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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

LEBANON

OPINION

ON THE DRAFT LAW ON THE ADMINISTRATIVE JUDICIARY

Adopted by the Venice Commission
at its 138th Plenary Session
(Venice, 15-16 March 2024)

on the basis of comments by

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I. Introduction

1. By letter of 23 June 2023, the Minister of Justice of the Lebanese Republic requested an opinion of the Venice Commission on the draft Law on the Administrative Judiciary (CDL-REF(2024)003) (hereafter "the draft Law").

2. Ms Slavica Banic, Mr Christoph Grabenwarter, Mr Martin Kuijer and Mr Bertrand Mathieu acted as rapporteurs for this opinion.

3. On 1-2 February 2024, the rapporteurs, along with Mr Mamuka Longurashvili and Ms Martina Silvestri from the Secretariat, had online meetings with the President of the State Council, the Minister of Justice, the Chair and members of the Parliamentary Sub-Commission on Administration and Justice, representatives of the Bar Associations, academia and international community, as well as with representatives of civil society. The Commission is grateful to the Delegation of the European Union to Lebanon for the excellent support provided in organising the online meetings.

4. Following the online meetings, the rapporteurs addressed additional questions to the President of the State Council. On 6 February 2024, the Commission received answers. On 6 and 8 February 2024, the Commission received from the Lebanese University and the NGO "Legal Agenda" their comments on the draft Law. On 16 February 2024, input on the draft Law was also received from the Beirut Bar Association. The Lebanese Association of Judges provided input on 25 February and on 3 March 2024. The Venice Commission is grateful to all the interlocutors for their input and welcomes their willingness to move forward with the reform of administrative justice.

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

6. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings. Following an exchange of views with Mr Henri Khoury, Minister of Justice of Lebanon and Mr Georges Okais, Chairman of the Sub-Commission on Administration and Justice of the Lebanese Parliament, it was adopted by the Venice Commission at its 138th Plenary Session (Venice, 15-16 March 2024).

II. General comments

7. The organisation of the administrative justice in Lebanon is governed by Decree-Law No. 10434 of 14 June 1975. Together with the administrative courts, the State Council forms the administrative justice system. The amendments introduced by Law No. 227 of 31 May 2000 created a first-instance administrative court in each of the six (currently nine) Governorates (*Muhafazat*). However, the administrative courts never became operational. Therefore, the State Council is currently the only administrative justice body. Established a century ago, in 1924, the State Council of Lebanon has undergone numerous changes throughout its history. Abolished twice in 1928 and 1950, it was re-instated in 1934 and 1952, respectively. The State Council, currently consisting of 50 judges, is divided into seven units: the Council of Cases, one administrative and five judicial Chambers (Article 84 of the draft Law).

8. Inspired by the French Code of Administrative Justice, the draft Law aims at reducing the influence of the executive and leaving more space for judicial self-government, creating a High Council of Administrative Justice (hereafter "the HCAJ"), the double degree of jurisdiction and codifying the entire administrative procedure. The HCAJ will be responsible *inter alia* for appointments, transfers, training and discipline of the administrative judges – and more generally for the independence and the proper functioning of administrative justice (Article 4). Similarly to

the current system, in the model proposed by the draft Law, administrative courts are foreseen as courts of first instance and a State Council - as the highest instance (Article 2). In addition, the Court of Conflicts (Article 467) will rule on the conflict of jurisdiction between judicial and administrative courts.

A. Existing hurdles for the implementation of the reform

9. Among the general problems faced by the Lebanese State and the judiciary (deep economic and political crisis, severe budgetary cuts, unstable governmental infrastructure in which a large part of the civil service is inoperative, and lack of public trust in the State institutions[1]), the omnipresence of confessionalism and the absence of a "duty of ingratitude" of judges towards the political forces were pointed out by various interlocutors during the online meetings as specific problems; the appointment to judicial positions depends not only on the merits, integrity and competencies of candidates but also on their endorsement by the political leaders of the respective communities.

10. The Venice Commission recalls that the Lebanese Constitution sets the abolition of political confessionalism as a national goal to be achieved according to a transitional plan (Preamble and Article 95, para. 1). At the same time, the Constitution (in para. 3 of Article 95) maintains an equal distribution of apex judicial positions between Christians and Muslims for a transitional period, without allocating any position to a specific confession and without setting out any specific time-frame within which this transition should take place. The Venice Commission reiterates that "any legislative reform of the judiciary should aim at introducing such mechanisms that help a change of direction from the continued assiduous application of confessionalism in practice towards a system of appointments which is 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 represent a lost opportunity to address the spirit of the above-mentioned constitutional provisions".[2]

11. Turning to the administrative judiciary, the Venice Commission notes that the draft Law makes no reference to confessionalism, that the selection of new administrative judges will be made through a competitive procedure (Article 34) and that the draft Law prohibits all types of discrimination during judicial appointments and transfers (Article 44). These features are to be welcomed.

B. Legislative and non-legislative measures to be considered

12. The need to subject administrative acts to judicial review is one of the fundamental elements of the rule of law. The Venice Commission has refrained from taking a definite stance on the establishment of separate administrative courts.[3] Both models (having special administrative courts or keeping administrative cases within the jurisdiction of ordinary courts) are legitimate. While specialisation may be very useful in certain circumstances, it creates a risk of complicating the system and is not always cost-efficient, especially in small countries. That being said, it is perfectly compatible with European standards to introduce administrative courts with specific jurisdiction alongside the ordinary general courts.[4]

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[1] Only 16% of Lebanese expressed confidence in their judicial system in 2021: https://news.gallup.com/poll/394952/port-explosion-investigation-saps-lebanese-trust-courts.aspx

[2] Venice Commission, CDL-AD(2022)020, Lebanon - Opinion on the draft law on the independence of judicial courts, para. 20.

[3] See, for example, Venice Commission, CDL-INF(2001)017, Report on the Revised Constitution of the Republic of Armenia, para. 59; CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, paras 6-7; CDL-AD(2017)019, Opinion on the Draft Judicial Code of Armenia, para. 44; CDL-AD(2019)004, Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules of Hungary, para. 28.

[4] Venice Commission, CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, paras 6-7.

13. Article 20 of the Lebanese Constitution provides for the independence of judges, being, however, silent on the method of their appointment, "their security of tenure, and other institutional and procedural arrangements which may ensure such independence in practice".[5] The Venice Commission reiterates its 2022 indications that certain basic elements, such as the appointment, guarantees and powers of the judiciary, should be entrenched in the Constitution[6] to preserve the system of judicial governance from political fluctuations.

14. It is also recalled that the introduction of a new court system requires robust safeguards to ensure their efficient, independent and impartial operation. According to Article 72 of the draft Law, the administrative courts will be established in each of the nine Governorates, and they will start functioning within six months from the date of promulgation of the Law. Further to the current economic and financial crisis impacting the judiciary in terms of lack of funds, appropriate infrastructure, judicial (according to some interlocutors, the new administrative courts would need 200-300 new judges) and non-judicial staff, it is difficult to know whether the full-scale implementation of the reform within the time-frame (six months) established in the same Article of the draft Law, is feasible. In particular, it appears doubtful that 200-300 new administrative judges may be trained (see below as regards the competition followed by the probationary period of two years).

15. Given the above and recalling that the first-instance administrative courts established in 2000 have never become operational, the Venice Commission would recommend exploring possibilities of a phased introduction of the administrative justice reform, starting, for example, with a "pilot" first-instance administrative court in Beirut with jurisdiction limited to specific areas. Such a phased approach would allocate the competent authorities adequate time to find sufficient funds, logistical arrangements, judicial and non-judicial staff and would provide proper guidance for the smooth set-up of other administrative courts based on that "pilot experience".

