

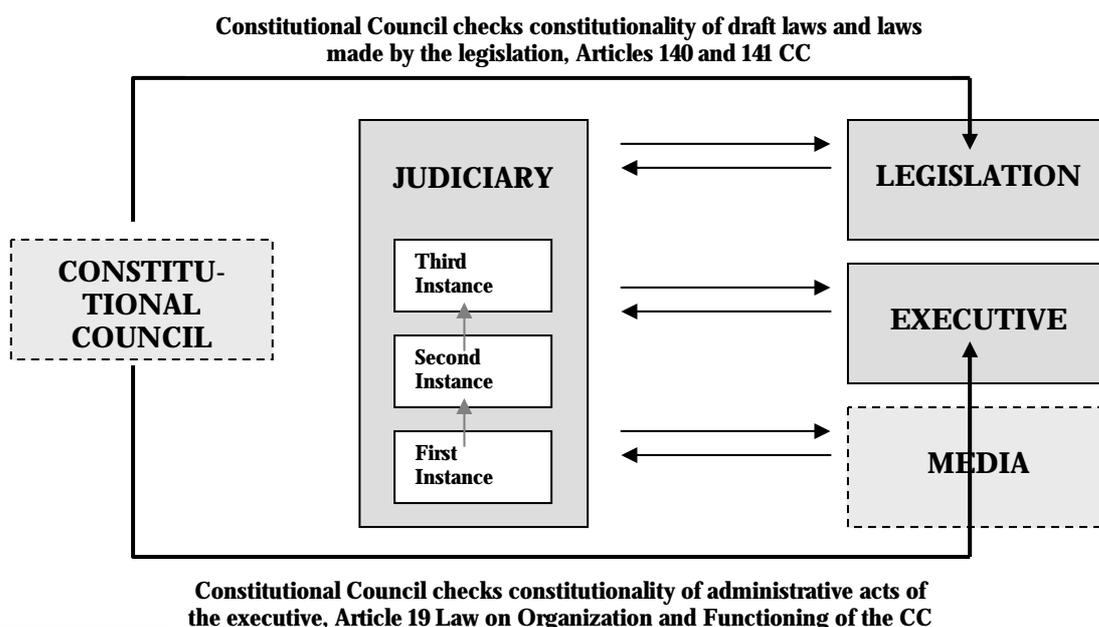
## *The Constitutional Council*<sup>8</sup>



### **A) Introduction:**

The Constitutional Council was not established in 1993 when the constitution entered into force. It took five more years until 1998 to appoint all its nine members because one of the appointing bodies, the Supreme Council of Magistracy, did not convene before December 1997.

Although the Constitutional Council's task is to interpret the constitution and to check the constitutionality of laws it is rather a highly **political** than a judicial body. It is an **independent constitutional organ** and not – like in many other countries<sup>9</sup> – a fourth instance. Therefore it is called “Constitutional **Council**” and **not** Constitutional **Court**”.



<sup>8</sup> see also [www.ccc.gov.kh](http://www.ccc.gov.kh)

<sup>9</sup> For example in Germany the “Federal Constitutional Court” is the highest body of administration of justice and jurisdiction.



The fact that the Constitutional Council is not operating as a genuine court is also made clear by Article 138 CC which states that its members neither necessarily need a law degree nor must be member in the judiciary. They may also hold a degree in administration, diplomacy or economics. But they must be experienced professionals in their respective field with at least 15 years of practice (Article 3 I Law on the Organization and Functioning of the Constitutional Council, LOFCC of March 1998). During their term members of the Constitutional Council can not hold any other position, for example in the government, parliament, political parties or trade unions, etc. and must resign from all professional occupations (Article 139 CC and Article 5 LOFCC).

