Lebanon:
Upholding Judicial Independence

Discussion and Recommendations on the Draft Law on the Independence of the Judiciary

An Advocacy Paper

International Commission of Jurists

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Published in December 2022

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Supported with German Federal Foreign Office's funds by ifa (Institut für Auslandsbeziehungen), Funding Programme zivik

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I. Introduction

Attacks on the independence of the judiciary have marred the ongoing investigations of certain recent high-profile criminal cases, such as the Beirut port blast investigation and the investigation into the role of the Governor of the Central Bank of Lebanon in the country's financial collapse. Such meddling has once again revealed how exposed to arbitrary, undue or unwarranted political interferences the Lebanese judiciary is, reflecting its persistent shortcomings and the Lebanese justice system's overall lack of independence.

Reforms are essential to restore the separation of powers and the rule of law and, in turn, break the existing vicious cycle in which political interference in the work of the judiciary feeds impunity.

As legislative elections held in May 2022 have brought new parliamentarians to the legislature in Lebanon, and at a time when a draft law aimed at improving the independence of the judiciary (hereinafter "the Draft Law") is being discussed in Parliament,[1] the momentum for reform of the justice system should not be missed.

Building on previous publications of the International Commission of Jurists assessing the Lebanese justice system's compliance with international standards on the independence of the judiciary,[2] this Paper aims to:

- take stock of the current situation of the judiciary in Lebanon;
- analyze the provisions of the Draft Law in light of international standards; and
- offer recommendations to the new legislature to ensure that the Draft Law, when enacted, complies with Lebanon's obligations under international human rights law.

[1] The draft law on the independence and transparency of the judiciary was initially developed by the Legal Agenda, a Beirut-based nonprofit research and advocacy organization, and endorsed by the Coalition for the Independence of the Judiciary in Lebanon, a coalition led by Legal Agenda made up of around 50 political parties and groups, as well as non-governmental and civil society organizations. A number of parliamentarians then submitted the draft to Parliament, which referred it to its Administration and Justice Committee. Following consultations with the Ministry of Justice and the High Judicial Council, the said Committee adopted an amended version, which was submitted to the Parliament, but upon request of the Minister of Justice, the legislature sent the draft back to the Administration and Justice Committee for procedural reasons. See Sandra Noujeim, Indépendance de la justice - Report technique ou politique ? in *Ici Beyrouth*, 22 February 2022, available in French at: https://icibeyrouth.com/liban/38837 (last consulted on 26 April 2022). See also, for the latest developments on the Draft Law, "Statement by the Independence of the Judiciary Coalition on the Obstruction of Judicial Reform: Parliament Remains Silent as the Minister of Justice Undoes Its Work", 22 October 2022, available at: https://english.legal-agenda.com/statement-by-the-independence-of-the-judiciary-coalition-on-the-obstruction-of-judicial-reform-parliament-remains-silent-as-the-minister-of-justice-undoes-its-work/ (last consulted on 6 November 2022). The version of the Draft Law discussed in this paper is the English translation made available by the Venice Commission of the Council of Europe (European Commission for Democracy through Law) on its website at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2022)014-e (last consulted on 27 May 2022), on which the Commission adopted Opinion No. 1057/2021, CDL-AD(2022)020, at its 131st Plenary Session (Venice, 17-18 June 2022), (hereinafter "Opinion" or "Venice Commission Opinion") available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)020-e# (last consulted on 26 June 2021). This version of the Draft Law appears to differ from the version commented upon by the Coalition for the independence of the judiciary in "The Administration and Justice Committee's Bill Fails to Achieve Judicial Independence", 18 January 2022, available at: https://english.legal-agenda.com/independence-of-the-judiciary-coalition-the-administration-and-justice-committees-bill-fails-to-achieve-judicial-independence/ (last consulted on 19 May 2022).

[2] ICJ, The Lebanese High Judicial Council in Light of International Standards. A Briefing paper, February 2017, available at: https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-HJC-Advocacy-Analysis-Brief-2017-ENG.pdf; The Career of Judges in Lebanon in Light of International Standards. A Briefing paper, February 2017, available at: https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-judges-Advocacy-Analysis-Brief-2017-ENG.pdf; Judicial Accountability in Lebanon: International Standards on the Ethics and Discipline of Judges. A Briefing paper, February 2017, available at: https://www.icj.org/wp-content/uploads/2017/03/Lebanon-Memo-re-accountability-Advocacy-Analysis-Brief-2017-ENG.pdf; Lebanon: The Role of Prosecutors in Ensuring Independent and Impartial Investigations and Prosecutions. A Briefing Paper, June 2018, available at: https://www.icj.org/wp-content/uploads/2018/06/Lebanon-Memo-re-prosecutors-Advocacy-Analysis-Brief-2018-ENG.pdf (all last consulted on 26 April 2022).

II. Recent emblematic attacks on the independence of the judiciary in Lebanon

i. The Beirut port blast investigation

Since the devastating Beirut port blast on 4 August 2020, which claimed the lives of at least 219 people and injured over 7,000 others – and which caused major infrastructural damage resulting in the forcible displaced of around 300,000 people – the judicial investigation promised by the Lebanese Government has been obstructed at every turn and subjected to blatant political interference.

On 10 August 2020, the Lebanese Government referred the criminal investigation into possible criminal offences that may have caused the Beirut port explosion to the Judicial Council (JC).[3]

> The JC is an "exceptional court" with no appeal process,[4] and with exclusive jurisdiction over cases referred to it pursuant to a decree of the Council of Ministers,[5] i.e., the Government.[6] The JC's membership comprises Court of Cassation judges appointed by decree by the Council of Ministers, upon a proposal of the Minister of Justice pursuant to the approval of the High Judicial Council (HJC).[7] The Public Prosecutor at the Court of Cassation initiates and carries out the public prosecution.[8] With respect to investigations, the Minister of Justice appoints the investigating judge into a case after the approval of the HJC.[9] All these "exceptional" elements,[10] including the role of the executive – directly or indirectly[11] – in the appointment of JC's judges and prosecutor greatly undermine the JC's independence. This is especially the case since the JC acts exclusively upon request of the Government, which has discretionary referral powers whose exercise cannot be assessed against any established and publicly known, objective criteria. Given its membership and manner of operation, the JC's jurisdiction is inconsistent with the prohibition of the use of special courts enshrined in the UN Basic Principles on the Independence of the Judiciary since it is not founded on reasonable and objective criteria.[12]

The 13 August 2020 appointment of Judge Fadi Sawan as the first investigating judge to lead the criminal investigation into the Beirut bomb blast by the Minister of Justice was opaque. Without providing any reasons, the HJC rejected two judges – whom Minister of Justice had initially

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[3] See Decree No. 6815 of 11 August 2020, available in Arabic at: http://77.42.251.205/LawView.aspx?opt=view&LawID=285744 (last consulted on 26 April 2022).
[4] Decisions issued by the investigating judge are not subject to any review (Code of Criminal Procedure, art. 362) and JC's judgments are also not subject to appeal (art. 366, para. 2).
[5] A Council of Ministers decree is a decree adopted by the Council of Ministers, which is the body in which executive authority is vested. See articles 65 and following of the Constitution.
[6] Code of Criminal Procedure, art. 355. Pursuant to article 356 of the Code of Criminal Procedure, the JC has jurisdiction over a list of high-profile offences, such as against the security of the State, terrorism-related or military offences.
[7] Code of Criminal Procedure, art. 357. It comprises the First President of the Court of Cassation as president, and four Court of Cassation judges.
[8] Code of Criminal Procedure, art. 360 and 361.
[9] Code of Criminal Procedure, art. 360, para. 2.
[10] Since its establishment in 1923 and until 2019, the JC purportedly investigated around 250 cases. After long years of investigation and trial, sometimes up to 35 years, the JC reached a decision in a number of these cases. However, in the vast majority of these cases it has not issued any decisions. See, in Arabic only, https://monthlymagazine.com/ar-article-desc_4861 .
[11] As detailed below, the executive plays a role in the appointment of Court of Cassation judges, of the Prosecutor General at the Court of Cassation, as well as of HJC members.
[12] UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of November 1985 and 40/146 of 13 December 1985 ("UN Basic Principles"), Principle 5. See also ICJ, Practitioner's Guide No. 1, The Independence and accountability of judges, lawyers, and prosecutors, pp. 7-11, available at: https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Procecutors-No.1-Practitioners-Guide-2009-Eng.pdf (last consulted on 26 April 2022).

proposed.[13] Similarly, Judge Fadi Sawan's removal from the case on 18 February 2021 – following a ruling of the Court of Cassation concluding that there was "legitimate suspicion" regarding his impartiality – was also reportedly politically tainted.[14]

Judge Tarek Bitar, whom the Minister of Justice appointed as Judge Sawan's replacement, requested Parliament to lift the immunity of three former ministers, all of whom were parliamentarians, so that he could charge them with criminal negligence as well as with "homicide with probable intent".[15] The Parliament, however, failed to lift their immunity. When the then ongoing parliamentary session was brought to an end, Judge Bitar summoned the three for questioning. Nonetheless, the three parliamentarians, as well as the former Prime Minister and another former minister, have refused to answer the summons, arguing that only the High Court responsible for trying presidents and former ministers, under article 80 of the Constitution, could try them. While the Constitution provides that ministers may be prosecuted before the High Court if a majority of two-thirds of Parliament accuses them of high treason or serious breaches of duty,[16] the legislature, thus far, has not accused these individuals.

In addition, the security forces have not executed warrants issued by Judge Bitar for the arrest of two former ministers, who had failed to appear before him for questioning. Two Ministers of Interior have also refused to grant Judge Bitar permission to prosecute the General Security Chief, and the High Defence Council blocked the interrogation of the State Security Chief.[17]

Moreover, former ministers targeted by his investigation have lodged a slew of cases against Judge Bitar, as well as against the State, in relation to his alleged "serious wrongdoings" and to other judges' alleged serious wrongdoings when rejecting lawsuits against him, resulting in the suspension of the criminal proceedings against the former ministers in relation to the Beirut port explosion, in whole or in part, for several months.[18]

> Articles 741 and following of the Code of Civil Procedure address State liability resulting from acts committed by "judicial" (as opposed to administrative) judges. Under Lebanese law, judges are potentially civilly liable in cases of "miscarriage of justice", "deception", "fraud" and "bribery", as well as "serious errors which should not have occurred had the judge exercised a normal degree of attention to his or her duties". Suits are to be brought before the Plenary Assembly of the Court of Cassation and, if the complaint is substantiated, the State is held liable for damages. The State then has recourse against the offending judge. During this procedure, the judge can intervene voluntarily and present his arguments, and must abstain from examining any legal case concerning the plaintiff.
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> The scope for civil liability of judges under Lebanese law is defined in potentially vague and overbroad terms, particularly since the relevant provisions refer to "serious errors". Those terms give rise to a real uncertainty as to whether a disgruntled litigant, including a

[13] For a detailed overview of these allegations, see The Legal Agenda, Nizar Saghieh, Twelve Bad Signs at the Outset of the Beirut Massacre Investigation, available at: https://english.legal-agenda.com/twelve-bad-signs-at-the-outset-of-the-beirut-massacre-investigation/ (last consulted on 26 April 2022).
[14] In particular, acting upon the complaint of two former ministers, whom Judge Bitar had charged with criminal negligence, the Court based its ruling, in part, on the fact that he had stated he would not recognize the parliamentary immunity claimed by the officials, and because he had received, like hundreds of thousands of Beirut residents, compensation for the damages his home suffered as a result of the explosion.
[15] Parliamentarians in Lebanon have immunity from prosecution during Parliament's session.
[16] Constitution, art. 70.
[17] Under Lebanese law, to prosecute State employees for a crime arising from their discharge of their official duties, judges need to obtain approval from the entity to which the employee belongs.
[18] Between 22 September and 28 October 2021, no less than 15 legal cases were filed against Judge Bitar: see https://today.lorientlejour.com/article/1280486/beirut-blast-investigator-forced-to-suspend-probe-for-3rd-time.html?utm_campaign=Post-74470&utm_medium=email&utm_source=CMS-34. For additional details, see https://www.the961.com/judge-mezher-suspended-beirut-blast-probe/.

member of the executive, may sue a judge simply for handing down an unfavourable decision (even if it is overturned). Therefore, judges are unduly exposed to the risk of arbitrary proceedings, an eventuality that, in turn, undermines their independence and impartiality.[19] The lawsuits targeting the judge in charge in the Beirut port blast investigation and the judges who ruled against his recusal or removal offer a graphic illustration of such a arbitrariness.

Following the retirement of several judges in the intervening period, the Court of Cassation has lost the required quorum to issue a ruling in the aforementioned lawsuits concerning the responsibility of the State for judges' "serious wrongdoings" that were still pending at the time of writing. The Finance Minister, Youssef Khalil, has thus far refused to sign the draft decree prepared by the HJC and already signed by the Minister of Justice, to appoint six chamber presidents to the Court of Cassation, purportedly for sectarian reasons.[20] As a result, the Court is effectively prevented from attaining the necessary quorum to rule on these cases.[21]

Judges at the Court of Cassation, which is Lebanon's highest court, are appointed by decree by the Council of Ministers, upon proposal of the Minister of Justice and pursuant to the approval of the HJC, which must be signed by the President of the Republic, Prime Minister and Minister of Justice, as well as the Minister of Finance when the decree involves additional funds. For more details, see section III-ii-A-*iii* below.

Moreover, the appointment of senior judicial positions in Lebanon is subjected, in practice, to a religion-based power-sharing agreement. As a matter of established practice, the First President of the Court of Cassation is Maronite Christian, and the chamber presidents of the Court of Cassation are also appointed according to a 50/50 ratio between Christians and Muslims. Sectarianism leads to politicization and undermines transparency. For more details, see section III-i-A below.

