

CCHR Analysis on Judicial Draft Laws (in brief)

I. Summary

This legal analysis is conducted with an aim to examine the scope of powers of the legislative and executive bodies as enshrined in the three important draft laws concerning the judicial powers, namely draft Law on the Organization and Functioning of the Supreme Council of Magistracy, and draft Law on the Statute of Judges and Prosecutors, and draft Law on Organization and Functioning of the Courts. As an independence principle of the courts which is the basis of democratic society does not allow directly or indirectly interfere and influence the powers of the executive body and those of legislative body, this analysis found that the three draft laws seriously affect the independence principle of the courts by means of:

- combining the powers of legislative body and those of executive body [the Ministry of Justice] in the structure, functioning and financing of the Supreme Council of Magistracy, which is supposed to ensure the independence of the courts;
- allowing automatic appointment of the members of discipline committee without being voted for by an independent body;
- allowing the executive body [the Ministry of Justice] to influence the grade and ranking promotion of the judges and prosecutors;
- providing the Ministry of Justice with powers to examine administration of the courts at all levels; and
- giving powers to the Ministry of Justice to manage the funds of the courts at all levels

II. Analysis on provisions of the draft laws based on international good practices

The basic principle in a country where democracy is applied and respected is the principle of separation and independence of powers between the legislative, executive and judicial bodies¹. Power of the courts is one of the backbones of modern, democratic country. Independence of the courts is the key element of the rule of laws and ensures in principle fair hearing. That is why the 1993 Constitution of the Kingdom of Cambodia stimulates the judicial power which shall be independent to ensure impartiality and protection of the people². Independence is the state of being free from subjection or control or influence from anyone³. In this regard, the power of the courts is independent only when the power is established and functioned in separation from the legislative and executive powers. This power shall be protected from inappropriate interference and influence from from both powers since the

¹ Article 51 (New) of the Constitution of the Kingdom of Cambodia: “The Kingdom of Cambodia adopts a policy liberal democracy and pluralism. [...] The legislative, Executive and Judicial powers shall be separate”

² See Article 128 (New) of the Constitution of the Kingdom of Cambodia. Article 10 of 1948 Universal Declaration of Human Rights: “Everyone is Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Article 14(1) of 1966 International covenant on Civil and Political Rights: “[...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. His/her case shall be fairly trialled and in public for decision against him/her in criminal charges or rights and obligations in civil case [...]”

³ Black Law’s Dictionary

judicial power plays an important role in controlling the enforcement of laws and power abuse of the legislative and executive bodies⁴. The King shall be the guarantor of the independence of the judiciary. The Supreme Council of Magistracy shall assist the King in this matter⁵.

Draft Laws on the Organization and Functioning of the Supreme Council of Magistracy, the Statute of Judges and Prosecutors and the Organization and Functioning of the Courts gravely affect the independence of the judiciary, guaranteed by the Constitution and international laws. These draft laws incorporate legislative powers and those of executive body [the Ministry of Justice] into the structure of the Supreme Council of Magistracy which plays a role as a guarantor of the independence of the courts. With such arrangement, the Ministry of Justice has the legal power to get involved in appointment and promotion of rankings and positions as well as punish the judges who are the key actors of the courts. The draft laws enable the legislative body [the Ministry of Justice] manage the court administration and finance of the courts, the body of the judicial powers. Such arrangement affects the independence of the courts, which requires the judges not only to be impartial but also indicates the public that the judicial power is truly separate from the powers of legislative and executive bodies, thus building trust of the whole society on the judicial power.

Therefore, this analysis focuses mainly on examination of powers and duties of the Ministry of Justice in the Supreme Council of Magistracy and the entire judicial system.

Draft Law on the Organization and Functioning of the Supreme Council of Magistracy

The aim of this law is to establish and set out organisation and functioning of the Supreme Council of Magistracy to assist the King in order to ensure the independence of the judicial powers as enshrined in the Constitution of the Kingdom of Cambodia⁶.

The duties of the Supreme Council of Magistracy are to decide and make proposal to the King on nomination, exchange, function removal, termination and removal of all judges⁷ as well as punishment of judges⁸.

Based on international practices to ensure the independence of the judiciary, any decisions which affect the recruitment, nomination, promotion of rankings or dismissal of judges shall be made by an authority independent of legislative and executive powers within which at least half of those who sit are judges elected by all judges following methods which ensure

⁴ See Definition principle (Checks and Balances) which is accessible at <http://www.merriam-webster.com/dictionary/checks%20and%20balances>

⁵ Article 132 (New) of the Constitution of the Kingdom of Cambodia.

