrates themselves. Five others are appointed by the Government and three are members *ex officio*: the President of the Court of Cassation, the Public Prosecutor at the Court of Cassation (hereinafter – the Prosecutor General), and the President of the Judicial Inspection. The three *ex officio* members are also appointed to their respective positions by a government decree. Therefore, out of ten SCM members eight are appointed either by the executive or with a significant involvement of the executive.

[13] See Article 65 of the Constitution
[14] This declaration is contained in Article 53 of the draft Law

30. Furthermore, most of the members of the SCM are judges holding administrative positions within the judiciary: presidents of the chambers in the Court of Cassation, presidents of the appeal courts, presidents of the first-instance courts. The two elected members are the presidents of the chambers of the Court of Cassation, and they are elected by the judges of the same Court of Cassation. In short, the current SCM is not only dependent on the executive because of the manner of appointment of its members, but also exclusively composed of higher judges, with no representation of lower courts' judges.

31. The future SCM will have ten members. Three are *ex officio* members: the President of the Court of Cassation, the Prosecutor General, and the President of the Judicial Inspection. These three officeholders are appointed by a governmental decree for a four years' non-renewable mandate. Under the draft Law, the Government has to choose candidates for those positions from a list of three names suggested by the SCM for each vacant position and approved by the Minister of Justice, or, alternatively, from a list proposed by the Minister of Justice with the approval of the SCM.

32. The remaining seven members are judges elected by their peers for a three years non-renewable mandate. According to Article 2 of the draft Law each of the following categories of judges will have one representative in the SCM: chamber presidents in the Court of Cassation, counsellors (ordinary judges) in the Court of Cassation, chamber presidents in the courts of appeal, counsellors in the courts of appeal, investigative judges, chamber presidents from the courts of first instance, and individual judges or those "on mission" (not attached to a particular court or, for example, seconded to the executive).

33. The elected judicial members are voted at the general assembly of all magistrates (i.e. judges and prosecutors together) by a secret ballot. Under Article 4 of the draft Law, each magistrate will vote for two candidates from the list of all candidates including at least one candidate from the category to which this judge belongs.

1. The status and organisation of the prosecution service in Lebanon

34. Before examining the new composition of the SCM, the Venice Commission has to make two important remarks on the organisation of the prosecution service in Lebanon, which is seen as a part of the judiciary and is governed by the same bodies.

35. In Lebanon prosecutors are considered as "magistrates", together with judges. Prosecutors have the same seniority grades as judges, which define their benefits and the eligibility for promotions,[15] and in practice prosecutors are often appointed as judges, and *vice versa*: a prosecutor may be promoted as a trial judge, and the trial judge may become a prosecutor. Prosecutor's offices are attached to the courts of appeal and the Court of Cassation. As per the draft Law, prosecutors will be subjected to the same disciplinary and evaluation procedures as judges.

36. As stipulated in Article 42 of the draft Law, "the organization of the Public Prosecution Office shall be subject to hierarchy and sequence". The prosecutorial system is headed by the Prosecutor General who may issue instructions to lower prosecutors. These could be either general instructions or instructions related to specific files; in the latter case the instruction should be "written, lawful and reasoned", and the prosecutor to whom it is addressed to has a right to leave a written comment in the casefile, accessible to the parties. The Prosecutor General cannot discontinue the proceedings once a criminal case has been opened by a lower prosecutor.

[15] See Article 83, for example.

37. As repeatedly affirmed by the Venice Commission, hierarchical organisation within the prosecution service is not against European standards and is quite common in many countries.[16] That being said, there is a general tendency in Europe of giving to the prosecution service more independence from the executive,[17] especially as regards the conduct of specific cases. "The rule of law requires independence of decision making, but not necessarily full institutional independence".[18] It is acceptable to have some political input in the appointment of the Prosecutor General,[19] but it is not acceptable for the political power to give instructions to the Prosecutor General in specific cases,[20] or for the Prosecutor General to be accountable before Parliament in individual cases of prosecution or non-prosecution.[21]

38. The Venice Commission considers that the draft Law should describe in more detail the relations between the Prosecutor General and the political powers of the State. Most importantly, it should be specified that the Prosecutor General cannot receive instructions on specific cases and should not be required to give account on such cases.[22] Few exception from this general rule may be provided in the law: for example, in cases where a particular investigation may have serious implications on the external relations of the State the Prosecutor General may decide to inform the relevant State authorities, but only if vital public interests are at stake. That does not exclude an obligation of the Prosecutor General to report to the Parliament on the general work of the prosecution service and on the implementation of the general priorities of the State penal policy.[23]

39. Next, the Venice Commission notes that under the draft Law the prosecutors will participate in the bodies of judicial governance. Thus, the Prosecutor General is and will remain an *ex officio* member of the SCM. Prosecutors will vote, together with judges, at the elections of the judicial members of the SCM. Moreover, prosecutors may be appointed as members of other statutory bodies of judicial governance, namely the Judicial Inspection and the Evaluation Commission (on the composition and powers of these bodies see below).