These political attempts to block the investigation came amid a coordinated campaign against Judge Bitar, which escalated into violence and political blackmail in October 2021. A senior Hezbollah official reportedly threatened Judge Bitar.[22] Protests against Judge Bitar organized by two political movements, Amal and Hezbollah, culminated into deadly shootings in Beirut on 14 October 2021. Both parties had blamed him for igniting tensions in the country.[23]

Moreover, on 12 October 2021, Ministers threatened to resign from the Government over Judge Bitar's investigation, leading Prime Minister Najib Mikati to say he would not convene a Council of Ministers' meeting until a "solution" was found.[24] The fate of the Government has thus been held

[19] For more details on judges' civil liability and related ICJ recommendations, see ICJ, Judicial Accountability in Lebanon: International Standards on the Ethics and Discipline of Judges, *op. cit.*, pp. 18-21.
[20] See https://today.lorientlejour.com/article/1297502/bitars-probe-blocked-at-the-finance-ministrys-door.html. See also "Statement by the Independence of the Judiciary Coalition: The Ministry of Justice Is Violating the Law and Judiciary and Manufacturing Injustice", 17 October 2022, available at: https://english.legal-agenda.com/statement-by-the-independence-of-the-judiciary-coalition-the-ministry-of-justice-is-violating-the-law-and-judiciary-and-manufacturing-injustice/ (last consulted on 6 December 2022).
[21] For the latest developments on this issue, see https://today.lorientlejour.com/article/1315752/port-blast-investigation-postponed-indefinitely-again.html (last consulted on 6 November 2022.
[22] See https://www.reuters.com/world/middle-east/we-will-remove-you-hezbollah-official-told-beirut-blast-judge-2021-09-29/ (last consulted on 5 December 2022).
[23] See https://www.the961.com/amal-blames-judge-bitar-for-tayyouneh-clashes/ (last consulted on 14 June 2022).
[24] See https://today.lorientlejour.com/article/1278355/mikati-says-cabinet-will-not-convene-before-finding-a-solution-to-disagreements-over-the-port-blast-probe.html (last consulted on 14 June 2022).

hostage for months by these threats that amount to direct political interference in the investigation.

ii. The criminal investigations into the role of the Central Bank's Governor

Lebanon has been facing a dire economic crisis since late 2019. The Lebanese Pound has lost as much as 90 per cent of its value against the US Dollar since then, resulting in a sharp decrease in the real value of people's income, and wiping out the Lebanese population's savings. In this context, the role of the Lebanese Central Bank (*Banque du Liban*, BdL) and its long-serving governor, Riad Salame, has come under particular scrutiny.[25]

Mr Salame is currently facing probes in five European countries, including a case in Switzerland, where the authorities are investigating him for embezzlement of 330 million US Dollars from BdL between 2002 and 2015 through payments to a company registered in the British Virgin Islands managed by his brother, Raja Salame. In addition, in Lebanon, Jean Tannous, deputy prosecutor at the Court of Cassation, has been investigating Mr Salame since January 2021 on suspicion of illicit enrichment, pursuant to a request from Swiss investigators.[26] In parallel, Mount Lebanon Public Prosecutor, Ghada Aoun, has been investigating Mr Salame, and referred him for judicial investigation in January 2021 on charges of professional negligence and breach of public trust in relation to mishandling of a foreign currency scheme.[27]

However, in April 2021, Ghassan Oueidat, the Public Prosecutor at the Court of Cassation, ordered Ghada Aoun's removal from the financial cases she had been overseeing,[28] including in relation to the above-mentioned charges against Mr Salame, on a reportedly legally flawed basis[29].

> The Public Prosecutor at the Court of Cassation, who is the head of prosecution services and has authority over all prosecutors, is appointed by decree by the Council of Ministers upon recommendation of the Minister of Justice. The only specified selection criterion is that the person must have attained the required seniority. For more details, see section III-iv-A below.
>
> Moreover, judges of the Public Prosecution Office shall be subject to the management and oversight of their superiors and to the authority of the Minister of Justice. Lebanese law does not provide for appropriate safeguards and limitations on internal and external instructions to prosecutors, which may allow for abuse of power from both within the prosecution services as well as non-prosecutorial authorities, in particular the executive. Nor does Lebanese law specify how the authority of the Minister of Justice is exercised and therefore does not safeguard the real and perceived independence of the prosecution services. For more details, see section III-iv-B below.

On 20 April 2021, the HJC issued a statement instructing Aoun to comply with Oueidat's decision to remove her, despite acknowledging there were questions over its validity.[30] Prosecutor Ghada

[25] See https://mondediplo.com/2021/08/04lebanon (last consulted on 14 May 2022).
[26] See https://today.lorientlejour.com/article/1287565/how-the-lebanese-investigation-targeting-riad-salameh-is-being-systematically-impeded.html (last consulted on 14 May 2022).
[27] See https://english.alarabiya.net/business/economy/2021/01/28/Lebanon-central-bank-chief-faces-FOREX-scam-professional-negligence-charges (last consulted on 14 May 2022).
[28] See https://www.icj.org/lebanon-stop-removal-of-investigative-authorities-overseeing-high-level-corruption-and-criminal-negligence-cases/ (last consulted on 15 May 2022).
[29] See https://english.legal-agenda.com/lebanons-mecattaf-case-who-transferred-money-abroad-and-why/ (last consulted on 15 May 2022).
[30] See https://english.legal-agenda.com/lebanons-mecattaf-case-who-transferred-money-abroad-and-why/ (last consulted on 15 May 2022).

Aoun was then summoned to appear before the Judicial Inspectorate based on a request of the HJC because she disregarded this instruction.[31]

> The HJC is the institution responsible for ensuring "the proper functioning, dignity and independence of the judiciary" and is entrusted with a wide range of powers related to the careers of judges and judicial discipline, including requesting the Judicial Inspectorate to investigate judges and subsequently to take appropriate measures. The executive is directly responsible for both the selection and appointment of eight out of ten HJC members, while the two other members are elected among the Court of Cassation chamber presidents, in whose appointment the executive plays a significant role as well. Moreover, the Minister of Justice plays a central role in the implementation of all the HJC's functions, including on issues pertaining to the disciplining of judges, giving rise to a real and pervasive interference by the executive. For more details, see sections III-i and III-iii-B below.
> The Judicial Inspectorate, which is the institution in charge of supervising the proper functioning of the judiciary and the work of judges and judicial personnel, works directly under the supervision of the Ministry of Justice, and its members are all appointed by decree by the Council of Ministers upon a proposal of the Minister of Justice. For more details, see section III-iii-B below.

In distinct investigations into his alleged criminal conduct at the BdL, Aoun issued a travel ban and a subpoena against Mr Salame in January and February 2022 respectively. He nonetheless failed to attend three hearings as a witness.[32] Because law enforcement officials were purportedly unable to locate him, Aoun charged and referred Mr Salame for judicial investigation, *in absentia*, with illicit enrichment in relation to properties in Paris on 21 March 2022, and issued a wanted notice for him in April 2022 in another case.[33]

Given Mr Salame's long tenure as governor of BdL, the scope of his alleged criminal conduct and the involvement of senior figures in the financial sector, investigations have been met with strong opposition.[34] Prime Minister Mikati in March 2022 stated that some actions by judges in Lebanon risked heightening tensions, although he did not specifically name Aoun.[35]

The Judicial Inspectorate referred Aoun to the Disciplinary Council (DC) in April 2022 for travelling to France without the Minister of Justice's official permission and for making offensive remarks about the judiciary.[36]

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[31] See https://today.lorientlejour.com/article/1298988/metns-urgent-matters-judge-orders-immediate-removal-of-red-wax-seals-from-the-mecattaf-companys-doors.html (last consulted on 15 May 2022).
[32] See https://www.reuters.com/world/middle-east/lebanese-judge-charges-cbank-governor-with-illicit-enrichment-judge-tells-2022-03-21/ (last consulted on 14 May 2022).
[33] See https://www.lorientlejour.com/article/1297200/riad-salame-vise-par-un-avis-de-recherche-lance-par-la-juge-ghada-aoun.html (last consulted on 15 May 2022).
[34] The Legal Agenda has documented attacks in the media against Ghada Aoun, legal filings accusing her of slander, confrontation by a lawyer for one of the banks concerned in the case in her office, and statements addressing, directly or indirectly, her work in this case during sermons by senior religious leaders. See https://english.legal-agenda.com/lebanons-mecattaf-case-who-transferred-money-abroad-and-why/.
Furthermore, banks have organised a strike in response to the freezing of their assets at the order of Ghada Aoun. Assets of the Bank of Beirut, Bank Audi, SGBL, Blom Bank and Bankmed were frozen, applying to properties, vehicles and shares in companies owned by the banks or the members of their boards. Travel bans were also issued against the heads of the boards of the five banks. For more details, see https://www.reuters.com/world/middle-east/lebanon-judge-freezes-assets-five-banks-members-their-boards-document-2022-03-14/ (last consulted on 15 May 2022).
[35] See https://www.swissinfo.ch/eng/lebanon-pm-says-some-judges-stoking-tension-within-country/47444272 (last consulted on 16 May 2022).
[36] See Judicial Inspection Commission chief Bourkan Saad has referred Ghada Aoun to disciplinary council - L'Orient Today (lorientlejour.com) (last consulted 16 May 2022).

The Judicial Inspectorate Council (JIC) is the body of the Judicial Inspectorate – which is not independent from the executive – that decides whether to refer a case to the DC after investigation. The DC members are all appointed by the President of the HJC – which is also under the influence of the executive – at the beginning of each judicial year, and the President of the Judicial Inspectorate serves as State Commissioner (i.e. effectively, as Prosecutor) before the Council. The executive's control and influence over the Judicial Inspectorate raises concern over arbitrary, undue or unwarranted political interference in judicial accountability processes. For more details, see Section III-iii-B below.

In the same vein, Jean Tannous's investigation into Riad and Raja Salame's illicit enrichment has been beset by delays and political interference. In November 2021, lawyers for Bankmed, one of the four Lebanese banks Tannous sought to call as a witness in the case, filed a lawsuit against the State accusing Jean Tannous of "serious wrongdoings",[37] which resulted in the automatic suspension of his probe. The Plenary Assembly of the Court of Cassation ultimately rejected Bankmed's accusations against Jean Tannous on the basis that Bankmed was not a party to the probe.

There were further obstructions of Tannous's investigation in the case when in January 2022 Tannous executed a search warrant to obtain Raja Salame's bank accounts, but was informed upon arrival at the bank that the warrant had been suspended at the request of the Court of Cassation Public Prosecutor and Tannous's supervisor, Ghassan Oueidat.[38] Oueidat also reportedly stopped Tannous from attending a meeting of European prosecutors in Paris, intended for information sharing and coordination in the Salame case.[39] Media outlets reported that he acted on the orders of Prime Minister Najib Mikati.[40]

In early June 2022, Raja and Riad Salame also filed a complaint against the State based on Tannous's alleged "serious wrongdoings".[41] As in the Beirut port blast case, such a complaint could result in the indefinite suspension of the investigation. Shortly thereafter, probably to avoid paralysis, the Court of Cassation Public Prosecutor, Ghassan Oueidat, referred the case for judicial investigation.[42]

The Beirut Blast and the Salame cases reflect Lebanon's long history of improper influence and arbitrary, undue or unwarranted interference by political actors in judicial matters. In 2018, the UN Human Rights Committee expressed concern about the "political pressure reportedly exerted on the Lebanese judiciary, particularly in the appointment of key prosecutors and investigating magistrates, and about allegations that politicians use their influence to protect supporters from prosecution".[43] In her speech to the Human Rights Council on 13 June 2022, Michelle Bachelet, the

[37] See https://www.thenationalnews.com/mena/2021/11/21/suspension-of-lebanon-probe-into-riad-salamehs-wealth-unprecedented-judge-says/ (last consulted on 14 May 2022).
[38] See https://today.lorientlejour.com/article/1287565/how-the-lebanese-investigation-targeting-riad-salameh-is-being-systematically-impeded.html (last consulted on 14 May 2022).
[39] See https://www.reuters.com/markets/europe/exclusive-contracts-show-lebanons-central-bank-obscured-recipients-commissions-2022-02-21/ (last consulted on 15 May 2022).
[40] See https://www.reuters.com/world/middle-east/lebanons-pm-denies-meddling-judiciary-over-financial-probe-2022-01-12/ (last accessed 6 December 2022). See also Statement by the Independence of the Judiciary Coalition: Public Prosecution Hierarchy Shields Impunity, 17 January 2022, available at: https://english.legal-agenda.com/statement-ijc-public-prosecution-hierarchy-shields-impunity/ (last accessed 6 December 2022).
[41] See https://www.reuters.com/world/middle-east/lebanon-cenbank-governor-brother-sue-state-over-mistakes-embezzlement-probe-2022-06-03/ (last consulted on 14 June 2022).
[42] See https://www.reuters.com/world/middle-east/corruption-probe-into-lebanon-cbank-governor-moves-next-stage-2022-06-09/ (last consulted 14 June 2022).
[43] UN Human Rights Committee, Concluding observations on the third periodic report of Lebanon, 9 May 2018, UN Doc. CCPR/C/LBN/CO/3, para. 41.

then UN High Commissioner for Human Rights "call[ed] upon the authorities to urgently enable the resumption of the investigation […]" of the Beirut Blast.[44]

Because the inadequate frameworks and structural weaknesses that underpin the Lebanese judicial system have permitted such political interferences, the Lebanese authorities should use the process of adopting the Draft Law as an opportunity to remedy the system's shortcomings.

III. Ensuring judicial independence

The right to an independent and impartial tribunal is an integral part of the right to a fair trial guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR).[45] In interpreting this provision, the UN Human Rights Committee has held that article 14 imposes on States the obligation to take measures guaranteeing the independence of the judiciary "through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them".[46] In a similar vein, the UN Basic Principles on the Independence of the Judiciary provide that it is the duty of every State to guarantee the independence of the judiciary and to enshrine such independence in law.[47]

In Lebanon, article 20 of the Constitution guarantees the separation of powers and provides for judges to be "independent in the exercise of their functions." It further provides that the law shall "determine conditions and limits of the judicial guarantees", which appears to refer to the statute of judges, and at provisions aimed at ensuring their independence.[48]

Legislative Decree No. 150 of 16 September 1983 on the organization of the judiciary (Decree-Law No. 150/83) regulates the High Judicial Council (HJC) **(i)** and the "ordinary" court system,[49] in particular the career **(ii)** and discipline **(iii)** of judges, including some aspects of the status of public prosecutors in Lebanon **(iv)**. The Draft Law touches upon all four areas, which are discussed below, through an analysis of both the existing legal framework and the changes contemplated by the Draft Law, in light of international standards.

i. Reforming the High Judicial Council

Under Decree-Law No. 150/83, the HJC is responsible for ensuring "the proper functioning, dignity and independence of the judiciary, the proper functioning of the courts, and for taking the necessary decisions in this regard."[50] The Decree-Law details the HJC's composition and competencies. If enacted as currently formulated, the Draft Law would alter the HJC's composition.