III. Applicable standards

16. The international standards applicable in Lebanon in respect of the independence of the judiciary generally apply equally in the field of administrative justice. The UN Human Rights Committee held that the concept of a "suit at law" in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) "encompasses (…) equivalent notions in the area of administrative law".[7] Article 14 of the 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 the "adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary".[8] 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.[9]

17. 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".[10] Lebanon is a party to these international instruments.

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[5] Venice Commission, CDL-AD(2022)020, *op. cit.*, para. 21.
[6] Given that the draft Law has been inspired by the French model, it is recalled that in France the constitutional amendment of 23 July 2008 confirmed this constitutional entrenchment, by introducing the concept of "administrative order" into Article 65 of the Constitution. In its decision of 3 December 2009, the Constitutional Council described the Cour de Cassation and the Conseil d'État as "courts on the top of each of the two orders of jurisdiction recognised by the Constitution".
[7] General Comment No. 32, para. 16.
[8] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.
[9] See points 20 and 7, respectively.
[10] See https://digitallibrary.un.org/record/551368?ln=fr.

18. Although Lebanon is not bound by European standards in the area of the independence of the judiciary, certain elements of the European constitutional heritage that have universal relevance 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 international and European standards and best practices.

19. European standards in this field are more detailed. The most important source of 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 (ECHR) to be applicable to proceedings before administrative courts if the outcome of the dispute is decisive for "civil" rights and obligations of the individual.[11] Certain categories of administrative offences may also fall within the ambit of the criminal head of Article 6: road-traffic offences punishable by fines or driving restrictions,[12] minor offences of causing a nuisance or a breach of the peace,[13] offences against social-security legislation,[14] administrative offences of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question,[15] administrative offence related to the holding of a public assembly,[16] etc. European standards are also codified in the recommendations of the Committee of Ministers of the Council of Europe[17] and further developed in the opinions and reports of the Venice Commission[18] as well as the specialised bodies of the Council of Europe, such as the Consultative Council of European Judges (CCJE),[19] which contain detailed recommendations on the composition of the bodies of judicial governance, procedures before them, substantive rules on promotions and discipline, etc.

IV. Scope of the Opinion

20. In its 2022 Opinion on the draft Law on the independence of judicial courts, which was its first Opinion concerning Lebanon, the Venice Commission noted that together with the draft Law on judicial courts, a draft Law on the administrative courts was pending before Parliament. The Commission invited the authorities "to consider these two draft Laws as part of the same comprehensive judicial reform" and noted that some of the remarks made in the 2022 Opinion "may be relevant *mutatis mutandis* to the organisation of the administrative judiciary as well".[20]

21. During the online meetings, the rapporteurs were informed that together with the draft Law under the Venice Commission's consideration, the parliamentary Sub-Committee on Administration and Justice is currently examining a second draft Law developed by the NGO "Legal Agenda".

22. The present opinion will refer to the draft Law as it appears in document CDL-REF(2024)003. The opinion focuses on the most important aspects of the draft Law. The absence of remarks on other aspects of the draft Law should not be interpreted as tacit approval.

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[11] See *inter alia* ECtHR, *Ferrazzini v. Italy*, appl. no. 44759/98, 12 July 2001, para. 27. See also Recommendation Rec(2004)20 of the Committee of Ministers on judicial review of administrative acts of 15 December 2004. Principle 3 states that judicial review of administrative acts "should be conducted by a tribunal established by law whose independence and impartiality are guaranteed in accordance with the terms of Recommendation No. R(94)12". This latter recommendation is applicable to "all persons exercising judicial functions".

[12] ECtHR, Marčan v. Croatia, no. 40820/12, 10 July 2014, para. 33; Igor Pascari v. the Republic of Moldova, no. 25555/10, 30 August 2016, paras 20-23.

[13] ECtHR, Lauko v. Slovakia, no. 2613895, 2 September 1998; Nicoleta Gheorghe v. Romania, no. 23470/05, 3 April 2012, paras 25-26.

[14] ECtHR, Hüseyin Turan v. Turkey, no. 11529/02, 4 March 2008, paras 18-21.

[15] ECtHR, Balsytė-Lideikienė v. Lithuania, no. 72596/01, 4 November 2008, para. 61.

[16] ECtHR, Kasparov and Others v. Russia, no. 21613/07, 3 October 2013, paras 39-45.

[17] Recommendation CM/Rec(2010)12.

[18] Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges.

[19] See in particular CCJE Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems.

[20] Venice Commission, CDL-AD(2022)020, *op.cit*., para. 10.

V. Analysis

A. Legislative process and technique

23. The rapporteurs were informed that together with the Ministry of Justice, the Association of Judges and the Bar Associations have been involved in the process of consideration of the two draft Laws by the Parliamentary Sub-Committee. The Venice Commission welcomes the involvement of these actors in this dialogue but recalls that any important institutional reform should be accompanied by a meaningful discussion both within and outside Parliament, involving civil society, experts, and other relevant stakeholders so that the Law is widely "owned" by society, which, in turn, furthers the building of trust in the administrative judiciary as an independent institution of the State. Therefore, the Commission, as it did in the 2022 Opinion, encourages the Parliament "to ensure meaningful dialogue amongst different political forces and to involve in this dialogue the civil society and the main stakeholders".[21]

24. As regards the structure of the draft Law under consideration, it is divided into three main parts: 1. Organisation of the administrative justice, 2. Administrative procedure, and 3. Arbitration. It contains 15 Titles, 35 Chapters and 574 Articles.

25. The Venice Commission finds that some draft provisions are extremely long and detailed. Some provisions (for example, Article 9 and Article 12 (e) and (f)) contain numerous repetitions instead of using cross-references between chapters and single provisions. Some provisions are scattered throughout the text, and it may be advisable to present them in a more streamlined manner.

26. The Venice Commission would like to draw the attention of the Lebanese legislators to its standards concerning the law-making procedures and the quality of the law. Among many useful findings based on the variety of legislation of the member States, the Commission recalls the "golden rule for structuring and drafting legislative acts, namely that an article should not contain more than three paragraphs (or subparagraphs), a paragraph should not contain more than three sentences, and a sentence should not contain more than one idea".[22]

B. Organisation of Administrative Justice

27. From the outset, the Venice Commission recalls that "judges should be independent and impartial in their decision-making and capable of acting without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including "authorities internal to the judiciary". Therefore, judicial independence must be protected both in its "external' and "internal" components.[23]

1. Composition of the High Council of Administrative Justice

28. As noted above (para. 13), the Lebanese Constitution does not provide the scope of judicial guarantees, i.e., it "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."[24] Therefore, the intention of the drafters to establish a High Council of Administrative Justice (hereafter "the HCAJ") in charge of the appointment of the administrative judges presents a positive development, thus following the Venice Commission's position that "a judicial council

[21] Venice Commission, CDL-AD(2022)020, *op. cit.*, paras 7 and 104.
[22] Venice Commission, CDL-AD(2010)017, Opinion on the Draft Law on Normative Legal Acts of Azerbaijan, para. 40. See also Venice Commission, CDL-PI(2021)003, Compilation of Venice Commission opinions and reports concerning the Law making procedures and the quality of the law.
[23] Venice Commission, CDL-AD(2017)002, Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova on the Criminal liability of judges, paras 14-15.
[24] Venice Commission, CDL-AD(2022)020, *op. cit.*, para. 21.

should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them".[25]

29. According to Article 5 of the draft Law, the HCAJ is composed of ten members: three *ex officio* members (the President of the State Council, the Government Commissioner to the State Council, appointed by a decree of the Council of Ministers following a proposal from the Minister of Justice, and the Head of the Judicial Inspectorate), two members elected by the magistrates of the State Council, and five members (three magistrates at the State Council and two presidents of the first instance administrative courts) appointed by a Cabinet of Ministers' decree following a proposal by the President of the State Council.