40. The Venice Commission notes that some form of participation of the prosecutors in the governance of the judiciary cannot be ruled out – this is the case in some European countries, such as France or Italy. However, as noted by the Venice Commission in an opinion on Bulgaria,

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[16] See, for example, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, paras. 28, and 31; see also CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, para. 15

[17] See Venice Commission, CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, para. 16

[18] See Venice Commission, CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, para. 19

[19] See Venice Commission, CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, para. 19

[20] CDL-AD(2017)028, Poland - Opinion on the Act on the Public Prosecutor's office, as amended, paras. 91, 95 and 99

[21] CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, para. 82

[22] See Venice Commission, CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts, para. 19; see also Venice Commission, CDL-AD(2007)011, Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", para. 25

[23] See Venice Commission, CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 30

in the countries without a long tradition of judicial independence participation of prosecutors in the bodies of judicial governance should be limited, especially when the prosecutorial members of the governance bodies are not full-time and where they remain under the hierarchical supervision of the Prosecutor General or where, after a full-time job in the bodies of the judicial governance they return to the prosecutorial system.[24]

41. As understood by the rapporteurs, the fact that some of the members of bodies of judicial governance in Lebanon were prosecutors before their appointment, or that prosecutors vote together with judges in the election of members of the SCM, is not seen in Lebanon as a major threat to the independence of judges. Similarly, the presence of the Prosecutor General as an *ex officio* member of the SCM does not seem to endanger the independence of this body. That being said, and given the experience of other countries, this aspect of the system should be under regular review by the legislator.

2. Composition of the Superior Council of Magistracy (the SCM)

42. The most important change proposed by the draft Law aims at reducing the influence of the executive within the SCM and leaving more space to judicial self-government. Thus, the number of judicial members elected by their peers will be increased from two to seven (out of ten members). This represents a serious progress in terms of increasing judicial independence and brings the Lebanese judiciary closer to the European standards. Notwithstanding this, several questions remain.

a. Judicial members elected by their peers

43. Although there are still examples of pluralist democracies which retain the method of appointment of the judiciary by the executive, at least formally, many national legal orders evolved towards a different model, where decisions on appointment are taken in substance by the bodies like the superior councils of magistracy, which include, along with the magistrates, members appointed by other branches of power, representatives of the civil society etc. The Venice Commission's opinion on Malta (which recommended changing the previous regime where judicial appointments were made by the Cabinet of Ministers, and the response by the Maltese legislator which implemented these recommendations) is a recent example of this trend. [25]

44. As explained to the rapporteurs, the current model of the SCM, where most of its members are appointed by the executive, favours bargaining amongst political leaders of the main confessional groups over the distribution of posts within the judiciary. The proponents of the reform argue that a more participative model of judicial governance, with increased involvement of the lower courts' judges, may change the way how the system operates.

45. Indeed, such a model is, as the situation stands presently, advocated by the Committee of Ministers of the Council of Europe and by the Venice Commission: at least half of the members of a judicial council should be judges elected by their peers.[26] The Consultative Council of European Judges (the CCJE) goes even further and requires that judges elected by their peers

[24] See Venice Commission, CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, §§ 51-53, with further references to the earlier opinions on Bulgaria.
[25] See Venice Commission, CDL-AD(2020)019, Malta - Opinion on ten Acts and bills implementing legislative proposals subject of Opinion CDL-AD(2020)006, with further references to the previous opinions on the independence of the judiciary in Malta.
[26] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para. 27. For the Venice Commission see for example CDL-AD(2020)035, Bulgaria - urgent interim Opinion on the Draft New Constitution, paras. 44 – 46.

should constitute a majority of members of a judicial council.[27] The draft Law corresponds to both these benchmarks.

46. That being said, under the draft Law most of the judicial members will still represent the upper strata of the judicial system or will be court presidents (see above). Both the Committee of Ministers[28] and the Venice Commission have recommended that there should be a fair representation of the different levels of the judiciary amongst the elected judicial members, "as well as diversity of gender and regions".[29]

47. The proposed structure of the judicial component of the SCM will result in a great disparity in the representation of the different levels: most of the places in the SCM will be reserved to the upper courts judges or court presidents, or to special categories of judges. The Venice Commission recommends ensuring better representation of judges from the lower-level courts in the SCM. This can be achieved by different means. For example, the law could allocate more seats in the SCM to the representatives of the lower courts' judges and ease the seniority requirements for the judicial members of the SCM. In addition, some of the interlocutors the rapporteurs met in Beirut have advocated for a single constituency for election of judges to the SCM; however, one should be aware that in France this has led to an excessive unionisation of the judiciary.

48. The Venice Commission stresses that the principle of fair representation does not necessarily mean that every judge should be eligible to the SCM, or that judges of each category should be represented in *exact proportion* to the number of judges in the corresponding category. The Ministry of Justice in their written comments stressed that the mandate of the *ex officio* member of the SCM requires significant experience and a lengthy career within the judiciary – this is why the draft Law provides that only judges having a seniority rank 16 or more (which is a very advanced rank) may be eligible as *ex officio* members. The Venice Commission agrees that it is not inappropriate that more senior judges may be better represented in this body. However, the Commission notes, respectfully, that judges with less experience, in general younger judges, should also be given the opportunity to be represented in the SCM. This would contribute to a greater diversity in the representation of judges and to making the system more "owned" by all judges, across the board, and therefore engendering greater confidence in the judiciary as a whole.

49. The Venice Commission understands that a more representative SCM may not be perfectly balanced in terms of confessional representation. It is important to ensure that the judicial structure reflects the whole spectrum of Lebanese society, and that the current constitutional requirement of "parity" in the appointment to top positions in the judiciary is respected. Similarly, it may be useful to also reflect on mechanisms which would promote even further the participation of women judges in the structures of judicial governance, in order to achieve, in the long perspective, a gender balance not only in the judiciary as a whole but also in the top positions within the judiciary.

50. Finally, the Venice Commission notes that the duration of the mandate of the elected members of the SCM is relatively short – only three years. As explained to the rapporteurs, frequent rotation of the members of the SCM is seen favourably in Lebanon. However, the Venice Commission recommends introducing a mechanism of partial renewal of the composition of the SCM, in order to preserve the institutional memory and continuity of this body. Simultaneous replacement of all seven elected members is to be avoided.