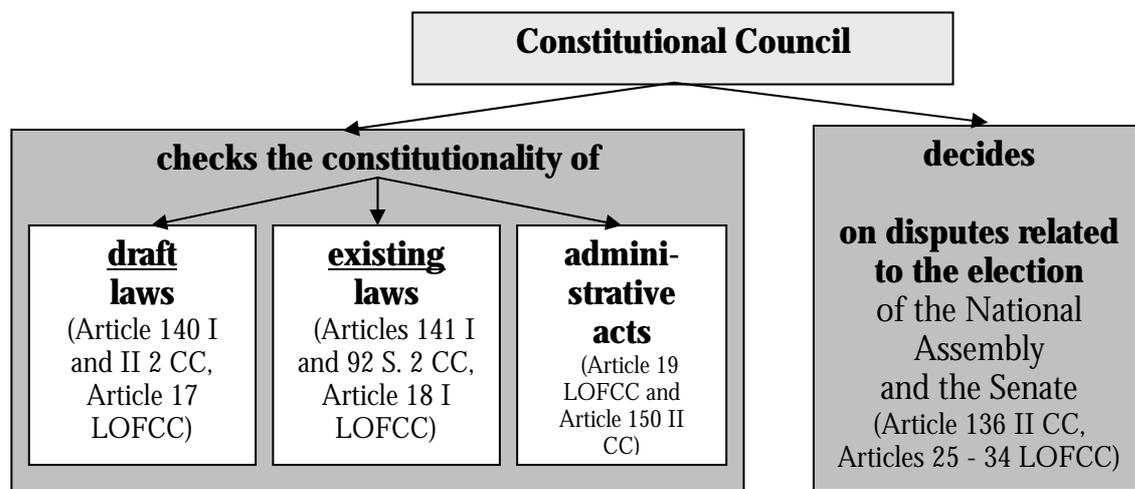
The Constitutional Council consists of nine members which are appointed by different bodies.

Article 137 I 3 CC:  
Three members (3) shall be appointed by the King, three (3) members shall be appointed by the National Assembly and three (3) others by the Council of the Magistracy.

The King, the National Assembly and the Supreme Council of Magistracy each appoint one member for a three year term, one member for a six year term and another member for a nine year term (Article 38 II, III and IV LOFCC)<sup>10</sup>.

**B) The Functions of the Constitutional Council:**

To safeguard the constitution (Article 136 I CC) the Constitutional Council has two main functions: first to check the constitutionality of draft laws, existing laws and administrative acts and second to decide on electoral disputes. **It is not entitled to amend the constitution (Article 151 CC and 15 LOFCC)!**



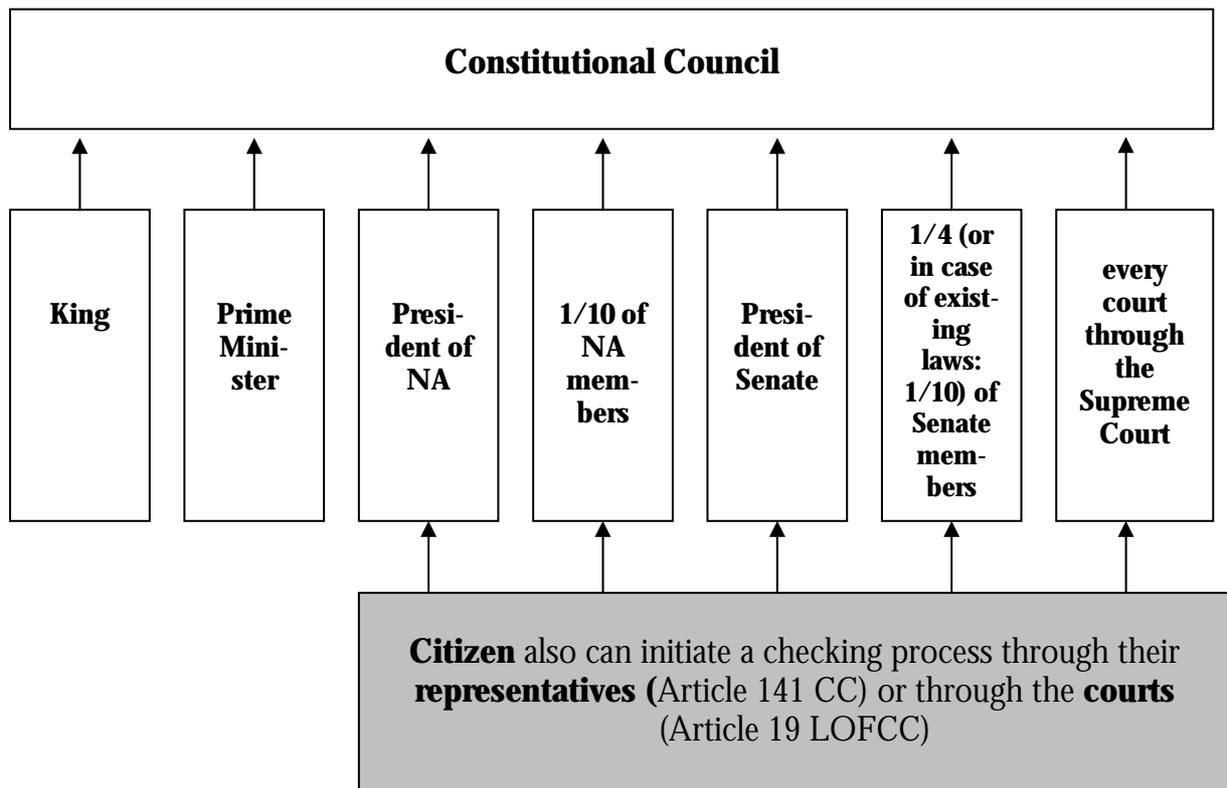
<sup>10</sup> The appointment of members by the Supreme Council of Magistracy (SCM) raises the question about the neutrality and independence of the Constitutional Council members as the SCM itself is not yet an institution elected in a public and transparent way.



