



The Judicial System of Cambodia

A) The Right to Have Judicial Control:

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) which have been adopted by Cambodia and thus are part of the national law of Cambodia (Article 31 I Cambodian Constitution) state that every human being has a right to an effective remedy granted by an independent judicial body in case of a violation of his/her rights.

Article 8 UDHR:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10 UDHR:

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 I ICCPR:

All persons shall be equal before the court and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

It is the obligation of every signatory state to establish a judicial system which is able to fulfill the peoples' right to judicial control. This right also explicitly includes a **right to judicial control of acts of administrative officials**.

Article 2 III ICCPR:

Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.



The **Cambodian Constitution** (CC) also explicitly acknowledges the basic right to a judicial protection against all kinds of violations of rights no matter if the right is violated by third parties or by the government.

Article 38 VIII CC:

Every citizen shall enjoy the right to defense through judicial recourse.

Article 39 CC:

Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts.

To ensure such a judicial protection by an independent body the Cambodian Constitution guarantees an **independent** judiciary:

Article 128 CC:

The Judicial power shall be an independent power.

The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens.

The Judiciary shall cover all lawsuits including administrative ones.

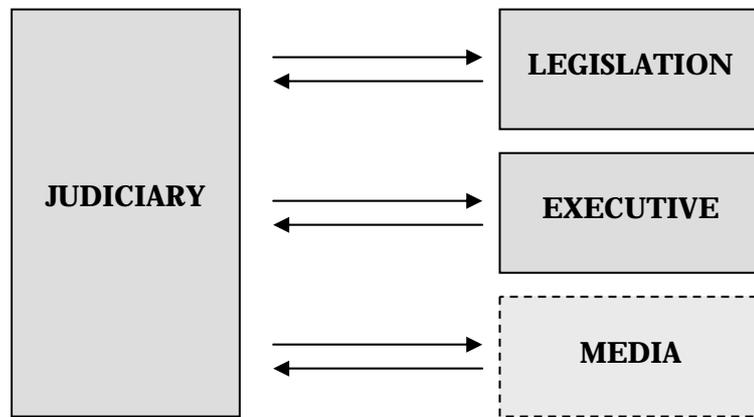
B) Structure of the Judiciary System on a Glimpse:

The judiciary is a complex system with numerous power relations, institutions and actors. To analyze and understand this system it is helpful to divide the overall picture into three parts and take a look at each part separately:



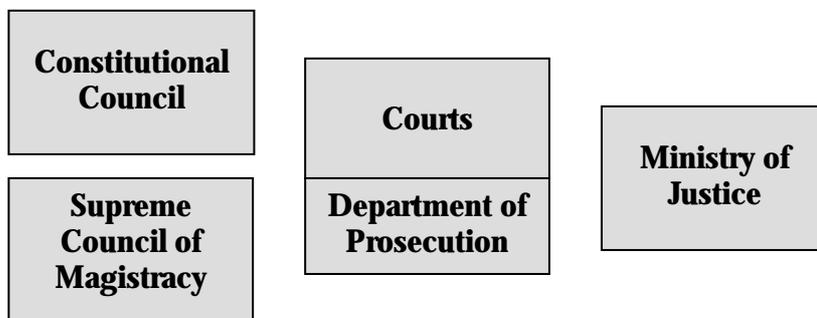
I) Power:

As the judiciary is one of the three powers in the state we first look at its function within this power structure and at the relation the judiciary has with each power (including the relation to the media which is sometimes called the “fourth power” because of its strong influence).