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[44] UN High Commissioner's Oral Update on global human rights developments to the 50th Human Rights Council session, 13 June 2022, available at: https://www.ohchr.org/en/statements/2022/06/oral-update-global-human-rights-developments-and-activities-un-human-rights (last consulted on 14 June 2022).
[45] Lebanon has been a party to the ICCPR since 1972.
[46] UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007 ("General Comment No. 32"), para. 19.
[47] UN Basic Principles, Principle 1.
[48] Article 20 of the French version of the Constitution provides: "*La loi fixe les limites et les conditions de l'inamovibilité des magistrats*." [The law shall determine the limits and conditions of judicial security of tenure.] However, the Arabic version, which is the official one, follows the English translation and only mentions "judicial guarantees".
[49] The "ordinary" court system includes civil, criminal and commercial courts. The administrative courts are regulated separately. For an analysis thereof, see ICJ, The Lebanese State Council and Administrative Courts. A Briefing Paper, October 2018, available at: https://www.icj.org/wp-content/uploads/2018/10/Lebanon-Memo-re-Court-Reform-Advocacy-Analysis-Brief-2018-ENG.pdf (last consulted on 23 May 2022).
[50] Decree-Law No. 150/83, art. 4. According to article 6 of Decree-Law No. 150/83, the HJC meets at the request of its President or, in his absence, its Vice President. It can also meet at the combined request of four of its members or at the request of the Minister of Justice, who can call on the HJC to convene.

A. Composition

The UN Special Rapporteur on the independence of judges and lawyers has stated that the composition of a judicial council "matters greatly to judicial independence as it is required to act in an objective, fair and independent manner when selecting judges".[51]

Under article 2 of Decree-Law No. 150/83, the HJC is composed of the following ten members:

- Three *ex officio* members:

  i. the first President of the Court of Cassation, who is the President of the HJC;
  ii. the Public Prosecutor, who is the vice-President of the HJC;
  iii. the President of the Judicial Inspectorate.

- Five members appointed by decree by the Council of Ministers upon proposals of the Minister of Justice:

  i. one judge chosen from among the chamber presidents of the Court of Cassation;
  ii. two judges chosen from among the chamber presidents of the courts of appeal;
  iii. one judge chosen from among the chamber presidents of the first instance courts;
  iv. one judge chosen from among the presidents of tribunals or heads of departments of the ministry of justice.

- Two judges elected from among the Chamber Presidents of the Court of Cassation by all the presidents and associate judges of the Court of Cassation through secret ballot.

International standards mandate that judicial councils be independent from the executive and legislative powers.[52] It is good practice to ensure that at least half of the members of judicial councils be judges chosen by their peers, following methods guaranteeing the widest representation of the judiciary at all levels.[53] This is currently not the case in Lebanon.

The three *ex officio* members are appointed to their positions by decrees of the Council of Ministers upon proposal of the Minister of Justice.[54] Moreover, as described below under section iii-B, the President of the Judicial Inspectorate operates as head of a body that exercises its functions under the supervision of the Minister of Justice. As a result, the executive is directly responsible for both the selection and appointment of eight out of ten HJC members.

The fact that only two members of the HJC are elected and that these two members must be chamber presidents at the Court of Cassation, elected by members of this Court only, does not allow for a truly representative judicial council and means that the judges of tribunals of first instance and the courts of appeal in Lebanon are not adequately represented in the judicial body that is in charge of overseeing their careers. Moreover, as highlighted above with respect to the Beirut port blast investigation and the refusal of the Minister of Finance to sign the decree appointing chamber presidents, the role of the executive is significant in their appointment as well.

[51] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 28 April 2014, UN Doc. A/HRC/26/32, para. 126.
[52] See e.g., UN Human Rights Committee, Concluding Observations on the Congo, 25 April 2000, UN Doc. CCPR/C/79/Add.118, para. 14.
[53] See e.g., Report of the Special Rapporteur on the Independence of Judges and Lawyers: note by the Secretariat, 2 May 2018, UN Doc. A/HRC/38/38, para. 107. See also European Charter on the Statute for Judges, Strasbourg, 8-10 July 1998, Principle 1.3. See similarly Council of Europe Committee of Ministers Recommendation CM/Rec(2010)12, adopted 17 November 2010 ("CoM Recommendation CM/Rec(2010)12"), para. 46.
[54] Respectively, Decree-Law No. 150/83, art. 26; New Code of Criminal Procedure, adopted by Law No. 328 of 7 August 2001, art. 13; and Decree-Law No. 150/83, art. 100.

Decree-Law No. 150/83 contains no further criteria for the appointment or election of the HJC's members other than the required judicial ranking. This is particularly important because the appointment of senior judicial positions in Lebanon is subjected, in practice, to a religion-based power-sharing agreement,[55] which impacts on the composition of Parliament, the Government and the judiciary.[56] Thus, the HJC's members are appointed according to a 50/50 ratio between Christians and Muslims.[57] 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 (IJS) is Shia Muslim. The chamber presidents of the Court of Cassation are also appointed according to a 50/50 ratio between Christians and Muslims.

The ICJ is of the view that it is important for the judiciary and the HJC to be representative of the Lebanese society as a whole. To achieve this objective, the Lebanese authorities should provide for a comprehensive general anti-discrimination clause, covering at least all the grounds covered by the ICCPR, and should take effective measures to ensure that people belonging to minorities, including religious minorities, enjoy equal access to and participation in the judiciary. However, the ICJ considers that the selection and the appointment of judges, including senior judges, as well as their representation in the HJC, should not be uniquely and exclusively based on whether or not the concerned judges belong to a specific religious group. Doing so would be discriminatory against judges who are adherents of other religions or who do not hold a religious belief. Rather, judicial selection and appointment should be based on objective criteria provided by the law and complied with in practice.

The term of the mandates of the *ex officio* members is not indicated in the decrees appointing them to these positions. The other seven members of the HJC – both appointed and elected – hold their posts for a non-renewable period of three years.[58] The law is silent regarding the possible causes of an early vacancy of a post and the procedure that applies in such cases. It is of crucial importance that the mandate of the members of the HJC be secured until the end of the term except in cases of incapacity or unethical behavior making them unfit to discharge their duties. The grounds and procedure for the dismissal of members of the HJC should be clearly defined and set out in the law in such as way as to guarantee the rights of the concerned HJC member to a fair and transparent procedure, and to protect against arbitrary dismissal. Moreover, the term of office of all the members of the HJC should be the same.

In addition, under Decree No. 11360 of 1 May 2014 establishing the Secretariat of the HJC, the HJC's Secretary General is appointed from among the HJC's members by decree of the Council of Ministers upon a proposal of the Minister of Justice.[59] The Secretariat is also aided in its functions by a maximum of three judges, who are appointed by decree of the Council of Ministers upon a proposal of the Minister of Justice and pursuant to the approval of the HJC.[60] The ICJ considers that, in order to enhance the administrative independence of the HJC, the HJC should be able to

[55] This despite article 95 of the Constitution, which aims to ensure the abolition of the confessional system. Article 95(b) states: "The principle of confessional representation in public service jobs, in the judiciary, in the military and security institutions, and in public and mixed agencies shall be cancelled in accordance with the requirements of national reconciliation; they shall be replaced by the principle of expertise and competence." However, this is has not yet been achieved in Lebanon, and it is not envisaged that the confessional system will be abolished in the near future.
[56] See article 24 of the Lebanese Constitution, as amended by the Taif Agreement of 1990 that put an end to the Lebanese civil war, according to which the distribution of seats within the Chamber of Deputies shall ensure equal representation between Christians and Muslims, as well as proportional representation among the confessional groups within each of the two religious communities (for example, the Maronite, Greek Orthodox and Greek Catholic confessional groups fall under the Christian community, and the Shia, Sunni and Druze fall under the Muslim community).
[57] Indeed, the current HJC's composition respects this ratio.
[58] Article 80 of Decree-Law No. 150/83 also prescribes the required grades to obtain various judicial posts.
[59] Decree No. 11360 of 1 May 2014, art. 2.
[60] Decree No. 11360 of 1 May 2014, art. 3.

appoint all the members of the Secretariat, including the Secretary General. Any role played by the executive in this regard must be removed.

The Draft Law

Under the Draft Law, if enacted as currently formulated, the composition of the HJC would remain at 10 members, including the same three *ex-officio* members, with the remaining members being elected as follows:

i. One tenured judge from among the presidents of chambers of the Court of Cassation;
ii. One tenured judge from among the judges (مستشار in Arabic) at the Court of Cassation;
iii. One tenured judge from among the presidents of chambers of the courts of appeal;
iv. One tenured judge from among the judges (مستشار in Arabic) of the courts of appeal;
v. One tenured judge among the investigating judges;
vi. One tenured judge from among the presidents of chambers of the courts of first instance;
vii. One tenured judge among the judges on mission and single judges.

Elected members would hold a non-renewable term of three years, while the term of *ex-officio* members would be of four years non-renewable as of their appointment in office. As a result, should the Draft Law be enacted as currently formulated it would perpetuate a regrettable term disparity between elected and *ex-officio* members.[61] As regards the replacement of *ex officio* members, a new member among three candidates submitted by the HJC would be appointed by decree of the Council of Ministers decree upon proposal of the Minister of Justice, who can submit other names, subject to the approval of the HJC. If the term of one of the *ex officio* members expires and no decision is taken to appoint a new member within a two-month period, the judge with the highest rank among the presidents of the chambers of the Court of Cassation may replace them on a provisional basis until a replacement is appointed.[62]

The ICJ is of the view that if the membership of the HJC continues to include *ex officio* members as currently provided by the Draft Law, they must be appointed to their offices in an independent manner, through a transparent procedure that is based on objective criteria, including skills, knowledge, experience and integrity.[63] In this regard, the Draft Law still provides for the involvement of the executive in the appointment of the judges who are *ex officio* members even though the HJC's approval is required.[64] Moreover, it is unclear whether the selection criteria set by the Draft Law for the selection of judges would apply to this appointment process as the only provision on the requirements to be selected for these positions relates to the grades determined for these positions[65].

[61] The Venice Commission pointed out that the mandate of the elected members was relatively short and recommended introducing a mechanism of partial renewal of the composition of the HJC, in order to preserve the institutional memory and continuity of this body (Opinion, para. 50).
[62] The Venice Commission advised that the Draft Law should anticipate possible blockages in case the Government refuses to choose one of the candidates proposed, and clearly indicate whether in this case the term of the outgoing top magistrates is extended, or whether the HJC may function without them, taking the view that the HJC should be able to function in a reduced composition if such blockage occurs (Opinion, para. 56).
[63] The Venice Commission expressed concern over the participation of the Public Prosecutor at the Court of Cassation in the HJC and, more generally, of prosecutors in judicial governance bodies (Opinion, paras 39-41).
[64] The Venice Commission recommended guaranteeing a transparent competition involving a sufficiently large pool of qualified candidates, and a single-track procedure where the HJC would vote for a list of three best candidates, which would then go directly to the Government for the final selection, advising to reconsider the role of the Minister of Justice (Opinion, paras 54-55).
[65] The Venice Commission noted that only the magistrates of a certain rank can be appointed to key positions in the judiciary, which poses 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 (Opinion, para. 57).

While welcoming the fact that, if enacted as presently formulated, the Draft Law would provide that the majority of HJC members be elected by their peers, the ICJ is of the view that the HJC should be representative of the judiciary as a whole, which is not the case given the over-representation of higher rank judges resulting from the election process provided by the Draft Law.[66] The HJC should also be representative of society in general, including by containing safeguards and specific measures and procedures to ensure women be adequately represented in its membership.[67] Moreover, the Draft Law is silent on sectarianism, which favours politicization and undermines transparency.[68]

The Draft Law, as presently formulated, provides that the term of office shall end in the event of death, resignation, retirement or a final disciplinary sanction, with the exception of a warning or reprimand. Moreover, members of the Council cannot be transferred from one judicial center to another during their term of office, nor can their immediate family members. While these provisions, if enacted, would constitute significant progress, it is important that disciplinary sanctions be adopted following a fair disciplinary procedure, as discussed below under section iii-B. In addition, as with other specialized functions occupied by judges, the Draft Law is silent on the reintegration of judges in their previous judicial functions after the end of their HJC term of office, including the conditions of such reintegration in terms of grade and level. As a result of such a silence, their independence may be undermined.

If the Draft Law were enacted in its present formulation, the Secretariat would be supervised full time by the youngest member of the HJC, who would not exercise any other function. However, the Secretariat's staff would be determined by decree by the Council of Ministers upon a proposal of the Minister of Justice, pursuant to the approval of the HJC. The ICJ regrets that the executive would retain a role in the appointment of staff, albeit to a lesser extent.

Recommendations:

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. *Ensure that the Minister of Justice is divested of any substantive role in the selection and appointment of the* ex-officio *HJC members, and clarify that the criteria set in the Draft Law for the selection of judges apply to these positions;*
ii. *Ensure that a greater proportion of more junior judges be represented among the elected members of the HJC through a revision of the election process;*
iii. *Include provisions to ensure that the HJC be representative of the judiciary as a whole and society in general;*
iv. *Provide for effective measures and safeguards to ensure the fair and adequate representation of women in the HJC;*
v. *Ensure that all members of the HJC have the same term of office;*

[66] For further analysis of the proposed composition, see Independence of the Judiciary Coalition: "The Administration and Justice Committee's Bill Fails to Achieve Judicial Independence", 18 January 2022, available at: https://english.legal-agenda.com/independence-of-the-judiciary-coalition-the-administration-and-justice-committees-bill-fails-to-achieve-judicial-independence/ (last consulted on 19 May 2022). See also, the Opinion of the Venice Commission recommending ensuring better representation of judges from the lower-level courts in the HJC (Opinion, paras 46-48) and deploring the absence of any genuinely external members, representing other branches of power, other legal professions, or society as a whole (Opinion, paras 59-63).
[67] See e.g., Report of the Special Rapporteur on the Independence of Judges and Lawyers: note by the Secretariat, 2 May 2018, UN Doc. A/HRC/38/38, para. 110. See also Venice Commission Opinion, para. 49.
[68] See the Venice Commission Opinion on this point, at paras 14-20. The Commission opined that any legislative reform of the judiciary should aim at introducing specific legal mechanism for the implementation of confessional parity that help a change of direction from the continued assiduous application of the confessional principle in practice towards a system of appointments that is essentially based on the merits of candidates, without, at the same time, perturbing social cohesion and inter-communal peace and that a reform which simply entrenches the *status quo* would represent a lost opportunity in this regard.

vi. Entrust the appointment of the HJC's Secretariat staff to the HJC, excluding any role of the executive.

B. Competencies

According to article 5 of Decree-Law No. 150/83, the HJC is entrusted with a wide range of powers related to the careers of judges, including appointments, preparing proposals for individual or collective judicial transfers, judicial discipline, and requesting the Judicial Inspectorate to investigate judges and subsequently to take appropriate measures and decisions. However, in the implementation of all these functions, the Minister of Justice plays a central role, including on issues pertaining to the selection, training and disciplining of judges, giving rise to a real and pervasive interference by the executive. The ICJ considers that the HJC should be exclusively competent, to the exclusion of the Minister of Justice, to manage the careers of judges, including the selection, appointment, promotion, transfer and the disciplining of judges, based on objective criteria that protect the individual independence of judges and the independence of the entire judiciary.