30. The Venice Commission welcomes the fact that the HCAJ consists of administrative judges. However, the proposed composition calls for the following remarks.

a. Members chosen by their peers from all levels of the judiciary

31. The Venice Commission notes that "a balance needs to be struck between judicial independence … on the one side and the necessary accountability of the judiciary on the other side".[26] One way to achieve this goal is to establish a judicial council with a balanced composition of its members. The Commission recalls[27] the standard set in this respect by the Committee of Ministers' Recommendation CM/Rec(2010)12,[28] i.e. that "not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with the respect of pluralism inside the judiciary". In its judgment *Grzęda v, Poland*, the Grand Chamber of the ECtHR, referring to this CM Recommendation, the Venice Commission report on the Independence of the Judicial System Part I: the Independence of Judges,[29] to the Commission's, Rule of Law Checklist[30] and the CCJE Opinion no. 10(2007),[31] noted that "a judicial council's autonomy in matters concerning judicial appointments must be protected from encroachment by the legislative and executive powers, and its independence must be guaranteed. Furthermore, it is recommended that no less than half of the members of judicial councils should be judges chosen by their peers".[32]

32. As the judges elected by their peers are only two out of ten members, the composition of the HCAJ under the proposed model is not in line with this standard.

33. Furthermore, there should be a fair representation of the different levels of the judiciary amongst the elected judicial members, which will also take into account gender diversity and regions.[33] In the proposed composition of the HCAJ, only two members represent lower-level courts; it follows that in this respect, too, this composition is not in line with European standards.

b. Lay members

34. The Venice Commission recalls that "In order to avoid corporatism and politicisation, there is a need to monitor the judiciary through non-judicial members of the judicial council.

[25] Venice Commission, CDL-AD(2007)028, Report on Judicial Appointments, para. 25.
[26] *Ibid*. para. 27.
[27] See among many others, Venice Commission, CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution, para. 44; CDL-AD(2022)030, Serbia - Opinion on three draft Laws implementing the constitutional amendments on Judiciary, para. 71 and CDL-AD(2023)015, France, Avis conjoint de la Commission de Venise et de la Direction Générale des Droits humains et de l'Etat de Droit (DGI) du Conseil de l'Europe sur le Conseil supérieur de la magistrature et sur le statut de la magistrature en ce qui concerne les nominations, mutations, promotions et procédures disciplinaires, para. 25.
[28] See Recommendation CM/Rec(2010)12, para. 27.
[29] Venice Commission, CDL-AD(2010)004, *op. cit.*, para. 25.
[30] See Venice Commission, CDL-AD(2016)007, Rule of Law Checklist.
[31] See CCJE, Opinion n°10 (2007) on "Council for the Judiciary in the service of society".
[32] ECtHR, Grzęda v, Poland, [GC], no. 43572/18, 15 March 2022, paras 124 and 305.
[33] CCJE, Opinion n°24 (2021) on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, para. 30.

Corporatism should be counterbalanced by the membership of other legal professions, the "users" of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society".[34] "This representation is justified since a Council's objectives relate not only to the interests of the members of the judiciary but especially to general interests".[35] Such non-judicial members may provide democratic legitimacy to the judicial council[36] and a fresh perspective on what is needed to become or be "a good judge". "Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgements, etc.".[37] The quality of a judicial council does not necessarily increase if the council is composed exclusively of judges. "While the main purpose of the very existence of a judicial council is the protection of the independence of judges by insulating them from undue pressures from other powers of the State",[38] "involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism".[39]

35. The Venice Commission notes that the draft law does not provide for any lay member to sit on the HCAJ; it follows that in this respect, the HCAJ falls short of meeting this standard.

36. In conclusion, the Venice Commission recommends, although it did take into account the comments relating to Lebanon's particular situation with regard to religious communitarianism, a) increasing the number of HCAJ members elected by their peers, b) ensuring better representation of judges from the lower-level courts and c) considering adding lay members to the new HCAJ. The Venice Commission also reiterates its 2022 recommendation as regards the duration of the mandate of the elected and appointed (seven) members, which is three years, namely d) introducing a mechanism of partial renewal of the composition of the HCAJ in order to preserve its institutional memory and continuity and avoid simultaneous replacement of more than one-third of the HCAJ ten members.[40]

2. Powers of the State Council's President

37. The President of the State Council (which has a dual mandate – see para. 7 above) also heads the HCAJ, which has an essential role in the appointment, transfer, training and discipline of administrative judges.

38. The President of the State Council has far-reaching powers, acting as supreme judge over all administrative, financial and disciplinary matters and exercising administrative and financial powers provided by laws and regulations except for constitutional powers (Article 2). The President is the Chair of the HCAJ (Article 5), of the Council of Cases (Article 85), of the Administrative Chamber (Article 88), of the General Assembly (Article 95) and of the Court of Conflicts (Article 467 – on the basis of rotation with the President of the Court of Cassation). The election and appointment procedure of the HCAJ is considerably influenced by the President of the State Council, who is entitled to propose five out of ten members of the HCAJ, which, in its essence, monopolises the selection procedure, thus limiting the democratic and transparent manner of the selection of members by the judiciary itself to only two HCAJ members. Furthermore, the President has the right to enter a written remark in the personal file of an administrative magistrate outside of any disciplinary procedure, to decide on transfers/secondments of members of the State Council, to approve the arrest of an administrative judge for a crime or a misdemeanour not arising from their employment; s/he may decide on urgent cases in summary proceedings and has the right to transfer a case from a chamber within the State Council to the Council of Cases which s/he chairs.

[34] Venice Commission, CDL-AD(2023)015, *op. cit.*, para. 23.
[35] Venice Commission, CDL-INF(1998)009, Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, para. 9.
[36] Venice Commission, CDL-AD(2007)028, *op. cit.*, para. 29.
[37] Venice Commission, CDL-AD(2010)004, *op. cit.*, para. 24.
[38] Venice Commission, CDL-AD(2007)028, *op. cit.*, para. 28.
[39] Venice Commission, CDL-AD(2016)007, *op. cit.*, para. 82.
[40] Venice Commission, CDL-AD(2022)030, *op. cit.*, para. 73.

39. The preponderant influence of the President of the State Council on the HCAJ and on the administrative judiciary is a source of concern regarding the independence of administrative judges in the exercise of their judicial functions.

40. In addition, despite those far-reaching powers and competences, very little is regulated in respect of the appointment of the President of the State Council. The President needs to be a judge of the 14th degree or higher, but s/he is not appointed by his/her peers. Instead, the Minister of Justice proposes a candidate who is appointed by a decree of the Council of Ministers (Article 5). This means that the executive has a decisive influence over who is the key figure in the administrative justice system.

41. The intention of the drafters to improve the external independence of the administrative judiciary by introducing the new HCAJ is positive. However, as noted above (paras. 32 and 33), the proposed composition of the HCAJ is not in line with international standards. In addition, the accumulation of considerable powers in the hands of the President of the State Council jeopardises the internal independence of the administrative judiciary and risks further "closure" of the system.