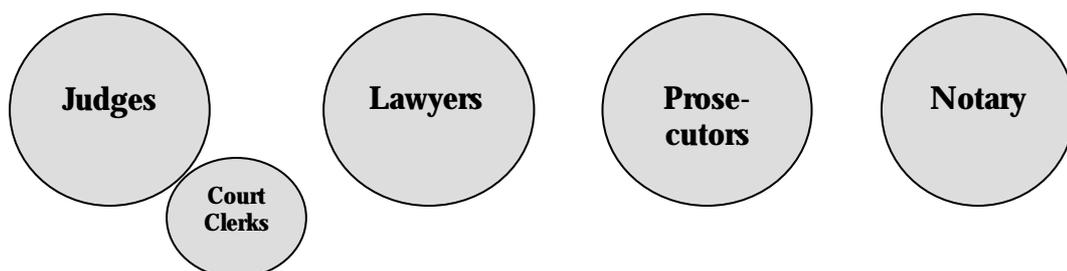
II) Institutions:

Secondly we look at the function of the different public institutions that are part of the judiciary such as the following:



III) Actors:

Finally we look at the functions, rights and duties of the following different actors:





IV) In Details:

1) Relation of the Judiciary to the Other Powers:

The role of the judiciary and its relations to the other powers can only be understood if it is clear why those powers are needed. The answer to this question is: Human beings are neither 100% good nor 100% bad. Everyone can make mistakes. This is reflected by a lot of sayings:

“Human beings are made of such crooked wood that nothing straight (smooth, perfect) can ever derive from them.”

“God lets the sun shine on just and unjust people alike”

“Nobody is perfect”

Therefore human beings need a power that sets up rules and laws for human behaviour (**Legislation**), one power that executes these laws (**Executive**) and also a power which controls whether the application and execution of laws was correct or not (**Judiciary**).

As a “fourth power” the **Media** finally carefully monitors the performance of these three powers and critically comments it.

But these institutions themselves are run by human beings who can make mistakes and can exceed their powers. So **each institution itself needs control and limitation**. Therefore the different powers have not only to be clearly separated but have to control and balance each other. This is called the “**Principle of Checks and Balances**” of the different powers. This principle has to be kept in mind when looking at the relation of the judiciary to the other powers.

One clear rule about this relation is that no other power shall take over the role of the judiciary.

Article 129 Sentence 2 CC:

... Only judges shall have the right to adjudicate. A judge shall fulfill this duty with strict respect for the laws, wholeheartedly, and conscientiously.

Article 130 CC:

Judicial power shall not be granted to the legislative or executive branches.