## I) Constitutionality of Laws:

### 1) Procedure of Checking:

To initiate an examination procedure with the Constitutional Council the following persons or bodies can make an application to the Constitutional Council (Articles 140 I, 141 I 1 CC and Articles 17, 18 I and 19 LOFCC):



#### Example:

A Cambodian citizen once wanted to get an interpretation of Article 38 of the Law on Political Parties which deals with penalties for those parties not complying with the law. Article 38 Law on Political Parties leaves it open who actually can impose a penalty, the authorities or only the courts.

The citizen addressed to the President of the National Assembly Prince Norodom Ranariddh to ask the Constitutional Council to give an interpretation. Prince Ranariddh wrote a complaint on behalf of the citizen and was later given the decision that Article 38 of the Law on Political Parties must be read in the way that only the courts can impose penalties on political parties because Article 128 II and 129 II CC stipulate that only judges can adjudicate.<sup>11</sup>

After receiving the complaint the Constitutional Council must regularly decide within 30 days (Article 140 II 2 CC, Article 22 I LOFCC), in urgent cases within 8 days. At least 7 members of the Constitutional Council must convene to deliberate the case (Article 14 II LOFCC) and to come to a conclusion.

<sup>11</sup> The decision was made on 5<sup>th</sup> August 2002 under the case number 049/003/2002



There is no public hearing but the Constitutional Council may invite experts to contribute to the clarification of relevant issues (Article 21 I LOFCC).

Example:

After the third national election in July 2003 the King asked the Constitutional Council to provide him its opinion on whether he as the King must convene the first session of National Assembly according to Article 82 I CC or not.

The Constitutional Council sought after the expertise of a lawyer who concluded that the King is not entitled to ask for an advisory opinion of the Council but may only request the checking of the constitutionality of laws.

Nevertheless the Constitutional Council decided that

- the King is entitled to ask for an interpretation of the constitution and
- must convene the first session of the National Assembly as his presence is important for the whole nation and for this supreme institution and as in the past the King's presidency always dignified the very first session.

The decision requires an **absolute majority of all nine members** (Article 22 III LOFCC), must be in **written form** and must **contain reasons** (Article 22 I and V LOFCC).

The Constitutional Council's decisions are **final** (Article 142 II CC) and have **binding force to all state powers** (Article 23 LOFCC). To ensure that all state powers learn about the Council's findings they must be published in an "Official Journal" (Article 24 I LOFCC) and the President of the NA must inform all lawmakers, the Prime Minister all members of the government and the President of the Supreme Court all courts.

## 2) Matter of Checking:

The Constitutional Council's checking competence covers **draft laws, existing laws** as well as **internal regulations of the National Assembly and the Senate**.

It might seem that there is no competence to also check the constitutionality of

- **administrative acts** (like banning a demonstration, arresting a peaceful demonstrator, refusing to open criminal charges, etc.) or
- of **Prakas** or **Anukrets**.

But this is not true as every administrative act as well as any Prakas or Anukret being the legal basis of any administrative act must be in conformity with the constitution (Article 150 II CC). And to guarantee the constitutionality of administrative acts every addressee of an administrative act imposing obligations on him/her has the right to a judicial review of this act (Articles 38 VIII and 39 CC) and the right of action to rescind. The citizen (plaintiff) must claim that his/her individual rights are infringed by the administrative act under appeal. S/he is always empowered to file a suit because s/he may always claim that the administrative act to be appealed restricts at least his/her basic right of freedom of action (Article 32 I CC).