42. Therefore, in the opinion of the Venice Commission, it is of utmost importance that the authorities introduce means of reducing the powers of the President of the State Council.

3. The jurisdiction of administrative courts

43. A first-instance administrative court consists of a president and two members. The President ensures its proper functioning and provides overall management of the court's activity (Article 73). The work shall be distributed among the chambers of the Administrative Court by a decision of the President of the HCAJ on a proposal from the President of the Court (Article 75).

44. The Venice Commission recalls that "one of the most important aspects of administrative procedure is a clear determination of jurisdiction, which concerns not only territorial jurisdiction but also jurisdiction based on the subject matter".[41]

45. The jurisdiction *ratione materiae* of the Lebanese administrative courts covers claims for compensation for damage resulting from general works; public establishments or the implementation of public services or damage resulting from administrative operations; administrative matters relating to contracts, operations, commitments or administrative privileges; employment matters, taxes, abuse of authority of decisions of an administrative nature, the legality of elections to administrative committees such as municipal committees and selection committees (Articles 79-81) and summary proceedings (Articles 476-495).

46. In order to prevent the overlapping of the administrative jurisdiction with the jurisdiction of the ordinary courts, it is advised to specify that administrative courts will be entitled to consider cases emanating from administrative legislation. This could help to delimit civil, criminal and administrative disputes. Furthermore, it is recommended to address different types of administrative claims in different articles, including admissibility criteria for each type of claim and a specific time-limit for the court to check the admissibility of a complaint.

[41] Venice Commission, CDL-AD(2018)020, Kazakhstan - Opinion on the Administrative Procedure and Justice Code, para. 50.

4. Guarantees for the independence of judges

a. Appointment

47. There is a great variety of methods for appointing judges in domestic legal orders. Much depends on the legal culture and traditions. Whatever model is chosen, the appointment of judges should be a merit-based process. International standards are more in favour of the extensive depolitisation of the process. Political considerations should not prevail over the objective merits of a candidate.[42]

48. It is welcome that the draft Law introduces a system in which the HCAJ and the Institute of Judicial Studies play a central role. The Institute of Judicial Studies prepares trainee magistrates to take on judicial work; its Administrative Justice Section provides initial training to deepen judicial knowledge and develop relevant skills essential for future judges (Article 26). The HCAJ determines the number of trainee magistrates needed (Article 28), is responsible for a public call for candidates (Article 29) and appoints a jury of six administrative judges responsible for the competitive (oral and written) examinations during which the jury may be assisted by specialists from different fields (Articles 30 and 31). A successful candidate will be admitted as a trainee magistrate. The Institute of Judicial Studies will then be responsible for the initial training in order to prepare the trainee magistrate to take on judicial work. Article 13 of the draft Law stipulates that the HCAJ shall examine the situation of the administrative magistrate two years after his/her appointment and may decide to exclude him/her if it appears that s/he does not have the skills required for his work.

49. The Venice Commission notes that the draft Law does not provide for regular competitions; the possibility of continuous training for judges is also missing. The competitions need to be organised regularly to provide the administrative justice system with the necessary number of judges, who also need continuous training during their careers. Therefore, it is recommended to add in Article 28 that the competitions will be held on an annual basis. Furthermore, the Institute of Judicial Studies should provide not only initial but also continuous training to the administrative judges.

50. The Venice Commission noted that setting probationary periods can undermine the independence of a judge.[43] In any event, if probationary periods exist, they "should not be longer than is needed to assess a judge's suitability".[44] A period of two years does not seem unreasonable, but it is recommended to introduce the basic criteria that will be applied by the HCAJ in order to determine whether the trainee magistrate has "the skills required for his/her work". It is also recommended to ensure judicial review of the HCAJ decisions on final appointments following the probationary period.

51. If the trainee magistrate is declared competent and capable, s/he will be appointed as a first instance magistrate by a decree following a proposal from the Minister of Justice having obtained the consent of the HCAJ (Article 39). Such a system is not *per se* contrary to international standards, provided that the Minister is *de facto* bound by the position of the HCAJ.[45] Members of administrative courts are chosen from among the deputy councillors and appointed by a decision of the President of the HCAJ, whereas the Presidents of the administrative courts are appointed by a decision of the HCAJ (Article 71).

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[42] Venice Commission, CDL-AD(2007)028, *op. cit.*, paras 3, 5 and 12.
[43] Venice Commission, CDL-AD(2017)018, Bulgaria - Opinion on the Judicial System Act, para. 78; CDL-AD(2007)028, *op. cit.*, para. 40.
[44] Venice Commission, CDL-AD(2018)011, Serbia - Opinion on the draft amendments to the constitutional provisions on the judiciary, para. 44.
[45] Venice Commission, CDL-AD(2019)004, *op. cit.*, para. 51.

b. Eligibility criteria

52. Article 34 of the draft Law enumerates the eligibility criteria for becoming an administrative judge. Most of these criteria, i.e., nationality, language skills, qualifications, absence of criminal convictions, etc., are quite common in other legal systems. However, two issues stand out.

53. The provision does not introduce a minimum age but a maximum age limit (i.e., candidates must be younger than 35 years). While not being contrary to international standards *per se*, the reasons for such a requirement are unclear.

54. Another eligibility criterion introduced in a separate paragraph of Article 34 is to "have a good biography". Undoubtedly, the merit of a candidate for a judicial post is not solely a matter of legal knowledge, analytical skills or academic excellence. It also includes matters such as character, judgment, accessibility, communication skills, efficiency in producing judgements, etc.[46] The Commission considers that a "good biography" should not be a separate eligibility criterion. Furthermore, it is too vague to be used as an objective assessment of judicial candidates. Phrased in the very broad manner it currently is, the provision risks being applied arbitrarily. It is, therefore, necessary to identify criteria based on which the integrity of a candidate could be assessed.[47]

55. High moral character, including integrity, is among the most important eligibility criteria for judges. The Venice Commission considers that these qualities are highly important in carrying out the duties of the judge. Therefore, the Commission will refer to the criteria established by highly reputed international advisory expert panels: 1. On Candidates for Election as Judge to the European Court of Human Rights (ECtHR) and 2. for the Court of Justice of the European Union, which will be quoted below.

- **Fifth activity report of the Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR for the attention of the Committee of Ministers, 27 October 2022[48]**

"Sources of information
28. In addition to the curricula vitae and any further information provided … the Panel on occasions receives unsolicited material from various sources (for example, non-governmental organisations and individuals…). The Panel does not actively seek information from such sources; and, more importantly, it will not reject a candidate as not qualified on the basis of information and representations received from them. However, the Panel does not exclude putting questions … in the light of unsolicited information or representations insofar as that appears appropriate in order to fully confirm that a candidate has the requisite competences and qualifications …. The Panel's final assessment of a candidate's suitability … will be based only on material supplied … and, … on relevant notorious facts in the public domain.

The condition of "be[ing] of high moral character"
35. In previous Activity reports, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and the absence of conviction for crimes have been mentioned as key components of this requirement, as well as (obviously) independence and impartiality. 36. … A candidate's character is hardly ever open to being assessed on the basis of what appears in the curriculum vitae. In particular, it will only be when something is manifestly apparent from the curriculum vitae (for example, if there is mention of the Commission of a criminal or disciplinary offence) that a negative judgement as to character can be made".

