

Judicial Independence in Cambodia: An Overview Analysis

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1. Introduction: Theoretical Framework

Judicial independence is unequivocally the backbone of the rule of law and democratic values.¹ It plays a crucial role to guarantee a number of important issues for a positive society, such as promoting human rights, good governance, economic growth, social justice, social harmony, political stability, transparency and fighting corruption. It has the power to ensure equality before the law, which safeguard the poor from the rich, the weak from the powerful, and the minority from the majority.

Although the notion of judicial independence is universally recognized² and supported, the concept itself continues to struggle for its certainty, and it varies from one country to another depending largely on values of jurisdiction of the country.³ Nonetheless, judicial independence simply means the freedom of judges to carry out judicial duties without any sort of interference or influence. It requires judges to dispense justice based on the law and their sense of justice without yielding to external pressure such as the executive and the legislative and internal pressure such as their superiors and associates in the judiciary.⁴ Moreover, judicial independence is an essential element of the principle of the separation of powers, providing that the power of the executive, the legislative and the judicial bodies must be balanced and independent from one another.⁵ It simply requires that no single body have more power or influence on one another.⁶

In addition, judicial independence is a multifaceted concept,⁷ with two important aspects: the individual independence of judges and the collective or institutional independence of the judiciary.⁸ Individual independence of judges means that judges should enjoy full freedom to conduct their judicial functions without any fear of retaliation, reprimand or reward.⁹ It requires judges to have the ability to make an impartial decision in a particular case based on an impartial and objective assessment of the facts and application of relevant laws, without any improper interference or influence directly or indirectly from any source or for any reason.¹⁰

¹ United Nations Office on Drugs and Crime (UNODC) 2007, *Commentary on the Bangalore Principles* (Commentary on the Bangalore Principles), p. 5, viewed 08 May 2015,

http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf

² 1950 *European Convention on Human Rights*, Art. 6(1); 1966 *International Covenant on Civil and Political Rights*, Art. 14(1); 1948 *Universal Declaration of Human Rights*, Art. 10; 2012 *ASEAN Human Rights Declaration*, Principle 20(1); 1981 *African Charter on Human and Peoples' Rights*, Art. 26.

³ Kelly, W, 'An Independent Judiciary: The Core of the Rule of Law', *the International Centre for Criminal Law Reform*, p. 1, viewed 08 May 2015,

www.icclr.law.ubc.ca/Publications/Reports/An_Independant_Judiciary.pdf

⁴ Larkins, CM 1996, 'Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis', *American Journal of Comparative Law*, vol. 44, p. 44.

⁵ Malleson, K 1997, 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence', *Modern Law Review*, vol. 60, p. 659.

⁶ Kelso, C 1993, 'A Report on the Independence of the Judiciary', *Southern California Law Review*, vol. 66, p. 2211.

⁷ See generally, Shetreet, S & Deschenes, J 1985, *Judicial Independence: The Contemporary Debate*, Boston: Martinus Nijhoff Publishers.

⁸ Commentary on the Bangalore Principles, *supra note 1*, para. 23.

⁹ Ferejohn, J 1999, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', *Southern California Law Review* vol. 72, p. 355.

¹⁰ *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 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (*UN Principles*),

As for institutional independence of the judiciary with regard to the separation of powers, it is the ability of the judiciary as an independent body to operate and function effectively free from undue interference by other bodies, especially the executive government.¹¹ The judiciary should be also equipped with sufficient power to resist external interference when adjudicating cases and to ensure that law enforcement actors comply with court judgments.

The concept of the institutional independence of the judiciary incorporates matters including court administration, as well as adjudicative functions of the court such as assignment of cases or judges, control over administrative personnel, maintenance of court buildings and arrangement of judicial budgets and resources.¹² Although some institutional relations, especially with the executive, are inevitable and even necessary, such relations must not undermine freedom of the judiciary in adjudicating cases and in upholding the law of the country.¹³

This study will provide an overview analysis on institutional independence of the judiciary in the context of Cambodia, with some reflections from international instruments and other jurisdictions on the independence of the judiciary. The study does not cover all the aspects of institutional independence of the judiciary, but is limited to key aspects such as judicial appointment, security of tenure and judicial accountability. It is also imperative to draw attention to the distinction between institutional independence and individual independence (i.e. the impartiality of judges) discussed in relation to the scope of this study. Both terms are used interchangeably throughout this study, due to the fact that they are inherently interlinked.

While institutional independence is essential for judicial independence, it is not sufficient to ensure overall judicial independence, which requires the impartiality of all judges in the judiciary. However, the institutional independence of the judiciary has a substantial effect on the individual independence of judges. Individual judges may not be able to perform their judicial duties independently, knowing that the judiciary is subject to external pressure from the executive or the legislature.¹⁴

The study essentially adopts legalistic and normative approaches to its assessment of judicial independence in Cambodia, due to the presumption that the government must comply with international minimum standards of judicial independence to maintain its legitimacy and credibility. Sources primarily used for this study include both binding and non-binding instruments of various international standards and

Principle 2; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing, 19 August 1995 and adopted by the LAWASIA Council in 2001, (*Beijing Statement*) para. 3(a).

¹¹ Peerenboom, R 2009, 'Judicial Independence in China: Common Myths and Unfounded Assumptions', in Peerenboom, R (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge University Press, pp. 71-72.

¹² *Beijing Statement*, para. 36; Commentary on the Bangalore Principles, para. 26.

¹³ Commentary on the Bangalore Principles, para. 26, citing *Valente v The Queen* [1985] 2 SCR 673 (Supreme Court of Canada). For more detailed discussion of the concept of institutional independence, *Valente v The Queen* [1985] 2 SCR 673 at [47]-[52] (Supreme Court of Canada).

¹⁴ Commentary on the Bangalore Principles, para. 23.

practices for ensuring judicial independence to determine whether Cambodia's domestic laws and practices reflect and adhere to those standards.

2. International Norms and Practices on Judicial Independence

The best practices and principles of judicial independence can be found in numerous international instruments, which are essentially identical to one another. Some of the more notable instruments are *the 1985 United Nations Basic Principles on the Independence of the Judiciary (UN Principles)*, and other key complementing principles such as *the 2002 Bangalore Principles of Judicial Conduct (Bangalore Principles)* and *the 1995 Beijing Statement of Principles of the Independence of the Judiciary (Beijing Statement)*.

These international instruments on judicial independence stipulate minimum standards for guaranteeing the independence of the judiciary, by representing contemporary consensus among states, international experts and international development practitioners, as well as consolidating best practices from various jurisdictions.¹⁵ The drafting history of *Bangalore Principles* epitomizes this process.¹⁶

Generally, each member state is expected to assure the independence of its judiciary in its constitution or supreme law of the country.¹⁷ According to *UN Principles*, institutional independence of the judiciary should be "guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."¹⁸

Although judicial independence seems to be an obvious essential element to any just and fair legal system, a precise definition of the scope of the principle and the overall question of how to attain it may be difficult in a world full of diversity in culture and legal systems.¹⁹ Nonetheless, although virtually no justice system in the world that complies with every provision of *UN Principles*, some countries comply to a greater extent than others.²⁰

2.1. Judicial Appointment

Appointment of judges is one of the fundamental requirements for institutional guarantee of judicial independence. *UN Principles* provides that "any method of

¹⁵ Henderson, KE 2009, 'Halfway Home and a Long Way to Go: China's Rule of Law Evolution and the Global Road to Judicial Independence, Judicial Impartiality, and Judicial Integrity', in Peerenboom, R (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge University Press, p. 26.

¹⁶ See generally, Commentary on the Bangalore Principles, §Drafting History.

¹⁷ *UN Principles*, Principle 1.

¹⁸ *Ibid*, Principle 2.

¹⁹ Kelly, *supra note* 3, p.1.

²⁰ *Ibid*, p. 3.

judicial selection shall safeguard against judicial appointments for improper motives.”²¹ Simply stated, judicial appointments should ideally be made without any types of direct or indirect interferences or influence to recruit the best available persons for judicial office. In practice, however, this requirement may vary from one country to another depending on the social values of each jurisdiction.²² In any event, there is a broad consensus that appointment of judges should be devoid of political and personal considerations. In this regard, there are two main aspects for judicial appointment: the merit criteria for appointments and mechanisms for appointment.