⁶ Article 1 of the Draft Law on the Organisation and Functioning of the Supreme Council of Magistracy.

⁷ *Ibid* Article 18.

⁸ *Ibid* Article 20.

the widest representation of the judicial power⁹. In this context, the authority shall be autonomous in decision on its proceedings¹⁰.

1. The draft law incorporates legislative powers and those of executive body [the Ministry of Justice] in the structure, functioning and finance of the Supreme Council of Magistracy, the body whose roles are to ensure the indeendency of the judiciary

The draft law allows the justice minister who is the member of the government and the agent of the legislative power to be a member of the supreme council of magistracy (Article 4) and/or chair of this body when he or she is nominated by the King as his royal representation to preside over the Supreme Council of Magistracy (Article 7).

The draft law allows the members of the national assembly and members of the Senate, the legislative bodies to have rights to vote for members of the Supreme Council of Magistracy (Article 4).

As the supreme council of magistracy has power to make a decision influencing the professions of the judges who are independent, the members of this body shall not be nominated or recruited by the legislative or executive powers¹¹. In addition, in order for the members to be away from the political powers, the candidates of this body shall not be members of the National Assembly, members of the Senate, members of the Royal Government of Cambodia, undersecretary of State, other roles whose mandates are the results of elections and members of Bar Association of the Kingdom of Cambodia¹². The judge or prosecutor candidates shall be the individuals who do not hold any positions in the Ministry of Justice and/or governmental ministries/institutions within the 5 consecutive years and are recruited by means of elections based on representations of the nationwide judges and prosecutors¹³. The elected members shall not be promoted with rankings and/or assigned to perform other duties when they are in office.

In order to avoid the perception of self-interest, self-protection and cronyism, and to reflect the different viewpoints within the society, the supreme council of magistracy should have a mixed composition of judges and prosecutors and other individuals with legal capacity such as lawyers, and legal professors who are voted for by an independent committee. They should not be active politicians or members of the Royal Government or legislative body¹⁴.

⁹ See Paragraph 38 of Opinion no 2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights.

¹⁰ See Paragraph 13 of Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) on the Council for the Judiciary, dated 23 November 2007. Based on Paragraph 2 of Opinion 10, the Council for the Judiciary is entrusted with the protection of the independence of the judges. This Council plays the same roles as those of the Supreme Council of Magistracy. Only wordings are different.

¹¹ *Ibid* Article 31.

¹² *Ibid* Article 29.

¹³ See *Recommendations on Composition of the Council for the Judiciary* [B(a)(b)], Opinion 10 (2007) of Consultative Council of European Judges on Council for the Judiciary, dated 23 November 2007.

¹⁴ *Ibid* Article Recommendation [B(c)].

The Supreme Council of Magistracy should have its own premises, a secretariat, computing resources and freedom to organise itself without reporting its activities to any political or other authority. It should be free to organise its sittings and communicate directly with courts in order to carry out its functions. It should have its own staff in accordance with the tasks assigned¹⁵.

The secretariat of the Supreme Council of Magistracy shall have its own premises and functions independent of the Ministry of Justice. The secretary general and deputy secretary general of the Supreme Council of Magistracy shall be directly appointed by the members of the Supreme Council of Magistracy or appointed based on the proposal made by the minister of the Ministry of Justice following consultations with all members of the Supreme Council of Magistracy and this shall be respected by the minister of the Ministry of Justice.

The Supreme Council of Magistracy should be financed in such a way that it is enabled to function properly. It should have appropriate means to operate independently and autonomously as well as power and capacity to negotiate and organize its own budget effectively¹⁶.

The Minister of the Ministry of Justice shall not be an authorizer or get involved in the finance of the Supreme Council of Magistracy. The King should delegate this right to his royal representative or any member of the Supreme Council of Magistracy.

2. The draft law allows the members of disciplinary council of the Supreme Council of Magistracy to be automatically appointed without being voted for by an independent body

The draft law requires the disciplinary council whose duties are to punish judges to be under the presidency of the chief of Supreme Court and disciplinary council whose duties are to punish the prosecutors to be under the presidency of the general prosecutors of Supreme Court. The members of the disciplinary council are members of the Supreme Council of Magistracy. In this case, the King and the Minister of the Ministry of Justice are not part of the disciplinary council. When a case concerns the chief of the Supreme Court, the discipline shall convene a meeting under the presidency of the King or his representative. The Minister of the Ministry of Justice shall attend the meeting of the disciplinary council (Article 20).