- **Seventh Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 14 July 2022[49]**

[46] Venice Commission, CDL-AD(2010)004, *op. cit.*, para. 24.
[47] Venice Commission, CDL-AD(2017)018, *op. cit.*, para. 77.
[48] See Fifth activity report for the attention of the Committee of Ministers, 27 October 2022.
[49] See Seventh Activity Report, page 19.

> "The panel attaches particular importance to the integrity and probity of candidates for the posts of Judge and Advocate-General of the Court of Justice and Judge of the General Court. The fulfilment of this requirement, which is essential, is undoubtedly difficult to assess solely on the basis of candidates' files as submitted …and hearings conducted by the panel where appropriate. The panel does, however, endeavour to establish whether there are factors of any kind which are likely to lead it to express reservations as to the ability of candidates to perform the duties … with independence, impartiality, integrity and probity. The panel may therefore need to question a candidate … on one or more aspects of an application which might give rise to doubts as to whether the candidate concerned would be able to perform the duties … completely independently and impartially, or doubts as to the candidate's integrity or probity".[50]

56. In light of the above, the Venice Commission recommends to the Lebanese authorities replacing "a good biography" with "high moral character and integrity" and elaborating the eligibility criteria in line with the above-mentioned international standards. The Venice Commission proposes to introduce a mechanism for checking the integrity of candidate administrative judges based on clear criteria and procedures, as described above.

c. Evaluation

57. According to Article 12 of the draft Law, a magistrates' performance will be assessed on an annual basis by virtue of performance indicators and the quality of the reports/judgments they prepare during the judicial year. The assessment report plays an essential role in allocating magistrates to new positions and promoting them while reclassifying them from one category to another. The magistrate will be involved in the assessment process, including discussing all the information in his/her file and commenting on it.

58. The Venice Commission has taken a nuanced approach with regard to the mechanisms introduced by the states to monitor the quality of judges' work. The authority of a judiciary can only be maintained if the legal system puts in place adequate mechanisms to ensure that candidates are not appointed as a judge if they do not have the required merit, qualifications, integrity, ability and efficiency[51] and the judiciary is cleansed of those who are found to be incompetent, corrupt or linked to organised crime.[52] This is essential not only in view of the role a judiciary plays in a state governed by the rule of law but also because a judge – once appointed for life – will, in principle, be irremovable except for limited grounds for dismissal.[53]

59. The Venice Commission welcomes that the draft Law describes certain core features of the procedure to be followed, i.e., the involvement of the judge concerned in the process. The Commission would, however, recommend further specifying the criteria to be used in the assessment, describing 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.[54] As an example, the Venice Commission recalls that Article 147 of the draft Law amending legislative Decree No. 150/1983 on the Organisation of the Judiciary, analysed in its 2022 Opinion, sets out 13 criteria for evaluating judicial judges. An Evaluation Commission determines score points attached to each

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[50] The Commission also refers to the Methodology for assessing the compliance of a candidate to the position of the member of the High Council of Justice and members of the High Council of Justice of Ukraine with the criterion of professional ethics and integrity: "Compliance with the criterion of professional ethics and integrity shall be established based on documents submitted by candidates, information received or requested by members of the Ethics Council, information from open sources, as well as based on the results of the interview with candidates …. Indicators for the criterion of professional ethics and integrity are independence, honesty, impartiality, incorruptibility, diligence, compliance with ethics norms and impeccable behavior in professional activities and personal life, as well as absence of doubts regarding legality of the sources of origin of property, conformity of the candidate's … level of life or that of his family members with declared incomes, conformity of the candidate's … lifestyle to his status".

[51] See Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges. Item iv.(c).

[52] Venice Commission, CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 7.

[53] Venice Commission, CDL-AD(2018)034, Albania - Opinion on draft constitutional amendments enabling the vetting of politicians, para. 48.

[54] Venice Commission, CDL-AD(2022)020, *op. cit.*, para. 87.

of those criteria, and, on the basis of the cumulation of those points, it defines the final score of each judge. Finally, it is recommended to ensure that the decisions of the Evaluation Commission are subject to an appeal.

d. Transfers

60. It is the understanding of the Venice Commission that the draft Law provides for three types of transfers:

- Magistrates can apply for transfers to other judicial posts. The HCAJ decides on transfers based on the magistrate's application, seniority, competence, diplomas, skills qualifications and assessment results. All types of discrimination are prohibited during judicial appointments and transfers (Article 44). Article 45 provides for compensation if a magistrate is transferred from one region to another.
- State Council members who have been appointed full magistrates for more than six years have the right to participate, for a limited period, in the work of ministries, administrations and public establishments. Such a secondment is subject to specific conditions: the secondment to more than one public administrative body is prohibited; the seconded magistrates continue working on the State Council's premises without being physically transferred to the administration concerned (i.e., "virtual" secondment) and, in their capacity as seconded advisors, they cannot deal with a case if it is under consideration of the administrative courts (Article 46).[55]
- Any councillor of the 7th degree and above at the State Council may be transferred, with his or her consent, to the posts of a ministry, public administration or public establishment by a decree issued by the Council of Ministers on a proposal from the Minister of Justice and the Minister concerned, with the consent of the HCAJ. Such councillors cannot be transferred back to the State Council (Article 48).

61. The Venice Commission pointed out in its Opinion on Hungary that prior working experience in public administration increases the effectiveness of administrative judges. Switching from a position as an ordinary judge to a government institution is common in many European states. Having administrative judges from more diverse professional backgrounds is a positive point. In a similar vein, administrative judges in France – and in particular, the members of the State Council – are encouraged to work in the public administration on secondment.[56]

62. The Venice Commission is, therefore, not opposed to a system allowing transfers and secondments in the context of the professional development of the judge concerned. However, such a system should provide safeguards to avoid the use or the threat to use such instruments as a sanction or in order to control a judge. For this reason, international standards favour a system in which a judge may only be transferred with his/her consent: "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".[57]

63. The Venice Commission understands from the above-mentioned provisions that the role of the executive has been minimised and is limited to setting compensation in case of judicial transfer to the regions. To the extent that transfers from one court to another aim to support the

[55] In its judgment *Procola v. Luxemburg*, (no. 14570/89, 28 September 1995) the ECtHR found violation of Article 6, para. 1 of the ECHR as a State Council, empowered to give advisory opinions on draft legislation and, at the same time, was responsible for the administration of justice in the field of administrative law, cannot be considered an "impartial" tribunal. The Court noted that "four members of the Conseil d'Etat of Luxembourg carried out both advisory and judicial functions in the same case. The mere fact that certain persons successively performed these two types of functions in respect of the same decisions was capable of casting doubt on the institution's structural impartiality. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the tribunal in question.

[56] Venice Commission, CDL-AD(2019)004, *op. cit.*, para. 34.

[57] See Recommendation CM/Rec(2010)12, para. 52. See also Venice Commission, CDL-AD(2021)032, Serbia - Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, paras 44-45.

normal functioning of the latter, i.e., they are an organisational measure and not a punishment, and that "transferring a judge even for a short period of time is a very costly option, as the judge concerned should be given appropriate housing and otherwise compensated for the drastic change of his/her lifestyle",[58] the Venice Commission welcomes the existence of the compensation component in the draft Law.

64. As regards the "virtual" secondments, although the State Council councillors "have the right to participate for a limited period" in the work of the public administrative bodies, the draft Law specifies neither the duration of the "limited period" nor whether the consent of the councillors concerned is required prior to the State Council President's decision. This is all the more important as, according to Article 100 of the draft Law, the Minister of Justice and the chairmen of the parliamentary committees have the right to ask the President of the State Council to appoint one of the members of the Council to assist the committees in the preparation of draft legislation.

