



## **Comments on certain provisions of the draft Law on the status of judges and prosecutors 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 status of judges and prosecutors. 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. The Office is convinced that the Law on the status of judges and prosecutors can represent an important and positive step forward in strengthening the independence of the judiciary of Cambodia. Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee for the right to a fair trial.<sup>1</sup>

**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 consultation. 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 principal objective of this Law should be to provide a clear legal foundation for an independent judiciary. In this regard, the present Law should protect and promote 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

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<sup>1</sup> See the Bangalore Principles of Judicial Conduct, available at <http://www.unrol.org/doc.aspx?d=2328>

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>2</sup> In this document, the Human Rights Committee has recalled that courts should be independent of the executive and legislative branches of government”.<sup>3</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>4</sup> They are explicitly stated in the 1993 Constitution in the Chapter on the judiciary.

**In this regard, OHCHR recommends reinserting in Article 1 the reference to the Basic Principles on the Independence of the Judiciary as in earlier versions of the draft law . In addition, OHCHR recommends that the Law also refer to the Guidelines on the Role of Prosecutors and include explicit guarantees to protect the principle of independence of judges and prosecutors such as:**

The independence of the judiciary is guaranteed by the Constitution. It is the duty of all to respect and observe the independence of the judiciary.

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the courts, in accordance with the law.<sup>5</sup>

## **2. Independence of the judiciary**

In Article 6, it is not clear how the security of judges and prosecutors and that of members of their families would be guaranteed and by whom.

**OHCHR recommends making this provision more specific – it could for instance state that**

**The authorities shall physically protect judges, prosecutors and their families when their personal safety is threatened as a result of the discharge of judicial functions.<sup>6</sup>**

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<sup>2</sup> See full text of General Comment No.32 on Article 14 at <http://cambodia.ohchr.org/EN/PagesFiles/PublicationsIndex.htm>.

<sup>3</sup> See General Comment No.32 on Article 14, para.18.

<sup>4</sup> Both documents are available in English and Khmer at <http://cambodia.ohchr.org/EN/PagesFiles/PublicationsIndex.htm>

<sup>5</sup> See principles 1 to 6.

<sup>6</sup> See Guidelines on the Role of Prosecutors, para.5.

Article 7 envisages that some judges and prosecutors could work during certain periods of time at the Ministry of Justice, as is currently the practice. This provision does not specify under which conditions and circumstances they would work at the Ministry of Justice. In any case, in light of the principle of separation between the executive and the judiciary, it would not be appropriate for members of the judiciary to work for the executive at the Ministry of Justice.

**OHCHR recommends removing Article 7.**

Article 9 deals with transfers of judges and prosecutors. There have been allegations in the past of judges being transferred to courts situated in remote provinces as a form of punishment. Without prejudice to the accuracy of these allegations, the law needs to protect judges against the risk of such transfers decided on unlawful grounds. In the case where a judge has *actually* committed some disciplinary offence, he or she should not be transferred to another court as a sanction – there are other more appropriate sanctions available (see Article 55), which would also better serve the efficiency and integrity of the courts located in remote provinces .

**OHCHR recommends removing the second sentence in Article 9.**

Article 50, para.3 and Article 96, para. 4 need some clarification. Judges and prosecutors need to be impartial and to be seen as impartial. While judges and prosecutors, like anyone else, are of course free to be members of any association, they should not be closely associated with a political party. This would compromise their perceived neutrality in the eyes of the public.

A provision clearly prohibiting active membership of a political party would help reinforce the principles of independence and impartiality of the judiciary. The inclusion of such a provision was a specific recommendation made by the Special Rapporteur on the situation of human rights in Cambodia in his report on the judiciary.<sup>7</sup>

**Consequently, OHCHR recommends that Articles 50 and 96 state explicitly that judges and prosecutors should not be active members of a political party.**

**In addition, OHCHR recommends that the Law provide that**

**Judges shall refrain from any kind of political party activity and from attendance at political gatherings or political fundraising events, or contributing to a political party, in such as way as to give the appearance of belonging to or publically supporting a particular political party. They shall bear in mind that political activity by a close family member might raise concern in a particular case about the judge's own impartiality.<sup>8</sup>**

Article 108 provides that a judge or prosecutor who is not serving in that role for a period of time needs to notify the Minister of Justice if he or she wants to take up any other activities. If there is to be any notification system in such a case, it should be to the SCM.

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<sup>7</sup> A/HRC/15/46, para.67.