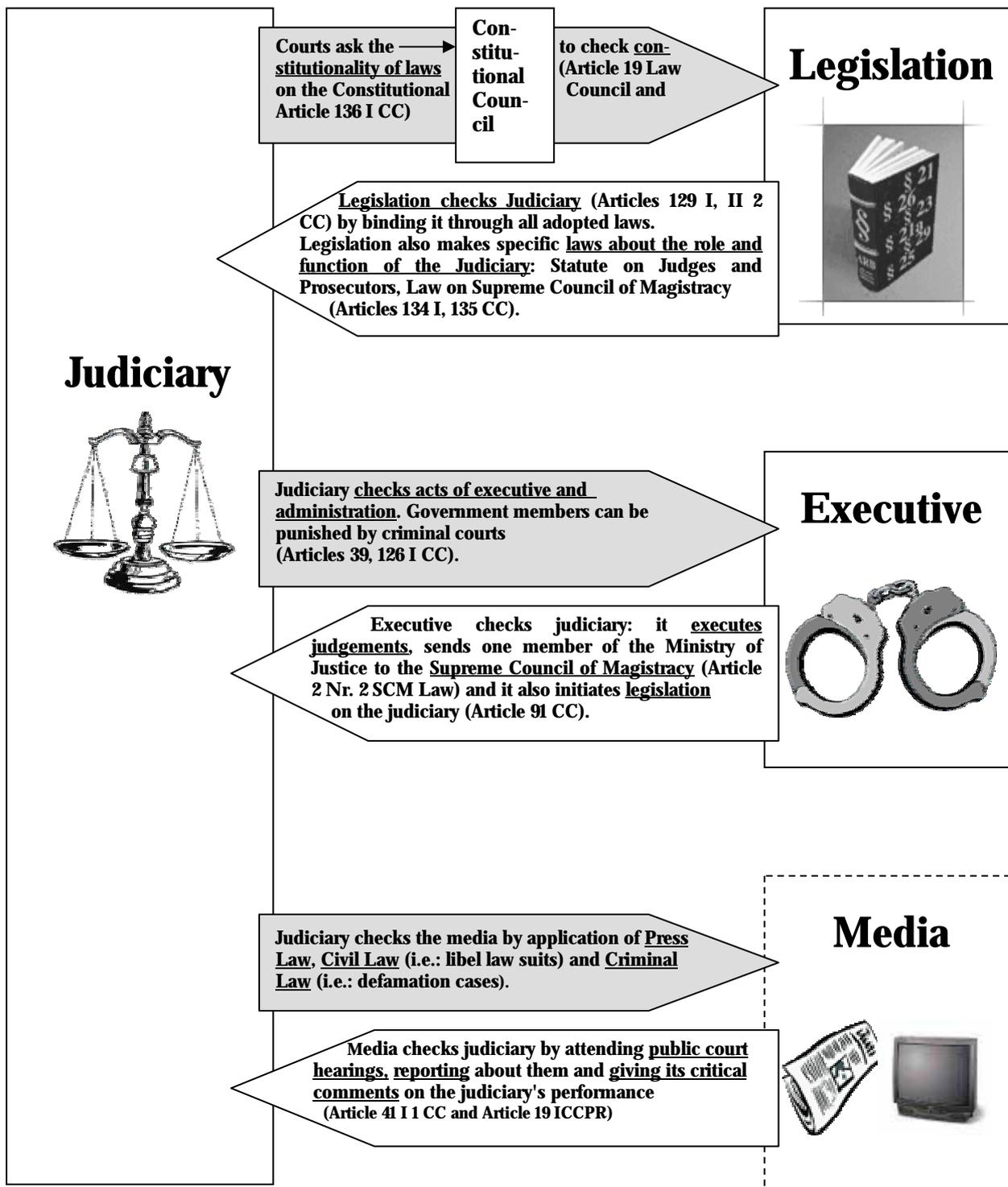
Article 131 CC:

Only the Department of Public Prosecution shall have the right to file criminal suits