Eventually by exhausting all court instances citizen will have the administrative act and the underlying respective Prakas or Anukret be submitted to the Constitutional Council through the Supreme Court.



Article 19 LOFCC:

Any person who involves in any suit at court, may request to the court of an unconstitutionality of any provisions of a law or any decision of a state institution which he/she affirms of affecting any of his/her fundamental rights and freedoms.

If the court determines that the above request has sufficient basis, it shall refer the case to the Supreme Court within a period of 10 days.

The Supreme Court shall proceed to consider and complain to the Constitutional Council within a period of 15 days, except when Supreme Court determines that such request is not acceptable.

Unfortunately up until now no individual complaint coming from the Supreme Court has ever reached the Constitutional Council.<sup>12</sup>

### 3) Legal Consequences of the Constitutional Council's Decisions:

The Constitutional Council renders its judgements solely upon questions concerning the constitution which is the highest legal source within the Cambodian legal system. Its decisions therefore influence the entire legal system of Cambodia.

The Constitutional Council

- **interprets** unclear or contradictory terms of **the constitution** with the consequence that related laws must be amended by the National Assembly (Article 151 II CC),
- **declares** laws or draft laws **constitutional or unconstitutional** with the consequence that in the latter case these laws or draft laws can not be promulgated or implemented (Article 142 CC).

Example:

Article 3 of the Draft Domestic Violence Law states that actions in accordance with “good Khmer traditions” can not be considered as domestic violence.

But what are “good Khmer traditions”? Most probably every Cambodian citizen give his/her own definition of this term. The lawmakers used an unclear term and by that violated the principle of separation of power (Article 51 IV CC) as they – the legislative – can not leave it up to the executive, i.e. the authorities or the judiciary, i.e. the courts to fill this unclear term.

In this case the Constitutional Council would declare this article unconstitutional. It could also give an additional recommendation to the lawmakers how this article could read in a constitutional way. But it is the National Assembly’s task to amend this article before the law can be promulgated.

- **declares administrative acts and Prakas and Ankrets unconstitutional** (through the procedure of Article 19 LOFCC) with the consequence that the Supreme Court as the submitting court (Article 19 III LOFCC) – has to declare these administrative acts, Prakas or Anukrets **null and void** (Article 150 II CC).

<sup>12</sup> Information of Constitutional Council member Son Soubert on 17<sup>th</sup> February 2004



## II) Election Related Disputes:

The Constitutional Council's second main function is **controlling acts of the National Election Committee** thus ensuring that the national elections are free and fair (Article 136 II CC).

Article 26 LOFCC:

The Constitutional Council determines and decides on:

I) requests of political parties or candidates against any decision of the National Election Committee (NEC) which rejected the contests against any candidacy or any candidate list. ...

II) requests of individuals contesting against the decisions of the National Election Committee (NEC) which rejected the requests for registration (in the voter register). ...

III) requests of individuals or their representatives who contest against the decisions of the National Election Committee (NEC) which decided to reject the contests regarding the missing names, opposition against any registration or retention in the voter list of any person's name who is considered as not appropriately in conformity with the conditions as stated in the Election Law. ...

IV) requests of political parties, which contested against the rejection from registering it in the political party register. ...

Article 27 LOFCC:

The Constitutional Council determines and decides on:

I) direct requests contesting against the election result of which the individuals or political parties which are running for election are disagreeing with. ...

(II) requests of the individuals or political parties contesting against the decisions of the National Election Committee (NEC) which rejected the contests against the election result. ...

To investigate an electoral request the Constitutional Council conducts **public hearings** (Article 32 LOFCC) and may take the following decisions (Article 34 LOFCC):

- approve or disapprove the NEC's decision(s),
- proclaims an election null and void or
- proclaims that a candidate is elected illegitimately/legitimately.

Its decisions shall be given in writing and must contain reasons. They are final (Article 34 IV CC), of absolute effect and shall also be published in the "Official Journal".



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**Study Question 6**

What are the main functions of the Constitutional Council?  
Please quote the relevant article(s).

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**Study Question 7**

One tenth of the lawmakers in the National Assembly ask the Constitutional Council to examine the constitutionality of a law related to the freedom of expression.

**a)** As a member of the Constitutional Council how would you interpret the word “freedom of expression”?

Give a short definition of this term.

**b)** If the National Assembly members do not agree with the decision of the Constitutional Council can they complain against the Council’s decision?

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