<sup>8</sup> See Guide to judicial conduct of the UK Supreme Court, para.3.3, available at <http://www.supremecourt.uk/about/judicial-conduct-and-complaints.html>

**If Article 108 is retained, OHCHR recommends replacing “the Minister of Justice” with “the SCM” in this provision.**

### **3. Freedom of expression and association**

Judges and prosecutors, like anyone else, have the right to freedom of expression as protected under Article 19 of the 1966 International Covenant on Civil and Political Rights (ICCPR) to which Cambodia became a party to in 1992. This principle has been reasserted in the Basic Principles on the Independence of the Judiciary (para.8) and the Guidelines on the Role of Prosecutors (para.8). In particular, the latter instrument recalls that

[Prosecutors] shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization.

This right is not unlimited and “judges should always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary”.<sup>9</sup>

Article 53 of the draft Law contains a requirement to request advance authorisation from the Supreme Council of Magistracy (SCM) before a judge wants to say or write anything related to their work. Article 96 contains a similar requirement for prosecutors who have to request prior authorisation from the Ministry of Justice. This is a disproportionate restriction on their freedom of expression. Judges and prosecutors should definitely not comment on cases under examination. Nonetheless, if a judge wants for instance to give an interview or a lecture about the role of judges in general, they should not need to request prior authorisation. Judges should be allowed to participate in general debates about the justice system.

In this regard, the Guide to judicial conduct issued by the UK Supreme Court recalls that

It is important for members of the [Supreme] Court to deliver lectures and speeches, to take part in conferences and seminars, to write and to teach and generally to contribute to debate on matters of public interest in the law, the administration of justice, and the judiciary. Their aim is to enhance professional and public understanding of the issues and of the role of the Court.<sup>10</sup>

**OHCHR recommends deleting in Articles 53 and 96 the requirement to request prior authorisation before a judge or a prosecutor can express himself or herself publicly on issues related to their work.**

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<sup>9</sup> See Basic Principles on the Independence of the Judiciary (para.8).

<sup>10</sup> Para.3.4.

Judges and prosecutors, like anyone else, have the right to freedom of association under Article 22 of the ICCPR. This right has been reaffirmed in the Basic Principles on the Independence of the Judiciary (para.9) and the Guidelines on the Role of Prosecutors (para.9). It has also been mentioned in regional instruments such as the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (para.9).<sup>11</sup> The draft Law does currently make any mention of this right.

**OHCHR recommends inserting a provision reaffirming the right of judges and prosecutors to freedom of association. The draft Law should state that**

**Judges and prosecutors shall be free to form and join professional associations and other organisations to represent their interests, to promote their professional training and to protect their judicial independence.**

#### **4. Qualifications, selection and training**

The Basic Principles on the Independence of the Judiciary provide that “persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.”<sup>12</sup>

Article 19 provides a list of criteria for the selection of trainee judges – the requirement to have “sufficient fitness to fulfil the duty” should not be interpreted in any manner which would exclude persons with disability.

**OHCHR recommends not interpreting this requirement in Article 19 in any manner which would exclude persons with disability.**

#### **5. Conditions of service and tenure**

Article 16 mentions maternity leave for women judges, which is to be welcome. In terms of gender equity, male judges should also be entitled to paternity leave.

**OHCHR recommends including in Article 16 a provision stating that male judges are entitled to paternity leave.**

According to the Basic Principles on the Independence of the Judiciary, any system of promotion for judges should be based on “*objective* factors, in particular ability, integrity and experience” (emphasis added).<sup>13</sup> The Guidelines on the Role of Prosecutors contains a similar provision.<sup>14</sup> One should also refer to the European Charter on the statute for judges

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<sup>11</sup> Available at <http://lawasia.asn.au/beijing-statement.htm>

<sup>12</sup> Para.10.

<sup>13</sup> Para.13.

<sup>14</sup> Para.7. See also Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (para.17).

which envisages two systems of promotion, one based on seniority and one based on merit. With regard to the latter, the Charter states that this system should be

“based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions as to promotion are then pronounced by [an authority independent of the executive and legislative within which at least one half are judges elected by their peers] or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.”<sup>15</sup>

In the draft Law, Article 28 lists a number of criteria for promotion which include “fulfilling tasks”. According to Article 31, the performance of each judge is to be assessed on a yearly basis by a senior judge using a series of questionnaires. A similar system of performance evaluation is envisaged for all prosecutors (Chapter 3, part 7). The content of these questionnaires, which presumably will be used to make decisions on promotion, will be crucial. Such questionnaires should be designed by the SCM, following broad consultations with judges, prosecutors and all relevant stakeholders, e.g. lawyers. Article 33 provides details on the composition of Commission on Promotion. In order to protect the independence of the judiciary, the executive should not be involved in issues related to the promotion of judges and prosecutors. Consequently, the Secretary of state of MoJ should not be the Chairperson of this Commission. In any case, there might be no need for such a Commission which does not include any elected judge or prosecutor. Decisions on promotions should be referred to the SCM instead.