Principle of Checks and Balances

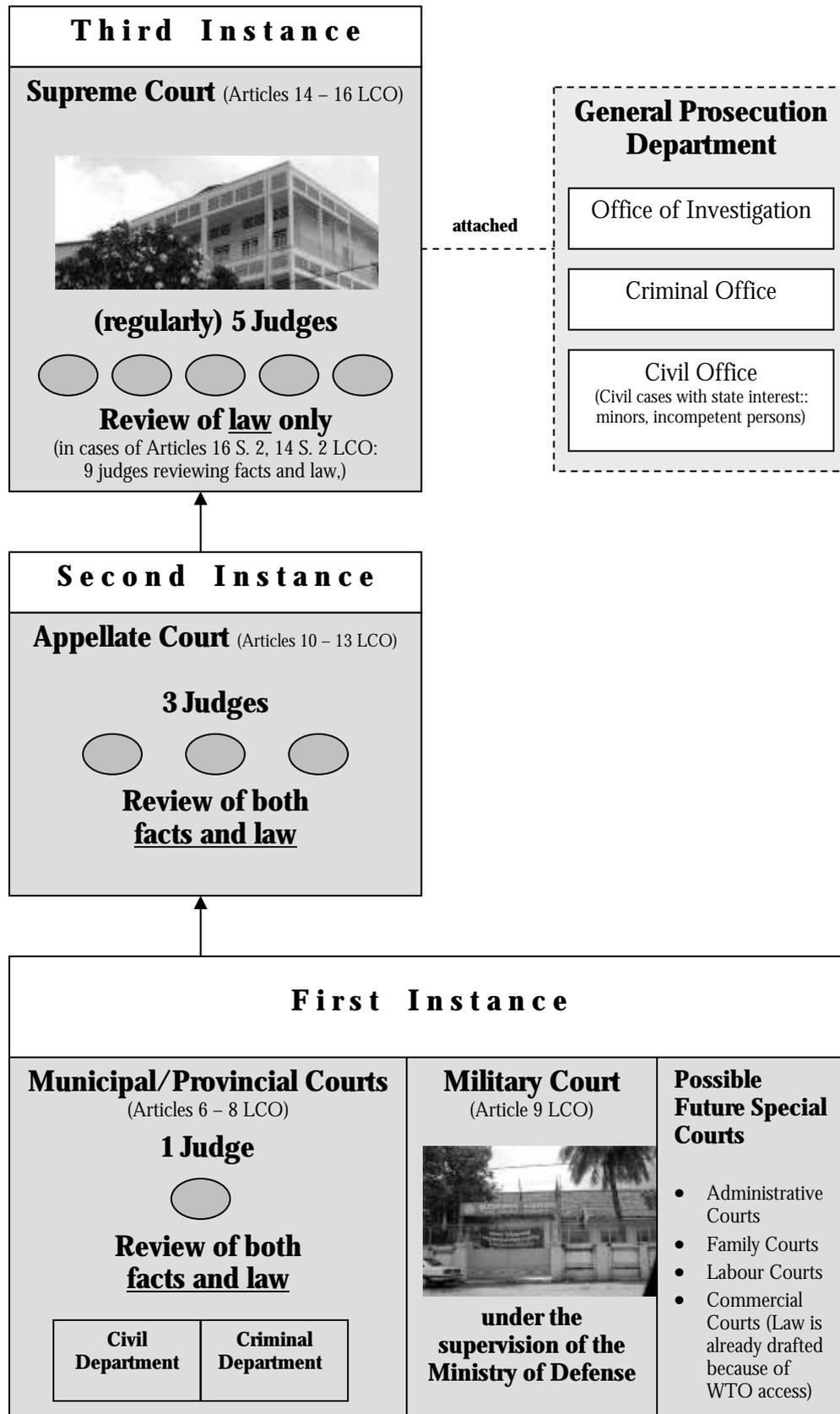
On the one hand the judiciary influences the other powers but  on the other hand at the same time these powers influence the judiciary: 





2) The Different Institutions of the Cambodian Judiciary:

a) **The Courts** (Article 135 CC in connection with the Law on Court Organization (LCO), 1993):





b) Institutions Supervising and Assisting the Courts:

Supreme Council of Magistracy
(Article 134 CC in connection with the Law on SCM)



- **appoints judges** (Article 134 III CC, Article 11 Law on SCM)
- **takes disciplinary actions on judges** (Articles 133 sentence 2 and 134 IV CC, Article 12 Law on SCM)
- **shall uphold the independence of the judiciary** (Article 132 sentence 2CC)

Ministry of Justice
Law on Establishment of MoJ (24th January 1996) and Anukret on Organization and Function of MoJ (20th January 2000)



- **monitors penitentiaries**
- **assures conformity of draft legislation with other existing laws**
- **maintains criminal records**

**Problem:
Enough independence for SCM?**

3) The Actors:

Judges
Draft Law on the Statutes of Judges and Prosecutors (last version: March 2003)



**Problems:
Independence?
Impartiality?
Legal knowledge?**

Lawyers
Statute of the Cambodian Bar and Code of Ethics for Lawyers



**Problems:
Free access to Bar Association?
Legal Aid?**

Prosecutors
Draft Law on the Statutes of Judges and Prosecutors (last version: March 2003)



**Problems:
Independence?
Impartiality?
Legal knowledge?**

Notary
Anukret Nr. 505 by Hun Sen of 4th December 2001



**Problems:
No law yet!
Can notary be a lawyer at the same time?**



C) The Courts:

The arrival of the UNTAC in 1992 brought fundamental changes to the court system in Cambodia. The Appellate Court was created, resulting in a **three – tier court system**:

- the Municipal and Provincial Court (first instance)
- the Appellate Court and (second instance)
- the Supreme Court (third and final instance).