The Consultative Council of European Judges considers that the intervention of an independent authority with the procedures guaranteeing full rights of defence, is of particular importance in matters of discipline¹⁷. It is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence. A Head of State, Minister of Justice or any other representative of political authorities cannot take in the disciplinary body¹⁸.

¹⁵ *Ibid* Paragraph 38 of Opinion 10 (2007) of Consultative Council of European Judges on Council for the Judiciary dated 23 November 2007.

¹⁶ *Ibid* Paragraph 37.

¹⁷ *See* Paragraph 60 (B) of Opinion 1 (2001) of Consultative Council of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judge, dated 23 November 2001.

¹⁸ *See* Paragraph 63 of Opinion 1 (2007) of Consultative Council of European Judges on the Council for the Judiciary, dated 23 November 2007.

The judicial council [the Supreme Council of Magistracy] shall trust in code of ethics. However, in order to avoid conflict of interest, first the disciplinary procedures should be handled by the disciplinary committee whose members are judges who are voted for by all judges or an independent authority¹⁹ and is of composition of different members of the judicial council [Supreme Council of Magistracy]²⁰.

Based on provisions in Article 4 on composition of the Supreme Council of Magistracy, the chief of the courts and prosecutor general of the supreme courts cannot be automatic chairmanship of disciplinary council. Members of disciplinary council should be elected by all members of the Supreme Council of Magistracy, the independent body or all judges and prosecutors.

The Supreme Council of Magistracy can initiate investigations without seizing complaints if a case is in relation with independence of judicial authority, code of ethics and discipline of the judges. The judges can lodge a complaint requesting interpretation of matters concerning the code of ethics. The scope of complaints and conditions of receipt of complaints should be clearly stated in a law to avoid a complaint on abuse which affects the independence of the courts and refusal of complaints without reasons.

Incorporating the Ministry of Justice, the executive body into the procedures on complaint settlement against the judges and prosecutors gravely affects the independence principle of the courts.

The hearing on code of ethics and discipline should be publicly held to ensure transparency, except that such public hearing impacts the public order, private life and any special circumstances concerning the interest of justice. Decisions shall be publicly announced although the hearing is held publicly or non-publicly.

Decisions of the Supreme Council of Magistracy shall be with factual and legal reasonings, are of enforcement power, and subject to appeal or judicial examinations²¹.

Draft Law on Statute of Judges and Prosecutors

This draft law defines the statute of judges and prosecutors and other principles concerning judges and prosecutors with an aim to ensure independence of the judicial powers as stated in the Constitution of the Kingdom of Cambodia²².

¹⁹ See Paragraph 71 of Opinion no. 3 of the Consultative Council of European Judges (CCJE) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality, dated 19 November 2002.

²⁰ See Paragraph 65 of Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) on the Council for the Judiciary, dated 23 November 2007.

²¹ *Ibid* Paragraph 39. See also Rule 20 of Key Principle of the United Nations on Independence of the Judiciary adopted by the 7th United Nation Congress on Prevention of Crimes and Commission of offenses in Milan from 26 August to 6 September 1985 and supported by the Decision of the Assembly No. 40/32, dated 29 November 1985 and No. 40/146, dated 13 December 1985.

²² Article 1 of Draft Law on Statute of Judges and Prosecutors.

The Supreme Council of Magistracy should have competence in recruitment, appointment and grade and ranking promotions of judges. This principle shall be independent of the legislative and executive powers²³.

The draft law provide powers to executive powers [the Ministry of Justice] influencing grade and ranking promotions of the judges and prosecutors

The draft law places the secretary of State of the Ministry of Justice who is the agent of the executive powers in a position in which he/she issues decisions on grade and ranking promotions of the judges and prosecutors. In addition, all members of the committee in charge of grade and ranking promotion of judges and prosecutors are automatically appointed. The minister of the Ministry of Justice can appoint other members as required to facilitate the committee (Article 33).

The authority which has the power to recruit and promote judges should be independent of government and administration. To safeguard its independence, rules should ensure that its members are be selected by the judiciary and that it has power to make its own decisions on procedural rules²⁴.

