

Briefing Paper

Key concerns over three judicial reform draft laws in Cambodia

The purpose of this paper is to highlight the International Commission of Jurists' concerns regarding the three draft laws on judicial reform which were recently approved by the Constitutional Council : the draft Law on the Organization of the Courts; the draft Law on the Statute of Judges and Prosecutors; and the draft Law on the Organization and Functioning of the Supreme Council of the Magistracy.

Although we commend the Royal Government of Cambodia's aim to strengthen the rule of law in the country, the ICJ is concerned that many of the provisions of the above-mentioned draft laws are inconsistent with international standards guaranteeing and aiming to safeguard the independence of the judiciary.

The independence of the judiciary is central to the protection of the rule of law and human rights. The Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (Beijing Statement of Principles), adopted in 1995 by Chief Justices and judges from the Asia and the Pacific region, proclaims that the independence of the judiciary is essential in order for the "objectives and the proper performance of its functions in a society" be achieved.¹

Independent and impartial judges are essential to ensure respect for the right to fair trial. Independent judges and prosecutors are fundamental to ensuring that those responsible for human rights violations are brought to justice and that victims of human rights violations are afforded effective remedies and redress.

The Government of Cambodia's duties to ensure, respect and safeguard the independence of the judiciary arise directly from the Constitution of Cambodia, and from international human rights standards, including the International Covenant on Civil and Political Rights (ICCPR), a treaty to which Cambodia is a party and is bound to implement.² In particular, Article 51 and

¹ Principle 4 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region.

² In addition to its duties under international law to implement the ICCPR, Article 31 of the Constitution requires the authorities of the Kingdom of Cambodia to "recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the Covenants and Conventions related to human rights, women's and children's rights" .

128 of the Constitution and Article 14 of the ICCPR³ guarantee the independence of the judiciary. Other international standards and conclusions and recommendations of human rights bodies and mechanism referred to in this letter set out safeguards necessary to ensure protection of judicial independence.

We are hopeful that this document, which sets out the ICJ's key concerns about these three draft laws in the light of relevant international standards, will contribute to the ongoing efforts to enhance respect for and protection of the independence of the judiciary in Cambodia.

The ICJ's key concerns about provisions of the three draft laws include the following:

(i) Encroachment on the principle separation of powers

Among other things, in accordance with Articles 51 and 128 of the Constitution respectively guaranteeing the separation of the Executive, Legislative and Judicial powers and the independence of the judiciary, and international standards which aim to safeguard judicial independence⁴, the judiciary as a whole and individual judges must be free from unwarranted interference from both the executive and legislative branches.

However, the ICJ is concerned that all three draft laws fail to adequately safeguard the separation of powers and protect the judiciary as an institution and individual judges and prosecutors from undue interference by the other branches of state power.

With regard to the draft Law on the Organization and Functioning of the Supreme Council of Magistracy the ICJ notes that Article 1 proclaims that the purpose of the establishment of the Supreme Council of the Magistracy (SCM) is "to guarantee the independence of judicial power", and to that end, Article 18 of the draft law mandates the SCM with direct responsibility for the appointment, transfer, discipline, discharge, suspension and removal of judges.⁵

In order to safeguard the independence of judges, the UN Human Rights Committee, the expert body mandated by the ICCPR to monitor the implementation of the treaty by States Parties, and the UN Special Rapporteur on the Independence of Judges and Lawyers, have repeatedly recommended

³ Article 14 of the ICCPR requires that each state party respect and protect the right of everyone in the territory or subject to its jurisdiction the right to "a fair and public hearing by a competent, independent and impartial tribunal established by law", in the determination of criminal charges or an individual's rights and obligations in a suit at law.

⁴ Principle 1 of the UN Basic Principles on the Independence of the Judiciary; Article 4 of the Singhvi Declaration; Principle 1.3 of the Bangalore Principles of Judicial Conduct

⁵ Article 18 draft Law on the Organization and Functioning of the Supreme Council of Magistracy

that the bodies responsible for the appointment and promotion of judges, as well as those responsible for the discipline of judges be independent from the Executive,⁶ plural and are composed mainly (if not solely) of judges and members of the legal profession.⁷

The ICJ is thus concerned that the composition of the SCM as set out in Article 4 of the draft law is inconsistent with respect for the principle of separation of powers and the independence of the judiciary. In particular, under article 4 of the draft law, the SCM comprises of nine members, where one is reserved for the Minister of Justice, and the Senate and the National Assembly respectively are empowered to elect two others. Should article 4 be implemented, the Minister of Justice, a member of the Executive, as a member of the SCM, will be given powers over the judiciary that should properly be reserved for members of the judiciary themselves. Furthermore, the provision that empowers Parliament to determine who should fill two of the other seats of the judiciary's appointment, management and oversight body, risks politicizing the appointment process if not the SCM itself.

Second, several provisions of the draft laws confer on the Minister of Justice, a member of the executive, power to control many aspects of the administrative affairs of the judiciary, and courts as well as functioning of prosecutors that should instead fall within the purview of the judiciary itself.