The details are stipulated in the “**Law on the Organization and Activities of the Adjudicate Courts**” of 25th January 1993.

I) Courts of First Instance:

The Court of First Instance is the lowest court which includes the Provincial, Municipal, and Military Courts. Each court's **jurisdiction covers a particular geographical area** where the court is located. An exception to this is the Military Court which has jurisdiction over the entire territory of Cambodia.

Comment:

The geographical jurisdiction has the advantage that the courts know the area and its problems and people very well. Therefore they might be able to come to a more just and appropriate assessment of cases.

But in a court system with a lot of corrupt judges it can be also a disadvantage to have a court with a clearly defined geographical jurisdiction: The judges are well known to the local people and can be contacted easier by persons who want to bribe them. There are two strategies to avoid such a disadvantage:

- **rotation of judges** on a regular base from one court to another court and with their prior consent. Such a rotation diminishes their chances to act in a corrupt way.
- **circuit judges:** these are different judges from a central court routinely traveling in the districts to conduct court sessions there. No party has the chance to contact them in advance to deal about the trial.

At the courts of first instance only a **single judge** conducts the proceedings and makes the judgement.

Comment:

The fact that one person can decide a case alone increases the chances of corruption because no one else is involved in the decision making and can control it. Furthermore it is easier and cheaper to contact just one person than several persons.

Therefore many court systems in the world established **benches composed of three or more judges**. Some other court systems include a **participation of laymen** who are elected from the public and sit and decide together with the professional judge (s). (Such a system for example was introduced after the French Revolution in France because people deeply mistrusted the judges who they suspected of still being in favour of the upper class or of the abandoned king.)



The judge has to collect the **facts** and evidence and must then apply the **law** to the facts. This whole proceeding has to follow the principles of a **fair trial**¹.

1) The Provincial and Municipal Court:

This is the lowest trial court. In principle, the Municipal Court or Provincial Court is composed of two departments: Civil and Criminal. However, in practice, as the number of judges is very limited, there is still no clear separation between the departments. A judge may handle both civil and criminal cases. The judge decides as a single judge².

2) The Military Court:

The Military Court is located in Phnom Penh. It is a court of first instance that has exclusive jurisdiction over cases **committed by military personnel** involving

- **military offenses** (violation of military duties, misconduct, etc.) or
- any **offenses affecting the property of the armed forces**.

Ordinary offences (such as murder, robbery, etc.) committed by military personnel are under the regular jurisdiction of the provincial/municipal courts. The Military Court is administratively, financially and logistically under the control of the Ministry of Defense.

Comment:

As the Ministry of Defense is regularly involved in the conflict as a party this raises the **question if a court depending on that ministry** can be **really** called **independent**.

A further concern is that the Military Court needs to strictly respect its limited jurisdiction. A Military Court is **not authorized to extend its jurisdiction on civilians** - as it has sometimes done in the past - even if a civilian has put damage to the armed forces.

3) Special Future Courts:

Administrative Courts, Family Courts, Labor Courts and Commercial Courts:

Some fields of law are very complicated and require **special proceedings rules** to handle them properly. Such fields are for example administrative law, family law, labour law but also commercial law. To apply these laws correctly it takes **special knowledge and training**. To handle these specific legal topics it is normally not sufficient to just know the civil and criminal code and the related criminal and civil proceedings codes. Therefore it is desirable that related cases and disputes are handled by highly **specialized and well trained judges**. To solve this problem many countries have established specialized courts to cover these special cases.

Comment:

- As Article 128 III CC and Article 2 III a ICCPR state that a judicial control of administrative acts must be ensured Cambodia is in urgent need of a specialized **Administrative Court**. Citizen must be able to file claims with such a court against all

¹ A Draft Law on Criminal Proceedings has been written with the assistance of France and a Draft Law on Civil Proceedings has been written with Japanese help. Both proceedings codes give guidance to judges on how to conduct a fair trial. **Clear proceedings rules** make it **more difficult** for judges **to decide arbitrarily**.