2.1.1. Merits for Appointment

The merit criteria for appointment of judges is a broad concept that does not have specific components or tools used to evaluate what are the qualities required when appointing judges.²³ However, experts from various jurisdictions consider a range of elements to constitute the merit criteria. These can be classified into two aspects, personal qualities and professional skills.²⁴ Personal qualities include, among other things, independence, integrity, impartiality, and high moral character. Professional skills refer to legal knowledge and experience, intellectual ability and competence.²⁵

The international instruments acknowledge these two common elements of merit. For personal qualities, *UN Principles* stipulates that individuals appointed as judges should have “integrity and ability with appropriate training or qualifications in law.”²⁶ *Beijing Statement* states that judges should be selected “on the basis of proven competence, integrity and independence.”²⁷ Regarding professional skills, although *Beijing Statement* does not specifically mention legal skills and knowledge like *UN Principles*, it does insist on “the appointment of persons who are best qualified for judicial office.”²⁸

Without adequate professional qualifications including legal education, training and experience, it can be argued that judges are more likely to depend on the behaviors and decisions of their judicial superiors or peers in dealing with their own caseload. As a consequence, adequate professional competence of judges is therefore significant to enable judges to become more proactive and independent when deciding cases.

2.1.2. Mechanisms for Appointment

²¹ *UN Principles*, Principle 10.

²² Kelly, *supra note* 3, pp. 13-17. Discussion about models of judicial appointment in common law and civil law system.

²³ Malleson, K 1999, *The New Judiciary*, Ashgate, Aldershot, p. 96.

²⁴ Mason, A 1997, ‘The Appointment and Removal of Judges’, in Cunningham, H (ed.), *Fragile Bastion – Judicial Independence in the Nineties and Beyond*, Judicial Commission of New South Wales, Sydney, p. 10.

²⁵ *Ibid.*

²⁶ *UN Principles*, Principle 10.

²⁷ *Beijing Statement*, para. 11.

²⁸ *Ibid.*, para. 12.

Mechanisms for judicial appointment are essential criteria in appointing judges. In any society, the process of judicial appointment contains formal and informal practices which vary from one country to another mainly due to their respective political cultures and social values. Although there are no standardized procedures governing judicial appointments,²⁹ the power to appoint judges should not be vested exclusively in the executive government. This is because there is always a risk that the executive will abuse its power of judicial appointment through personal consideration and political favoritism, which might undermine credibility of the judiciary.³⁰ Judges appointed in this regard could be argued that they might be tempted to adjudicate cases in a way to serve the interests of their appointing authority, which may impair judicial independence.³¹

An independent judicial body or a separate regulatory body to nominate candidates for judicial office is one desirable mechanism to reduce the exclusive power of the executive to appoint judges.³² Such bodies are assigned the task of choosing candidates, proposing a “recommendations only” shortlist, or providing a shortlist that require the executive to provide justified reasons when making decision on appointments of judges.³³ The effectiveness of the selection body depends on its composition and the type of appointment system used. The body may be composed of senior judges, senior lawyers, senior prosecutors, distinguished legal academics, and even senior officials from the Ministry of Justice, as long as it is not under the exclusive control of the executive.³⁴ Appointment mechanisms should be fair, participatory, and transparent.³⁵

Transparency requires that judicial vacancies should be publicly known through broad advertisement or announcement in order to reach as many potential applicants as possible and, more importantly, to gain public confidence in the appointment system.³⁶ If not, there is great scope for manipulation of the requirement for appointment, and judges consequently might be appointed on the basis of personal or other considerations of the executive.³⁷ Qualifications of the shortlisted candidates should be prepared in standard form curriculum vitae and published for public access and comment, especially academics and legal practitioners.³⁸

²⁹ Skordaki, E 1991, *Judicial Appointments: An International Review of Existing Models*, the Law Society, London, p. 12.

³⁰ Colvin, E 1986-1987, ‘The Executive and the Independence of the Judiciary’, *Saskatchewan Law Review*, vol. 51, p. 239.

³¹ Friedland, ML 1995, *A Place Apart: Judicial Independence and Accountability in Canada*, Canadian Judicial Council, Toronto, p. 233.

³² Hayo, B & Voigt, S 2007, ‘Explaining *De Facto* Judicial Independence’, *International Review of Law and Economics*, vol. 27, p. 270.

³³ Lavarch, M 1993, *Judicial Appointments – Procedure and Criteria*, Discussion Paper, Attorney General’s Department, Canberra, p. 22.

³⁴ Malleon, *supra note 23*, p. 133.

³⁵ Luu, TD 2003, ‘Judicial Independence in Transitional Countries’, *United Nations Development Programme – Oslo Governance Centre*, pp. 25-26.

³⁶ USAID 2002, *Guidance for Promoting Judicial Independence and Impartiality*, p. 17, viewed 8 May 2015, http://pdf.usaid.gov/pdf_docs/PNACM007.pdf

³⁷ Malleon, *supra note 23*, p. 128.

³⁸ Rekosh, E, ‘Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia’, in USAID 2002, *Guidance for Promoting Judicial Independence and Impartiality*, p. 58.

In addition, significant differences exist between the two main types of legal systems regarding judicial appointments. In common law system, most judges are selected from professionally experienced lawyers believed to have the requisite experience, competence, and personal traits best suited to the judiciary. For instance, in Canada, a lawyer with at least ten years of experience may apply for appointment as a judge to an independent federal committee who later provides the Federal Justice Minister with a list of the applicants they believed qualified. Those shortlisted applicants are generally recommended by an impartial committee of informed legal professionals. After consultation with political colleagues, the Minister then appoints judges mostly from supporters of the political party in power. Therefore, there are obviously some political considerations in the appointment process in common law systems.³⁹

However, in European civil law systems as opposed to common law systems, judges are recruited without significant professional experience. In Sweden, for example, a person with a legal qualification may take a very competitive examination to become a law clerk for two years and then spend several years working to build up their professional experience in the court administration or as young judges in order to earn status as a permanent judge.⁴⁰ Notably, they also can build their professional experiences outside the judiciary and still qualify to become a permanent judge. They can work in public administration serving as legal advisors or as a secretary of committees in government departments.⁴¹ As a consequence, the majority of judges are selected from those who have government experience. Therefore, it can be argued that judicial appointees in Sweden are selected through political considerations to some extent.

Similarly, in Germany, the State Justice Ministry has the ultimate power to decide on the appointment of judges.⁴² After passing the entry examination, law graduates are required to complete two years' legal training in courts, prosecutors' offices, administrative agencies and private practice. The appointment of judges by the Justice Ministry is aided by a judicial selection committee composed of legislative and executive officials as well as tenured judges and lawyers. Likewise, at the federal level, federal law provides for the creation in each state of a judicial appointment council composed of judges. This council provides advice as to the personal and professional aptitude of the candidates. The advice is not binding, although it has been suggested that it is usually followed.⁴³

Italy appears to have the most transparent mode of judicial appointment. The Consiglio Superiore della Magistratura, a constitutional body responsible for judicial administration, is completely autonomous from the government and is primarily composed of judges who set public exams, with some assistance from the Ministry of Justice, and appoint candidates.⁴⁴ Promotions to higher posts are based on years of

³⁹ Kelly, *supra* note 3, pp. 13-15.

⁴⁰ Adenitire, J, 'Judicial Independence in Europe: the Swedish, Italian and German perspectives', *Intern, Judicial Independence Project*, pp. 5-6, viewed 8 May 2015, <https://www.ucl.ac.uk/constitution-unit/research/judicial-independence/judicial-independence-in-europe.pdf>

⁴¹ *Ibid.*

⁴² *Ibid.*, pp. 19-21.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 13.

service, which limits the opportunities for influence to be exerted by external pressures or dictated by politics.

Despite Italy's apparently independent appointment structure, the 2014 World Justice Project, which assesses countries' rule of law adherence, surprisingly ranked Italy globally at 26, Germany at 9, and Sweden 3, out of 99 countries.⁴⁵ This statistic indicates that greater political interference in the appointment process does not necessarily jeopardize the independence of the judiciary, nor does it necessarily reduce respect for the judicial role.