[27] CCJE Opinion no. 24, paras. 29 and 30
[28] Recommendation CM/Rec(2010)12, para. 27
[29] CCJE Opinion no. 24, para. 30

b. *Ex officio* members of the SCM and the process of selection of top officeholders within the judiciary

51. Under the proposed draft Law, in the future SCM the only group which are not "judges elected by their peers" will be *ex officio* members: the President of the Court of Cassation, the Prosecutor General, and the President of the Judicial Inspection. All of them are magistrates, and all of them at the same time have some links with the executive, since they will be appointed by a government decree, for a four years' non-renewable mandate, and with the participation of the Minister of Justice.

52. Thus, under the draft Law, for each vacant position the Government will choose one name from a list of three candidates suggested by the SCM. The list proposed to the Government by the SCM should be approved by the Minister of Justice. In addition, the Minister of Justice may come out with an additional list of three names which are to be approved by the SCM and then submitted to the Government for the selection of the winner.

53. As follows from the Venice Commission's report on judicial appointments, from the comparative perspective appointment of top officeholders within the judiciary by the executive is not uncommon. However, the Venice Commission always recommends that a judicial council (or a similar body) should play a decisive role in this process.[30] In the Lebanese context it is positive that in the future model the Government would have to choose from a list of three candidates who all should enjoy the support of the SCM. However, several important issues remain.

54. First of all, the draft Law is silent as to how the SCM prepares the list of candidates. Given the importance of those positions, a transparent competition involving a sufficiently large pool of qualified candidates would be strongly advisable, before the three best candidates are chosen. It should also be specified that all three candidates proposed by the SCM should have sufficient support within the SCM, i.e. be voted as a list.

55. Second, the role of the Minister in the process needs to be reconsidered. Under the Law, the Minister has to approve a list proposed by the SCM before submitting it to the Government. The Venice Commission does not see any reason why the SCM could not send the list *directly* to the Government, given that the Minister is also represented there. The need for an alternative procedure – where the Minister proposes three more candidates – is also not certain. The Venice Commission recommends simplifying the draft Law by providing for a single-track procedure where the SCM would vote for a list of three best candidates which then goes directly to the Government for the final selection.

56. Thirdly, the draft Law does not describe what happens if the Government refuses to choose one of the candidates proposed by the SCM (or by the Minister with the approval of the SCM, as in the draft Law). The draft Law should anticipate possible blockages and clearly indicate whether in this case the mandate of the outgoing top magistrates is extended, or whether the SCM may function without them.[31] In the opinion of the Venice Commission, the SCM should be able to function in a reduced composition if such blockage occurs. Similarly, the bodies which these officeholders preside should remain operational. Otherwise, there is a risk of paralysis of the whole system if the Government, for whatever reason, refuses to choose any of the three candidates pre-selected by the SCM.

[30] Venice Commission, CDL-AD(2007)028, Judicial Appointments – Report, para. 25

[31] Article 17 (c) suggests that the SCM may function with only 7 out of 10 members, but it is unclear whether this applies to a situation where not all 10 members are properly elected or appointed.

57. Finally, the Venice Commission notes that under the draft Law only the magistrates of a certain rank[32] can be appointed to key positions in the judiciary. It is reasonable to assume that only relatively senior judges are apt to perform such duties. At the same time, the pool of potential candidates from which the SCM may select three names should be large enough. Otherwise, there is a risk that these posts will always be destined to the few most senior magistrates, and therefore judicial governance in Lebanon would display an elitist character that will tends to reproduce itself.

58. In sum, the Venice Commission recommends simplifying the procedure of appointment of those three officeholders by providing that each of them is selected by the Government from a list composed by the SCM following a transparent competition involving a sufficiently large pool of candidates, and that in the case the Government fails to select on one of the three, there should be an unblocking mechanism such as the SCM continuing to function in a reduced composition.

c. Possible inclusion in the SCM of external (non-judicial) members

59. A problematic element of the proposed model of the SCM is the absence of any genuinely external members, representing other branches of power, other legal professions, or society as a whole.

60. A high proportion of judicial members in the SCM may potentially lead to corporatism in the governance of the judiciary. To counter this risk, the Venice Commission recommended counterbalancing judicial members with non-judicial (lay) members, representing other "users" of the judicial system (e.g. attorneys, notaries, academics), or a wider civil society.[33] To ensure the democratic legitimacy of the SCM, lay members may be elected by Parliament (preferably by a qualified majority or through a proportional system, in order to avoid politicisation),[34] or, alternatively, appointed by the Government under the parliamentary control, but a certain number of lay members may also be delegated to the SCM by external independent institutions.

61. As understood by the rapporteurs, while Lebanese judges are generally in favour of more independence from the executive, they are against the inclusion in the SCM of non-judicial members. The most common argument in this context is that lay members do not understand how the judicial system operates, the nature of the judges' work, their needs, etc. However, for the Venice Commission, the very idea of including non-judicial members in the SCM is based on the assumption that these members would bring a fresh perspective, free from professional biases, and should therefore make the operation of the SCM more transparent and hence more understandable for society as a whole. The Venice Commission considers that the SCM would benefit from the inclusion in its ranks of a certain number of such external members. Their number should not be higher than the number of judges elected by their peers, who must represent at least half of the total membership.[35]

62. The Ministry of Justice, in their written comments, expressed strong reservations about the idea of electing seven judicial members of the SCM by their peers, and stressed that it is too early, in the current political context of Lebanon, to open the SCM to the external (non-judicial) members. The Venice Commission is mindful of those concerns: one can appreciate that, in view

[32] Corresponding to the 16th degree – see Article 2, Article 127 as regards the President of the Judicial Inspection, and Article 142 as regards the President of the Judicial Evaluation Commission

[33] See Venice Commission, CDL-AD(2018)003, Opinion on the Law on amending and supplementing the Constitution (Judiciary) of the Republic of Moldova, para. 56, CDL-AD(2020)015, Urgent Joint Opinion on the draft Law on Amending the Law No. 947/1996 On Superior Council of Magistracy of the Republic of Moldova, para 21.