Moreover, the HJC's institutional independence would be enhanced further if, as discussed below under section iii-B, it were granted oversight and authority over the Judicial Inspectorate, which is the institution in charge of supervising the proper functioning of the judiciary and the work of the judges, staff of the registrar and other affiliated persons.[69] Insofar as the HJC manages the careers of judges, and that various aspects of such management are based on the reports of the Judicial Inspectorate, the ICJ considers that Decree-Law No. 150/83 should be amended to end the Minister of Justice's supervision over the Inspectorate and ensure that the HJC be fully empowered to oversee its work and appoint its members. Similarly, the HJC should have authority over the IJS as regards judges' training and selection (see below sections ii-A-*i* and *ii*).

In addition to these powers, the HJC may, in accordance with article 5 of Decree-Law No. 150/83, express opinions on draft laws and regulations related to the judiciary and, in this regard, propose projects and texts that it deems appropriate to the Minister of Justice. It is positive that the HJC may, of its own initiative, report on matters relating to the judiciary and contribute to judicial reform processes, including legislative reform. However, the ICJ considers that the role of the HJC in these matters should be expanded so that all authorities, in particular the Parliament and the Government, be required to consult the HJC and to consider its opinion on all matters relating to the judiciary, including judicial reforms.

The ICJ also considers that, in addition to ensuring the HJC's institutional and administrative independence, for the HJC to be truly independent and able to guarantee judicial independence, it ought to have sufficient financial resources to carry out its mandate and, consequently, be able to develop and manage its own budget and the budget of the judiciary as a whole. With regard to financial independence, the UN Special Rapporteur on the independence of judges and lawyers has stated that a judicial council tasked with overseeing judicial affairs "should manage its own budget", and "have enough human and financial resources to carry out its mandate".[70]

The budgets of the judiciary and of the HJC are a part of the budget of the Ministry of Justice, which is responsible for the judiciary's financial matters in their entirety, and to which both budgets are, therefore, entrusted. The Ministry of Justice sets its budget in accordance with the law, but the HJC does not play a role in the setting of its own budget or that of the judiciary.

[69] Decree-Law No. 150/83, art. 98. The Judicial Inspectorate has the power to inspect the judicial and administrative courts as well as the bodies of the ministry of justice, i.e., the Audit Bureau and its subsidiaries and the central departments.
[70] UN Special Rapporteur on the Independence of Judges and Lawyers, Report on Accountability, 28 April 2014, UN Doc. A/HRC/26/32, para. 126.

The UN Special Rapporteur on the independence of judges and lawyers has consistently urged that the judiciary be involved in the drafting of its own budget.[71] Where judicial councils exist, as in Lebanon, such bodies should "be vested with the role of receiving proposals from the courts, preparing a consolidated draft for the judicial budget and presenting it to the legislature".[72] Moreover, the management and administration of the courts' budget should be entrusted to the judiciary through the independent body responsible for the judiciary where this body exists. According to the Special Rapporteur, this has the effect of reinforcing judicial independence.[73]

The ICJ considers that, to be in line with international standards, the HJC should be directly involved in the preparation of its own budget and the judiciary's budget, and that it should be empowered to manage and administer the allocation of judicial resources. Further, adequate resources for the judiciary must be guaranteed in law.

The Draft Law

If the Draft Law were enacted as currently formulated, the HJC would retain its powers relating to the career and disciplining of judges, although, as will be seen below, the Ministry of Justice would continue to play a role with respect to both judicial careers and disciplining, including through the Judicial Inspectorate and the IJS. Moreover, the HJC would provide opinion on the training programs for trainee judges and on the continuing education programs for judges, but the IJS would remain under the authority of the ministry of justice.

Under the Draft Law in its present formulation, the HJC would also retain the power to issue recommendation to the Minister of Justice on any reform to ensure the proper functioning of the judiciary and its independence, as well as to issue opinions on bills and proposals relating to the judiciary. However, the executive and legislative powers would continue to have no obligation to seek and consider the HJC's opinion on such reforms.

The HJC's budget would remain allocated within the budget of the Ministry of Justice but the HJC would submit a proposal to, and discuss it with the Minister of Justice. It would also provide its opinion on the draft budget for the courts submitted by the Ministry of Justice. These would be positive developments, albeit the HJC should be empowered to manage its own budget and the budget of the judiciary, as already noted.

The HJC would also be responsible for drafting the code of ethics for judges, in collaboration with the Judicial Inspectorate, the Judicial Evaluation Commission (JEC) and the IJS, which would all fall under the authority or influence of the Ministry of Justice. As discussed below under section iii-A, this is an important responsibility as the issuance of a proper, enforceable, code of ethics would be key to judicial accountability.

<u>Recommendations</u>

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. Ensure that the HJC be exclusively competent, to the exclusion of the Minister of Justice, for the management of judicial careers, including judges' selection, appointment,

[71] Report of the Special Rapporteur on the independence of judges and lawyers, 24 March 2009, UN Doc. A/HRC/11/41, para. 39.
[72] *Id*. A number of regional standards also provide that the judiciary should be consulted regarding the preparation of the budget and its implementation. See CoM Recommendation CM/Rec(2010)12, para. 40; African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section A, Principle 4(v).
[73] Report of the Special Rapporteur on the independence of judges and lawyers, 24 March 2009, UN Doc. A/HRC/11/41, para. 42.

promotion, transfer and disciplining, based on objective criteria that protect the individual independence of judges and the independence of the judiciary as a whole;

ii. *Ensure that the HJC be fully empowered to oversee the work of the Judicial Inspectorate, the JEC and the IJS;*

iii. *Ensure that the HJC be empowered to manage its own budget and the budget of the judiciary;*

iv. *Ensure that the legislative and the executive branches of the State must consult the HJC and consider its opinions on all matters relating to the judiciary, including judicial reforms.*

ii. Review of criteria and procedures for managing the career of judges

The requirement of independence must apply not only to the HJC but also to decisions relating to individual judges more generally. International standards require that all aspects of the career of judges, including their training, should be free from any undue or improper influence of the executive or legislative branches.[74]

A. Training, selection and appointment

i. Training

The institution in charge of training judges in Lebanon is the IJS,[75] which itself is a unit of the Ministry of Justice.[76] Moreover, while the members of the IJS Board are all judges, they are all appointed, directly or indirectly, by the Minister of Justice through a Council of Ministers decree, pursuant to the approval of the HJC, including the Chairman and Director.[77] The Board is led by the President of the HJC, and its Vice-President is the Secretary-General of the Ministry of Justice.[78]

Such a set up casts a serious doubt upon the independence of the Board, which, in turn, affects the independence of the IJS as a whole. This is even more concerning when taking into consideration that the Board also plays a role in the selection of judges, as described below.

The ICJ considers that Decree No. 150/83 should be amended to reinforce the independence of the IJS by providing that at least half of the judges who are members of the Board be elected by their peers. The IJS should have full financial and administrative independence: in particular, it should be placed under the direction of the HJC, instead of being under the authority of the executive, and it should have the power to set and administer its own budget.

ii. Criteria for selection and appointment

Lebanon's selection and appointment system does not provide the safeguards necessary to ensure the independence and impartiality of its judiciary. The law does not set clear and transparent criteria for selection and appointment, nor does it limit the criteria to considerations of merit. Candidates for judgeship must go through a complex three-step procedure: acceptance to undergo the examination once a competition has been opened by the HJC; passing the examination and

[74] See in particular Concluding Observations of the Human Rights Committee on the Congo, 25 April 2000, UN Doc. CCPR/C/79/Add.118, para. 14, with particular attention given to the training of judges; CoM Recommendation (2010)12, para. 57; European Charter on the Statute for Judges, para. 2.3, which refers to para. 1.2.
[75] Decree-Law No. 150/83, art. 54.
[76] Decree No. 85-23 of 23 March 1985, art. 3.
[77] Decree-Law No. 150/83, art. 55(1) and (2).
[78] Decree-Law No. 150/83, art. 55(3).

being selected and appointed as a trainee judge within the IJS; and graduation from the IJS and appointment as a tenured judge.[79]

Candidates are subjected to a two-tiered preliminary interview system to be allowed to take the examination to become trainee judges.[80] The interviews do not limit the criteria simply to merit,[81] allowing a wide margin of discretion in the decision. The examination itself also allows for much discretion and little transparency. While there is a written examination, the subject matter of which is determined by the HJC, the oral examination eliminates the possibility of anonymity.[82]

The ICJ is also concerned about the method allowing holders of a doctorate in law to be directly appointed as trainee judges upon the proposal of the Minister of Justice and approval of the HJC.[83] The law is silent on what exact criteria the Minister of Justice might deem sufficient. Not only does this procedure allow direct interference by the Minister of Justice, but it also bypasses the regular selection procedure. The process for selecting judges and prosecutors should "take place through a public competitive selection process, free from political or economic influences or other external interference".[84]

When they have completed their three-year training, the records of trainee judges established by the IJS are sent to the HJC for the latter to make a decision on whether or not to appoint them as tenured judges.[85] At this stage as well, there is no clear criteria to regulate the decision-making process transparently and objectively. The other method of appointment as a tenured judge, which allows for direct appointment of lawyers, employees of the judicial administration or employees in public agencies and institutions who have a law degree and have exercised their functions for at least six years,[86] is also of great concern.

Finally, other than requirements regarding the level or grade of the judge, there are no objective criteria or qualifications set out in law upon which appointment decisions are made. In practice, appointment decisions are generally based on political considerations and sectarian quotas.

The ICJ considers that Lebanese law should set forth criteria that are fully and clearly prescribed, based solely on merit, and exclude any political considerations at all levels of the selection and appointment process. Indeed, the criteria should focus principally on qualifications and training in law, experience, skills and integrity, and ensure that the method of selection safeguards against judicial appointments for improper motives. These criteria should remain objective; therefore, oral examinations should be strictly regulated to avoid the possibility of discretion and partiality. It should also be provided that there shall be no discrimination in the selection of judges on any grounds other than citizenship; therefore, any sectarian consideration should be eliminated.

iii. Procedures for selection and appointment

Moreover, the legal framework regulating the procedures for selection and appointment of judges is deeply flawed, particularly in light of the extent of executive interference. For one, as explained above, both the HJC and IJS are constituted in a manner that does not respect the principle of the separation of powers and allows for a great degree of executive interference. This is problematic in light of the important role the HJC plays in the selection process of judges, *inter alia*, organizing a

[79] For a detailed presentation of the procedure, see ICJ, The Career of Judges in Lebanon in Light of International Standards, *op. cit.,* at pp. 4-10.
[80] Decree No. 150/83, art. 62.
[81] E.g., in the course of the first interview, the candidate is also subjected to questioning about his or her "cultural background".
[82] Decree-Law No. 150/83, art. 60.
[83] Decree-Law No. 150/83, art. 68.
[84] Report of the UN Special Rapporteur on the independence of judges and lawyers, 13 August 2012, UN Doc. A/67/305, para. 113(j).
[85] Decree-Law No. 150/83, art. 70.
[86] Decree-Law No. 150/83, art. 77.

competitive examination when there is a need to recruit new judges, examining the applications, conducting preliminary interviews, and selecting the candidates who will be allowed to take the competitive examination. Most importantly, the HJC makes the decision as to whether or not a trainee judge is transferred to the tenured judiciary.

Notwithstanding this issue, the ICJ is of the view that the reasoning behind any decision concerning the selection and appointment of judges should be made available to applicants upon their request. As is made clear by the Council of Europe, "procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made".[87] These procedures are not made available to Lebanese applicants for selection: the decision that a trainee judge is deemed ineligible terminates their service, with no subsequent administrative order.

Moreover, the executive plays a central role throughout the selection and appointment process in various other ways. For example, the Minister of Justice evaluates the need to recruit new judges, including the required number, and has even the power of directly proposing certain candidates as tenured judges (through a decree of the Council of Ministers and pursuant to the approval of the HJC).[88]

Most importantly, while the HJC is in charge of preparing the list of judicial appointments, this document is only enforceable once approved by the Minister of Justice.[89] Despite the fact that, in case of disagreement, a majority of seven members of the HJC makes the final decision, the scope of this prerogative is limited in practice, as it is difficult to gather the majority of seven members against the Minister of Justice who is in charge of appointing eight of the 10 HJC members. Moreover, as illustrated by the recent blocking – still ongoing at the time of writing - of the appointment of Court of Cassation judges by the Minister of Finance, since the decree publishing the list of appointments must be signed by the President, Prime Minister and Minister of Justice, as well as the Minister of Finance when the decree involves additional funds, this allows the executive to, at the very least, delay the publication.

Where the executive or legislative branch formally appoints judges following their selection by an independent body, the UN Special Rapporteur on the independence of judges and lawyers explains that the recommendations made by the independent body should only be rejected in exceptional cases and on the basis of well-established criteria that have been made public in advance, and written substantiation should be made accessible to the public, so as to enhance transparency and accountability of selection and appointment.[90]

Decree No. 150/83 should therefore be amended to ensure that the HJC, once reformed, be responsible for the entire process of selecting trainee judges, based on specific and objective criteria. Both the criteria and method of selection must safeguard against judicial appointments for improper motives, and must be substantially prescribed in law and not merely delegated to subsidiary legislation, including decrees, promulgated by executive officials.

The Draft Law

The Draft Law, if adopted as currently formulated, would not fundamentally change the situation. The IJS still could not be deemed independent. It would remain a unit of the Ministry of Justice

[87] Recommendation CM/Rec(2010)12, art. 48.
[88] Decree-Law No. 150/83, art. 77.
[89] Decree-Law No. 150/83, art. 5(b).
[90] Report of the UN Special Rapporteur on the independence of judges and lawyers, 24 March 2009, UN Doc. A/HRC/11/41, para. 33.

without any legal personality. The Minister of Justice would nominate all its directors, and the members of its Board, after the HJC's or, as appropriate, the State Council's approval.

The selection process would remain flawed, with an additional requirement of a preparatory year before admission to participate in the examination to enter the IJS, in which candidates are to be enrolled following an interview, based on no objective criteria, with a committee appointed by the IJS Board, as well as a written examination reviewed by a committee appointed by the HJC. The IJS would be the one to determine who succeeded the preparatory year based on grades and behaviour. Admission to participate in the written examination to enter the IJS would be further subject to an interview by the HJC, again with no objective criteria. The written examination would be reviewed by a committee appointed by the HJC. Results would be published on the Ministry of Justice's website. At the end of each year at the IJS, the HJC would have the power to declare trainee judges ineligible by reasoned decision upon proposal of the IJS Board. Such a decision would have to be formalized by a Council of Ministers decree, which would be subject to appeal before the State Council. When there is no vacant office, the trainee judge would be attached to the Ministry of Justice until issuance of his appointment.