**OHCHR recommends that the Law explicitly state that promotion criteria are exclusively based on objective criteria, in particular ability, integrity and experience. Any performance evaluation system should be elaborated in consultation with judges, prosecutors and other relevant stakeholders. The body deciding on promotions, whether it is the SCM or another body, should not include any member of the executive. Consequently, OHCHR recommends amending Article 33 to give responsibility to the SCM to decide on promotion.**

According to the Basic Principles on the Independence of the Judiciary, judges shall have guaranteed tenure “until a mandatory retirement age or the expiry of their term of office, where such exists”.<sup>16</sup> Article 62 of the draft Law sets the retirement age at 60 for all judges. Nonetheless, the draft Law introduces a different regime for judges of the Supreme Court. These judges continue to work beyond the age of 60 and retire “at the request of the concerned judge”. The provision even seems to suggest that judges of the Supreme Court could work beyond the age of 65 if authorised by the SCM upon their request. It is unclear whether this means that if authorised by the SCM, some Supreme Court judges could continue to work well beyond the age of retirement set by the law and for an indefinite period.

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<sup>15</sup> Para.4.1.

<sup>16</sup> Para.12.

**OHCHR recommends that judges of the Supreme Court continue to serve beyond the age of 60 *only* if expressly authorised by the SCM to do so. The Law should set an upper age limit beyond which no judge should be allowed to continue to serve.**

## **6. Discipline, suspension and removal**

Disciplinary offences should be defined in precise terms by the law.<sup>17</sup> It should be recalled that a judge or prosecutor should be suspended or removed “only for reasons of incapacity or behaviour that renders them unfit to discharge their duties”.<sup>18</sup>

The draft Law contains a chapter on disciplinary sanctions (Articles 54 to 56).<sup>19</sup> Article 54 defines disciplinary mistakes too generally (“gaps of judges in fulfilling their profession, the harm to honour, good morals and dignity of judges and prosecutors”). Such offences need to be defined more precisely, whether in this law or in a separate text. Article 55 sets out two types of disciplinary sanctions. However, there is no indication as which type of sanction applies to which type of misconduct.

Article 55 refers to “compulsory transfer for further training”- it is not clear what this means. In line with our comments on Article 9, such transfers should be to another court, but to a training facility, such as the Royal Academy of Judicial Professions.

**OHCHR recommends that disciplinary offences be defined with explicit references to serious infringements of the Code of Ethics for judges and prosecutors. OHCHR also recommends clarifying which types of disciplinary sanctions apply to which disciplinary offences.**

## **7. Role and reporting duties of prosecutors**

Article 74 deals with the role of prosecutors. While their primary role is to prosecute crimes, prosecutors are also responsible to supervise the execution of court decisions, monitoring detention and overseeing the judicial police as clearly provided for in the Code of Criminal Procedure. They should also “cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.”<sup>20</sup>

**OHCHR recommends including these responsibilities of prosecutors in Article 74.**

Article 76 provides that chief prosecutors and the Prosecutors-General attached to the Court of Appeal and to the Supreme Court should report yearly on their activities. Such a reporting mechanism should help introducing more accountability and transparency within the justice system. In order for this reporting mechanism to be meaningful, prosecutors should be asked to report, among other activities, on the number of cases prosecuted, the number of cases filed without processing, on the Police-Court-Prison meetings organised

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<sup>17</sup> See Guidelines on the Role of Prosecutors (para.21).

<sup>18</sup> See Basic Principles on the Independence of the Judiciary (para.18).

<sup>19</sup> Disciplinary proceedings are covered in the draft Law on the SCM.

<sup>20</sup> See Guidelines on the Role of Prosecutors (para.20).

and the recommendations made at these meetings, and on visits to prisons and police stations conducted during the reporting period. In order to assist prosecutors, it would be useful to develop a template for their reports.

**OHCHR recommends that more detailed guidance on the reporting mechanism be provided in secondary legislation and that a template for reporting be developed. OHCHR stands ready to provide any assistance in this regard.**

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