² In 2002 the around 190 Cambodian judges handled 9303 criminal cases and 26199 civil cases.



acts of the administration (like bans on peaceful demonstrations, building permits, excessive administrative fees, decisions of the Cadastral Commissions³ on land law conflicts, Commune Council activities, public school certificates, etc.). An independent control of such administrative acts would contribute significantly to the fight against corruption.

- The creation of a **Family Court** including a special proceedings rule for family law disputes is not yet on the political agenda. But such a specialized branch of the courts seems to be highly recommendable as women, children and victims of domestic violence are especially weak clients of the court system. They not only need special protection but also special remedies (like fast eviction orders against violent husbands) and judges who are especially trained to understand their situation and to listen attentively to them.
- A **Labor Court** is necessary to handle the sometimes very difficult collective labor disputes that can quickly end up in illegal strikes and lockouts if not settled properly. Right now the **Arbitration Council on Collective Labor Disputes** fills this gap until well functioning specialized labor courts are established⁴.
- A **Commercial Court** has not yet been created. But according to the contractual obligations of Cambodia stemming from its accession to the World Trade Organization it is necessary to establish such a court. A commercial court would only handle commercial matters. The court would probably be established in Phnom Penh. The territorial jurisdiction of this court will cover all of Cambodia. A **Draft Law** on the creation and functioning of a Commercial Court **already exists**⁵.

II) Second Instance: The Appellate Court

The jurisdiction of the Appellate Court **covers the whole territory** of Cambodia. This court is located in Phnom Penh. It hears all cases appealed from a court of first instance – municipal, provincial or military court. The Appellate Court **reviews both questions of law and of fact**. If a party is not satisfied with the judgement or a decision rendered by the court of first instance, that party may file an appeal to the Appellate Court through the Clerk's Office of the court rendering such judgement or decision. The Appellate Court will then make a **new adjudication** which may **uphold, modify** or **annul** the lower court judgement or decision. The Appellate Court uses trial procedures similar to those of the courts of first instance. The only difference is that the case is heard by **three judges**, called "Trial Council", and an additional investigation may be conducted to resolve the factor gaps left by the lower court. An appeal against a lower court judgement is not conditional. There is no law specifying grounds needed for appeal or penalties for unreasonable appeals. Thus there is no mechanism to reduce the flow of groundless or unreasonable appeals to the Appellate Court.

Comment:

Having a second instance reviewing the first instance's decisions at least helps to fight corruption among the courts. To enable the second instance to review the lower courts' proceedings and decisions it is **very important that the lower courts document each**

³ The current Land Law already provides a court-like proceedings before the Cadastral Commissions which are part of the Land Management Ministry.

⁴ For further details on the role, functioning and statutes of the Arbitration Council but also on the awards already delivered by this council see: www.arbitrationcouncil.org

⁵ It was drafted in August 2003 and is available at KID's "Om Radsady Library".



of their proceedings steps properly in well kept files. Furthermore it is important that they give a written reasoning for their judgement. Otherwise it would not be possible to control their decision and to see if it was only influenced by the facts and the law. The fact that the Appellate Court consists of a bench of **three judges** creates an additional **obstacle for attempts to bribe this court** because it is simply more difficult and more expensive to bribe all three judges and the chances are bigger that at least one out of them is honest.

III) Third Instance: The Supreme Court

The Supreme Court is located in Phnom Penh. It is the highest court of appeals in the country and its jurisdiction covers the whole territory of Cambodia.

Since 1994 the Supreme Court with a bench of **5 judges** has adjudicated **questions of law** for cases appealed from the Appellate Court.