Lawyers, judicial assistants and other public employees whose position requires a law degree with 10 years of experience could be appointed, "when necessary", as tenured judges by a Council of Ministers decree upon proposal of the Minister of Justice, pursuant to the HJC approval, although they would be required to pass a competitive examination held by the IJS. They would have to be attached to the IJS for six months, following which they could be declared ineligible by the HJC, based on a report prepared by the IJS, without any possibility of review.

The Minister of Justice would be the one to determine the number of new judges to be recruited, after consulting the HJC and based on clear criteria. Although the executive would retain influence through the authority it has over the IJS and its role in appointing some HJC members, it would no longer have the possibility of directly recruiting trainee or tenured judges.

While the personnel charts prepared by the HJC in the context of annual rotations would be considered effective if the Government fails to issue a decree within one month after the draft reaches the bureau of the Ministry of Justice, this would remain subject to the HJC reaching a seven-member majority to overrule the disagreement with the latter, with a new requirement that each judicial center be voted on individually, which would be difficult to achieve, even with the new composition of the HJC under the Draft Law.[91]

The Draft Law, if enacted in its current formulation, would also introduce objective criteria for the appointment of judges (see below on promotions). It includes a provision prohibiting discrimination of any kind in appointments, in particular discrimination on the grounds of race, sex, religion or doctrine.

Recommendations:

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. Reinforce the independence of the IJS, including by:
   a) Placing it under the oversight of the HJC rather than the Ministry of Justice's;
   b) Ensuring that the IJS Board members be judges selected and appointed based on

[91] The Venice Commission pointed out that it was unclear whether such a decision of the HJC will have to be approved by the Government, in particular 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, and that the question of constitutionality of the proposed arrangement may arise (Opinion, para. 23). It further noted that the Minister retains a very important delaying power, and that it cannot be altogether excluded that the Minister has enough influence within the HJC, as composed, to prevent a vote overcoming his or her veto. It therefore recommended to lower the majority required to overcome the Minister's veto (Opinion, para. 82).

objective criteria and through transparent procedures that protect against undue or improper influence and that guarantee the institutional and functional independence of the IJS;

c) *Granting the IJS full financial and administrative independence, including the power to set and administer its own budget.*

ii. *Enhance the IJS mandate to develop and implement appropriate initial and continuing judicial training programs, including human rights programs, consistent with the requirements of open-mindedness, competence, integrity and impartiality;*

iii. *Ensure that the Minister of Justice be divested of any role in the selection and the appointment of judges;*

iv. *Ensure that until they are appointed to a tribunal, tenured judges be attached to the HJC, to the exclusion of the Ministry of Justice;*

v. *Ensure that the HJC be exclusively competent to decide on all issues relating to the selection, appointment and other aspects of the career of judges;*

vi. *Ensure that the process for the selection of trainee judges take place through a public, transparent and competitive selection process, free from political influence or other external interference, including by either eliminating the preliminary interviews system or replacing it with a process involving standardized and objective questioning by judicial officers who are not at risk of influence by the executive;*

vii. *Ensure that the reasons for any decision concerning the selection and appointment of judges be made available to applicants upon request, and that the decision be subject to an independent review;*

viii. *Ensure that the general anti-discrimination clause cover at least all the grounds of prohibited discrimination explicitly featured in the ICCPR;*

ix. *Take effective measures to ensure that people belonging to minorities, including religious minorities, enjoy equal access to the judiciary, including by ensuring their adequate representation within its membership;*

x. *Ensure that the selection and the appointment of judges, including in senior positions, is not uniquely and exclusively based on whether the concerned judges belong to a specific religious group but rather on objective criteria;*

xi. *Provide for specific and concrete measures to ensure women's full and equal representation in the judiciary, including senior judicial positions.*

B. Evaluation and promotion

The career of judges in Lebanon is organized in accordance with a ranking system. In accordance with the Law on civil servants,[92] trainee judges who succeed in their training and continue on to perform their duties as tenured judges are classified in the first grade, then automatically upgraded to the next grade every two years, until retirement at the age of 68.[93] To this day, Lebanese law does not further regulate the evaluation or assessment of judges, nor does it prescribe a system of promotion.

The ICJ considers that it is of crucial importance, in line with international standards,[94] that the Lebanese judiciary, in coordination with the HJC, establish a clear, transparent and independent system of assessment of the work of its judges, based on a set of objective criteria including integrity, independence, and competence, which should be prescribed in detail and made available to all members of the judiciary. Such a system should include a fair procedure for judges to be able to challenge their appraisal.

[92] Decree-Law No. 112 of 12 June 1959, art. 32.
[93] Decree-Law No. 150/83, art. 71. The retirement age for judges is provided for in article 1 of Decree No. 2102 of 25 June 1979.
[94] Draft Universal Declaration on the Independence of Justice (the Singhvi Declaration), para. 14; CoM Recommendation CM/Rec(2010)12, para. 58.

With regard to promotions, judges are appointed to higher positions through the same process as the one governing their initial appointment – through a Council of Ministers decree upon proposal of the Minister of Justice and pursuant to the approval of the HJC – if they have attained the required grade.[95]

The ICJ recommends that a system of promotions for judges be established in Lebanon, in line with international standards, according to which judges are promoted according to clear and transparent criteria and objective factors based on merit. The current system of rankings, while affording some protection to judges on the basis of experience, is not sufficient. As the Special Rapporteur on the independence of judges and lawyers made clear, "while adequate professional experience is an essential prerequisite for promotion, it should not be the only factor taken into account in such decisions. Promotion, like with initial selection and appointment, should be merit-based, having regard to qualifications, integrity, ability and efficiency".[96] To comply with international standards,[97] this system should be put under the competence of the HJC, as the judicial body in charge of the decisions related to the career of judges.

The Draft Law

Under the Draft Law, if enacted as currently formulated, all judges would be subject to periodic evaluation every two years through the Judicial Evaluation Commission (JEC). Each judge would have an evaluation file, which they would have a right to consult. The JEC would operate under the aegis of the HJC. It would comprise a president, chosen from among the high-level judges, and eight members (seven high-level judges and one judge from the State Council). The members would be appointed by decree on the proposal of the Minister of Justice, after consulting the HJC and the State Council, for a three-year term renewable once. The HJC would propose three names for the presidency of the JEC, but the Minister of Justice would have the latitude to add other names, subject to the HJC's approval. As with the three *ex-officio* members of the HJC, it is unclear which criteria would guide the selection of the president.

Under the Draft Law as presently formulated, the JEC would carry out regular visits to evaluate the work in the courts and issue recommendations to improve the efficiency of justice, bringing any shortcomings to the attention of the relevant authorities. A scientific committee would be responsible for the evaluation of the caseload and the elaboration of the annual plan for the distribution of cases to magistrates.[98]

The Draft Law, in its current formulation, sets out the judicial evaluation process, based on a performance evaluation card. The 13 evaluation criteria, assessed by the JEC, would include independence, integrity, neutrality, personality ("composure, appearance and demeanour"), "moral courage", productivity (volume and quality), attendance, efficiency, administrative skills, mediation abilities, specialization, communication skills, scientific and research activities and publications, with score points attached to each.

While welcoming the introduction of a transparent assessment system, the ICJ regrets that the executive would retain a significant role in the appointment process of the JEC, thereby undermining its independence, as underscored by the Venice Commission.[99] Moreover, as also

[95] Decree-Law No. 150/83, art. 80.
[96] Report of the UN Special Rapporteur on the independence of judges and lawyers, 24 March 2009, UN Doc. A/HRC/11/41, para. 72.
[97] See European Charter on the Statute of Judges, sections 4.1 and 1.3; Report of the UN Special Rapporteur on the independence of judges and lawyers, 24 March 2009, UN Doc. A/HRC/11/41, para. 71; UN Human Rights Committee, Concluding observations on Azerbaijan, 12 November 2001, UN Doc. CCPR/CO/73/AZE, para. 14.
[98] The Venice Commission pointed out the importance of having clear and foreseeable principles of distribution of incoming cases to ensure transparent and fair distribution of cases and exclude arbitrariness (Opinion, para. 103).
[99] After noting positively that the JEC is to work under the supervision of the HJC, the Venice Commission reiterated, with regard to the appointment of the President, the concerns expressed over the mode of

pointed out by the Venice Commission,[100] the evaluation criteria should be revised so as to be more objective and clearer, particularly those with respect to personality.

With regard to promotions, these would be regulated in the context of the annual rotations decided by the HJC, as described above, based on requirements specific to each position as well as on set criteria, which include ethics (including "morality"), scientific, judicial and personal competence, productivity, seniority, and attendance,[101] and taking into account the judicial evaluation process.[102] While the ICJ considers that the introduction of merit-based promotion system would constitute a positive development, the organization shares the concern expressed by the Venice Commission with regard to such a system's independence and objectivity.

Recommendations:

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. *Ensure that the executive play no substantive role in the appointment of the JEC members, including its president;*
ii. *Ensure that the selection of the JEC members, including its president, be based on objective and transparent criteria;*
iii. *Ensure that judicial evaluation and promotion criteria be objective, clear and transparent.*

C. Removal, transfers and secondments

Judges in Lebanon are appointed until the retirement age of 68 years. Article 44 of Decree No. 150/83 provides that judges may only be transferred or removed in accordance with the law. The combination of these provisions appears to guarantee security of tenure. However, other provisions of Decree No. 150/83 actually undermine it.

In particular, article 95 of Decree No. 150/83 grants the HJC the power to remove a judge who is purportedly deemed not qualified to remain in the judiciary from their office by a reasoned decision approved by a majority of eight of its members, upon the proposal of the Judicial Inspectorate and after listening to the judge in question, but without resort to any disciplinary proceedings. The law does not permit judges to appeal such decisions.

This provision runs counter to Lebanon's obligations under international law, including under article 14 of the ICCPPR. The Human Rights Committee has stated that, "judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law".[103]

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appointment of HJC's *ex officio* members and, with regard to the appointment of members, recommended stipulating that the opinion of the HJC is binding and the Government or the Minister cannot bypass it by appointing other members (Opinion, paras 77-78). It added that the law should indicate what happens if the executive refuses to appoint candidates selected by the HJC, stating that it would not object against a suspensive veto of the executive regarding the appointment of the JEC members, but that the final word should belong to the HJC (Opinion, para. 79).

[100] The Venice Commission underlined that this makes the evaluation process more objective and transparent (Opinion, para. 84) but called for the revision of the criteria, in particular unclear criteria such as personality and moral courage (Opinion, para. 89).

[101] The Venice Commission criticized these criteria, in particular the risk of an overly broad and subjective interpretation of the notion of morality, which may lead to unjustified interference with the judge's privacy and lifestyle choices (Opinion, para. 89).

[102] The Venice Commission pointed out the lack of clarity of the relationship between the provisions on the appointments, promotions and transfers decided by the HJC based on these five criteria, and the evaluation system by the JEC based on the thirteen criteria mentioned above: according to the Commission, if the score given by the JEC plays a decisive role, the JEC, and not the HJC, becomes the central body in the mechanism of promotions and transfers, which makes it even more important to ensure that the JEC is not under the influence of the executive (Opinion, paras 83-87). The Commission added that including in the law a duty of the HJC to give reasons for the decisions on transfers and promotions would increase the transparency and thus fairness of the process (Opinion, para. 88).

[103] General Comment No. 32, para. 20. See also UN Basic Principles, Principles 18-20.

The Lebanese authorities should therefore repeal article 95 of Decree-Law No. 150/83 and ensure that judges may only be removed from office for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and following a transparent and fair procedure that protects the concerned judges against arbitrary removal and that guarantees their right to a fair hearing.

The principle of irremovability also extends to the appointment, transfer, assignment or secondment of a judge to a different office or location without their consent. In this regard, international standards recommend that assignment and transfer decisions be made based on objective criteria[104] by judicial authorities, and that the consent of the judge in question be sought.[105]

The HJC is in charge of preparing proposals for individual or collective judicial transfers, assignments and secondments, and of submitting them to the Minister of Justice for approval.[106] The Minister of Justice may decide on the necessity of assignments, following the approval of the HJC, in cases where judges of the courts of appeal are unable to perform their duties and the President of the Court of Appeal appoints a subsidiary judge.[107] A judge may also be "seconded",[108] with their consent, to all different public administrations or institutions, by a Council of Ministers decree adopted upon proposal of the Minister of Justice and of the minister in charge of the department in question, pursuant to the approval of the HJC. The judge who is seconded receives both their salary as well as the remuneration allocated to the function to which they are assigned.[109]

The power to second judges to non-judicial functions may be used to undermine judicial independence, in particular when seconded positions offer potentially lucrative financial and non-financial benefits. In any event, the HJC should make secondment decisions based on objective criteria and through transparent procedures. Moreover, the law should detail the specific situations in which a judge may be transferred or reassigned. To ensure consistency with international standards, the law should specify that the HJC is competent to review and, where necessary, revoke the decision to delegate the judge to another jurisdiction; that the consent of the judge to a transfer or reassignment, which should not be unreasonably withheld, should in principle be sought in all cases; and that the entire process protects against arbitrary transfers and guarantees the judge's individual independence.

The Draft Law

The Draft Law, if enacted as currently formulated, would still empower the HJC to remove judges outside disciplinary or criminal proceedings, through their disqualification (declaration of incompetence), by a seven-member majority, although the possibility of an appeal before the plenary assembly of the Court of Cassation would be introduced. The perpetuation of such a direct threat against judicial independence in breach of international law is of serious concern. It undermines the main objective of the Draft Law, namely, to strengthen the independence of the judiciary.[110]

[104] Report of the UN Special Rapporteur on the independence of judges and lawyers, 13 August 2012, UN Doc. A/67/305, para. 53.
[105] Singhvi Declaration, para. 15.
[106] Decree-Law No. 150/83, art. 5(a).
[107] Decree-Law No. 150/83, art. 20.
[108] Decree-Law No. 150/83, art. 48. The Arabic text of the article says that the judge may be "moved", but the context of the article suggests that it provides for possibilities of secondment.
[109] Decree-Law No. 150/83, art. 49.
[110] The Venice Commission recommended stipulating in the law that the President of the Judicial Inspectorate should withdraw from consideration of such cases in order to avoid a conflict of interests (Opinion, para. 73). It advised that the law should describe the criteria for declaring the judge "incompetent", or at least provide some indications of what sort of competencies or performances are evaluated in this context. It further stressed that *honest* judicial errors or occasional incorrect interpretation of law or facts should not be treated as

The Draft Law as presently formulated further states that a judge may not be transferred without their consent, even in the case of promotion, except in the case of a disciplinary sanction other than a warning or reprimand and except in the framework of the annual rotations prepared by the HJC. Such rotations would be established following interviews of judges who apply (expression of three choices with reasons) and who meet the specific requirements set by the Draft Law for each position (grade, having occupied certain functions for a minimum number of years) as well as general requirements (completion of term, having served in four different governorates before being assigned to the same one),[111] based on the above-mentioned criteria (see above under promotion). The list of applicants for each post would be accessible to any judge.