From Germany's point of view, it is argued that although the executive government is involved in the appointment of judges to a large extent, political interference is unlikely to be a serious concern because academic achievement and accomplishments in the traineeship period of the candidates are the main objective factors that are taken into consideration.⁴⁶

In the case of Sweden, the appointment of judges has always been considered an open process.⁴⁷ Although the government has a final say on the appointment of permanent judges, it is bound to select from a list of candidates recommended by *Domarnamnden*, an independent committee composed of senior judges and lawyers.⁴⁸

The reality is that political intrusion in the appointment of judges is common in most jurisdictions. However, if appointments are based solely on political considerations or political services, the public will lose confidence in the judiciary. To maintain the balance between political considerations and public confidence, judges must be selected based on their merits, particularly professional skills and personal qualities such as integrity, efficiency, and sense of impartiality and independence rather than purely on political considerations. Moreover, the appointment process must also be entirely transparent and open to public scrutiny so that the public is able to ascertain that judges are appointed based on their merits. It is argued that transparency in judicial appointment process is even more vital than the composition of the appointing authority.⁴⁹

2.2. Security of Tenure

Security of tenure for judges is another precondition of institutional independence of the judiciary. It is closely linked with judicial appointments as discussed above. When a person is appointed to judicial office, the next essential question is whether the tenure of their office is adequately secure or not. Without security of tenure, judicial powers will be undermined due to the fact that judges may conduct their judicial

⁴⁵ The World Justice Project Rule of Law Index 2014, viewed 8 May 2015, http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

⁴⁶ Adenitire, *supra note 40*, p. 20.

⁴⁷ *Ibid*, p. 6.

⁴⁸ *Ibid*.

⁴⁹ USAID, *supra note 36*, p. 1.

powers with a view to satisfy the authority that has the legitimate power to terminate their service without any reasonable grounds.⁵⁰

UN Principles provides that “the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”⁵¹ Similarly, *Beijing Statement* recommends that judges should be “appointed for a period to expire upon the attainment of a particular age.”⁵² *Bangalore Principle* provides that it does not matter whether a judge has life tenure or a fixed tenure, as long as it guarantees judicial independence from executive interference.⁵³

The permanent tenure of judges may be fixed for life or for a fixed period of time to a certain retirement age so that judges feel more protected and confident in exercising their judicial duties fairly and impartially without fearing that the appointing authority will arbitrarily remove or replace them.

In Sweden, there are interesting mechanisms along with the appointment process for judges to be entitled to a position as a permanent judge. Firstly, law clerks after passing the entry exam and serving as reporting clerks for 12 months are required to serve another two years as an assistant judge. Upon completion of this period, the assistant judge serves one more year as a judge in order to be qualified for a nomination as an associate judge. Both the assistant and associate judicial positions hold only a fixed-term tenure. At this stage, it is likely that they are tempted to adjudicate in a way that satisfy the appointing authority, which is the government in this case.⁵⁴ The associate judge is further required to continue working either within or outside the judiciary in particular in governmental or administrative agencies until they are appointed as a permanent judge.⁵⁵ Thus, judges in Sweden have to work their way through this meticulous process to earn a permanent status.

However, having a life tenure is perhaps less desirable than a mandatory age of retirement tenure. A life tenure judge may eventually no longer properly discharge their duties due to ill health or old age. The physical condition of elderly judges naturally prevent them from properly discharging their duties, which can result in unnecessary inconvenience and delays in the judicial process. Malleon supports this argument by explaining that the introduction of a retirement age serves to uphold judicial independence because it minimizes the necessity to remove a judge for incapacity.⁵⁶

Although some may argue that life tenure may give impetus to judicial corruption, life tenure is in fact more likely to reduce judicial corruption. Life tenure gives a strong message to concerned parties that it is not easy to bribe judges who do not want to risk their secured job. A study on judicial independence in transitional countries found

⁵⁰ Friedland, *supra note 31*, p. 2.

⁵¹ *UN Principles*, Principles 11-12.

⁵² *Beijing Statement*, para. 20.

⁵³ *Commentary on the Bangalore Principles*, para. 26.

⁵⁴ Adenitire, *supra note 40*, p. 7.

⁵⁵ *Ibid*, pp. 5-6.

⁵⁶ Malleon, *supra note 23*, p. 213.

that judges without security of life tenure appear to submit to government demands more often than judges with life tenure.⁵⁷

A long-term tenure of judges sets a minimum retirement age for senior judges, which may have an adverse effect that jeopardizes judicial independence. Ill political motive, in particular by the government, may influence the body with the power of judicial appointment to take advantage of a long-term tenure when some senior judges are bound to retire from their positions despite their competence. However, the extension of judicial tenure is not a desirable solution either although it may be used to minimize the backlog of cases by using retired judges with rich experiences. The reason is that elderly judges who wish to continue their service may yield to the appointing authority or the government for the extension of their service. Such practice should be avoided.⁵⁸

In fact, the extension beyond retirement or re-employment of retired judges may adversely undermine judicial independence.⁵⁹ In deciding cases, judges may be tempted to make decisions in a way that would help them be re-employed in the future.⁶⁰ Accordingly, judges who view the executive government as their potential future employer might be tempted to appease the executive in exchange of favored treatment.⁶¹ Practically, it is inevitable that the executive government involves itself in some cases concerning its political interests. As a consequence, the general public may suspect that judges maybe be tempted to favor the government in deciding cases. This situation undermines the independence of the judiciary and therefore, the practice of extension beyond retirement or employment of retired judges should be avoided.

Security of judicial tenure may also be endangered by changes of tenure, terms and other conditions of service. One potential risk to judicial tenure is that the executive government may be tempted to remove judges by reducing the tenure of judges in office. Another risk is that if the executive government does not like the existing judges' decisions, it may reduce the judicial salary or change other conditions of service so that the judges give up their office with a view to earning more incomes in legal practice. Therefore, judicial independence requires that the tenure of judges and other terms and conditions of their service should not be changed to their disadvantage.

UN Principles provides that the “term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”⁶² Although it appears that *UN Principles* does not have an express provision preventing alterations or changes of

⁵⁷ Luu, *supra note 35*, p. 18.

⁵⁸ *Ibid*, p. 19.

⁵⁹ Singh, MP 2000, 'Securing the Independence of the Judiciary – The Indian experience', *Indiana International & Comparative Law Review*, vol. 10, p. 249.

⁶⁰ Friedland, *supra note 31*, p. 46.

⁶¹ Wood, D 1996, *Judicial Ethics*, The Australian Institute of Judicial Administration, Carlton, p. 40.

⁶² *UN Principles*, Principle 11.

terms and conditions of service, *Beijing Statement* provides that the tenure of judges “must not be altered to the disadvantage of the judge during their term of office.”⁶³

2.3. Disciplinary Measures

In the proper administration of justice, judicial conduct and the capacity to perform judicial duties are two important requirements for judges. The conduct and performance of a judge has a direct impact on the status and integrity of the judicial office, and therefore it is extremely significant to retain public confidence in the judiciary.⁶⁴ In a democratic society, the public expects their judges to maintain standards of judicial conduct and exercise judicial functions in accordance with legal norms and principles.⁶⁵ Therefore, judges should be accountable for their inability to exercise judicial functions and for any breach of judicial conduct. This accountability can be ensured by way of disciplining judges or by the threat of removal from office due to incompetence.

Judicial accountability is generally aimed to ensure proper conduct and performance, which is closely connected with judicial independence.⁶⁶ In general, judges are subject to disciplinary measures when they commit criminal offence, serious misconduct, or become incapable of carrying out their duties. Disciplinary measures normally include forced replacement or transfer, demotion, compulsory retirement and removal. Although these disciplinary measures have a direct influence on judicial tenure, both notions do not necessarily contradict to one another. Judicial discipline must be conducted through a fair and transparent procedure in accordance with the Constitution and laws of the country.⁶⁷ It is important to note that judges cannot be disciplined for *bona fide* mistakes or holding different opinions regarding a particular interpretation of the law.⁶⁸

Without proper control over judicial conduct, the judiciary may do whatever it wishes, and abuse its power by, for example, taking bribes, performing poorly or committing crimes.⁶⁹ The judiciary is also deemed as a privileged institution with high integrity and expectations of performance otherwise the public cannot rely on it for solving disputes and protecting their interests.

⁶³ *Beijing Statement*, para. 21. It provides in more details that “Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.”

⁶⁴ Potas, I 2001, ‘The Judicial Commission of New South Wales: Treading a Fine Line between Judicial Independence and Judicial Accountability’, *Law in the Context*, vol. 18, no. 1, p. 105.