[34] See CDL-AD(2010)042, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, para 34

[35] See Venice Commission, CDL-AD(2021)043, Cyprus - Opinion on Three Bills Reforming the Judiciary, para. 49.

of the novelty of this concept in the governance of the judiciary in Lebanon, this opening to non-judicial members could be introduced in a graduated manner.

63. If the legislator opens up the SCM to the non-judicial members, it is necessary to ensure that the criteria and the method of appointment of such members ensure their political detachment, integrity, and sufficient professional and personal experience in the relevant fields (law, public administration, civil society work, etc). Those non-judicial members who are appointed by Parliament should not be appointed by a simple majority but rather by a qualified majority or following a proportional system, to ensure their political neutrality or at least political pluralism within the SCM.[36] Further, if non-judicial members are added, the overall number of members of the SCM may need to be revised in order to ensure that the judicial members *elected by their peers* still remain in the majority.

3. Other bodies of judicial governance: Judicial Inspection, Disciplinary Councils, Judicial Evaluation Commission

d. The Judicial Inspection

64. Under the draft Law the Judicial Inspection is competent to inspect the work of ordinary and administrative judges, prosecutors, auditors, clerks at the court registries, etc.[37] The Judicial Inspection is the only authority which may refer a disciplinary case concerning a judge or a prosecutor to a disciplinary body. It is composed of the President and inspectors, who are selected from amongst the magistrates (judges and prosecutors) of certain grades, as well as judges of the specialised courts.

65. While Article 124 defines the Judicial Inspection as "an independent body", but it further specifies that the Inspection is placed "under the supervision of the Minister of Justice". The President of the Judicial Inspection is appointed by the Government for four years on the basis of the list of candidates approved by the SCM, following the procedure described above, in respect of the appointment of the three *ex officio* members of the SCM.[38] This method of appointment of the President would be acceptable only if the draft Law is amended and supplemented in line with the recommendations formulated in the Section 2 (b) above.

66. By contrast, "general inspectors and the inspectors are appointed by a [governmental decree] for a term of four years, not renewable or extendable".[39] It therefore appears – unless this is a problem of translation – that the appointment of inspectors is fully in the hands of the executive.

67. The Venice Commission notes that the Judicial Inspection takes decisions collectively.[40] If the majority[41] of those who decide on triggering disciplinary proceedings against judges or initiate their removal for "incompetency"[42] are appointed single-handedly by the executive, such body cannot be really considered as fully "independent", as stated in the first sentence of Article 124.

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[36] The Venice Commission has previously recommended various models which may ensure political neutrality or pluralism within the "lay" component of the judicial and prosecutorial councils – see, for example, CDL-AD(2021)030, Montenegro – urgent opinion on the revised draft amendments to the law on the state prosecution service, para. 13.
[37] See Article 12
[38] See Article 2 of the draft Law
[39] See Article 127 of the draft Law
[40] See, in particular, the last paragraph of Article 132, and Article 135 of the draft law
[41] See Article 126 of the draft Law
[42] See the last paragraph of Article 132 and Article 104 on the "declaration of incompetency"; see also below the discussion about the concept of "incompetency".

68. Furthermore, the Ministry of Justice seems to manage the staff and the finances of the Inspection and approves its internal procedures, which further reduces the independence of this body.[43] The Venice Commission recommends giving the Inspection sufficient administrative and financial capacity to carry out its functions and objectives.

69. While the Judicial Inspection itself cannot impose disciplinary sanctions (this is the prerogative of the Disciplinary Council), the Inspection nevertheless retains a very important power to drop a case against a judge. And most importantly, the Judicial Inspection may request the Minister of Justice to suspend a judge whose case is referred to the Disciplinary Council.[44] The question is whether giving all these powers to the Inspection is appropriate.

70. An answer may be found in a Venice Commission's opinion on Armenia,[45] where the Venice Commission noted that a model where disciplinary proceedings against a judge may be initiated by a member of the executive – the Minister of Justice – is not unknown in other countries (for example, in Italy). However, in Armenia such proceedings could also be brought by the Ethics and Disciplinary Commission, which is a body of the General Assembly of judges. Thus, in Armenia the power of the Minister to trigger disciplinary proceedings was not exclusive – it was just one of the mechanisms of bringing a case before the disciplinary body.

71. By adverse implication, if only the Minister may trigger disciplinary proceedings, this may be problematic. Under the draft Law the power to initiate a case before the Disciplinary Council belongs exclusively to the Judicial Inspection, which, as shown above, is not fully independent from the executive. The Venice Commission is in favour of stronger checks and balances in the exercise of disciplinary powers. These can be achieved in various ways including, for example re-considering the manner of appointment of the Inspectors (for example, by involving in this process a pluralistically composed SCM), or dividing the power to start disciplinary proceedings between the Inspection and some other entities which are representative of the judges themselves. The Venice Commission reiterates that a constitutional amendment might be needed to ensure that the new method of appointment of certain officeholders does not contradict the general power of the executive to appoint civil servants. Alternatively, if the Judicial Inspection is composed of Inspectors elected with a meaningful input from the judiciary, the Minister of Justice may retain the power to bring disciplinary proceedings before the Disciplinary Council. What the Venice Commission would seek in this context is a balanced system where the power to investigate disciplinary complaints against prosecutors and judges and bring cases before the Disciplinary Council does not belong neither exclusively to the Ministry or the inspectors appointed by the Ministry nor exclusively to the judges themselves.