Upon a **second appeal** from the Appellate Court, where that court does not follow the judgment of the Supreme Court then by a bench of **9 judges** tries **both questions of fact and law.**

Currently the Supreme Court is headed by a President and is composed of two chambers: A Civil and Social Chamber and a Penal Chamber. The Civil Chamber handles civil disputes, marriage, family and administrative matters and labor and commercial disputes. The Penal Chamber handles only criminal matters.

The Supreme Court has **no** power to review legislative acts, executive regulations or to make its own case law. It can only apply the laws made by the legislature. The Supreme Court is publishing a quarterly „Bulletin of the Supreme Court Judgements“ which are intended to be used as model judgements to be adapted by lower courts but it is unclear whether the court’s previous judgements are binding upon later similar cases.

D) The Department of the General Prosecution:

The Department of General Prosecution is attached to the Supreme Court.

According to Article 131 CC only this Prosecution Department shall have the right to file criminal suits at the courts.

The Department of the General Prosecution is mainly composed of three units:

| Office of Investigation | Criminal Office | Civil Office |
|--|---|---|
| assists in <ul style="list-style-type: none"> ensuring the legality of investigations, examining documents of investigative institutions or organizations concerning offences and violations of law, and conducts its own investigation where needed, or conducts additional investigations. | assists and is responsible to the Prosecutor-General in the exercise of his/her prosecutorial rights in criminal proceedings such as <ul style="list-style-type: none"> reading charges, making conclusions, questioning, acting as the principle party, making or withdrawing accusations, etc. | assists and is responsible to the Prosecutor-General in civil cases that affects the State’s interest, minors or incompetent persons. It is responsible for collecting information and evidence for the Prosecutor-General to make conclusions at trial. |



Problem:

In case of a criminal offense committed by a **civil servant** the prosecutor can file an indictment only with the approval of the Council of Ministers or the related ministry the concerned civil servant works for. The prosecutor has to request for this approval through the Ministry of Justice (Article 51 of the Law on the Statute of the Civil Servants).

This procedure entitles the **executive branch to finally decide whether charges are filed or not**. This influence of the executive violates the principle of equality before the law (Article 31 II CC) as well as the principle of separation of power (Article 51 IV CC).

According to Article 134 III and IV CC the Supreme Council of Magistracy is in charge of the appointment of prosecutors and of disciplinary sanctions against them in case of misconduct.

E) Institutions Monitoring and Assisting the Courts:

I) The Ministry of Justice:

The Ministry of Justice (MoJ) has the following main duties (Article 3 of the Sub-Decree (Anukret) on the Organization and Functioning of the Ministry of Justice of 7th April 2000):

- to assure the smooth operation of the courts in civil, criminal, administrative and commercial matters,
- to monitor the execution of judgements through inspection of penitentiaries,
- to assure uniformity and consistency in the drafting of civil, criminal, administrative, labour and commercial laws and the implementation thereof and
- to maintain criminal records and issue abstracts thereof

Comment:

The Ministry of Justice does **not have the competence to issue circulars giving guidance to judges on how to decide cases in general or in particular**. There is also **no** article in the abovementioned sub-decree which entitles the ministry to **instruct** or give **advice or answer questions of judges how to decide a case or how to interpret a law**. The former practice to influence the judges by such means is illegal under the present regulations.

II) Supreme Council of Magistracy:

Articles 132 - 134 CC state that the Supreme Council of Magistracy (SCM) shall assist the King in guaranteeing the independence of the judiciary. It shall especially make proposals for the **appointment of judges** (Article 134 III CC). Furthermore it shall decide about **disciplinary sanctions against judges** (Articles 133 Sentence 2 CC and 134 IV CC).

As prescribed in Article 134 I CC a special **Law on the Organization and Functioning of the Supreme Council of Magistracy (SCM Law)** was adopted in 1994. It foresees that members of the SCM are appointed by Royal Decree.