⁶⁵ Malleon, *supra note 23*, p. 226.

⁶⁶ Shetreet & Deschenes, *supra note 7*, p. 570.

⁶⁷ International Commission of Jurists (ICJ), 2007, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – A Practitioners Guide*, (2nd ed), p. 55, viewed 16 May 2015, <http://www.icj.org/international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors/>

⁶⁸ *Ibid.*

⁶⁹ Mollah, MdAH 2002, ‘Independence of Judiciary in Bangladesh: An Overview’, *International Journal of Law and Management*, vol. 54, no. 1, p. 68.

In every system of judicial disciplines there are two basic elements, causes for discipline and mechanisms for discipline.

2.3.1. Causes for Discipline

UN Principles and *Beijing Statement* provide two common causes for judicial discipline or removal: incapacity and misconduct or misbehavior. *UN Principles* provides that a judge may be subject to disciplinary action only for the causes of “incapacity or behavior” which make them unfit to perform judicial duties.⁷⁰ Likewise, *Beijing Statement* states that judges may be removed from their office only for “proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge”.⁷¹

The most common causes for discipline in all countries are incapacity and misconduct or misbehavior. Incapacity or incompetence of a judge can be explained as a state of being unable or incompetent to perform the duties of judicial office. It may arise from the lack of physical, intellectual or mental ability. In this regard, the Federal Court of Australia held that incapacity could be relatively referred to “physical or mental incapacity.”⁷²

Bangalore Principles in its commentary provides that competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation.⁷³ Judicial competence may be diminished when a judge is incapacitated by drugs or alcohol, or is otherwise mentally or physically impaired. In a smaller number of cases, incompetence may be caused by inadequate experience, personality and temperament issues, or the appointment to judicial office of individuals who are unsuitable to exercise judicial tasks and exhibit that unsuitability in the discharge of judicial duties.⁷⁴

In addition, misconducts of judges relate to non-compliance with the standards of judicial conduct that should be complied with by a person holding judicial office.⁷⁵ It refers to gross negligence or non-compliance with the standards that should be respected by judicial officers. If the standards of judicial conduct are not effectively maintained or respected, public confidence in the judiciary will be undermined.⁷⁶ The question is what are these standards? Thomas explained that these standards derive from “perception of human duty,” which are one of the most rigorous regulated disciplines of professional conduct in the community.⁷⁷

UN Principles and *Beijing Statement* identically emphasize that disciplinary proceedings against judges should be determined in accordance with “established

⁷⁰ *UN Principles*, Principle 18.

⁷¹ *Beijing Statement*, para. 22.

⁷² *Repatriation Commission v Moss* [1982] 40 ALR 553 (Australia Law Reports), at [558].

⁷³ Commentary on the Bangalore Principles, para. 192.

⁷⁴ *Ibid.*

⁷⁵ Thomas, JB (2nd ed) 1997, *Judicial Ethics in Australia*, LBC Information Services, Sydney, p. 9.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, pp. 10-11.

standards of judicial conduct.”⁷⁸ However, none of the documents provide any specific standards of judicial conduct. It is to be noted that standards of judicial conduct can be found in domestic jurisdictions; for instance, in 2005 Cambodia adopted the *Code of Judicial Ethics* to prescribe standards of judicial conduct for judges sitting before the Khmer Rouge tribunal.⁷⁹

In any society, judges are obliged to act or conduct themselves properly and they should always refrain from improper or wrongful conducts or acts. This is because the acts or conducts of judges, whether in their private capacity or in office, have a great impact on public respect and confidence in the judiciary.⁸⁰ Judges should refrain not only from acts or conducts which are apparently improper or wrongful, but also from acts or conducts which appear to be improper or wrongful.⁸¹ Any improper or wrongful acts or conducts of a judge would constitute judicial misconduct.

2.3.2. Mechanisms for Discipline

The effectiveness of judicial discipline systems relies on the characteristics of the mechanisms for discipline. For that reason, it is essential to establish appropriate disciplinary mechanisms for judges applied by the assigned authority to ensure their accountability. If the authority assigned with this task abuses its power through unnecessary or unsound interference, judicial independence is potentially threatened. Therefore, the power of judicial discipline should be vested in mechanisms that can balance the tension between judicial independence and accountability and can manage judicial disciplinary matters fairly and effectively.⁸²

Although *UN Principles* does not specifically mention the mechanisms for judicial discipline, it does indicate that the powers for judicial discipline may be vested in the judiciary or parliament.⁸³ *UN Principles* emphasizes that judges subject to judicial discipline are entitled to an expeditious procedure and a fair hearing.⁸⁴ *UN Principles* further provides that decisions in the proceedings for discipline or removal, except decisions taken by the highest court or the legislature, should be “subject to an independent review”.⁸⁵

Beijing Statement recognizes that states may adopt different procedures of disciplinary measures due to their differences in history and culture. The *Statement* also recognizes that disciplinary procedures by parliamentary have been traditionally adopted in some countries, while these procedures may not be suitable in other countries.⁸⁶ If parliamentary procedures are not considered appropriate, the

⁷⁸ *UN Principles*, Principle 19; *Beijing Statement*, para. 27.

⁷⁹ *The Cambodia Code of Ethics 2007*, approved by the Supreme Council of Magistracy, adopted on 5 February 2007, viewed 8 May 2015, http://www.eccc.gov.kh/sites/default/files/legal-documents/Code_of_judicial_ENG.pdf

⁸⁰ Thomas, *supra* note 75, p. 9.

⁸¹ *Ibid*, p. 15.

⁸² Office of Democracy and Governance, 2002, *Guidance for Promoting Judicial Independence and Impartiality-Revised Edition*, Technical Publication Series (PN-ACM-007), pp. 39-40.

⁸³ *UN Principles*, Principle 20.

⁸⁴ *Ibid*, Principle 17.

⁸⁵ *Ibid*.

⁸⁶ *Beijing Statement*, para. 23.

Statement argues that “the procedures for the removal of judges must be under the control of the judiciary.”⁸⁷ Like *UN Principles*, the *Statement* emphasizes the right of judges to a fair hearing according to established standards of judicial conduct.⁸⁸

Judicial discipline systems by parliamentary procedures are found in most common law countries, such as Canada, England and the United State of America. Under such systems, disciplinary proceedings are conducted in a form of impeachment by parliament. For instance, Article II of *the US Constitution* indicates that only the Congress has the ultimate power to impeach judges for judicial misconducts.⁸⁹

Impeachment involves the trial of a judge by parliament, which enables the parliament to take disciplinary action against judges itself.⁹⁰ Under this system, parliament acts as a mechanism to prevent the executive from exercising the power to discipline judges exclusively. It can therefore safeguard judges from arbitrary removal by the executive government.

Neither of *UN Principles* and *Beijing Statement* embraces the use of exclusive executive power in disciplining judges. If the executive has exclusive powers in respect of judicial discipline, judges may be placed in a position yielding to the executive.⁹¹ Thus, it is not desirable for the power to adjudicate disciplinary proceedings to be granted exclusively to the executive because it is arguably the most important power to uphold the rule or law and maintain the balance of separation of powers, in particular the executive.⁹²

In some cases, the executive is entrusted with the powers to carry out disciplinary measures, but in exercising such powers the executive may be required to consult senior judges.⁹³ In this regard, it can be inferred that the judiciary has only consultative role and that the executive is not bound to take advice from senior judges.

Some judicial disciplinary models adopt an approach whereby the power to discipline judges is entrusted to the executive, but the power is limited subject to the recommendation of the judiciary. In this approach, the judiciary can instigate disciplinary investigations and proceedings in order to prepare recommendations for the executive regarding measures against judges. The executive then decides on appropriate disciplinary measures based on these recommendations.⁹⁴

⁸⁷ *Ibid.*, para. 24.

⁸⁸ *Ibid.*, paras. 26-27.

