



## **Comments on certain provisions of the draft Law on the Supreme Council of Magistracy in relation to international human rights standards**

**May 2014**

The following comments have been prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in order to assist the process of adoption of the draft Law on the Supreme Council of Magistracy (hereinafter the draft SCM Law). The comments are based primarily on Cambodia's international human rights obligations, as well as relevant international and regional instruments on the independence of the judiciary.

The comments refer to the provisions of the latest draft of the Law, as tabled before the National Assembly. They also focus on areas which OHCHR believes should be included in the Law. We appreciate that reform of the current SCM is much needed, and view the new SCM Law as a unique opportunity to improve and strengthen this important institution which plays a central role in protecting and promoting the independence of the judiciary of Cambodia.

**As a matter of established good practice, OHCHR recommends that a public consultation be organised to discuss this draft. In this regard, OHCHR stands ready to provide assistance with the organisation of such public consultations. OHCHR further stands ready to provide briefings to the members of the National Assembly and Senate on its analysis of the draft law from the perspective of Cambodia's international human rights obligations.**

### **1. General principles**

The Supreme Council of Magistracy is intended to safeguard the following principles:

- The principle of independence of courts and judges
- The principle of separation of powers (legislative, executive and judiciary)
- The principle of impartiality of judges

These basic principles are enshrined in the 1966 International Covenant on Civil and Political Rights (ICCPR) to which Cambodia became a party to in 1992. In accordance with Article 31

of the 1993 Constitution and the decision of the Constitutional Council of 10 July 2007, the ICCPR is part of Cambodian law.

The most relevant provision of the ICCPR is Article 14 which protects the right to a fair trial. This includes the right to a “fair and public hearing by a *competent, independent and impartial* tribunal established by law” (emphasis added). The Human Rights Committee, which is the international monitoring body established under the ICCPR, has adopted General Comment No.32 on Article 14, which provides detailed guidance to States on how to interpret Article 14.<sup>1</sup> In this document, the Human Rights Committee has recalled that courts should be independent of the executive and legislative branches of government”.<sup>2</sup>

The principles mentioned above are also included in the United Nations Basic Principles on the Independence of the Judiciary and the Guidelines on the Role of Prosecutors.<sup>3</sup> They are explicitly stated in the 1993 Constitution in the Chapter on the judiciary.

## **2. Composition of the SCM**

In line with the principle of independence of the judiciary, all decisions relating to the appointment, promotion, suspension of judges should be taken by an institution that is fully independent from the executive and the legislature. In this regard, the European Charter on the statute for judges provides that this institution should be

“an authority independent of the executive and legislative within which at least one half are judges elected by their peers”<sup>4</sup>

The Consultative Council of European Judges is of the opinion that such an institution, which it refers to as the Council for the Judiciary, should have a mixed composition of judges and non-judges.<sup>5</sup> A substantial majority of members should be judges elected by their peers.<sup>6</sup> The non-judge members can include “outstanding jurists, university professors, with a certain length of professional service, or citizens of acknowledged status”.<sup>7</sup> No Minister can be a member of the Council of the Judiciary.<sup>8</sup> On the selection methods, the Consultative Council “does not advocate systems that involve political authorities such as the Parliament or the executive at any stage of the selection process.”<sup>9</sup> If such a system is still adopted and any non-judge members are elected by the Parliament, they should not be members of

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<sup>1</sup> See full text of General Comment No.32 on Article 14 at <http://cambodia.ohchr.org/EN/PagesFiles/PublicationsIndex.htm>.

<sup>2</sup> See General Comment No.32 on Article 14, para.18.

<sup>3</sup> Both documents are available at <http://cambodia.ohchr.org/EN/PagesFiles/PublicationsIndex.htm>

<sup>4</sup> Para.4.1.

<sup>5</sup> See para.16 of Opinion no 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, available at

<https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE%282007%29OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3>

<sup>6</sup> Para.18.

<sup>7</sup> Para.22.

<sup>8</sup> Para.23.

<sup>9</sup> Para.31.

Parliament and “should be elected by a qualified majority necessitating significant opposition support”.<sup>10</sup>

The issue of composition of the SCM is of crucial importance to ensure its independence and its ability to guarantee the independence of the judiciary. It is generally understood that the current composition of the SCM is one of the main factors which has prevented this institution from fulfilling its role of protecting and promoting the independence of judges. In this regard, the Special Rapporteur on the human rights situation in Cambodia has recommended that the current SCM Law “should be amended to make it a truly independent body. [...] This would reinforce the independence of the judiciary by removing the current elements of executive control and would introduce a democratic and transparent procedure for selecting and appointing members.”<sup>11</sup>

One should also note that the “Conseil supérieur de la magistrature” in France (on which the Cambodian SCM was modelled) was reformed in 2008 and no longer includes any member of the executive.<sup>12</sup> In Thailand, the Judicial Service Commission, which is responsible for the appointment, promotion and removal of judges, does not include any member from the executive. It is composed of the President of the Supreme Court as Chairperson, twelve elected judges from all court levels, and two non-judge members elected by the Senate.<sup>13</sup>

The draft SCM Law goes some way in trying to reform the composition of the SCM by including more judge members elected by judges and prosecutors than in the current SCM. Under Article 4 of the draft SCM Law, the new SCM would also include three experienced jurists (who are not current members of the judiciary) elected by the National Assembly, the Senate and the Constitutional Council. The new SCM would also include a prosecutor appointed by the Minister of Justice. Under the current draft SCM Law, the Minister of Justice remains a Member of the SCM. In light of the principle of separation of powers, a member of the executive should not be part of the SCM which is the main institution in charge of the judiciary. For the same reason, the executive should not be involved in the selection of SCM members.