e. Two Disciplinary Councils

72. The first-instance Disciplinary Council, under the draft Law, will consist of the President of a chamber in the Court of Cassation and two members who are presidents of chambers in a court of appeal. The three members of the Disciplinary Council are to be elected by the SCM by a 2/3 majority vote.[46] Under Article 95 of the draft Law, the Disciplinary Council should inform the judge concerned about any accusation against him or her and the supporting evidence; the judge may participate in the hearings before the Disciplinary Council, be assisted by a lawyer, and request a public hearing (by default proceedings before the Disciplinary Council are held *in camera*). Decisions of the Disciplinary Council, which should be motivated, may be appealed against before the Supreme Disciplinary Council which is composed of the President of the SCM or his

[43] See Articles 137 and 138 of the draft Law
[44] See Article 102 of the draft Law
[45] See Venice Commission, CDL-AD(2017)019, Armenia - Opinion on the Draft Judicial Code, paras. 136 et seq.
[46] See Article 94 of the draft Law

or her deputy as president *ex officio*, and of four members appointed by the SCM from among its members at the beginning of each judicial year.[47]

73. The Venice Commission recalls that disciplinary proceedings in respect of judges "should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction".[48] Entrusting the power to examine appeals against the decision of a disciplinary body to a permanent court of law (instead of an *ad hoc* body) is a preferable solution.[49] However, the model proposed by the draft Law can be deemed acceptable if two conditions are met. First, members of the Supreme Disciplinary Council should be judges appointed by the SCM from amongst its composition. It is necessary to stipulate in the law that the President of the Judicial Inspection cannot be a member of the Supreme Disciplinary Council. Otherwise, he or she would perform two incompatible functions: of an accuser and of a judge.[50] The same applies to the procedure of dismissal of the judge for "incompetency" which is decided by the SCM itself, at the request of the Judicial Inspection:[51] the President of the Judicial Inspection should withdraw from consideration of such cases in order to avoid a conflict of interests. The law should also stipulate that the Prosecutor General should not be involved in the examination of disciplinary appeals concerning judges.

74. Second, the procedures before the Supreme Disciplinary Council should be of judicial character and provide the judge concerned with all basic guarantees of fair trial. This seems to be the case under Article 101 of the draft Law, which refers to the procedure under Article 95, but it might be stipulated in the draft Law more clearly.

f. The Evaluation Commission

75. The Judicial Evaluation Commission is tasked with the performance evaluations of magistrates; it gives the magistrates scores on the basis of regular evaluations. As explained to the rapporteurs, these scores are very important (if not decisive) in the matters of promotions and transfers.[52]

76. Contrary to the Judicial Inspection, the Evaluation Commission "works under the supervision of the SCM", which is positive. The President of the Evaluation Commission is appointed by the Government from the list submitted by the SCM in the same procedure as the three *ex officio* members of the SCM. So, all remarks related to the election of the three *ex officio* members of the SCM are applicable to the President of the Evaluation Commission as well. As to the other members of the Evaluation Commission, under Article 142 they are appointed from the number of magistrates, plus one member coming from the number of administrative judges, by a Government decree based on a proposal by the Minister of Justice "after taking the opinion of [the SCM] […]".

77. It is unclear whether the opinion of the SCM is binding on the Minister and the Government or has only an advisory value. Given the importance of evaluation in the matters of promotion (on

[47] See Article 101 of the draft Law
[48] See the Committee of Ministers Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, point 69.
[49] See Venice Commission, CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia", para. 96
[50] See the ECtHR case of *Mitrinovski v. the former Yugoslav Republic of Macedonia*, no. 6899/12, §§40 – 46; see also Venice Commission, CDL-AD(2014)032, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on making changes to the Law on disciplinary Liability and disciplinary Proceedings of Judges of General Courts of Georgia, §16
[51] See Article 104 of the draft Law
[52] See Article 82 of the draft Law

this see below), the Venice Commission recommends stipulating that the opinion of the SCM is binding and the Government or the Minister cannot bypass it by appointing other members.

78. Similarly, it should be indicated what happens if the executive refuses to appoint candidates for the Evaluation Commission selected by the SCM. The Venice Commission recalls in this respect that for the CCJE, "in order to safeguard judicial independence, individual evaluations should be undertaken primarily by judges. The Councils for the Judiciary (where they exist) may play a role in the process. Evaluations by the Ministry of Justice or other external bodies should be avoided".[53] For the CCJE, as well as for the Venice Commission itself, the influence of the executive in the process of evaluations should be limited. Consequently, the Venice Commission would not object against a suspensive veto of the Minister or the Government regarding the appointment of the members of the Evaluation Commission, but the final word should belong to the SCM (on this see below, the discussion about the participation of the executive in the matters of promotion and transfers).

E. Performance evaluations and the system of promotions and transfers: substantive and procedural rules

79. During the meetings in Beirut the rapporteurs heard a lot of criticism with regard to a practice of transfers of judges between different regions and appointment to judicial positions. This process is widely seen as arbitrary and driven by political and/or confessional considerations, rather than by the needs of the system and the merits of the candidates. Moreover, in the same meetings, it was stressed that in recent years the process of appointments and transfers has been stalled on many occasions, reportedly due to the impossibility for the political actors to reach an agreement on the distribution of posts within the judiciary.

80. The draft Law entrusts to the SCM the power to decide on transfers and on the attribution of specific posts to specific judges within the court system.[54] This is one of the most important powers of the SCM; however, under the draft Law, the SCM will share this power with the Minister of Justice who has to approve the organisational chart of the Lebanese judiciary. If the Minister disagrees with the attribution of posts proposed by the SCM, the matter should be returned to be decided at a joint session of the SCM together with the Minister. If no agreement is reached, the SCM will vote again by a qualified majority of seven members, and the decision of the SCM is submitted to the Minister again for approval.