⁸⁹ *The Constitution of the United States*, Art. II, viewed 15 May 2015,

http://www.senate.gov/civics/constitution_item/constitution.htm

⁹⁰ See generally methods of removal of judges by parliamentary impeachment in the United States, viewed 15 May 2015,

http://www.judicialselection.us/judicial_selection/methods/removal_of_judges.cfm?state

⁹¹ Shetreet, S 1986, 'Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends', *International Legal Practitioner*, vol. 11, p. 40.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

Accordingly, the power to discipline judges should be preferably vested in a mechanism that is independent of executive control.⁹⁵ However, to ensure judicial accountability, the disciplinary power should not be vested exclusively in the judiciary either.⁹⁶

Self-regulated judiciary can be found in some civil law countries like France and Italy. Under this system, a judicial council or commission is established and comprised of all or majority of senior judges. It is entrusted with the powers to oversee virtually all aspects of judicial affairs, especially judicial discipline.⁹⁷ However, judicial independence is a complex phenomenon that judges may become subservient to senior judges who have the disciplining authority although they may be independent from the executive.⁹⁸

In short, independent bodies like a parliamentary and a judicial commission are considered as most capable of being independent and impartial in disciplining judges.⁹⁹ However, their effectiveness depends largely on their compositions, powers and functions. In this regard, an open and transparent process is once again of the paramount importance in ensuring that the powers of these independent bodies are significant for limiting the exclusive executive power of disciplining judges. Even though the judiciary has only recommendation or consultative roles, transparency requires that judges' advice or recommendation are published for the public to scrutinize the executive's decisions regarding the manner in which the executive deals with judicial discipline.¹⁰⁰ For that reason, transparency enhances public confidence in the disciplinary system and harmonizes the tension between independence and accountability in disciplining judges.

3. Judiciary in Cambodia

3.1. Historical Background

Following the collapse of the Khmer Rouge regime, under which a quarter of Cambodia's population perished,¹⁰¹ only six to twelve lawyers survived, out of an established 400 to 600 legal professionals prior to the regime.¹⁰² The Khmer Rouge mainly targeted professionals, intellectuals and educated people, as these people were deemed to be a major threat to the communist party.¹⁰³ The regime abolished the judicial system completely, abolishing courts and removing the roles of judges, prosecutors and lawyers. Even though there was provision for a judicial system

⁹⁵ Shetreet, *supra note 91*, p. 40.

⁹⁶ Morabito, V 1993, 'The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to be Followed?', *University of New South Wales Law Journal*, vol. 16, p. 490.

⁹⁷ Garoupa, N & Ginsburg, T 2008, 'Guarding the Guardians: Judicial Councils and Judicial Independence', *Public Law and Legal Theory Working Paper*, no. 250, pp. 5-7.

⁹⁸ *Ibid*, p. 8.

⁹⁹ Mollah, *supra note 69*, p. 68.

¹⁰⁰ Shetreet, *supra note 91*, p. 40.

¹⁰¹ McCargo, D 2011, 'Politics by Other Means? The Virtual Trials of the Khmer Rouge Tribunal', *International Affairs*, vol. 87, no. 3, p. 613.

¹⁰² Linton, S 2007, 'Putting Cambodia's Extraordinary Chambers into Context', *Singapore Year Book of International Law and Contributors*, vol. 11, p. 5.

¹⁰³ *Ibid*.

under the Khmer Rouge constitution, in reality, there were no courts or any procedural protections established.¹⁰⁴ Instead, the regime turned what were once courthouses, law schools, and other judicial and legal institutions into military bases or detention centers.¹⁰⁵

After toppling the brutal regime, Vietnam took control of Cambodia as an occupying power and helped set up a legal system according to the Communist model in which courts were considered as agents of the state meant to protect the policies of the government.¹⁰⁶ Due to the shortage of legal professionals to fill in the court office, Vietnam provided a legal training course for three months to a number of Communist Party members.¹⁰⁷ It was not until 1993, following a peacekeeping mission of the United Nations Transitional Authority in Cambodia, that there have been more legal training projects, but these remains limited to ensuring a strong judiciary.¹⁰⁸

3.2. Legal Protection of Judicial Independence

3.2.1. Constitutional Protection

Article 128 of the Constitution clearly states that the judiciary shall be an independent authority that has a primary responsibility to guarantee the rights and freedoms of the citizens.¹⁰⁹ Article 129 further articulates that the judiciary represents the citizens of Cambodia and has the exclusive right to adjudicate according to the laws and procedures in force. For this reason, the judiciary earns the public trust and should carry out their duties diligently, consistently, and wholeheartedly. Article 130 emphasizes the separation of powers, under which the judicial power is entirely independent from the executive and the legislative. In addition, Article 131 gives the Department of Public Prosecutions the exclusive duty for criminal prosecutions. Article 132 confers on the King the privileged role of guaranteeing judicial independence and requires the Supreme Council of Magistracy (SCM) to assist him in fulfilling this duty. Finally, the Constitution requires there to be separate laws regarding the statuses and specific roles of judges and prosecutors.¹¹⁰

3.2.2. Three Laws on the Judiciary¹¹¹

¹⁰⁴ Mong Hay, L 2006, 'Institutions for the Rule of Law and Human Rights in Cambodia'.

¹⁰⁵ Neilson, KE 1996, 'They Killed All the Lawyer: Rebuilding the Judicial System in Cambodia', p. 1, viewed 8 May 2015, http://www.uvic.ca/research/centres/capi/research/researchpublications/papers/Neilson_Killed_Lawyers.pdf

¹⁰⁶ Dunlap, B 2014, 'The Rule of Law Without Lawyers: American Legal Reformers and the Cambodian Lawyer Shortage', p. 15, viewed 15 May 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424255

¹⁰⁷ *Ibid*, p. 16.

¹⁰⁸ *Ibid*, p. 17.

¹⁰⁹ *The Constitution of the Kingdom of Cambodia* (the Constitution) entered into force 1993.

¹¹⁰ *The Constitution*, Art. 135.

¹¹¹ Despite the passing of these three judicial laws, these laws are yet to be officially available. *Unofficial Translations* (from Khmer to English) of these laws were distributed during Cambodia National Conference on the Dissemination of Three Laws Concerning the Justice Sector and Discussion in 16 December 2014 (The National Conference on Judicial Laws). At the time of writing these official translations had not been publicly released. Thus, this article is based on these *Unofficial Translations* for reference and analysis.

The three draft laws on the judiciary are fundamentally important to ensure genuine independence of the courts, increasing the transparency and competency in the courts, and the proper functioning of the courts. Although the Constitution requires that there be separate laws governing judges and prosecutors, the process of drafting these laws has been prolonged.¹¹² Eight years after the commencement of the Constitution in 1993, in 2001, the government declared to set a short-term and long-term action plan for legal and judicial reform.¹¹³ Subsequently, three judicial laws, namely the Law on the Statute of Judges and Prosecutors¹¹⁴ (*Law on Judges and Prosecutors*), the Law on the Organization and Functioning of the Supreme Council of the Magistracy¹¹⁵ (*Law on SCM*), and the Law on the Organization and Functioning of the Courts¹¹⁶ (*Law on Court Organization*), were drafted. However, the passing of these three draft judicial laws continued to be delayed between the Cabinet of Ministers and the Ministry of Justice (MoJ).¹¹⁷ Twelve years later in 2013, Surya P. Subedi, United Nations Special Rapporteur on the Status of Human Rights in Cambodia, called on the government, in particular the MoJ, to release the three draft laws as soon as possible for public scrutiny.¹¹⁸ In April 2014, the Cabinet of Ministers adopted the three draft laws. Later, Prime Minister Hun Sen publicly stated that the Cabinet of Ministers needed to forward the three draft laws to the National Assembly directly, without the need to seek any consultation from the opposition party and NGOs.¹¹⁹ One month later, the three draft laws were unfortunately passed by the National Assembly and subsequently by the Senate.¹²⁰

The enactment of the three draft laws has been widely criticized by national and international rights groups and which consider that some provisions give excessive power to the executive, which may enable it to undermine the independence of the

¹¹² Seiff, A 2012, 'Judiciary Laws Facing Long Delays', viewed 8 May 2015,

http://en.cisa.org.kh/index.php?option=com_content&task=view&id=1955&Itemid=1

¹¹³ The International Monetary Fund (IMF), 2004, *Cambodia: Selected Issues Legal and Judicial Reform: Recent Developments and Prospects*, pp. 69-79, viewed 8 May 2015,

<https://www.imf.org/external/pubs/ft/scr/2004/cr04331.pdf>

¹¹⁴ *Law on the Statute of the Judges and Prosecutors*, passed by the National Assembly on 23rd May 2014, reviewed by the Senate on 12th June 2014, and approved by the Constitutional Council in its decision N^o 149/003/2014 KBTH.Ch on 2nd July 2014.