65. In sum, the Venice Commission recommends indicating in the draft Law the duration of the secondment and providing for the requirement of prior consent for the short-term "virtual" secondments; further, in a situation where the administrative judiciary is under pressure due to the lack of administrative judges, and will continue to be so for several years pending the implementation of the reform, the Commission recommends providing that administrative judges having changed to a position in the administration have the right to return to their original judicial function.

66. The Venice Commission recalls that the cumulative exercise of legal and advisory functions in government administration by the State Council members poses a problem with regard to the principle of independence (see also Footnote 55 above). While certain interlocutors noted that the presence of the State Council members in the ministries contributes to guaranteeing the quality of legal standards and, moreover, that these members were too few in number, it would be appropriate to resolve the question by increasing the number of State Councillors.

e. Disciplinary proceedings

67. The disciplinary regime is an essential component of the legal status of magistrates. As noted in para. 31 above, in the field of judicial discipline, a balance needs to be struck between judicial independence (necessary to avoid political interference by the executive), on the one side, and the necessary accountability of the judiciary, on the other, averting possible negative effects of corporatism within the judiciary.

68. The Venice Commission has previously pointed out that "disciplinary proceedings against judges based on the rule of law should correspond to certain basic principles, which include the following: the liability should follow a violation of a duty expressly defined by law; there should be fair trial with full hearing of the parties and representation of the judge; the law should define the scale of sanctions; the imposition of the sanction should be subject to the principle of proportionality; there should be a right to appeal to a higher judicial authority".[59]

- *Liability grounds*

69. Grounds for disciplinary liability are formulated in Article 49 of the draft Law as *any act* affecting honour, dignity or morals; use of judicial capacity to serve personal interests, corruption and abuse of power; delay in settling cases, discrimination between litigants and disclosure of the content of hearings; violation of the obligation of reserve of magistrates.

[58] 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. 59.
[59] Venice Commission, CDL-AD(2016)009, *op. cit.*, para. 34.

70. The Venice Commission has several remarks regarding the above-mentioned provisions.

71. *First*, "acts affecting honour, dignity or morals" and "obligation of reserve" are formulated in a rather vague manner; while the first sentence of the provision refers to "*any* act affecting honour, dignity or morals", the paragraph relating to the "obligation of reserve" concerns "reputation dignity and independence" of the judiciary. The Venice Commission finds that this leaves wide discretion to the deciding body and might open the door to arbitrary use of disciplinary powers.

72. *Second*, whether a judge is able to conduct proceedings (or certain procedural acts during those proceedings) in a timely fashion is dependent on his/her overall workload, the adequacy of support staff and/or IT facilities, and the procedural behaviour of the parties to the proceedings. An individual judge should not be held liable when the malfunction results from structural deficiencies within the judiciary as a body. More generally, only deliberate abuse of judicial power or repeated or gross negligence should give rise to disciplinary liability. The law should clarify that a judge cannot face disciplinary liability as a result of *bona fide* errors or simply for disagreeing, in good faith, with a particular interpretation of the law preferred by the executive, legislature, or other non-judicial entities. Furthermore, *in fine*, delays can be taken into account, provided that the means available to the judge and the complexity of the cases are taken into account.

73. The Venice Commission recommends clarifying the content of "honour, dignity or morals" and "obligation of reserve" based, for example, on principles or a code of conduct for judges or established disciplinary jurisprudence. Mere delays in settling cases, in particular, given the current low number of administrative judges and lack of funds and staff, should not be a ground of disciplinary sanctions. It is, therefore, recommended to delete or at least modify "delay in settling cases and failure to comply with the time limits set by this law for rendering judgments" as a ground for disciplinary liability.

- *Procedural guarantees*

74. The draft Law introduces a convoluted and rather unclear system of disciplinary proceedings and lacks coherence and clarity when it comes to the actors of the proceedings and the interaction between them. The setting and the procedural sequence in the proposed model, as understood by the Venice Commission, are the following.

75. The President of the State Council exercises his/her powers as supreme judge over all disciplinary matters (Article 2), and the HCAJ is responsible for applying disciplinary guarantees granted to administrative magistrates (Article 4). The President of the State Council exercises judicial and administrative inspection (Article 5). The Judicial Inspection Commission (the composition of which needs to be clarified) is responsible for investigating complaints against a magistrate or judicial assistant working within the State Council or the administrative courts (Article 51). The HCAJ Chairman (i.e., the President of the State Council) considers the disciplinary liability of a magistrate on the basis of a referral from the Judicial Inspection Commission and may decide to suspend the magistrate pending the decision of the Disciplinary Board on his/her own initiative or at the request of the Judicial Inspection Commission (Article 53). The Disciplinary Board appointed by the President of the HCAJ considers the discipline of a magistrate on the basis of a referral from the Judicial Inspection Commission (Article 54) in the following procedure.

76. The Chairman of the Disciplinary Board (or his/her representative) shall prepare a report based on the investigation after hearing the defendant (a magistrate concerned by the disciplinary complaint), the complainant (person who lodged a disciplinary complaint against that magistrate before the Judicial Inspection Commission) and, if necessary, witnesses. Based on the investigation, the Chairman/his or her representative prepares the report and submits it to the Disciplinary Board (Article 55). Subsequently, the same Chairman invites the defendant to consult his/her personal file and the investigation report, and to participate in a hearing before the Disciplinary Board, which is held *in camera*. During the hearing, the investigation report is read,

and the defendant is asked to present his/her defence. The defendant has the right to a lawyer. After the hearing, the Disciplinary Board delivers its reasoned decision on the same or the next day (Article 56). That decision may be subject to an appeal to the High Disciplinary Jurisdiction either by the defendant or by the Chairman of the Judicial Inspection Commission within 15 days of the date of notification (Article 57). The High Disciplinary Jurisdiction is made up of the President and Vice-President of the HCAJ and four State Council members of the 12th degree or more appointed by the HCAJ. Its decision is final and comes into force as soon as it is notified to the person concerned (Article 58).

77. The Venice Commission notes that the disciplinary proceedings, as understood and structured above, contain some positive elements: The defendant has the possibility to be represented by a lawyer, has access to his/her file and the investigation report, presents his/her defence (i.e., adversarial proceedings) and can appeal against the disciplinary decision.

78. At the same time, the Venice Commission considers that the Law should expressly stipulate that enough time be given to the defendant to prepare his/her defence and that the Disciplinary Board should also be given a reasonable amount of time to fully assess the defendant's arguments (given that the decision is taken on the same or next day of the hearing). The deciding body – while respecting the presumption of innocence applicable to the proceedings – should be allowed some flexibility, taking into account the complexity of the case and the gravity of possible consequences. Article 56, according to which "the trial is held in secret", is problematic as the hearings, as a general rule, are held in public; they are held *in camera* only exceptionally, in the circumstances prescribed by Law. If the protection of public order or private life so require, or if there are any special circumstances that may undermine the interests of the justice system, the hearing room may be closed to the public, for all or part of the hearing, by the Disciplinary Board, if necessary, of its own motion.

79. Nevertheless, such procedural safeguards in disciplinary proceedings are not a sufficient substitute for legal remedies against decisions that interfere with judges' rights. Turning to the issue of excessive powers of the State Council's President once again, 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".[60] Entrusting the power to examine appeals against the decision of a disciplinary body to a permanent court of law is a preferable solution.[61] It is important that the appeal instance qualifies as a "court", i.e., provides for sufficient procedural guarantees and is institutionally independent,[62] which does not seem to be the case as the President of the State Council, who is also President of the HCAJ, intervenes at pre-trial (suspension), investigative (Chairman of the Disciplinary Board is appointed by him/her) and appeal (s/he presides the High Disciplinary Jurisdiction) stages of the procedure.