81. It is understood – although the text of the draft Law, or at least its translation, is not entirely clear on that – that the decision of the SCM taken by seven votes is binding on the Minister, and even if the Minister disagrees, he or she will be obliged to issue a decree approving the nominations.[55] Thus, the SCM may overrule the objections of the Minister by a qualified majority of votes.

82. This procedure limits the influence of the executive in the matters of transfers and promotions, which is positive. However, the Minister retains a very important delaying power. And it cannot be altogether excluded that the Minister has enough influence within the SCM, as composed, to prevent a vote overcoming his or her veto. In this regards the Venice Commission recalls that in the future SCM three members out of ten will have quite strong ties with the executive. The remaining seven members are judges elected by their peers, but one of the SCM members will be a detached judge who may be seconded to an executive authority and whose independence from the executive may be questionable. Thus, while the Venice Commission has no reason do doubt the constructive approach of the current Minister in these matters, a risk of political

[53] See CCJE, Opinion n°17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, recommendation no. 8.
[54] See Article 77 of the draft Law
[55] See the last sentence of Article 77 of the draft Law

blockages of judicial appointments in the future cannot be excluded. It is therefore recommended to consider lowering the majority required to overcome the Minister's veto, which should be possible to do by an absolute majority of members of the (newly composed) SCM, meaning a majority of all members eligible to vote rather than a majority of the members present and voting.

83. The next question is the relationship between the system of evaluations by the Evaluations Commission, on the one hand, and the provisions on the appointments and transfers which are decided by the SCM, on the other.[56]

84. All judges in the country will be evaluated according to thirteen criteria set out in the draft Law.[57] The Evaluation Commission determines score points attached to each of those criteria, and, on the basis of the cumulation of those points it defines the final score of each judge. This makes the process of evaluation more objective and transparent.

85. However, it is unclear what role the scores given by the Evaluation Commission play in the decisions on promotions or transfers, regulated by Articles 77 et seq. On the one hand, the last sentence of Article 148 implies that the scores given by the Evaluation Commission should be "taken into account" by the SCM in deciding on the transfers and promotions. On the other hand, the SCM applies its own list of five criteria for selecting judges, described in Article 82 of the draft Law, which partly overlaps with the list of criteria for assessment used by the Evaluation Commission (like productivity, for example).

86. If the score given by the Evaluation Commission plays a decisive role, this Commission, and not the SCM, becomes the central body in the mechanism of promotions and transfers. If this is the case, the question of the composition of the Evaluation Commission arises again. It is therefore even more important to ensure that the Evaluation Commission is not under the influence of the executive (see the remarks on this issue above).

87. In sum, the legislator should decide whether the key role in the decisions on promotions and transfers should be given to the SCM or to the Evaluation Commission. Some sort of a power-sharing between those two bodies could be envisaged. Thus, the Evaluation Commission might assess more formal elements of the judge's work (productivity, compliance with the time-limits, etc.), whereas the SCM would be given a role of assessing the personality and managerial skills of the candidates. In both cases, the law – or a regulation adopted by the SCM – should describe a method of assessment of different aspects of the judges' work and abilities, and the respective weights of different elements. These regulations would serve as an objective basis for all decisions on transfers and promotions.

88. Furthermore, including in the law a duty of the SCM to give reasons for the decisions on transfers and promotions would increase the transparency and thus fairness of the process.

89. Several other aspects of the future system of transfers and promotions are worth attention. First, the lists of evaluation criteria used by the Evaluation Commission and the SCM need to be revised. It is not clear what some of the evaluation criteria are supposed to assess (see, for example, criterion no. 4 in Article 148 which mentions "balance, appearance and behaviour", and criterion no. 5 – "moral courage"). The criteria applied by the SCM[58] are also open to criticism. In particular, the Venice Commission is concerned that the SCM has to assess the "morality" of the judges. There is a risk of an overbroad interpretation of the notion of "morality", which may lead to the unjustified interference with the judge's privacy and lifestyle choices. Indeed, a serious breach of professional ethics by a judge may affect his or her chances of promotion. However, forms of such conduct should be more precisely defined in the law, and a general reference to

[56] See Articles 77 et seq. of the draft Law
[57] See Article 147 of the draft Law
[58] See Article 82 of the draft Law

the "morality" is dangerously broad. While the integrity of judges, and in particular the lack of incidents disclosing a potential conflict of interests can be used to assess the judges' chances of promotion, assessment of "morality" in the broad sense may be very subjective and should therefore not be used as a criterion.

90. Second, the draft Law reaffirms the practice of regular rotation of judges in different regions.[59] Those rotations are supposed to combat corruption and the risk that judicial offices become "personal fiefs" of the judges holding them. This is a serious concern which needs to be taken into consideration.[60] On the other hand, if the system of transfers or promotions is not fair and transparent (see above), those periodic transfers may be used to put pressure on some of the judges who are about to be transferred. Another downside of this system is the need to redistribute cases due to the departure of a judge and a relatively short time which a judge may spend in the same position (4 years for the lower courts' judges). This may have adverse effects on the planning of work in a given court. The benefits and downsides of the mandatory mobility rule should therefore be carefully assessed.

91. Third, under the draft Law, judges may be seconded from their judicial duties to serving in the administration, outside the judiciary. It is also the case under the current law. Such form of secondment exists in some European countries: it exposes judges to a different working environment and permits to enlarge their professional experience. However, the mechanism of secondments may entice serving judges to move to within the executive structures, therefore negatively effecting the perception of independence of the judiciary. It is therefore necessary to formulate conditions for such secondments, fixing their duration, frequency, eligibility for, benefits associated with the secondments, etc.