While reiterating its reservation with regard to promotion criteria as indicated above, the ICJ considers that the transparency and objective criteria introduced would be an improvement. Nonetheless, the HJC's lack of independence and the Minister of Justice's role in its decisions, including the annual rotation, undermine the process, especially since the Draft Law, if enacted in its current formulation, would grant the HJC the power not to follow these criteria and requirements in exceptional cases, e.g., by reasoning that an insufficient number of judges fulfill the conditions for appointment to some offices. Moreover, as pointed out by the Venice Commission, there should be a legal avenue for appealing decisions that are manifestly arbitrary or affected by serious procedural flaws.[112]

Moreover, the Draft Law, if enacted in its current formulation, would create the category of "judges on mission", corresponding to five per cent of judicial posts. These judges would not occupy a specific judicial post and the HJC would be able to assign them to any task corresponding to their qualifications and diplomas. The existence of this category is intended to fill all judicial vacancies. As pointed out by the Legal Agenda, this would be a source of concern as these "transferable" judges would be more vulnerable to arbitrary, undue or unwarranted political pressure and their independence may therefore be more fragile.[113]

Finally, the ICJ regrets that, if adopted in its current form, the Draft Law would perpetuate the possibility of secondment to non-judicial positions within the public administration, including in the executive, with financial benefits.[114] As noted above, the power to second judges to non-judicial functions could be used to undermine judicial independence, in particular when seconded positions offer potentially lucrative financial and non-financial benefits, and should at least be subjected to objective criteria and transparent procedures.

Recommendations:

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. Remove the HJC's power to dismiss judges through disqualification or declaration of incompetence outside any disciplinary proceedings, and ensure that judges may only be

"incompetence" and that liability for incompetence should be governed by the principle of proportionality, i.e. not necessarily entailing dismissal (Opinion, paras 98-99).

[111] With the exception of the presidents of the chambers of the Court of Cassation and the first presidents of the courts of appeal, a judge may only hold office for a fixed period, as specified for each type of judicial office. A judge can only be appointed in the same governorate after having been appointed in four different governorates.

[112] The Venice Commission underscored that it was unclear whether the possibility to appeal "individual and non-organisation decisions" of the HJC before the plenary assembly of the Court of Cassation was available in this case or whether the possibility to challenge decrees and administrative decisions before the State Council would apply (Opinion, para. 92 and fn 61).

[113] See Independence of the Judiciary Coalition: "The Administration and Justice Committee's Bill Fails to Achieve Judicial Independence", 18 January 2022, available at: https://english.legal-agenda.com/independence-of-the-judiciary-coalition-the-administration-and-justice-committees-bill-fails-to-achieve-judicial-independence/ (last consulted on 19 May 2022).

[114] The Venice Commission recommended to formulate conditions for such secondments, fixing their duration, frequency, eligibility for, benefits associated with the secondments to avoid that they negatively affect the perception of independence of the judiciary (Opinion, para. 91).

removed from office for reasons of incapacity or conduct making them unfit to discharge their duties, pursuant to a transparent and fair procedure that protects the concerned judge against arbitrary removal, and that guarantees their right to a fair hearing;

ii. *Remove any substantive role of the Minister of Justice or of any other member of the executive in the appointment, transfer and secondment of judges;*

iii. *Ensure that the consent of the concerned judge, which they should not withhold unreasonably, be sought in appointment, transfer and secondment decisions, and make it possible to seek judicial review of such decisions;*

iv. *Ensure that if the secondment of judges to non-judicial functions continues, such decisions be taken by the HJC based on objective criteria and through fair and transparent procedures that protect against arbitrary, undue or unwarranted interferences in judicial matters.*

iii. Review of the disciplinary system

Judicial accountability is inherent to the rule of law and is essential to an efficient judiciary.[115] Judicial accountability mechanisms, however, must not operate in a way that would infringe the independence of the judiciary. In order to prevent abuse of power and improper influence over judges individually and the judiciary as a whole, "a clear set of standards must be established", "clear mechanisms and procedures established by law, and clear rules on the authority of the supervising parties".[116] To that end, and to ensure a proper balance between independence and accountability, judges should act in accordance with established rules of ethics and conduct regulating the duties and responsibilities inherent to their functions. Accountability mechanisms must function independently so as to prevent any arbitrary, undue or unwarranted interferences which may affect the objectivity, transparency and impartiality of the process.

In light of these principles, this section analyzes the current legal framework and the Draft Law in its current formulation with respect to the rules of judicial ethics and disciplinary infractions **(A)** and the disciplinary procedures and mechanisms **(B)**. As the Draft Law only addresses judges' disciplinary accountability, other forms of accountability, i.e. criminal and civil liability that are provided for in other legislative texts, are not addressed in this section.[117]

A. Judicial ethics and disciplinary infractions

International standards recommend that ethical standards for judges in the discharge of their professional duties be set down in law or codes of conduct.[118] Such codes must be sufficiently detailed to ensure that judges have notice of what conduct is prohibited, and to prevent arbitrary interpretation. Standards of ethics may be non-binding in nature and serve as guidance for judges to follow. However, disciplinary proceedings and sanctions, such as suspension or removal, "shall be determined in accordance with established standards of judicial conduct".[119] Grounds for and decisions about judicial discipline, including sanctions, must be based on clearly established ethical standards.[120]

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[115] Report of the Special Rapporteur on the independence of judges and lawyers (2014), UN Doc. A/HRC/26/32, para. 19.
[116] Report of the Special Rapporteur on the independence of judges and lawyers (2014), UN Doc. A/HRC/26/32, para. 48.
[117] For an analysis of these forms of accountability, see ICJ, Judicial Accountability in Lebanon: International Standards on the Ethics and Discipline of Judges, *op. cit.*, pp. 18-21.
[118] Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), para. 27; Council of Europe Committee of Ministers Recommendation CM/Rec(2010)12, adopted 17 November 2010 ("CoM Recommendation CM/Rec(2010)12"), para. 73; International Bar Association Minimum Standards of Judicial Conduct, para. 29(b).
[119] UN Basic Principles, Principle 19.
[120] UN Basic Principles, Principle 19. See also Consultative Council of European Judges, Magna Carta of Judges (Fundamental Principles), para. 19.

Under article 83 of Decree-Law No. 150/83, "any breach of professional duty, honour or dignity or courtesy" should be sanctioned through disciplinary measures. Such breaches include unjustified absence, delay in the adjudication of pending cases, unjustified discrimination between the parties and disclosure of deliberations (that is, confidentiality breaches). The language of article 83 suggests that this brief list of breaches is not exhaustive.

Article 89 provides that disciplinary sanctions include warnings, reprimands, delay in promotion for no more than two years, downgrading, suspension for no longer than one year, dismissal, or removal from office and deprivation of compensation or retirement pension. These sanctions are not attached to any particular disciplinary breaches, but appear among those available at the discretion of the disciplinary decision-maker, i.e., the Disciplinary Council.

Moreover, in 2005, the Minister of Justice put forward the "Basic Principles of Judicial Ethics" (Code of Judicial Ethics), which were developed by a committee composed of the Presidents of the HJC, State Council (*Shura* Council) and Judicial Inspectorate, and of the First Honorary President of the Court of Cassation.[121] This Code of Judicial Ethics contains eight principles of ethics for judges: independence; impartiality; integrity; the obligation of restraint; moral courage; modesty; honesty and dignity; and competence and diligence. The Code develops these ethical principles in broad terms to offer some guidance. The Code of Judicial Ethics has been made available to the judiciary following ratification by the Ministry of Justice, but has not been enacted into law. Therefore, it appears to be intended to be advisory in nature.

The ICJ welcomes the fact that a Code of Judicial Ethics was developed by judges, albeit by a very select group of judges whose appointment, as mentioned above, involved a high degree of executive interference. Nonetheless, the ICJ also welcomes that the Code itself makes reference to the Bangalore Principles of Judicial Conduct,[122] albeit again with an insistence on "Lebanon's own experience and unique culture, as well as the needs of Lebanese society and the judicial reality".[123] However, the legislative framework surrounding judiciary's ethical obligations, conduct and discipline is inconsistent with international standards in several ways.

The ICJ considers that the description of what constitutes a disciplinary infraction, as formulated in article 83 of Decree-Law No. 150/83, is too vague and overbroad to truly give reasonable notice of what conduct is prohibited for judges. Given that disciplinary decisions are not published or otherwise made available to all judges in Lebanon (see section iii-B below), they cannot be a source of legal interpretations of article 83 based on the doctrine of precedent. Moreover, article 89 does not satisfy the requirement that sanctions be proportionate to the misconduct committed.[124]

The ICJ considers that, in view of the absence of truly enforceable, clear and detailed principles of judicial conduct in Lebanon, a code should be elaborated and incorporated into law, in order to increase legal certainty and public confidence in the Lebanese judiciary. To satisfy international standards of legality (including precision and predictability), transparency, fair trial and judicial independence, the status and role of the Code of Judicial Ethics in disciplinary proceedings must be clearly and unequivocally set out in Lebanese law.

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[121] An unofficial English translation of the Code can be found here: http://www.deontologie-judiciaire.umontreal.ca/fr/magistrature/documents/LIBAN-JudicialCodeOfEthicsENG.pdf.

[122] The Bangalore Principles are the primary source for standards of judicial conduct at the international level : they were developed by the Judicial Integrity Group, a group of Chief Justices and Superior Court Judges from around the world, under the auspices of the UN. See Commission on Human Rights Resolution 2003/43, UN Doc. E/CN.4/2003/L.11/Add.4; UN Economic and Social Council (ECOSOC), Strengthening Basic Principles of Judicial Conduct, UN Doc. E/RES/2006/23. For drafting history see UNODC, Commentary on the Bangalore Principles of Judicial Conduct (September 2007).

[123] Code of Judicial Ethics, Introduction, para. 7.

[124] ICJ, Practitioners Guide No. 13, pp. 8-14, 26.

If the Code of Judicial Ethics is to be applied in the context of disciplinary proceedings as, in effect, a further codification of legal grounds for sanctions, the ICJ recommends that it be developed to include clear and specific disciplinary offences, defined in a way that will allow judges to know from the wording of the relevant legal provisions which acts and/or omissions would make them disciplinarily liable, and the precise sanctions that may be incurred for such conduct. In particular, the code must explicitly provide that the reasons for suspension or removal from office, prior to the expiration of a judge's term, must be restricted to reasons of incapacity or behaviour that renders the judge unfit to discharge their duties.[125] Furthermore, the Code should be developed either by the judiciary itself or in close consultation with the judiciary.[126] Finally, the Code of Judicial Ethics, once amended and completed in line with international standards, should constitute the only basis for disciplinary action against judges.

While the Code does incorporate a series of ethical principles that are consistent with the Bangalore Principles, the vagueness of many of its provisions would be cause for concern if disciplinary proceedings were brought under them, as these provisions could be either deliberately abused or given an overly broad interpretation, undermining judges' independence and human rights.[127] Moreover, the ICJ observes that unlike the Bangalore Principles[128] and the UN Basic Principles,[129] the Code of Judicial Ethics does not affirm judges' right to freedom of association.[130]

Draft Law

As regards the description of what constitutes a disciplinary infraction, the Draft Law, in its current formulation, does not improve the terms of article 83 of Decree-Law No. 150/83, and remains too vague and overbroad.[131] The terms of article 89 on applicable sanctions have also been kept identical in the Draft Law, which leaves entire discretion to the decision-maker, including with respect to dismissal or suspension, in violation of international standards.[132]

The Draft Law, as presently formulated, enshrines the rights of judges to freedom of expression and association, including to join or form professional associations to represent their interests. However, it subjects these rights to overly broad conditions, indicating that they should not be exercised if in conflict with the HJC's powers or ethical principles.[133] Moreover, the Draft Law does not specify whether such conflict could result in disciplinary sanctions.

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[125] UN Basic Principles, Principle 18. See also, General Comment No. 32, para. 20, where it is specified that judges may be dismissed only on serious grounds of misconduct or incompetence.
[126] CoM Recommendation CM/Rec(2010)12, para. 74.
[127] For examples, see ICJ, Judicial Accountability in Lebanon: International Standards on the Ethics and Discipline of Judges, *op. cit.*, at p. 7.
[128] Bangalore Principles, para. 4.13: "A judge may form or join associations of judges or participate in other organisations representing the interests of judges". The commentary to the Bangalore Principles makes clear that such language includes the right to join or form a trade union or other association of that nature: see United Nations Office on Drugs and Crime (UNODC), Commentary on the Bangalore Principles of Judicial Conduct (2007), regarding Principle 4.13, p. 116. The Commentary also states, "Given the public and constitutional character of the judge's service, however, restrictions may be placed on the right to strike."
[129] UN Basic Principles, Principles 8 and 9.
[130] For more details on the failure of Lebanon to guarantee the right of judges to freedom of association and a critical analysis of the absolute prohibition on judges to exercise their right to strike, which runs counter to international standards, see ICJ, Judicial Accountability in Lebanon: International Standards on the Ethics and Discipline of Judges, *op. cit.*, at pp. 9-11.
[131] The Venice Commission also criticized the overly broad formulation of the disciplinary violations, and warned against references to morality in this context (Opinion, paras 94-95).
[132] In this regard, the Venice Commission recommended including in the law an explicit reference to the principle of proportionality in the Law, which should guide not only the choice of the penalty but also the very finding that a disciplinary breach has been committed (Opinion, para. 97).
[133] In this regard, the Venice Commission advised to clarify the following distinction in the law: "It is natural that associations of judges cannot exercise *powers* which are given by the law to the [HJC] 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 [HJC], or which are governed by the code of ethics, should not render illegal the operation of this association (Opinion, para. 102).

As noted above, the Draft Law in its present form provides that, in collaboration with the Judicial Inspectorate, the JEC and the IJS's Board of Directors, the HJC shall draft the code of ethics for judges, to be adopted by a two-third majority of all its members. This code would also include a document of general principles regulating the communication of judicial authorities with the mass media. According to the Draft Law, the HJC shall forward the code to the Minister of Justice, who shall propose it to the Council of Ministers to prepare a draft law in this regard, and such law shall then be referred to the House of Representatives, within a period of six months from the date of its referral to the Minister of Justice.[134]

The ICJ considers that this would be a positive development provided that the code of ethics be clear and detailed enough.[135] However, as set out above, even under the terms of Draft Law as currently formulated, the Judicial Inspectorate, the IJS, the JEC and the HJC would neither be independent nor representative of the judiciary as a whole. It would thus be important that the judiciary be closely consulted in the elaboration of the code.