**OHCHR recommends that Article 4 be amended so as exclude from the SCM any member of the executive or any member appointed by the executive. In order to have a majority of elected judges, the list of proposed members could include:**

- **The President of the Supreme Court, member *ex officio***
- **The Prosecutor General attached to the Supreme Court, member *ex officio***
- **A former judge, prosecutor or outstanding jurist, university professor, with a certain length of professional service, or citizen of acknowledged status *elected* by the Senate (but not a member of the Senate)**

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<sup>10</sup> Para.32.

<sup>11</sup> A/HRC/15/46, para.72.

<sup>12</sup> See <http://www.vie-publique.fr/decouverte-institutions/justice/personnel-judiciaire/magistrats/qu-est-ce-que-conseil-superieur-magistrature.html>

<sup>13</sup> See [http://d-arch.ide.go.jp/idedp/IAL/IAL000600\\_006.pdf](http://d-arch.ide.go.jp/idedp/IAL/IAL000600_006.pdf)

- **A former judge, prosecutor or outstanding jurist, university professor, with a certain length of professional service, or citizen of acknowledged status *elected* by the National Assembly (but not a member of the National Assembly)**
- **A judge from a superior court (Supreme Court or Court of Appeal) *elected* by peers**
- **A prosecutor from a superior court *elected* by peers**
- **A judge from a court of first instance *elected* by peers**
- **A prosecutor from a court of first instance *elected* by peers**

With regard to the duration of the mandate of the SCM members, Article 5 provides that elected members serve for a five-year term. There do not seem to be any limits on the number of terms. In order to ensure regular changes in the composition of the SCM, it would be more appropriate to limit the number of terms.

According to Article 6, elected judge members serve on a full-time basis, which should make the work of the SCM more effective. This was a recommendation from the Special Rapporteur on the situation of human rights in Cambodia.<sup>14</sup> Nonetheless, it is still important to ensure that judges sitting on the SCM “are not absent for too long from their judicial work, so that, whenever possible, contact with court practice should be preserved.”<sup>15</sup> In this regard, elected judges and prosecutors should not sit on the SCM for too many consecutive years.

**OHCHR recommends including a limit on the number of terms of office in Article 5. In paragraph 1, one could add a sentence as follows:**

**The number of terms of office is limited to two.**

Article 28 provides that the elections of representatives from judges and prosecutors shall take place within 3 months of the law coming into effect, but there does not seem to be any timeline for the elections of non-judge members.

**OHCHR recommends establishing in Article 28 a clear timeline for the elections of all elected members of the SCM in order to ensure that the SCM in its new composition can start functioning as soon as possible.**

### **3. Functioning of the SCM**

In order to be effective, the SCM should have adequate resources to fulfil its mission. In particular, it is crucial that it should have

“its own premises, a secretariat, computing resources and freedom to organise itself, without being answerable for its activities to any political or other authority. It should be free to organise its sittings and set the agenda for its meetings, as well as

<sup>14</sup> A/HRC/15/46, para.73.

<sup>15</sup> See para.34 of Opinion no 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society.

have the right to communicate directly with the courts in order to carry out its functions.”<sup>16</sup>

Under Article 8, the General Secretariat of the SCM comes under the Ministry of Justice. In order to guarantee the full independence of the SCM, its Secretariat should be separate and autonomous.

**OHCHR recommends deleting in Article 8 the phrase “under the central administration of the Ministry of Justice”.**

Article 10 provides that the Minister of Justice shall convene meetings of the SCM. As mentioned above, the SCM should be free to organise its meetings and decide what it wants to discuss – it should not be the prerogative of the Minister of Justice to convene SCM meetings.

**OHCHR recommends amending Article 10 as follows:**

**The Chairperson of the SCM shall convene a meeting upon the request of at least four members of the SCM.**

Article 11 deals with the issue of quorum which is set at 6 members. Under the composition as currently determined in Article 4, this would mean that meetings of the SCM could take place and decisions could be adopted *without* the four elected representatives of judges and prosecutors. If Article 4 remains as it is, the quorum should be more than 7 in order to ensure that at least one elected representative from judges and prosecutors is present and participates in decision-making.