¹¹⁵ *Law on the Organization and Function of the Supreme Council of Magistracy*, passed by the National Assembly on 23rd May 2014, reviewed by the Senate on 12th June 2014, and approved by the Constitutional Council in its decision N^o 148/002/2014 KBTH.Ch on 2nd July 2014. This article takes notice of first enactment of the Law by the National Assembly on 22nd December 1994, viewed 15 May 2015, http://cambodia.ohchr.org/klc_pages/KLC_files/section_002/section02_008_1994.pdf

¹¹⁶ *Law on the Organization of the Court*, passed by the National Assembly on 22nd May 2014, reviewed by the Senate on 12th June 2014, and approved by the Constitutional Council in its decision N^o 149/003/2014 KBTH.Ch on 2nd July 2014. This article takes notice of its predecessor, *Law on the Organization and Activities of the Adjudicative Courts of the State of Cambodia* entered into force 28th January 1993, viewed 15 May 2015,

http://cambodia.ohchr.org/klc_pages/KLC_files/section_002/section02_001_1993.pdf

¹¹⁷ See Sisovann, P 2005, 'Independence in Question as Courts Restructure', *The Cambodia Daily*, 31 August, viewed 15 September 2014, <http://www.cambodiadaily.com/archives/independence-in-question-as-courts-restructure-49199/>

¹¹⁸ See Crothers, L 2014, 'UN Envoy Subedi Calls for Release of Draft Laws', *The Cambodia Daily*, 24 May, viewed 15 September 2014, <http://www.cambodiadaily.com/archives/un%E2%80%88envoy-subedi-calls-for-release-of-draft-laws-56024/>

¹¹⁹ See the Agence Kampuchea Press (AKP news) *Prime Minister: the Draft Laws concerning justice system will be adopted by the National Assembly*, dated 28 April, 2014.

¹²⁰ Cambodia Center for Human Rights (CCHR), 2014, *Briefing Note: Judicial Reform*, viewed 8 May 2015,

http://www.cchrcambodia.org/admin/media/analysis/english/CCHR%20Briefing_Note_Judicial%20Reform_ENG_2014%E2%80%8B.pdf

judiciary.¹²¹ Further, the laws have been enacted unilaterally by the ruling party without any input or consultations from the opposition party, rights groups and other relevant stakeholders.¹²² To address such concerns, in mid-December 2014, the MoJ, with the support of the German and French embassies, organized a “National Conference on the Dissemination of Three Laws Concerning the Justice Sector and Discussion.” However, participation in this conference was limited to government and court officials, including lawyers, judges and clerk students, leaving academics and rights groups uninvited.

From the government’s perspective, the three laws on the judiciary provide Cambodia for the first time with a comprehensive legal framework governing the judiciary.¹²³ The fact that three judicial laws share a single purpose in its first article to ensure the independence of the judiciary indicates a positive and collective commitment of the government to improve the justice system.¹²⁴

Law on Court Organization is expected to improve the efficiency and effectiveness of the judicial system by providing two more jurisdictions for the establishment of individual courts to deal with labor¹²⁵ and commercial disputes.¹²⁶ It offers a clear distinction between the administrative and adjudicative functions of the courts.¹²⁷ Currently, Cambodia has only one appeal court, located in Phnom Penh, which hears all cases appealed from the courts of first instance.¹²⁸ In this regard, the Law will also contribute enormously to the limited capacity of the Appeal Court by establishing more provincial appeal courts.¹²⁹ Although it appears that the government is yet to assess resources available and needed to materialize the creation of regional appeal courts, it is important to have such provision in the law.

Law on Judges and Prosecutors is designated to establish a co-administration relationship between the SCM and the MoJ.¹³⁰ Under this model, Law on SCM outlines the role of the SCM with respect to appointment and judicial discipline of judges and prosecutors,¹³¹ while the MoJ is vested with the powers to control the

¹²¹ Subedi, SP 2014, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, A/HRC/27/70, pp. 10-11, viewed 8 May 2015, http://cambodia.ohchr.org/WebDOCs/DocReports/3-SG-RA-Reports/A-HRC-27-70_en.pdf; LICADHO, ‘Unconstitutional Draft Laws on the Judiciary Should be Rejected’, *Press Release*, viewed 6 May 2015, <http://www.licadho-cambodia.org/pressrelease.php?perm=346>

¹²² Subedi, *supra note 121*, pp. 10-11; See Sokheng, V 2014, ‘CPP Passes Judicial Laws in Senate’, *The Phnom Penh Post*, 13 June, viewed 10 September 2014, <http://www.phnompenhpost.com/national/cpp-passes-judicial-laws-senate>

¹²³ See generally agenda of the National Conference on Judicial Laws.

¹²⁴ *Law on Court Organization*, Art. 1; *Law on Judges and Prosecutor*, Art. 1; *Law on SCM*, Art. 1.

¹²⁵ *Law on Court Organization*, Arts. 14, 25 & 26.

¹²⁶ *Ibid*, Arts. 14, 22 & 23.

¹²⁷ *Ibid*, Article 6 states, “there is only the court which has power to adjudicate the case and to make a court decision.” Article 10 stipulates, “there is an administrative unit, at all levels of courts, which is under central administration of the Ministry of Justice for the support of court and prosecution operation.” Article 11 further provides that “the Ministry of Justice has power to control/review on administrative works of all courts with General Department of Court Administration as support unit.”

¹²⁸ Subedi, SP 2010, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, A/HRC/15/46, para. 19, viewed 10 May 2015, http://cambodia.ohchr.org/WebDOCs/DocReports/3-SG-RA-Reports/A_HRC_CMB16092010E.pdf

¹²⁹ *Law on Court Organization*, Art. 35.

¹³⁰ *Law on Judges and Prosecutors*, Art. 7.

¹³¹ *Law on SCM*, Arts. 18 & 20.

administration of the judiciary both courts¹³² at all level and the SCM.¹³³ Although it appears that the powers of the judiciary and the executive inevitably overlap, the ultimate goal of the Law is to guarantee impartial independence of judges to decide on cases to safeguard the constitutional rights of the judiciary.

3.3. Cambodian Perspectives on Judicial Independence

3.3.1. Judicial Appointment

3.3.1.1. Merit Criteria

As discussed above, the merit criteria for appointment of judges can be analyzed through personal qualities and professional skills. With regard to personal qualities, Article 4 of *Law on Judges and Prosecutors* provides that an individual selected to be a judge should be proven to have competency, honesty and good morality.¹³⁴ Article 19 of the Law also further indicates that student candidates applying for entry exam to become a judge must not have any prior criminal offences, whether misdemeanors or felonies. However, the independence of judicial officers is provided for by *Law on Court Organization*, which requires judges to perform their duties independently, heartedly and consciously with strict obedience to the law.¹³⁵

As for the professional skills, although there is no specific provision for an individual to have a legal qualification to be qualified as a judge, there are rigorous mechanisms for the appointment of judges to ensure that an individual possesses high legal qualification when appointed to the judiciary (discussed in detail below).

3.3.1.2. Mechanisms Criteria

According to Article 1 of *Law on SCM*, the SCM is an independent body, established to assist the King to guarantee the independence of the judiciary, as required under the Constitution.¹³⁶ Accordingly, the SCM has the authority and primary responsibility for nominating judicial candidates and proposing to the King for the appointment, promotion and transfer of judges, as well as any disciplinary action in relation to them.¹³⁷ Article 4 of *Law on SCM* provides for the composition of the SCM. The King chairs the SCM, along with 11 other members from the executive and legislative officials, as well as tenured judges and prosecutors.¹³⁸ The appointment of judges is further regulated by *Law on SCM* and *Law on Judges and Prosecutors*, which provides for the relationship between the SCM and the MoJ in such matters.

Article 19 of *Law on Judges and Prosecutors* provides for the recruitment of judges through public entry examinations. To be entitled to sit the examination, candidates

¹³² *Law on Judges and Prosecutors*, Art. 7.

¹³³ *Law on SCM*, Art. 10.

¹³⁴ *Law on Judges and Prosecutors*, Art. 4.

¹³⁵ *Law on Court Organization*, Art. 6.

¹³⁶ *Law on SCM*, Art. 1; *The Constitution*, Art. 132.

¹³⁷ *Law on SCM*, Art. 18.