80. Furthermore, given the above-mentioned considerations relating to disciplinary procedure, the Venice Commission considers that the introduction of an appeal to a court of law should not be limited to disciplinary sanctions but also cover other acts that have negative effects on the status/the activities of administrative judges, for instance: appointment, evaluation, transfer, denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc., i. e., most of them covered by the powers of the State Council's President (see para. 38 above). In a State where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases.[63]

81. Another problematic point is that according to Article 57, the decision of the Disciplinary Board may be appealed by the defendant or the Chairman of the Judicial Inspection Commission.

[60] See Recommendation CM/Rec(2010)12, para. 69.
[61] Venice Commission, CDL-AD(2015)042, *op. cit.*, para. 96.
[62] Venice Commission, CDL-AD(2017)019, *op. cit.*, paras 150-151.
[63] Venice Commission, CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, para.76.

It is not clear to the Venice Commission why the Judicial Inspection Commission should be allowed to appeal. The appeal should be allowed to the complainant as well.

- *Disciplinary sanctions*

82. Article 60 of the draft law sets out a list of disciplinary penalties: 1. Warning; 2. Reprimand; 3. Delaying ranking for up to two years; 4. Suspension from office without pay for up to one year; 5. Degree reduction; 6. Category reduction; 7. Termination of service; 8. Dismissal with refusal of redundancy compensation or retirement pension. Article 50 provides that outside any disciplinary procedure, the President of the State Council has the right to give a "remark" to any administrative magistrate and add such a remark to his/her personal file.

83. The Venice Commission recalls that the Committee of Ministers of the Council of Europe stated that "disciplinary sanctions should be proportionate".[64] Similarly, the Venice Commission stated that the "imposition of the sanction should be subject to the principle of proportionality".[65] The draft Law should expressly stipulate that a judge may only be dismissed as a result of disciplinary proceedings if the disciplinary offence is particularly serious (i.e., seriously damages the reputation of the judicial office or public confidence in the courts).

84. In the same context, the scope of the application of Article 25 of the draft Law (Any person who interferes in the administrative justice process through the influence of magistrates and the review of cases still under consideration and without a final judgment by any means of the publication including the means referred to in article 209[66] of the Criminal Code, shall be punished by the penalties set out in article 419[67] of the Criminal Code) raises risks of the arbitrary application and for freedom of expression. The provision, read together with Article 209 of the Criminal Code, contains an absolute prohibition of commenting, be it, for example, in the context of a public debate on highly sensitive issues or in social media on matters of general interest, such as systemic or structural problems. The Venice Commission recommends clarifying the meaning of "interference" as well as the modalities of application of that provision.

85. As regards the "remark" provided in Article 50, if it equals *de facto* a "warning" or a "reprimand" (listed in Article 60 as disciplinary penalties), only the formal path of disciplinary proceedings with its procedural guarantees should be applied. In response to its questions in this regard, the Venice Commission delegation received conflicting information: On the one hand, it was told that these remarks have no disciplinary effect and will never affect the career of the judge, but on the other hand, it was specified that such remarks could bring the judges before the Disciplinary Board. For the Venice Commission, either "remark" is a simple reprimand, independent of any disciplinary procedure in the interest of the judge concerned, in which case they do not have to appear in the file of the judge or are warnings of a disciplinary or pre-disciplinary nature, likely to influence career development, in which case there is an overlapping with Article 49. In any case, the Venice Commission does not see the added value of "remarks" outside of disciplinary procedure but sees risks of the arbitrary application of Article 50. The Commission, therefore, recommends deleting this provision.

[64] Recommandation CM/Rec(2010)12, *op. cit.*, para. 69.
[65] Venice Commission, CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia, para. 9. See also, Venice Commission, CDL-AD(2016)009, *op. cit.*, para. 34.
[66] "Article 209. Means of publication: 1 - Actions and movements if they take place in a public place or place open to the public or exposed to view or witnessed by the fault of the perpetrator or not. 2 - The noisy speech or screaming, whether it is said or conveyed by mechanical means, so that in both cases it can be heard by anyone without any real input. 3 - Writing, drawings, manual and photographic pictures, pictures and signs of any kind, if they are displayed in a public place or in a permissible place".
[67] "Article 419. Appeal to a judge: Whoever appeals to a judge in writing sufficiently or adequately for the benefit of or against one of the plaintiffs, shall be punished by the amount of the fine from 20 000 to 100 000 Liras".

5. Administrative procedural law

86. Article 2.2 of the draft Law gives a general description of what is required by the right to a fair trial (ensure equality of parties, in accordance with the same procedural and legal standards; designation of the judicial authority seized of a particular dispute by virtue of previously determined objective criteria; the trial based on the principles of effectiveness of investigation and participation in the hearing; respecting a reasonable time-frame for ruling, by setting a precise date for the publication of the report, and pronouncement of judgment, taking into account the investigation procedures, if necessary; enable complainants to exercise any kind of remedy without hindrance). The Venice Commission recommends aligning this provision with the manner in which the right is formulated in international human rights law in order to make certain core notions more explicit in the text. The principles of administrative justice should, for example, include the impartiality of the administrative judge in the administration of justice.

a. Case assignment

87. According to Article 73 of the draft Law, the presidents of the administrative courts ensure their proper functioning and provide overall management of their activity. They submit proposals to the HCAJ as to the distribution of work among the chambers of the administrative courts (Article 75). Similarly to Article 75, Article 91 stipulates that the work shall be distributed among the chambers of the State Council by the HCAJ's decision. The rapporteurs were informed by the various interlocutors that often, the Chamber President can change the ruling bench and that it is only at the very last moment that it becomes clear which judge will handle a case. The anonymity of the judges impedes the possibility of effectively exercising the right of a party to challenge the judge concerned. In this regard, it is noted that according to Article 159 of the draft Law, once a case has been submitted to the Administrative Court or the State Council, it is submitted to the President of the Chamber within three days. The President, by means of a decision recorded in the minutes, appoints the bench and a rapporteur to whom s/he will forward the file in order to carry out the necessary checks. The parties are notified. The notification modalities are regulated by the Code of Civil Procedure.[68] Additionally, the parties and their lawyers can consult the trial documents at the court registry. The documents may also be communicated to the interested party in writing (Article 164). The Chamber President has the right to act as rapporteur him/herself and must deliver the report within a maximum period of three months. The Venice Commission considers that the provision aims to reinforce the principle of "natural judge"[69] as the obligation to notify the parties, the time-frames set for the attribution of the cases and the preparation of the report, prevent the delayed appointment of the ruling bench as well as the anonymity of the ruling judges until the last moment.

88. As regards the system of distribution of cases, the Venice Commission recalls that in order to enhance the impartiality and independence of the judiciary, it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria (for example, an alphabetical order, a computerised system or categories of cases). The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g., court regulations laid down by the HCAJ.