92. Finally, it is unclear for the Venice Commission whether the draft Law provides for any legal avenues for judges to complain about irregular transfers or appointments. While it is important to respect the discretion of the statutory bodies assessing the qualities of candidates and their past performance, there should be a legal avenue for appealing decisions which are manifestly arbitrary or affected by serious procedural flaws. Article 21 of the draft Law indicates that "individual and non-organisational decisions" of the SCM may be appealed before the General Assembly of the Court of Cassation. However, it is unclear whether the decision approving judicial formations (which partly affects the organisation of the court system) is considered "individual and non-organisational" or not. That should be made clear in the draft Law.[61]

F. Disciplinary proceedings and the dismissal for "incompetence"

93. The draft Law formulates the grounds for disciplinary liability and sets out a list of disciplinary penalties. It is not entirely clear whether these grounds are applicable only to the judges or also to the prosecutors: the fact that the list of disciplinary breaches includes a failure "to issue judgments on time"[62] implies that this list does not apply to prosecutors, or, at least, that not all of those breaches are applicable to the prosecutors. This should be clarified.

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[59] See in particular Article 79 of the draft Law

[60] The Venice Commission observes that under point 52 of the Recommendation CM/Rec(2010)12 "A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system". However, the Venice Commission understands this provision as preventing *ad hoc* transfers, which are more prone to abuses, and not a generalised system of rotation of judges amongst courts or amongst the regions based on pre-established criteria set out in the law.

[61] See point 48 of Recommendation CM/Rec(2010)12. In addition, it was explained to the rapporteurs that in the current system where the transfer and appointment are decided by a decree, they can be contested by the State Council, as any other administrative decision. The question remains whether this legal avenue would remain available if the power to appointment or transfer judges passes to the SCM.

[62] See Article 92 of the draft Law

94. In the opinion of the Venice Commission, some of the disciplinary violations in Article 92 are formulated in an overly broad manner. In particular, it is unclear what is meant by the "acts that affect honour, dignity or morals", acts that "suggest lack of independence, lack of integrity", or acts which "move away from rapid achievement with professionalism and efficiency". The Venice Commission warns against references to "morality" in this context.

95. The problem of imprecisely formulated grounds for disciplinary liability of judges is not unique to Lebanon. The Venice Commission has previously noted, in respect of other countries, that disciplinary breaches should be established, first, in the law itself, and, second, be formulated with sufficient precision. That being said, the use of some general formulas may sometimes be unavoidable. [63] The meaning of certain concepts may be further developed in the regulations adopted by the bodies of judicial governance and in the case-law of the disciplinary authorities.

96. Article 92 refers to the violations of the "provisions of the moral code" as a ground for a disciplinary liability. It is understood that the "moral code" in Article 92 is the same as the code of judicial ethics in Article 11 of the draft Law. The legal status of this code in the Lebanese legal order is not entirely clear. Article 11 of the draft Law provides that such code is to be drafted by the SCM, together with some other statutory bodies. After that the draft code should be forwarded to the Government which is to submit it to Parliament for the adoption as a law, as stipulated in Article 11 of the draft Law. It is not clear whether the Government or later Parliament may change the content of the code drafted by the SCM or may only endorse it. In any event, the grounds for the disciplinary liability and in particular the grounds for the removal of a judge should be formulated in the legislation; any sub-legislative act may only develop and explain the statutory provisions within the limits set out in the legislation.

97. It is very important to specify in the law that any disciplinary case should be decided in the light of the principle of proportionality, which should guide not only the choice of the penalty but also the very finding that a disciplinary breach has been committed. Thus, for example, "delay in deciding cases", mentioned in Article 92, may be related to the dysfunction of the system as a whole.[64] In this case such delay should not result in finding of a disciplinary violation. The Venice Commission recommends referring to the principle of proportionality in the text of the draft Law.

98. The range of disciplinary sanctions varies from warning to dismissal.[65] These sanctions are applied by the Disciplinary Commission, discussed above. In addition, a judge may be dismissed for "incompetency" by the SCM, with a majority vote of seven of its members, at the proposal of the Judicial Inspection.[66] The relation between the dismissal for a disciplinary breach, decided by the Disciplinary Commission, and the dismissal for "incompetency", decided by the SCM, is not entirely clear, as well as the reason for having two separate procedures for removing a judge from office.

99. If the "incompetency" relates to cases where no specific disciplinary breach could be detected, but the judge nevertheless demonstrated blatant lack of professionalism (for example, in cases of prolonged under-performance without objective reasons, etc.), this should be explained in the draft Law and the criteria for declaring the judge "incompetent" should be described therein, or at least some indications are given of what sort of competencies or performances are evaluated in this context. The Venice Commission stresses in this context that *honest* judicial errors or occasional incorrect interpretation of law or facts should not be treated

[63] See Venice Commission, CDL-AD(2016)013, Republic of Kazakhstan - Opinion on the Draft Code of Judicial Ethic, para. 27
[64] See Venice Commission, CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the Former Yugoslav Republic of Macedonia", para. 18
[65] Article 96 of the draft Law
[66] See Article 104 of the draft Law

as “incompetency” and are to be corrected by way of judicial appeals, and not by bringing the judge to personal liability. Every judge enjoys certain discretion in the interpretation of the law or of the facts of the case. However, systematic or grave errors in this area going clearly beyond this acceptable margin of discretion may have legal consequences for the career of the judge concerned. This should be specified in the draft Law.[67] Furthermore, as with the disciplinary liability, liability for “incompetency” should be governed by the principle of proportionality. Not every “incompetency” needs to be punished with a dismissal and sometimes it may be remedied by undergoing an appropriate training.