¹³⁸ *Ibid*, Art. 4.

must be born in Cambodia and be of Khmer nationality. Age restrictions also apply. Thus, candidates must be 35 years or under if they are students, or 40 years or under if they are public servants. Candidates must also hold a bachelor degree, at a minimum, have no prior criminal offences and be in good physical condition.¹³⁹ There is also an internal exam for experienced lawyers, court officials and clerks, provided that they have at least bachelor degree of law and five years' work experience in the legal field.¹⁴⁰ Both the public and internal examination, including its rules and procedures, is managed exclusively by the MoJ.¹⁴¹ Candidates who pass the entry exam are required to undertake further training for at least two years, which is organized by the MoJ following consultation with the SCM.¹⁴²

Once they have successfully completed their training, student judges are then appointed as intern judges¹⁴³ or considered as a judge on duty¹⁴⁴ for another year. On completing this internship, the intern judge is officially included in judge's cadre and designated as a subordinate judge. Those who fail to pass the internship test can request for an additional internship period, which is determined by the SCM.¹⁴⁵

The MoJ has the administrative authority to assign work to all judges and appoint them to work in the MoJ after receiving approval from the SCM.¹⁴⁶ Judges also have the ability to engage in other work, as Article 31 of *Law on Judges and Prosecutors* states that "judges who have been assigned to work in other institutions."

Judges in Cambodia are primarily divided into three grades: (1) senior judges (*Udom Chaokrom*), (2) intermediate judges (*Vorak Chaokrom*), and (3) subordinate judges (*Anuk Chaokrom*).¹⁴⁷ Each grade consists of a range of degrees that further designate the seniority of judges, which is determined by a separate Royal Decree.¹⁴⁸ The President of the Supreme Court is the highest senior judge while the rest of the judges of the Supreme Court are senior judges. All judges of the Appeal Court except the President, who is deemed to be a senior judge, are either senior judges or intermediate judges. Likewise, the President of the Court of First Instance is an intermediate judge, while all others are intermediate judges or subordinate judges.¹⁴⁹

Judicial promotion occurs via promotion of an individual judge's degree and grade, and is determined specially by a separate Royal Decree.¹⁵⁰ Yet, *Law on Judges and Prosecutors* also enumerates some basic principles required for promotion of degrees and grades of judges, based on various factors, including their work ethic, compliance with judicial codes of conduct, work experience, job performance and

¹³⁹ *Law on Judges and Prosecutors*, Art. 19.

¹⁴⁰ *Ibid*, Art. 23.

¹⁴¹ *Ibid*, Arts. 22-23.

¹⁴² *Ibid*, Art. 23.

¹⁴³ *Ibid*, Art. 24.

¹⁴⁴ *Ibid*, Art. 47.

¹⁴⁵ *Ibid*, Art. 25.

¹⁴⁶ *Ibid*, Art. 7.

¹⁴⁷ *Ibid*, Art. 10.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid*, Art. 49.

¹⁵⁰ *Ibid*, Art. 27.

further studies in law.¹⁵¹ *Law on Judges and Prosecutors* further emphasizes that promotion of judges is quantitatively determined by the needs of the judiciary and the availability within the national budget to fund such promotions.¹⁵²

Promotion of the degrees and grades of judges is conducted and assessed by their senior judges or the heads of state institutions where they work.¹⁵³ Each judge has an individual bulletin, which their senior judges or supervisors at public institutions use to evaluate their performance and give them scores.¹⁵⁴ In this regard, the appointment of judges requires some political considerations.

After having two years experience, any judge who wishes to be promoted can register in the list for promotion.¹⁵⁵ *Law on Judges and Prosecutors* establishes a Commission (the Commission), which has the power to decide judicial promotions. That Commission is chaired by a Secretary of the State of the MoJ, along with three prosecutors, three judges and a Secretary General of the SCM. The MoJ can also appoint additional members to assist the work of the Commission.¹⁵⁶ If any judge has the potential to be promoted but is not included in the list for promotion, they can file a complaint to the MoJ.¹⁵⁷ At this point, it can be argued that the MoJ is likely to abuse its power by blocking such a complaint from proceeding further without reasonable grounds if the complainer acts in a way which is against the interest of the government. The fact that there is no specific provision that allows judges to launch a complaint against how the MoJ deals with concerning issues in the complaint reinforces the argument. For this reason, an open and transparent process of this appeal mechanism may be a practical solution to balance the power of the MoJ.

Article 5 of *Law on SCM* does not prohibit members of the SCM from holding another position in other bodies during their terms of office. The possibility that a member of the SCM could hold multiple positions simultaneously creates the possibility of conflicts of interest arising. Further, members of the SCM who hold other positions are highly unlikely to be able to perform their tasks and responsibilities properly, due to the multiple demands on their time. As a result, they cannot oversee the judiciary effectively, and their backlogs become bigger, risking that matters may be transferred to a team working under the MoJ to deal with.¹⁵⁸ As a consequence, all members of the Commission double their works, and their work with the Commission can become second priority compared to their first job.¹⁵⁹

Given all these provisions, it can be fairly concluded that the appointment of judges in Cambodia is strongly influenced by and through the MoJ. This raises the further question of politicization of the judiciary.

¹⁵¹ *Ibid*, Art. 28.

¹⁵² *Ibid*, Arts. 27-29.

¹⁵³ *Ibid*, Art. 31.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid*, Art. 32.

¹⁵⁶ *Ibid*, Art. 33.

¹⁵⁷ *Ibid*, Art. 35.

¹⁵⁸ Subedi, *supra note 128*, para. 26.

¹⁵⁹ (CCHR), 2014, *Legal Analysis: Three Draft Laws Relating to the Judiciary*, pp. 6-7.

Although the judiciary alone has the exclusive right and power to adjudicate cases,¹⁶⁰ the question is whether the MoJ's administrative powers over the judiciary adversely affects the adjudicative power of the judiciary. If it does not, then the involvement of the MoJ at an administrative level does not matter. What really matters is the *de facto* independence of the judiciary not the *de jure* independence.¹⁶¹

3.3.2. Security of Tenure

Law on Judges and Prosecutors provides that retirement age of judges is 60, in most cases.¹⁶² Only judges of the Supreme Court can extend their retirement age to 65, and any further extension beyond 65 requires permission from the SCM upon a request of the concerned judge.¹⁶³ The MoJ provides administrative assistance to the SCM regarding this issue by preparing and submitting a draft Royal Degree to the King for signature for the request to be enforced.¹⁶⁴

As discussed above, there are arguments for and against fixed tenure and life tenure of judges. However, Cambodia should adopt a more flexible and balanced approach regarding security of tenure of judges. Since judges of the Supreme Court are the most senior, requiring rich experience and great professional achievements, they should hold a life tenure. One of the main arguments against life tenure is that elderly judges can be a burden on the judicial system, requiring the devotion of time and resources to prove their incompetence, in order to require them to retire due to mental or physical fragility that is the result of old age. However, it can be fairly argued that there are far fewer cases at the Supreme Court than at lower levels, which indicates that judicial processes at the Supreme Court are unlikely to be delayed merely because judges have life tenure. While *Law on Judges and Prosecutors* requires judges who cannot fulfill their judicial duties due to mental and physical incompetence to retire,¹⁶⁵ it reinforces the argument for a life tenure that competence of judges should be the greatest concern, rather than the mere age of judges.

Although the MoJ can initiate a report to the SCM regarding suspicious or apparent incompetence of judges, in order for the SCM to decide on retirement,¹⁶⁶ this does not necessarily mean that the MoJ can remove judges for improper reasons. This is because the MoJ must prove the alleged incompetency through authenticated documents from an expert doctor appointed by the Ministry of Health.¹⁶⁷ MoJ's involvement in this process is limited to providing administrative assistance by investigating and documenting evidences to the SCM, so that the forcible retirement of allegedly incompetent judges has a legitimate basis.

¹⁶⁰ *Law on Court Organization*, Art. 6.

¹⁶¹ Remarks by Hauerstein, RK 2014, presented at the National Conference on Judicial Laws.

¹⁶² *Law on Judges and Prosecutors*, Art. 62.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, Art. 66.

¹⁶⁶ *Ibid.*, Art. 67.

¹⁶⁷ *Ibid.*

3.3.3. Disciplinary Measures

Law on Judges and Prosecutors establishes grounds for disciplinary actions against judges while *Law on SCM* addresses mechanisms for discipline.