For example, under provisions of the draft law on the Organization and Functioning of the Supreme Council of Magistracy, the Minister of Justice is the only "legitimate budget authorizer"⁸ of the SCM as well as the person in charge of preliminary examination into disciplinary cases of judges and prosecutors.⁹ Under the draft Law on the Statute of Judges and Prosecutors, the Minister of Justice has the power to change and appoint the composition of the Commission of Promotion in Rank and Grade¹⁰, determine the selection process of judges¹¹, as well as order an injunction to prosecutors at all

⁶ See e.g. Concluding Observations of the UN Human Rights Committee on the Congo, CCPR/C/79/Add.118, para. 14; Concluding Observations of the Human Rights Committee on Liechtenstein, CCPR/CO/81/LIE, para. 12; Concluding Observations of the Human Rights Committee on Honduras, CCPR/C/HND/CO/1 (2006), para. 16; Concluding Observations on Azerbaijan, UN Doc. CCPR/C/AZE/CO/3 (2009), para. 12; Human Rights Committee, Concluding Observations on Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1 (2006), para. 20. Also see Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration), Article 11; Universal Charter of the Judge, Approved by the International Association of Judges on 17 November 1999, Article 9.

⁷ Special Rapporteur on the independence of judges and lawyers, Report to the Human Rights Council, UN Doc. A/HRC/11/41 (2009), para. 28-29. See also International Commission of Jurists, International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide, no. 1 (2007), pp. 45-48.

⁸ Article 15 of the draft Law on the Organization and Functioning of the Supreme Council of Magistracy

⁹ Ibid article 23

¹⁰ Article 33 of draft Law on the Statute of Judges and Prosecutors

¹¹ Ibid article 22

levels.¹² Further, pursuant to Articles 11 and 84 of the draft Law on the Organization of the Courts, the Minister of Justice is empowered to “supervise all administrative affairs of all courts or tribunals”, and control the overall budget of the courts and prosecution.

The above-mentioned articles fail to adequately safeguard the independence of judges guaranteed under the Cambodian Constitution in a manner that is consistent with international human rights standards. International standards clarify among other things that as a safeguard of judicial independence, the courts’ budget shall be prepared “in collaboration with the judiciary having regard to the needs and requirements of judicial administration”, and as noted below, the administration of the budget and the administration of the courts should remain with the judiciary.¹³ In addition, as noted above, human rights bodies have repeatedly emphasized that the bodies that are responsible for appointment, promotion and discipline of judges should be independent of the executive¹⁴. Furthermore international standards clarify that prosecutors must be free to exercise their role within the justice system independently and impartially, without discrimination or improper interference, in a manner that is consistent with the law and that respects and protects human rights.¹⁵

(ii) Lack of powers over finance and administrative matters

The allocation of sufficient resources to the judiciary and sufficient control over its allocated budget are indispensable aspects for the protection of the rule of law, ensuring access to justice, and the protection of judiciary from external influences that could undermine the independence and impartiality of judges. Thus, Principle 37 of the Beijing Statement of Principles clarifies that the budget of the courts should remain within the control of the courts or a competent authority in collaboration with the judiciary. The amount allotted must be adequate to enable the judiciary to properly perform its functions.¹⁶ As for the management of the court’s administrative matters, Principle 36 of the Beijing Statement of Principles states “the principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary”.

In their current form, the draft laws fail to adhere to these standards. For example, as briefly highlighted above, Article 84 of the draft Law on the Organization of the Courts states the budgets of the courts and prosecution will be allocated from the budget of the Ministry of Justice. Under the provision, a Royal Decree will determine the future control and management of the budget. With regard to administrative matters, Article 11 of the draft

¹² Ibid article 75(1)

¹³ Article 34 of the Singhvi Declaration, Principles 36 and 37 of the Beijing Statement of Principles

¹⁴ See footnote 6, above.

¹⁵ Guidelines 4, 10, 12-14 of the UN Guidelines on the Role of Prosecutors.

¹⁶ Principle 7 UN Basic Principles on the Independence of the Judiciary

Law on the Organization of the Courts states the Ministry of Justice will supervise all administrative matters of the courts, including the issuance of legal instruments and guidelines when necessary, as well as the power to assign an inspection on specific issues.

(iii) Undue Interference with freedom of expression

As a safeguard to judicial independence, Principle 8 of the UN Basic Principles on the Independence of the Judiciary, clarifies, that judges “are like other citizens entitled to freedom of expression, belief, association and assembly; provided however that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary”. This principle is also applicable to prosecutors, as is set out in Guideline 8 of the UN Guidelines on the Role of Prosecutors.