The SCM is composed of:

- the King, President
- the Minister of Justice, Member
- the President of the Supreme Court, Member
- the Prosecutor – General of the Supreme Court, Member
- the President of the Appellate Court, Member
- the Prosecutor of the Appellate Court, Member
- three judges, elected by judges, Members
- three judges, also elected by judges, alternate Members. They replace an absent full member (elected judge)

The SCM convened for the first time on 3rd December 1997.

One of the main duties of the SCM is to ensure the smooth functioning of the judiciary. In this regard Article 11 SCM Law stipulates that the SCM has the duty to “decide and propose to the King the appointment, transfer, secondment, leave of absence, delineation of duties and dismissal of judges and prosecutors”.

Article 10 SCM Law furthermore states that “all proposed laws and draft laws regarding the organization and functioning of the judiciary require consultations with the SCM and its opinions should be given within 30 days, or within 10 days in case of emergency, of the date of the proposed or draft laws are received from the Ministry of Justice”.

Comment:

The SCM is a rather **powerful institution** with a lot of influence on the judges regarding their **appointment, promotion, discipline and dismissal - topics that always touch the judges’ independence**⁶.

Basically it is a good idea to have this institution being formally independent of any other power. Independent Councils of Magistracy exist for example in many European countries like in Spain and Italy but also in some of the former east-block countries that turned into democracies after the collapse of the communist rule. To strengthen the independence of this institution itself it is crucial to **make sure that the members of this body are elected in a public and transparent way**.

Additionally they should be elected not only by the judges themselves but also by lawmakers of all parties represented in the National Assembly and by members of the Bar Association.

In any case it is most important that this body is not influenced by the executive or that at least the executive influence is as weak as possible. A new **Draft Law on the Amendment of the SCM Law**⁷ tries to improve the independence of the actual SCM but still leaves many wishes open regarding the appointment of the SCM members themselves.

⁶ For example in March 2004 the SCM removed the two Phnom Penh Municipal Court Judges Hing Thirith and Oun Bunna from the bench three days after they released two suspects in the murder case of Chea Vichea for lack of evidence. Both judges were not even given the fair chance to know the charges against them or to be present and defend themselves during the SCM’s proceedings. One of the principles of an independent judiciary is to reserve the removal of a judge as the utmost measure of disciplinary sanction only for proven cases of a judge’s personal incapacity, or conviction of a crime, or a conduct which violates a properly established code of conduct so severely that it renders the judge unfit to be a judge.

⁷ The latest version dates from April 2002 and is not yet adopted by the National Assembly.



Study Question 1

Look at the graphic on the relation between the judiciary and other powers (see page 5).

According to this graphic the executive has influences on the appointment of the judges by the Supreme Council of Magistracy.

- a) Is this compatible with the principle of separation of power?
- b) What are the advantages and disadvantages of the abovementioned influences of the executive body?



Study Question 2

Why do all Cambodian judgments show the headline “In the Name of the Cambodian People”?

Please give a reason for your answer and quote the relevant article(s) in the Cambodian Constitution.



Study Question 3

Is it necessary to established administrative courts in Cambodia?

Please give reasons for your answer and quote the relevant article(s) in the Cambodian Constitution.



Study Question 4

Look at Article 7 of the pertinent Law on the Supreme Council of Magistracy (SCM Law) and compare it with the new Article 7 of the Draft SCM Law Amendment (see Annex).

What do you think is the goal of the suggested amendment?



Study Question 5

Please sort the functions of the following persons into the three state powers:

Executive: Is s/he enforcing and executing the law or

Judiciary: Is s/he controlling the application of the law in single cases or

Legislation: Is s/he adopting binding legal norms?

- 1) Assistant of the Court Clerk
- 2) General Secretary of the National Assembly
- 3) Prosecutor
- 4) Chief of the Commune Council
- 5) President of the Bar Association
- 6) Director of “The Khmer Institute of Democracy”
- 7) Director of Prison
- 8) Investigation Judge
- 9) President of Council of Jurists
- 10) Labor Inspector of the Ministry of Labor settling labor disputes
- 11) President of the Association of the Garment Factory Owners