Recommendations

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. Ensure that the law clearly and precisely define the forms of misconduct that may make a judge disciplinarily liable and, in this regard:
   a) Ensure that all disciplinary offences be clearly and precisely defined within the law so that judges can know from the wording of the relevant legal provisions what conduct may make them disciplinarily liable;
   b) Ensure that the scope of grounds for disciplinary action be not overbroad as to be open to abuse or to arbitrary, undue or unwarranted interference with the independence of individual judges;
   c) Ensure that disciplinary sanctions be clearly defined, and that they be proportionate to the character and gravity of the disciplinary offence committed;
   d) Specify that suspension or removal from office be a sanction that may be imposed only for conduct that renders the judge concerned unfit to discharge their duties;
   e) Ensure that the law do not authorize disciplinary proceedings solely on the basis of the legitimate exercise of the rights to freedom of expression and association;
   f) Ensure that any limitation to the legitimate exercise by judges of their rights to freedom of expression, association and peaceful assembly be in accordance with international law and standards, including by being lawful, proportionate and necessary in a democratic society;
   g) Ensure that the code of ethics for judges be elaborated in close consultation and with a diverse representation of the judiciary, and that, prior to its finalization, a draft of the said code be published for comments from stakeholders before being finalized and passed into law; and
   h) Ensure that if the code of ethics for judges is adopted, its status and role in disciplinary proceedings, if any, be clearly explained.

B. Disciplinary proceedings and mechanisms

In Lebanon, disciplinary proceedings generally arise from the investigations of the Judicial Inspectorate, which is the institution in charge of supervising the proper functioning of the

[134] The Venice Commission underscored that it wasn't clear whether the Government or later Parliament may change the content of the code drafted by the SCM or may only endorse it (Opinion, para. 96).
[135] The Venice Commission recommended that the grounds for disciplinary liability and in particular the grounds for the removal of a judge be formulated in the legislation, adding that "any sub-legislative act may only develop and explain the statutory provisions within the limits set out in the legislation" (Opinion, para. 96).

judiciary and the work of judges and judicial personnel.[136] Decree-Law No. 150/83 establishes the Judicial Inspectorate, which works directly under the supervision of the Ministry of Justice.[137] The Judicial Inspectorate is composed of one president, four inspectors general, and six inspectors, all appointed by a Council of Ministers decree upon proposal of the Minister of Justice.[138]

The Judicial Inspectorate Council (JIC), composed of the president and the four inspectors general, is the body that decides whether to refer a case to the Disciplinary Council (DC) after investigation. At the beginning of each judicial year, the JIC is to put forward an annual inspection program and present it to the Minister of Justice.[139] The President of the JIC must promptly investigate the complaints received either directly or through the Minister of Justice, albeit it may decide not to pursue a complaint received directly if it is deemed not serious.[140]

The DC is exclusively composed of judges – a President of one of the Chambers of the Court of Cassation and two Chamber Presidents from the Court of Appeal – who are all appointed by the President of the HJC at the beginning of each judicial year.[141] The President of the Judicial Inspectorate serves as State Commissioner (i.e. effectively, as Prosecutor) before the Council.

The DC undertakes disciplinary proceedings following the referral of cases from the JIC.[142] The JIC may propose to the Minister of Justice to suspend the judge referred to the DC.[143] Upon referral, the President of the DC is to conduct the necessary investigations, hear the concerned judge, and then provide a report to the DC expeditiously. Following the receipt of such a report, the president of the DC summons the judges concerned to attend a hearing before the DC, which is conducted confidentially. The president of the DC is also supposed to immediately provide the concerned judges with access to their file, including the said report. The law does not specify the amount of time that must elapse between the transmission of the file to the judges concerned and the day of the hearing.

During the hearing, the judges concerned have the right to put forward their defence to the allegations against them, and may be represented by a lawyer or another judge. If the concerned judge does not appear at the hearing, the DC is to examine the case in light of the file in its possession; in this case, the law does not specify whether the judges must or can provide an explanation for their absence before the DC decides to go ahead and examine the case without their presence. The DC is to issue a reasoned decision on the same day as the hearing, or the next day at the latest.

The decision is subject to an appeal by the concerned judge or by the President of the Judicial Inspectorate within 15 days of the day the decision is issued. The High Body for Judicial Discipline – which is composed of the President of the HJC or his deputy, and of four judges who are appointed by the HJC at the beginning of every judicial year –[144] hears the appeal. The High Body applies the same procedures as the DC, but its decisions are not subject to any review. The decision is final and directly applicable as soon as the concerned judge is formally informed of it. If the disciplinary decision includes a sanction of dismissal or removal from office, disciplinary

[136] Decree-Law No. 150/83, art. 98.
[137] Decree-Law No. 150/83, art. 97.
[138] Decree-Law No. 150/83, art. 99, 100 and 101.
[139] Decree-Law No. 150/83, art. 105.
[140] Decree-Law No. 150/83, art. 108.
[141] Decree-Law No. 150/83, art. 85. This article also provides that judges of the DC shall recuse themselves in the same manner and on the basis of the same grounds as judicial judges must do in the course of the functions, and in accordance with the same provisions of the Code of Civil Procedure. See Code of Civil Procedure, Decree No. 90/83, art. 120-123. Requests for the withdrawal of a DC judge shall be examined by the HJC within three days.
[142] Decree-Law No. 150/83, art. 85.
[143] Decree-Law No. 150/83, art. 106.
[144] Decree-Law No. 150/83, art. 85.

proceedings are only made public knowledge once the final decision is issued. However, decisions by the DC or High Body are not published.[145]

Finally, members of the Judicial Inspectorate themselves can be referred to a disciplinary body upon the proposal of the Minister of Justice and following consultation with the JIC, through a Council of Ministers decree that also establishes the members of the disciplinary body – a President and two members selected among the Presidents of Chambers of the Court of Cassation.[146] The Public Prosecutor at the Court of Cassation acts as State Commissioner. The disciplinary body is thus established *ad hoc* by the executive in every potential case of misconduct.[147]

In light of the above, the ICJ is concerned that the current disciplinary system lacks sufficient guarantees to ensure fairness, and that it does not fully satisfy international safeguards with respect to independence and impartiality.

The role of the Ministry of Justice in the supervision, appointment and discipline of members of the Judicial Inspectorate allows an unacceptable degree of risk of executive interference or control, which is inconsistent with international principles on the independence of the judiciary. The UN Human Rights Committee has emphasized that the exercise of power by the Ministry of Justice over judicial matters, including its power of inspection of the courts, constitutes an interference by the executive and a threat to the independence of the judiciary.[148] This is especially true given that the Judicial Inspectorate plays an essential role in in the disciplinary process by entirely controlling the referral of disciplinary matters to the DC. The ICJ is therefore of the view that the work, appointment and discipline of the Judicial Inspectorate should be placed under the purview of the HJC, once the latter is appropriately reformed.

Furthermore, since the HJC is controlled by the executive, its role in the appointment of the members of the High Body for Judicial Discipline may, in turn, affect the independence and impartiality of the High Body and, consequently, adversely impact the independence and impartiality of any appeal process. This further highlights the need to reform the HJC.

Moreover, while welcoming the procedural guarantees set out in Decree-Law No. 150/83 pertaining to the right to a defence – including the right to have access to the investigation file; the right to be represented by a lawyer or a judge; to make representations at the hearing; and the right to appeal – the ICJ considers that other guarantees of due process are absent.

First, the ICJ is concerned about the power of the Minister of Justice to suspend a judge referred to the DC upon proposal of the JIC without any condition or review process. Removal and suspension decisions, even temporary suspension, should follow procedures complying with articles 17 to 20 of the UN Basic Principles on the Independence of the Judiciary, and be made on the basis of established standards of judicial conduct (with evidentiary thresholds and procedures appropriate for an interim, as opposed to final, measure).[149] The DC itself could be mandated to make decisions regarding interim suspension, which would better guarantee the independence and impartiality of such decisions, and guarantees should be introduced to ensure that the judges' rights are respected.

[145] Articles 86 and 87 of Decree-Law No. 150/83 prescribe the proceedings in disciplinary cases.
[146] Decree-Law No. 150/83, art. 113.
[147] Apart from the difference in selection and appointment of its members, this body observes the same procedures as prescribed for the Disciplinary Council in relation to all judges, as described above.
[148] UN Human Rights Committee, Concluding observations on Romania, 28 July 1999, UN Doc. CCPR/C/79/Add.111, para. 10.
[149] See ICJ, Practitioners' Guide No. 13 on Judicial Accountability, p. 80, available at: https://www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf (last consulted on 31 May 2022).

Second, the ICJ is concerned that Lebanese law does not fully guarantee a judge facing disciplinary proceedings adequate time and facilities to prepare a defence.[150] The law should specifically require that enough time, depending on the complexity and gravity of the case, be given to the concerned judges to prepare their defence after having accessed the case file, and that the DC should be given a reasonable amount of time to fully assess the judge's arguments before issuing a decision.

Third, the ICJ considers that judges should benefit from the right to be present during their hearing, which is an essential element of the right to challenge the case against oneself and to present one's defence.[151] The fact that the DC may immediately examine the case if the judge does not appear at their hearing, apparently regardless of the reasons why the judge is absent, runs counter to these rights.

Fourth, it is also of serious concern that the decisions of the Lebanese disciplinary bodies are not published. The right to a fair trial and international standards on judicial independence and accountability affirm the right to a public judgment, in order to ensure that the administration of justice is public and open to public scrutiny.[152] All disciplinary decisions, once the proceedings duly terminated, should be published, including to provide all judges with a better appreciation and understanding of reprehensible misconduct.

Draft Law

Under the Draft Law, if enacted as currently formulated – although described as an independent body – the Judicial Inspectorate would remain under the authority of the Ministry of Justice, and would retain similar disciplinary powers to the ones it currently enjoys under existing legislation.[153] As described above in relation to the *ex officio* members of the HJC, the Judicial Inspectorate's president would be appointed among three candidates submitted by the HJC via a Council of Ministers decree upon proposal of the Minister of Justice, who could submit other names, subject to the approval of the HJC. The other members, eight inspectors general and a number of inspectors, would be appointed by a Council of Ministers decree for a non-renewable term of four years. The president and members could not be transferred during their tenure except upon their written request.

Moreover, complaints against members would be reviewed and investigated by the JIC itself, and they would be referred, by a majority of six members, to a special disciplinary council, namely the plenary assembly of the Court of Cassation.

The Draft Law, if enacted in its current formulation, would strengthen the independence of the Judicial Inspectorate, including through the introduction of the role of the HJC in the appointment of its President, the non-transferability of its members, and its disciplinary system. However, the ICJ regrets that the executive would retain a role in the appointment of all its members and that the Judicial Inspectorate would remain under the supervision of the Ministry of Justice rather than the HJC.[154]

[150] ICCPR, art. 14(3)(b).
[151] ICCPR, art. 14(3)(d).
[152] ICCPR, art. 14(1); see also ICJ, Practitioners Guide No. 13, *op. cit.*, pp. 73-76.
[153] The Venice Commission expressed concerns over such a concentration of disciplinary powers, advocating for "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" (Opinion, paras 69-71).
[154] The Venice Commission concluded that the Judicial Inspectorate "cannot be really considered as fully 'independent'" (Opinion, paras 65-67), also pointing to the role of the ministry of justice in the management of staff and finances, and recommending giving the Inspectorate sufficient administrative and financial capacity to carry out its functions and objectives (Opinion, para. 68).

The DC's composition would remain the same under the Draft Law if it were enacted in its current formulation, but its appointment would be made by a two-third majority of the HJC members, which would enhance its independence, instead of being appointed solely by its President as it is currently the case. The due process guarantees before the DC would be improved: the Draft Law specifies that the defendant judge is notified of the referral and has access to the case file at least seven days before the first investigative hearing. The date of the trial is not to be set before at least 48 hours following the submission of the investigation report have elapsed, unless a disclosure request is submitted (in which case the trial date would not be set until this request is processed). The Draft Law also better frames the conditions under which proceedings may proceed *in absentia*.

The DC would still have to issue its decision on the day of the end of the trial or the next day at the latest, irrespective of the nature of the case. Reasoned decisions would have to be issued within six months of the notification of the complaint to the defendant, and dissenting opinions would also be part of the reasoned decision. While the investigation and trial would not be public, a major improvement would lie in the publication of decisions on the website of the HJC, and the availability of copies to the public upon request. Personal information would be redacted, except in cases of dismissal. The HJC would have to include in its annual report information about the number of disciplinary decisions and the type of misconduct the decisions dealt with, as well as the type of disciplinary sanctions imposed and the main reasons for disciplinary decisions. This would limit the discretion of the DC and allow for public scrutiny.

The appeal body would be the same, except that the members of the High Body for Judicial Discipline would all be appointed among members of the HJC.[155] The procedure would be unchanged, with no further review.[156]

Finally, the ICJ deplores that the Minister of Justice would retain the power to suspend a judge accused of misconduct pending a disciplinary decision, upon proposal of the JIC, without any possibility of review. In this regard, the Draft Law as presently formulated adds that if the Minister fails to suspend the judge within 15 days, the HJC may issue an administrative suspension decision upon request of the Judicial Inspectorate, after having heard the judge concerned. Judges suspended from work would receive half of their salaries.[157]

Recommendations:

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. *Ensure that, once reformed, the HJC have oversight over the entire disciplinary process and, in this regard place the Judicial Inspectorate under the purview of the HJC, including by giving the HJC the power of appointing the members of the Judicial Inspectorate and overseeing its functioning;*
ii. *Rescind the power of the Minister of Justice to suspend judges pending a disciplinary decision and ensure that any decision on immediate suspension be based on clear and objective grounds and subject to a prompt, fair and transparent review procedure that*

[155] After noting that 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, the Venice Commission recommended in this regard stipulating in the law that the President of the Judicial Inspection cannot be a member of the appeal body and that the Prosecutor General should not be involved in the examination of disciplinary appeals concerning judges (Opinion, para. 73).
[156] The Venice Commission recommended that the law should stipulate more clearly that the appeal proceedings should be of judicial character and provide the judge concerned with all basic guarantees of fair trial (Opinion, para. 74).
[157] The Venice Commission urged the authorities to reconsider this provision in light of the risk of abuse, highlighting that such decisions should be taken with the participation of an independent body (Opinion, para. 100).

protects the rights of the concerned judge. Given its interim character, the salary and other benefits of the concerned judge should be maintained during any interim suspension;

iii. Give the disciplinary decision-maker reasonable time to fully consider the defence arguments before issuing a decision.

iv. Enhancing the independence of prosecutors

Prosecutorial independence is essential to ensure prosecutors work without undue pressure or other inappropriate influence or obstruction. The UN Guidelines on the Role of Prosecutors is the main standard at global level aimed at ensuring prosecutors play an effective role in administration of justice, consistent with the right to fair trial.[158]

The structure of the Office of the Public Prosecutor (OPP) and the role of prosecutors are largely set out in the Lebanese Code of Criminal Procedure and Decree-Law No. 150/1983. The main function of the OPP is to initiate public action in criminal matters.[159] The OPP is also granted investigative powers in order to investigate offences characterized as misdemeanours or felonies in order to prosecute those who participated in their commission.[160] Prosecutors in Lebanon are additionally granted some power to take decisions of a judicial character, such as supervising the custody of suspects during *garde-à-vue*, to the exclusion of any other judicial authority, which raises concern with respect to their impartiality and independence in making such decisions.[161]

In Lebanon, prosecutors are magistrates part of the judicial corps. The training and selection procedure for prosecutors is the same as that of judges as described above under section ii-A-*i* and *ii*.[162] As illustrated by the reported intervention, at the request of a Government official, of the Public Prosecutor at the Court of Cassation in high-profile investigations conducted by lower-level prosecutors, prosecutorial independence raises specific issues with regard to the appointment to this position **(A)** and the power of the executive to give instructions in cases **(B)**.