In contravention of these standards, Article 53 of the draft Law on the Statute of Judges and Prosecutors states that judges must first seek permission from the Supreme Council of the Magistracy before publishing or broadcasting. Likewise, prosecutors are also required to obtain initial authorization from the Ministry of Justice before releasing a written document to the public.¹⁷

(iv) Selection, promotion, removal and disciplinary procedures

Principle 10 of the UN Basic Principles on the Independence of the Judiciary states that individuals appointed to judicial office must be persons of integrity and possess the appropriate training or legal qualifications. Candidates should be afforded equality of access to judicial office, except for cases of lay judges.¹⁸ The selection process shall be carried out in a non-discriminatory¹⁹ manner and safeguarded against improper motives. Principle 12 of the Beijing Statement of Principles further provides that the appointment process must ensure that the best qualified individual for judicial office is chosen. Where a Judicial Service Commission is established to perform this purpose, representatives of the higher judiciary and the independent legal profession must be included to ensure the maintenance of judicial competence, integrity and independence.²⁰ As noted above, the body or bodies responsible for selection, appointment and discipline of judges should be independent of the executive.²¹ Principle 13 of the UN Basic Principles on the Independence of the

¹⁷ Article 97 of draft Law on the Statute of Judges and Prosecutors

¹⁸ Principle 9 of the Singhvi Declaration

¹⁹ Article 10 of the UN Principles on the Independence of the Judiciary explains “there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory”.

²⁰ Principle 15 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region

²¹ See footnote 6.

Judiciary clarifies that “the promotion of judges should be based on objective factors, such as, ability, integrity and experience”.

In addition, the decision to have a judge disciplined or removed should generally be under the control of the judiciary.²² It is essential that a judge suspected of misconduct be given fair hearing,²³ with the opportunity to be informed of and to challenge the evidence against him or her, and to present evidence. Furthermore, decisions must be based on established standards of judicial conduct that are consistent with international standards.²⁴ Disciplinary sanctions must be proportionate to the circumstances of the case, and the law must ensure that a judge may only be suspended or removed for reasons of incapacity or behavior that renders him or her unfit to discharge his or her duties.²⁵ Decisions to discipline a judge and the sanctions of discipline should be subject to independent review.²⁶ Finally, judgments in disciplinary proceedings, whether held in camera or in public, should be published.²⁷

In light of the above international standards, it is concerning to note provisions in the draft laws that do not ensure the fair selection, promotion, discipline and removal of judges.

Among other provisions of concern is Article 23 of the Law on the Statute of Judges and Prosecutors that provides the possibility of an internal judicial examination specifically for government officers and clerks who fulfill the legal qualification and age requirement. This provision is inconsistent with the ensuring equal access to the judiciary and the prohibition of discrimination; it could lead to the more favorable treatment of government employees and hinder the appointment of the most suitable candidates.

Additionally, Articles 23 and 19(2) of the Law on the Statute of Judges and Prosecutors further favour government employees and civil servants interested in becoming a judge, with no apparent objective or rational basis that is proportionate to a lawful aim. The rule under Article 19(2) of the draft law, that only individuals who are “not more than 35 years of age” may take the examination for the selection of judge, applies generally. But under the same provision, civil servants, and under Article 23, government officers and clerks with certain qualifications and experience are treated differently: civil

²² Ibid, See also Principle 24 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region

²³ Principle 26 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region

²⁴ Principle 19 of the UN Principles on the Independence of the Judiciary ; Principle 27 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region

²⁵ Principle 18 of the UN Basic Principles on the Independence of the Judiciary; Principle 22 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region

²⁶ Principle 20 of the UN Basic Principles on the Independence of the Judiciary

²⁷ Principle 28 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region

servants up to the age of 40 may take the examination and government officers and clerks with the appropriate qualifications and experience to the age of 45 may register to take the exam. Without a rational or objective basis that basis is proportionate to a legitimate aim, these provisions related to civil servants and government officers and clerks appear to be inconsistent with the prohibition of discrimination set out in international standards, including Principle 10 of the UN Basic Principles on the Independence of the Judiciary.

Third, the commission responsible for promotions, the Commission of Promotion in Rank and Grade²⁸, is headed by the Secretary of State of the Ministry of Justice and lacks any members of the independent legal profession. Promotions are also based on vaguely worded factors, including compliance with working discipline, good conduct or morals and having worked in hardship postings,²⁹ rather than on more objective factors called for under international standards: ability, integrity and experience

Fourth, the draft laws are silent as to pertinent safeguards necessary to ensure fairness in relation to discipline or removal. For example, SCM, the body responsible for the removal of judges is not limited to the judiciary. While the draft safeguards the right of the judge facing discipline to represent themselves or to be represented by a lawyer, it does not guarantee judges suspected of misconduct the right to be informed of and challenge the evidence against themselves and to present evidence in their favor. There is also a lack of explicit reference made to the right of a judge to a fair hearing or the requirement that judgments in disciplinary proceedings be made public. Finally, the ICJ notes that there is no right to appeal the decision of the SCM to discipline a judge.

²⁸ Article 33 of draft Law on the Statute of Judges and Prosecutors

²⁹ Ibid Article 28