89. More specifically, it may not always be possible to establish a comprehensive system that operates for all cases, leaving no room for decisions regarding the allocation of individual cases. There may be circumstances requiring the consideration of the workload or the specialisation of judges. Complex legal issues may especially require the participation of judges who are experts in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore,

[68] "Article 397. Notification: The parties are informed of the content of the trial papers and procedures through notification".
[69] The judge hearing a case within a court must be designated according to objective criteria and must not be changed arbitrarily in the course of proceedings.

it may be prudent when a court has to give a principled ruling on a complex or landmark case that senior judges will sit on that case. The criteria for the court president to make such decisions should, however, be defined in advance.[70]

90. The Commission, therefore, recommends that the case distribution system be elaborated in line with international standards.

b. Public hearing

91. The draft Law does not contain provisions on oral hearings. Article 3 stipulates that the administrative procedure is based on the principles of a fair trial while respecting the confidentiality of the hearing. In a similar vein, Article 21 stipulates that administrative magistrates shall take an oath swearing, *inter alia*, "to keep the hearing secret".

92. Article 14 of the ICCPR states that – in the determination of rights and obligations in a suit at law – everyone shall be entitled to a public hearing. In General Comment No. 32, the Human Rights Committee stated that all trials within the scope of application of that provision "must in principle be conducted orally and publicly" (paragraph 28). The nature of the issues to be decided in the court proceedings may exceptionally warrant a decision by the administrative court to hold the proceedings *in camera* (although this exception will be more common in case of family law disputes or proceedings involving young persons than in the majority of administrative disputes).

93. Similarly, Council of Europe standards provide that judicial review of administrative acts should be held publicly: "The public character of proceedings before the judicial bodies … protects litigants against the administration of justice in secret with no public scrutiny".[71] "The proceedings should be public, other than in exceptional circumstances".[72] Article 6 of the ECHR stipulates that everyone is entitled to a public hearing if the domestic proceedings fall within the scope of the application of that provision. The ECtHR has – within the context of administrative proceedings – held that the right to a "public hearing" may entail an entitlement to an "oral hearing" if the administrative court acts as the first and only judicial instance in the contested proceedings.[73] Although the public hearing is not absolute and may be justified by the special features of the relevant proceedings, a precondition for such justification is that a public hearing is held at first-instance courts.[74]

94. In the case of the draft Law, both administrative courts, as first instance courts and the State Council, as appeal court and the court of first and last instance for certain cases, are conducting the hearing *in camera*, i.e., without public hearing. The ECtHR has dealt with compliance with Article 6 para. 1 of the ECHR of a procedure conducted before an administrative court without a public hearing and concluded that while it is not contrary to Article 6 para. 1 of the ECHR for administrative authorities to determine civil rights or obligations, only a court established by law by which the individual may challenge the decision in a fair and public hearing may be considered a tribunal in terms of Article 6 para. 1 of the ECHR.[75]

95. In light of the above, the Venice Commission recommends introducing a public hearing as a general rule and specifying the circumstances in which the hearing can be held *in camera*.

[70] Venice Commission, CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, para. 91. See also Venice Commission, CDL-AD(2019)004, *op. cit.*, paras 107-108; Venice Commission, CDL-AD(2013)005, Opinion on Draft amendments to Laws on the Judiciary of Serbia, para. 39.
[71] ECtHR, Helmers v. Sweden, no. 11826/85, 29 October 1991, para. 33.
[72] See Recommendation Rec(2004)20, Principle 4.f.
[73] ECtHR, Fredin v. Sweden (No. 2), no. 18928/91, 23 February 1994, paras 21-22.
[74] ECtHR, Helmers v. Sweden, *op. cit.*, para. 36.
[75] For example, ECtHR, Fischer v. Austria, no. 16922/90, 26 April 1995; Zumtobel v. Austria, no. 12235/86, 21 September 1993.

c. Recusal and self-recusal of judges

96. Articles 245-248 of the draft Law describe the procedure of recusal/self-recusal of administrative judges based on the grounds of conflict of interest provided in Article 120 of the Civil Procedure Code.[76] According to Article 247 of the draft Law, if the challenge is considered to be unfounded by a chamber of the Council of State, the person who challenged the judge is obliged to pay fines.

97. The Venice Commission recommends providing an exhaustive list of recusal and self-recusal grounds in the Law. The Commission also recalls that the right to challenge a judge should not be made liable to a financial penalty. It is therefore recommended to delete this provision or to limit its scope to situations in which the right to challenge a judge is manifestly abused.

VI. Conclusion

98. The initiative of the Lebanese authorities to modernise the administrative justice system is commendable, as is their wish to strengthen the independence of the administrative justice system vis-a-vis political power. The Venice Commission welcomes the involvement of the Association of Judges and Bar Associations in the ongoing consideration of the draft Laws in the parliamentary sub-committee and invites the authorities to involve civil society representatives and all other relevant stakeholders as well.

99. The Venice Commission would recommend the relevant authorities to explore possibilities of a phased introduction of the administrative justice reform, starting, for example, with a "pilot" first-instance administrative court in Beirut with jurisdiction limited to specific areas. Such a phased approach would allocate the competent authorities adequate time to find sufficient funds, logistical arrangements, judicial and non-judicial staff and would provide proper guidance for the smooth set-up of other administrative courts based on that "pilot experience".

100. Regarding the draft Law itself, the Venice Commission makes the following key recommendations and notes that further detailed recommendations are to be found in the text of this opinion:

- to increase the number of HCAJ members elected by their peers; to ensure better representation of judges from the lower-level courts and add lay members; to provide for partial renewal of the HCAJ composition;
- to reduce the powers of the President of the State Council;
- to further clarify the jurisdiction of administrative courts in order to avoid overlapping with the jurisdiction of the ordinary courts;
- to provide annual competitions for candidate administrative judges and continuous training for administrative judges; to specify the assessment criteria and methodology;
- to replace "a good biography" with "high moral character and integrity" and introduce a mechanism for checking the integrity of candidate administrative judges;
- to specify duration and requirement of consent for the short-term "virtual" secondments; to prohibit the holding of both judicial and administrative functions within a government or parliamentary body while on secondment; to provide that administrative judges who have changed to a position in the administration have the right to return to their judicial function;

[76] "Article 120 - The parties may request the judge's dismissal for one of the following reasons: direct/indirect interest in the case; kinship with one of the litigants or his/her representative(s), one of the members of the board of directors of the litigating company or one of its managers having a personal interest in the lawsuit; involvement in another case with the same litigant(s) or his/her representative(s); s/he or one of his/her relatives up to the 4th degree has previously considered the case as a judge, expert, arbitrator or was a witness; … s/he expressed an opinion on the particular case, even if that was before his appointment to the judiciary. … enmity or affection between the judge and one of the litigants affecting his/her impartiality; … if one of the litigants is a creditor or debtor of the judge or one of his relatives up to the 2nd degree".

- to clarify the content of concepts such as "honour, dignity or morals" and "obligation of reserve" as well as the meaning of "interference" and the modalities of application of Article 25;
- to delete or at least, modify "delay in settling cases and failure to comply with the time limits set by this law for rendering judgments" as a ground for disciplinary liability in Article 49; to delete Article 50;
- to hold judicial and disciplinary hearings in public and provide in the Law the exceptions to hold them *in camera*;
- to allow the complainant to appeal the decisions of the Disciplinary Board before the High Disciplinary Jurisdiction; to introduce the possibility of appealing the latter's decisions to a permanent court of law; to ensure judicial review in respect of basic aspects of the judge's legal status;
- to introduce the case distribution system in line with international standards;
- to provide an exhaustive list of recusal/self-recusal grounds in the law; to delete the provision on the application of fines or to limit its scope to situations in which the right to challenge a judge is manifestly abused.

101. Finally, the authorities are also invited to improve the structure and coherence of the draft Law in line with international standards.

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