The independence principle of the judiciary not only safeguards the institution from being interfered and external influence but also protect the judges from internal influence, especially from the internal judicial hierarchy²⁵.

Grade and ranking committee is a body with powers to issue decisions on career progress of individual judge and prosecutor. When the Ministry of Justice which is the legislative body is the chief of this committee and is of power to promote judges and prosecutors, it is risky that judges and prosecutors would abandon their impartiality for the sake of promotions.

In this regard, the members of committee for grade and ranking promotion of judges and prosecutors shall be judges, prosecutors or other competent candidates who have no connection with the legislative and executive powers and are selected by all judges and prosecutors.

Draft Law on Organization and Functioning of the Courts

The aim of this Draft Law is to:

- Define the organisation and functioning of the Courts in all units and levels of the judiciary within the Kingdom of Cambodia;
- Define the organisation and functioning of the prosecution in all units and levels of the judiciary within the Kingdom of Cambodia; and
- Define competence of judiciary in all units and levels based on the skills and expertise;
- Prepare management, administration and functioning of the courts²⁶

²³ Recommendation D(b) of Opinion 10 (2007) Consultative Council of European Judges on Power of the Council for the Judiciary, dated 23 November 2007.

²⁴ See Paragraph 36 of Opinion 1 (2001) of Consultative Council Of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judge, dated 23 November 2001.

²⁵ *Ibid* Paragraph 66.

1. The draft law provides the Ministry of Justice with power to examine the administration of all judicial courts

The draft law provides the Ministry of Justice with power to examine the administration of all judicial courts with general department of court administration as a secretariat and being assigned to conduct inspections on any specific issues (Article 11).

The judicial council [Supreme Council of Magistracy] might have competence on administration and management of the courts to ensure the quality of justice²⁷.

The separation of the judicial administration from the Ministry of Justice ensures the power divisions of the judicial body and executive body. The Supreme Council of Magistracy which is independent and ensures the independence of the courts should have competence over court administration to make sure that it has ability and means to examine the implementation of independence in all units of the courts.

2. This draft law provides the Ministry of Justice with power to manage finance of all judicial courts

The draft law requires the courts of first instance and its prosecution, appeal court and its general prosecutors and supreme court and its general prosecutors to have a separate package of finance for their operations under the finance package of the Ministry of Justice (Article 84).

Based on the key independence principle of the United Nations on independence of the courts, it is an obligation of the state members to provide sufficient resources to the courts so that they can perform their duties appropriately²⁸. Therefore, the budgets of the courts and prosecutions should be prepared by the courts or authority specialized in budget preparation in cooperation with the courts to meet the requirements of independence of the courts and court administration.

Although the funding of the courts is part of the State budget, such funding should not be subject to political fluctuations. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence. The arrangements for parliamentary adoption of the judicial budget should include a procedure that takes into account the opinions of the judiciary²⁹.

Consultative Council of European Judges is of the opinion that the courts can only be properly independent if they are provided with a separate budget and administered by a body independent of the executive and legislature, whether it is a council for the Judiciary or an independent agency³⁰. Consultative Council of European Judges stressed that extended financial powers for the council for the Judiciary [Supreme Council of Magistracy] imply its

²⁶ Article 2 of the Draft Law on Organization and Functioning of the Courts.

²⁷ Recommendation (f) of Opinion 10 (2007) of Consultative Council of European Judges on Council for the Judiciary dated 23 November 2007.

²⁸ Rule 7 of Key Principle of the United Nations on Independence of the Judiciary adopted by the 7th United Nation Congress on Prevention of Crimes and Commission of offenses in Milan from 26 August to 6 September 1985 and supported by the Decision of the Assembly No. 40/32, dated 29 November 1985 and No. 40/146, dated 13 December 1985.

²⁹ Paragraph 73 of Opinion 10 (2007) of Consultative Council of European Judges on Council for the Judiciary, dated 23 November 2007.

³⁰ *Ibid* Paragraph 74.

accountability not only vis-a-vis executive and the legislature but also vis-a-vis the courts and the public³¹, especially the effectiveness and quality of court services.

The determination of the conditions for the allocation of the budget to the various courts and the decision as to the body which should examine and report on the efficiency of the courts are sensitive issues. The CCJE considers that the Council for the Judiciary should have competence in this respect³².

³¹ *Ibid* Paragraph 75.

³² *Ibid* Paragraph 76.