Article 50 of *Law on Judges and Prosecutors* briefly enumerates some of the key obligations and code of conducts expected of judges. The provision stipulates that judges must adhere to their code of conducts. Although the provision does not specify clearly what are those ethical behaviors in the judicial code of conducts, it may refer to a separate judicial code of conduct that has not yet been adopted generally, although one has been adopted in respect of the Khmer Rouge tribunal. Moreover, Article 50 prohibits judges from engaging in any activity in their private life which may affect their “prestige, dignity and reputation.” In dealing with political issue, the judge must be “absolutely neutral.”¹⁶⁸ It can be implied that judges are not prohibited from holding a particular political ideology. However, this provision is silent on whether or not judges can involve in political activity. Any breach under this provision can lead to disciplinary action.

Article 53 of *Law on Judges and Prosecutors* emphasizes the obligation of judges to maintain professional confidentiality by forbidding judges from expressing themselves to the public through “all means of texts, writing or other ideas related to their function” without prior approval from the SCM. However, general information relating to proceedings of a case is permissible. In his latest report, Surya P. Subedi, United Nations Special Rapporteur on the Status of Human Rights in Cambodia, expressed his deep concern regarding this strict restriction, providing that judges should not “be prevented from contributing to debates on matters of public interest relating to the law, the administration of justice and the judiciary.”¹⁶⁹

Article 20 of *Law on SCM* establishes a Disciplinary Council that is composed of all members of the SCM. The President of the Supreme Court acts as the president of the Council in disciplinary actions against judges. The General Prosecutor of the Supreme Court is president of the Council in disciplinary actions against prosecutors. Disciplinary actions concerning the President of the Supreme Court are presided over by the King or his royal representative.

It is argued that the President of the Supreme Court and the General Prosecutor of the Supreme Court should not automatically be Presidents of the Disciplinary Council. Members of the Disciplinary Council should be elected by all members of the SCM or by all judges and prosecutors. In order to avoid conflicts of interest, the initial stage of a disciplinary action should be addressed by the disciplinary commission whose members should be elected by all judges and prosecutors or an independent body.¹⁷⁰ In sum, the composition of this disciplinary commission should differ from the members of the SCM.¹⁷¹

¹⁶⁸ *Ibid*, Art. 50.

¹⁶⁹ Subedi, *supra* note 121, para. 38.

¹⁷⁰ See The Consultative Council of European Judges (CCJE), 2002, *Opinion No. 3 on the Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behavior and*

Law on SCM also establishes an “Inspection Team” to assist the Disciplinary Council in investigating disciplinary matters.¹⁷² The Inspection Team is composed of co-leaders between a senior judge and a senior prosecutor.¹⁷³ This composition is arguably satisfactory due to the fact that it is free from the MoJ. However, there is no specific provision to prevent them from holding other positions as a judge and a prosecutor. Again, it appears that they may occupy two positions simultaneously, raising doubts on effectiveness of their work performance.

The Inspection Team is also equipped with the power to summon any judges to be interviewed in relation to disciplinary issues. If the summoned judge fails to cooperate with the Team, such behavior is considered as a breach of judicial conducts.¹⁷⁴ The Team is required to submit the result of their investigation to either the Secretariat General of SCM or the MoJ.¹⁷⁵ After receiving the complaint, the MoJ can decide whether to undertake a preliminary investigation to establish a disciplinary case file before sending it to the Disciplinary Council.¹⁷⁶ At this stage, the involvement of the MoJ in the accountability process of the judiciary may impair the independence of the judiciary.

A judge accused of committing judicial misconduct has the right to defend themselves personally, or through a legal representative, before the Disciplinary Council.¹⁷⁷ However, the hearing concerning disciplinary matters is conducted in a private meeting and all attendees or persons involving in the hearing are required to maintain its confidentiality strictly.¹⁷⁸

It is essential that disciplinary procedures against judges are fair and impartial, adhering to the principle of judicial independence. Accordingly, disciplinary procedures should define disciplinary faults clearly, operate without any political pressure, and representatives of political authorities, such as the MoJ, should not be included in any disciplinary body.¹⁷⁹

A hearing on professional misconduct of judges should be held in public to ensure transparency. An exception to this presumption may be made in the interest of justice, such as where public order or an individual’s privacy is at risk. The ultimate

Impartiality, para. 71, viewed 11 May 2015,

https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%203_EN.pdf

¹⁷¹ See CCJE, 2007, *Opinion No. 10 on the Council for the Judiciary at the Service of Society*, para. 64, viewed 11 May 2015, https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf

¹⁷² *Law on SCM*, Art. 21.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, Art. 22.

¹⁷⁵ *Ibid.*, Art. 23.

¹⁷⁶ *Ibid.* “disciplinary motion against the judges and prosecutors shall be submitted to the Secretariat General of the Supreme Council of Magistracy or to Ministry of Justice. The Ministry of Justice can decide for preliminary examination and investigate this disciplinary motion in order to file the disciplinary case before the deciding to submit to the Disciplinary Council of the Supreme Council of Magistracy for further processing.

¹⁷⁷ *Ibid.*, Art. 25.

¹⁷⁸ *Ibid.*

¹⁷⁹ Opinion No. 10 of CCJE, *supra note 170*, para. 63.

decision should be based on sound legal reasoning, in public; and the decision should be appealable or be able to be the subject of judicial review.¹⁸⁰

4. Conclusion

The judiciary is widely perceived to enjoy limited independence in authoritarian regimes, where law and the judiciary are highly politicized and susceptible to the ruling party.¹⁸¹ Under authoritarian regimes, politically significant cases are entrusted to regime-controlled courts to protect the regime's interests. There are many reasons authoritarian governments attempt to control the judiciary, including to maintain the *status quo* by overseeing and disciplining local officials to ensure that they are obedient to the central government, to legitimize government economic policies or unpopular decisions irrespective of human rights and public concern, and to intimidate and silence dissenting voices through prosecutions and lawsuits. However, the courts also enjoy some measure of independence in private cases or non-political cases.¹⁸² In this way, the authoritarian regime can legitimize itself, at least to some extent, depending on the regime's ability to attract foreign investment. Relatively independent courts play a positive but limited role in protecting citizens' rights and can be used by opposition groups as a forum for their grievances, since by going to court they can gain significant visibility if they receive an unfavorable result.¹⁸³

Generally, the judiciary in Cambodia faces similar problems regarding its independence as those which are faced by courts in authoritarian countries. It is argued that, for the past twenty years of democratisation, the Cambodian government has actually retreated from the model of democratic governance, moving from an unstructured authoritarian regime to a structured authoritarian regime.¹⁸⁴

However, it is also clear that democracy is not a prerequisite for judicial independence, although judges in true democracies generally enjoy greater independence than their counterparts in authoritarian regimes.¹⁸⁵

This paper has attempted to demonstrate that the notion of judicial independence is a dynamic concept in which there is no one model of government that can automatically guarantee judicial independence. Comparisons with other jurisdictions also demonstrate that it is difficult to assess and determine which model is best.

¹⁸⁰ *UN Principles*, Principle. 20.

¹⁸¹ Guarnieri, C 2009, 'Judicial Independence in Authoritarian Regimes: Lessons from Continental Europe', in Peerenboom, R (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, Cambridge University Press, pp. 238-39.

¹⁸² *Ibid*, p. 240.

¹⁸³ *Ibid*.

¹⁸⁴ Un, K 2011, 'Cambodia: Moving away from Democracy?', *International Political Science Review*, vol. 32, no.5, p. 550.

¹⁸⁵ Ginsburg, T 2009, 'Judicial independence in East Asia: Lessons for China', in Peerenboom, R (ed), *Judicial independence in China: lessons for global rule of law promotion*, Cambridge University Press, p. 249.

Efforts to strengthen and promote the independence of the judiciary must take a holistic view, involving interrelated situations and changes in the political, social, economic and legal domains. Bearing in mind that Cambodia is still struggling to rebuild itself after the destructive Khmer Rouge Regime, it will take time and effort to address the wide range of issues adversely affecting its legal system. The resolution of one problem can cause problems in other ways, meaning that the path to judicial independence is an iterative process, dealt with in a piecemeal fashion. In this task, it is important to ensure that the judiciary does not carry the burden of resolving such complex issues alone. To do so would ignore the reality and complexity of the situation in Cambodia.

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