A. Appointment of the Public Prosecutor at the Court of Cassation

Neither Decree-Law No. 150/83, nor the Code of Criminal Procedure prescribes specific, clear and objective criteria for the selection and appointment of prosecutors. The only specified criterion, namely, that the individual concerned must have attained the required seniority, applies exclusively to the appointment of the Public Prosecutor at the Court of Cassation, who is the head of prosecution services.[163]

In line with the UN Guidelines on the Role of Prosecutors and the Standards of professional responsibility and statement of the essential duties and rights of prosecutors, prosecutors should be selected on the basis of objective criteria, and their recruitment should be carried out in a fair and impartial manner.[164] The ICJ is of the view that Lebanese law should, in accordance with

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[158] UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1, para. 189, welcomed by UN General Assembly Resolution 45/166 (1990) ("UN Guidelines").
[159] Code of Criminal Procedure, art. 5.
[160] Code of Criminal Procedure, art. 24(a).
[161] For an analysis and criticism of this dual role in light of international standards, see ICJ, Lebanon: The Role of Prosecutors in Ensuring Independent and Impartial Investigations and Prosecutions, *op. cit.*, pp. 3-8.
[162] For an analysis and criticism of this dual status in light of international standards, see ICJ, Lebanon: The Role of Prosecutors in Ensuring Independent and Impartial Investigations and Prosecutions, *op. cit.*, pp. 8-10.
[163] Notwithstanding a few exceptions – notably in cases heard by the Court of Cassation, the Justice Council, or in cases of prosecution of judges – the Public Prosecutor at the Court of Cassation does not himself/herself prosecute, but rather refers cases to the appropriate prosecutors for them to initiate the requisite public prosecution (art. 13). Article 17 of the Code of Criminal Procedure prescribes the duties of the Public Prosecutor at the Court of Cassation, while article 24 prescribes the duties of the Public Prosecutor at the Court of Appeal.
[164] See UN Guidelines, Guidelines 1 and 2; Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted by the International Association of Prosecutors on 23 April 1999 and endorsed by the UN Commission on Crime Prevention and Criminal Justice, resolution 17/2 (2008)

international standards, provide for clear and objective criteria for the selection and appointment of prosecutors. In conformity with the UN Guidelines on the Role of Prosecutors, these criteria should be based on integrity and ability, and appropriate training and qualifications.[165]

Under article 31 of Decree-Law No. 150/83 and article 13 of the Code of Criminal Procedure, the Public Prosecutor at the Court of Cassation is appointed by a Council of Ministers decree upon recommendation of the Minister of Justice.

The method of selection and appointment of the head of the prosecution service varies between countries and may include appointment by head of State or Minister of Justice. However, the Special Rapporteur on the independence of judges and lawyers has underlined the need for methods of selection that maintains public confidence, and recommended that recruitment bodies be composed of members from within the profession.[166] The manner and qualifications for appointment must be transparent and tailored to safeguard functional independence, impartiality and objectivity.

The ICJ is of the view that the law and practice on the appointment of the Public Prosecutor at the Court of Cassation should be amended to ensure that appointments be made through a transparent process, that safeguards functional independence and is based on specific objective and merit-based criteria. Further, appointment should result from cooperation among different governmental bodies, rather than from a single body,[167] and the law should provide that expert advice be sought to ensure that an objective transparent and appropriate choice is made.

Draft Law

If the Draft Law were enacted as presently formulated, the Public Prosecutor at the Court of Cassation would be appointed among three candidates submitted by the HJC by a Council of Ministers decree upon proposal of the Minister of Justice who could add names, subject to the HJC's approval. Besides the grade required for the position, it is unclear whether the criteria set by the Draft Law for the appointment of judges would apply to this specific appointment.

While the proposed mode of appointment would be an improvement in terms of judicial independence, the ICJ regrets that the Draft Law fails to clarify that the appointment of the Public Prosecutor at the Court of Cassation should be based on objective and merit-based criteria.[168]

B. Instructions and guidelines

With a view to ensuring a fair and consistent approach in criminal justice policy, it is common for guidelines to be issued to prosecutors both by the prosecution service itself (internally) and by non-prosecutorial authorities (externally). Acknowledging this, international standards set out a number of conditions and limits to ensure that such instructions are not politically motivated. Lebanese law, however, does not provide for appropriate safeguards and limitations on internal and external instructions to prosecutors, which may allow for abuse of power from within the prosecution services as well as by non-prosecutorial authorities, in particular the executive.

"Strengthening the rule of law through improved integrity and capacity of prosecution services" ("IAP Standards"), art. 6(e); Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012, UN Doc. A/HRC/20/19, para. 59.

[165] UN Guidelines on the Role of Prosecutors, *op. cit.*, Guideline 1.

[166] Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012,UN Doc. A/HRC/20/19, paras 62-64.

[167] Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012, UN Doc. A/HRC/20/19, para. 63.

[168] The Venice Commission also took the view that the Draft Law should describe in more detail the relations between the Prosecutor General and the political powers of the State (Opinion, para. 38).

With respect to internal instructions, under article 13 of the Code of Criminal Procedure, the authority of the Public Prosecutor at the Court of Cassation extends to all prosecutors and the Public Prosecutor may give prosecutors written or oral instructions for the conduct of a prosecution, which is reiterated in article 31 of Decree-Law No. 150/83. Additionally, under article 24(a) of the Code of Criminal Procedure, where the OPP at the Court of Appeal obtains knowledge of a serious offence, it must immediately inform the Public Prosecutor at the Court of Cassation and carry out their instructions. In each instance, the law does not specify whether the instructions should be in writing and it does not appear to be subject to any limits.

The Bordeaux Declaration on the Relations between Judges and Prosecutors in a Democratic Society recognizes that prosecutors of a lower rank might be subjected to the instructions of their superiors and recommends that transparent lines of authority, accountability, and responsibility be established. Directions to individual public prosecutors, including from within the OPP, should therefore "be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria." [169] The ICJ accordingly recommends that where the Public Prosecutor, or other hierarchical superior, may issue instructions to individual prosecutors regarding the conduct of a prosecution, these instructions should be issued in writing, be in compliance with publicly available prosecution guidelines and criteria, where applicable, be consistent with human rights, and aim to enhance fairness and consistency of approach in the prosecution process.[170]

With respect to external instructions, article 45 of Decree-Law No. 150/83 provides that "judges of the Public Prosecution Office shall be subject to the management and oversight of their superiors and to the authority of the Minister of Justice". Further, under the Code of Criminal Procedure, the Minister of Justice may request a Public Prosecutor to proceed with the prosecution of any offence of which they have knowledge. The ICJ is concerned that these provisions may allow the executive to interfere in the conduct of prosecution, as neither Decree-Law No. 150/83 nor the Code of Criminal Procedure specify how the authority of the Minister of Justice is exercised, or in which manner the instruction to prosecute a specific offence should be issued, and therefore they do not safeguard the real and perceived independence of the prosecution services.

The Special Rapporteur on the independence of judges and lawyers has cautioned against case-specific instructions, and has stated that, "they should be in writing and formally recorded and carefully circumscribed to avoid undue interference or pressure."[171] The Standards of professional responsibility and statement of the essential duties and rights of prosecutors additionally state that any instructions from non-prosecutorial authorities should be transparent; consistent with lawful authority; subject to established guidelines to safeguard the actual and the perceived prosecutorial independence.[172]

There is specific guidance on instructions from the executive to prosecutor within Recommendation (2000)19 of the Committee of Ministers of the Council of Europe. States should take effective measures to guarantee that the nature and scope of the powers of the Government in relation to public prosecution are established in law, exercised in a transparent way in accordance with law, that if the Government has the power to give instructions to prosecute a case, such instructions should be in writing and must respect principles of transparency and equity; that prosecutors

[169] Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE), Opinion on Judges and Prosecutors in a Democratic Society, CM(2009)192, para. 9.
[170] UN Guidelines, Guideline 17.
[171] Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012, UN Doc. A/HRC/20/19, para. 116.
[172] IAP Standards, art. 2.2 and 2.3.

remain free to make any legal argument of their choice to a court; and instructions not to prosecute a case are either prohibited or are exceptional.[173]

Considering such standards, the Lebanese authorities must ensure that the power of the Minister of Justice over the prosecution is, at a minimum, regulated in a manner that is consistent with these standards. Rules should be clearly established by law to ensure that instructions by the executive to the OPP be in writing and respect the principles of transparency and equity, as well as human rights, and take into account established prosecution guidelines, the interest of the victim and other interested parties. There should be a requirement that instructions become part of the public case file, and the law should provide that instructions not to prosecute a case are either prohibited or exceptional. In the latter case, such an instruction should be substantiated.

Moreover, international standards provide that prosecutors must be able to challenge instructions on the basis of professional or ethical duties.[174] With respect to this, the ICJ is concerned that neither Decree-Law No. 150/83 nor the Code of Criminal of Procedure provides for the possibility for prosecutors to challenge or contest instructions received from their hierarchical superiors or the Minister of Justice. The ICJ of the view that no instruction may be permitted that would force a prosecutor to contravene international standards or professional or ethical duties, in particular those listed in the UN Guidelines on the Role of Prosecutors. In this regard, it would be incompatible with the said Guidelines for a prosecutor to be subject to disciplinary consequences for refusing to follow instructions that conflict with them or other ethical and professional standards.[175] Lebanese law should explicitly provide that in disciplinary proceedings, prosecutors may plead a defence of their belief, in good faith, that acting in accordance with a certain instruction would have conflicted with ethical or professional standards.

Draft Law

The Draft Law, if enacted in its current formulation, would improve the situation regarding instructions: while the possibility that the Public Prosecutor at the Court of Cassation would issue binding individual instructions related to the initiation and conduct of prosecution would be maintained, those would have to be written, legal and reasoned, and a copy of such decisions would have to be deposited in the file of the case in question and made accessible to any interested parties. Moreover, the member to whom these instructions are directed would have the possibility to include written comments about the same. The ICJ welcomes these efforts towards transparency and accountability. However, as the interferences of the Government in the criminal cases relating to the Central Bank Governor demonstrate, there is a need to further restrict the ability of the executive to provide instructions to the OPP.[176]

[173] Council of Europe, Recommendation (2000)19 on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000, para. 13.
[174] See IAP Standards, art. 6.9, stating that prosecutors in general should be entitled "to relief from compliance with an unlawful order or an order that is contrary to professional standards or ethics." Similarly, the UN Special Rapporteur on the independence of judges and lawyers recommends that prosecutors should have the right to challenge instructions received and that a mechanism should also be established to properly and duly investigate any allegation of improper interference. See Report of the Special Rapporteur on the independence of judges and lawyers, 7 June 2012, UN Doc. A/HRC/20/19, para. 116.
[175] See UN Guidelines, Guideline 22.
[176] The Venice Commission considered that 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 (Opinion, para. 38).

Recommendations:

In light of the above, the ICJ calls on the new legislature to amend the Draft Law as follows:

i. *Ensure that the procedure for the appointment of the Public Prosecutor at the Court of Cassation, in particular the selection of names by the HJC or the Minister of Justice, be based on clear and objective, merit-based criteria to ensure that an objective, transparent and appropriate choice be made;*
ii. *Define in law the nature and scope of any power of the Minister of Justice or other non-prosecutorial authorities to issue instructions to the Public Prosecutor, in particular:*
    a) *These instructions must respect human rights, and take into account established prosecution guidelines, and the interests of victims and other interested parties;*
    b) *Include a prohibition on the executive issuing instructions not to prosecute or requiring prosecution in a specific case;*
iii. *Grant prosecutors the right to challenge any instructions received that they deem to be unlawful or contrary to professional standards of ethics, and establish a mechanism to duly investigate any allegation of arbitrary, undue or unwarranted interference with their work through such instructions;*
iv. *Ensure that in any disciplinary measures against a prosecutor for having refused to follow an instruction, the prosecutor can raise as a defence a good faith belief that acting in accordance with the instruction received would have conflicted with the Guidelines or other professional or ethical standards;*
v. *Specify that the provisions of the Code of Criminal Procedure that are in conflict with the provisions of the Draft Law be thereby amended to comply with the Draft Law or repealed.*

IV. Conclusions

The Beirut port blast and the Central Bank Governor cases confirm that without legislative reform, political interference in the work of the judiciary is likely to continue.

Overall, the Draft Law, if enacted in its current formulation, would bring about a number of significant improvements that would strengthen the independence of the judiciary in Lebanon. Nonetheless, as currently drafted, it presents substantial shortcomings, particularly with regard to its failure to fully ends the executive interference with the judiciary, and to abolish provisions that expose judges to arbitrariness and run counter to international law and standards.

The new legislature, when reviewing the Draft Law, should pay attention to the recommendations formulated in this Paper. If the Draft Law is adopted as presently formulated, it will be essential that the judiciary adopt a detailed code of judicial ethics, in line with the Bangalore principles and with the international law principles relevant to disciplinary proceedings against members of the judiciary.

The new legislature should also address the unwritten rules that make sectarianism prevalent across the judiciary, exposing it to politicization and, as a result, undermining its independence. The problem of sectarianism is not an issue specific to the judiciary but to Lebanon's governance as a whole, and it will take time to change mindsets and practices in this regard. In any event, the ICJ is of the view that the adoption of a legal framework that complies with international human rights law and standards to protect the independence of the judiciary will still be a meaningful step. Improving and eventually adopting the Draft Law will provide a solid basis on which judges will be able to rely on to defend their independence. In particular, the introduction of more objectivity and transparency in career and disciplinary decisions may play a critical role in changing the behaviour of decision-makers. As such, it is an opportunity that should not be missed by the new legislature.

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