100. The Venice Commission also urges the authorities to reconsider Article 102 which entitles the Minister of Justice to suspend a judge following a request of the Judicial Inspection. The power to suspend may be abused (for example, in order to prevent a specific judge from examining a specific case). Therefore, the question of suspension should not be decided between the Judicial Inspection, which in its current composition seems to be dependent from the executive, and the Minister of Justice. Such decisions should be taken with the participation of an independent body – for example, a properly composed disciplinary authority or the SCM as a whole.[68]

G. Associations of judges

101. Although the issue of the judges’ associations’ is always delicate, the CM Recommendation cited above has emphasised that the freedom of judges to join professional associations is important in order to protect their independence. The extent of the judges’ involvement in public life varies in different European countries. The Venice Commission acknowledges that the judges’ freedom to form associations, as well as their freedom to express themselves in public could be limited by the imperatives of their work and the need to maintain public trust in their independence and the respect in the judicial institutions.[69]

102. The draft Law allows judges to establish and join professional associations; however, it makes an important reservation that such associations should not “conflict with the powers of [the SCM], the code of ethics, or the principle of the independence of the judge”. The meaning of this clause is unclear, in particular since the mandate of the SCM is defined very broadly and includes *inter alia* ensuring the rights of judges.[70] It is natural that associations of judges cannot exercise *powers* which are given by the law to the SCM and to other statutory bodies. However, the fact that an association of judges may work *in the areas* which are also defined as the area of competency the SCM, or which are governed by the code of ethics, should not render illegal the operation of this association. This distinction should be clearly made in the draft Law.

H. Distribution of cases

103. Article 32 and 144 of the draft Law empower the presidents of the courts to distribute casefiles amongst judges of their courts in accordance to the case-weight guidelines adopted by the Scientific Committee, established by the Evaluation Commission. It is positive that the law seeks to ensure that the work is distributed amongst judges fairly. However, having clear and

[67] Point 70 of Recommendation 2010(12) of the Committee of Ministers clearly indicates that “judges should not be personally accountable where their decision is overruled or modified on appeal.”

[68] It is unclear whether the suspension within the “incompetency” procedures may be ordered by the Judicial Inspection or the SCM (see Article 104): it is certainly cannot be within the sole competency of the Inspection and the SCM should take this decision.

[69] See in this respect CDL-AD(2015)018, Report on the Freedom of expression of Judges, paras. 40 and 48.

[70] See Article 8 of the draft Law which entitles the SCM to ensure the moral and material rights of judges, their fairness, and everything related to their independence, appointment, formation, transfer and discipline”.

foreseeable principles of distribution of incoming cases has another benefit: it reinforces the important principle of a "natural judge", which is an additional guarantee of fairness of the proceedings. One possible solution is to introduce a system of more or less random allocation of cases of the same category or weight to the judges of a given court. Presidents of the courts should not be able to allocate (or transfer) specific sensitive cases to "appropriate" judges, even if, at the end of the day, the workload within a given court is distributed evenly. That does not exclude that the principles of distribution of the workload should allow for some flexibility, and take into account specific competencies of certain judges, but the discretion of the President in these maters should be limited by pre-established rules and any departure from these rules should be permissible in clearly defined conditions and should be objectively justified and explained in each specific case. These rules could be established at the sub-legislative level but should be accessible and sufficiently detailed, in order to ensure transparent and fair distribution of cases and exclude arbitrariness.

IV. Conclusions

104. By letter of 6 September 2021, Ms Marie Claude Najm, the former Minister of Justice of Lebanon, requested an opinion of the Venice Commission on the draft Law on the Independence of Judicial Courts. In the overall, the draft Law goes in the right direction and may potentially reinforce judicial independence in Lebanon in line with the European standards and best practices. The Venice Commission encourages the legislature to ensure meaningful dialogue amongst different political forces and to involve in this dialogue the civil society and the main stakeholders (judges, prosecutors, and lawyers).

105. The Venice Commission notes at the outset that the system of judicial governance in Lebanon lacks a clear constitutional basis. The Commission invites the authorities to consider possible constitutional entrenchment of some basic features of this system, and, in particular, of the powers and the composition of the Superior Council of Magistracy (the SCM). In the meantime, a "sunset" clause could be included in the law, requiring its revision several years later.

106. The key areas where the draft Law might be improved further are as follows:

- it is positive that in the future SCM seven judicial members will be elected by their peers. However, it is necessary to increase the representation of the lower courts' judges amongst the elected judicial members;
- the Venice Commission recommends simplifying the procedure of appointment of the three top officeholders within the judicial system (the President of the Court of Cassation, the Prosecutor General of the Court of Cassation and the President of the Judicial Inspection) by providing that each of them is selected by the Government from a list composed by the SCM following a transparent competition involving a sufficiently large pool of candidates, and that in the case the Government fails to select one of them, the SCM may continue functioning in a reduced composition;
- the authorities should consider opening up the SCM to external members, not representing the judiciary or the executive. The method of election of these members would introduce an element of democratic legitimacy and pluralism in the SCM;
- members of the Judicial Inspection should not be appointed by the executive single-handedly, but rather with a binding opinion of the SCM. If this is implemented, the Minister of Justice may retain the power to trigger disciplinary proceedings, along with the Inspection. Suspension of judges pending disciplinary (or "incompetency") proceedings should only be decided on the basis of a binding opinion of the SCM;
- members of the Evaluation Commission should be appointed on the basis of a binding opinion of the SCM; the authorities should consider lowering the majority required for the SCM to overcome the veto of the Minister and the Government in the matters of transfers and promotions;

- the list of disciplinary breaches should be revised, and the definitions be made more precise, with an explicit reference to the principle of proportionality. The notion of "incompetency" needs to be explained better;
- associations of judges should be able to operate in those areas which are governed by the draft Law, by using all legitimate means which the law gives to the private law associations, while respecting restrictions related to the respect for the judges' duty of impartiality; that being said, all public-law powers will remain with the statutory bodies of judicial governance.

107. The Venice Commission remains at the disposal of the authorities of Lebanon for further assistance in this matter.