**OHCHR recommends that in Article 11, the quorum should be set at a number which ensures that no meetings and decisions can take place without at least one elected judge member of the SCM. The rule should also apply for the adoption of internal rules under Article 14.**

Article 15 provides that the SCM shall have its own budget, which is to be welcome. Nonetheless, Article 15 also provides that it is the Minister of Justice who can authorise budget expenses. In order to preserve the SCM’s ability to spend its own budget independently and autonomously, it would be more appropriate for the Chairperson of the SCM (who is not the Minister of Justice) to be the authority to approve expenses.

**OHCHR recommends that Article 15 be amended so that the Chairperson of the SCM is the budget authoriser.**

Article 18 establishes the mandate of the SCM. As mentioned in the comments on the draft Law on the status of judges and prosecutors, decisions on promotion can be made by the SCM, rather than by a separate Commission on Promotion. According to Article 18, the SCM

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<sup>16</sup> See para.38 of Opinion no 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society.

can make recommendations on appointments, transfers, etc, only *at the request of the Minister of Justice*. In light of the principle of separation of powers, the executive should have no say in such matters concerning the judiciary.

**OHCHR recommends adding in Article 18 “promotion” to the list of issues on which the SCM can decide, and deleting the phrase “at the request of the Minister of Justice” in the 2<sup>nd</sup> paragraph.**

Currently, the SCM has no specific powers to encourage the appointment of women within the judiciary. While the number of women judges and prosecutors has increased in recent years, there are still only about 50 women out of a total of around 400 judges and prosecutors. At the moment, there is one female member of the SCM, namely the Prosecutor-General of the Supreme Court.

In 2006, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) recommended that the Cambodian Government adopt “*measures that will result in an increased number of women in elected and appointed office, including the judiciary*”.<sup>17</sup> The Committee made a similar recommendation in 2013.<sup>18</sup> Such measures should include temporary special measures *to actively promote women*, training and awareness-raising. The reformed SCM should have a specific mandate to promote women within the judicial professions in line with this recommendation.

**OHCHR recommends adding a sentence in Article 18 as follows:**

**The Supreme Council of Magistracy shall adopt measures to improve gender parity and the representation of women within the judiciary, including in superior courts.**

#### **4. Disciplinary proceedings**

When it comes to disciplinary proceedings against judges and prosecutors, the United Nations Basic Principles on the Independence of the Judiciary recall that

“A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.”<sup>19</sup>

The United Nations Guidelines on the Role of Prosecutors contain a similar provision.<sup>20</sup> In addition, the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (adopted by the Chief Justices of the LAWASIA region and other judges

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<sup>17</sup> CEDAW/C/KHM/CO/3, para.24.

<sup>18</sup> CEDAW/C/KHM/CO/4-5, para.29.

<sup>19</sup> Para.17.

<sup>20</sup> Para.21.

from Asia and the Pacific in Beijing in 1995 and adopted by the LAWASIA Council in 2001) provides that

“Judgments in disciplinary proceedings, whether held in camera or in public, should be published.”<sup>21</sup>

With regard to the right to appeal, international instruments recall that decision in disciplinary proceedings against judges and prosecutors should be subject to independent review.<sup>22</sup>

Section II of Chapter IV deals with the competence of the SCM in disciplinary actions against judges and prosecutors. Article 20 states that the Minister of Justice does not participate in the Disciplinary Council, except when it comes to action against the President and the Prosecutor General of the Supreme Court. In order to protect the independence of judges and prosecutors, such an exception is not justified – the executive should not be involved in disciplinary actions against judges and prosecutors under any circumstances.

**OHCHR recommends deleting the last sentence of the second paragraph of Article 20.**

Article 23 deals with the complaints mechanism. Since complaints shall be submitted to the General Secretariat of the SCM, there is no justification for having an additional system of receiving complaints and investigating them at the Ministry of Justice. In any case, the executive should not be involved in the processing and investigation of complaints against judges and prosecutors – complaints should be submitted only to the SCM, and not to the Ministry of Justice.

**OHCHR recommends amending Articles 23 and 24 so that complaints are submitted to the SCM (and to no other institution). Only the SCM shall proceed with the investigation of such complaints. These two provisions could read as follows:**

**Article 23**

**A complaint related to disciplinary actions against judges and prosecutors shall be submitted to the General Secretariat of the Supreme Council of Magistracy.**

**Article 24**

**Upon receiving the complaint and if found necessary, the Chairperson of the Disciplinary Council shall order an investigation using the mechanism of the inspection team of the Disciplinary Council of the Supreme Council of Magistracy.**

Article 26 does specify whether decisions of the Disciplinary Council are published. It provides that decisions will not be subject to any appeal.

**OHCHR recommends that the following amendments be made in Article 26:**

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<sup>21</sup> Para.28. Available at <http://lawasia.asn.au/beijing-statement.htm>

<sup>22</sup> See Basic Principles on the Independence of the Judiciary, para.20 and Guidelines on the Role of Prosecutors, para.21.

**Add at the end of paragraph 1 - “Decisions of the Disciplinary Council shall be published”**

**Delete at the end of paragraph 3 – “This decision shall not be subject to any appeal” and replace by “This decision can be appealed to the Supreme Court”.**

Prepared by the OHCHR Cambodia Country Office,  
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