



The Rule of Law

A) Primary Functions of Law:

To draft a law or at least to give a comment on a draft law takes a deeper understanding of the role and function of the law. Only from such a deep understanding the different requirements and minimum conditions for the formulation of a law can be derived. It is not sufficient just to mention the term “rule of law” as everybody else does but it takes a thorough analysis of this term and of the role which the law shall play.

Concerning the **human rights**¹⁹ of the members of society the law provides:

- a **non violent, balanced resolution for conflicts** between human rights
- a **limitation** on the **purposes and intensity of restrictions** on human rights and
- a **framework of rules** and solutions for the members of a society and **predictable conditions** of life that guarantee peace, safety, stability and economic growth

Concerning the principle of **separation of power** the law:

- **expresses the will of the people,**
- **limits the executive power** and gives instructions to it and
- **serves as a yardstick for conflict resolution by the judiciary.**

B) Law and the Protection of Human Rights:

I) Balance Between Conflicting Human Rights:

The main function of law is **to protect human rights** of the members of a society. This is clearly stated in the Universal Declaration of Human Rights (UDHR):

Preamble III UDHR:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

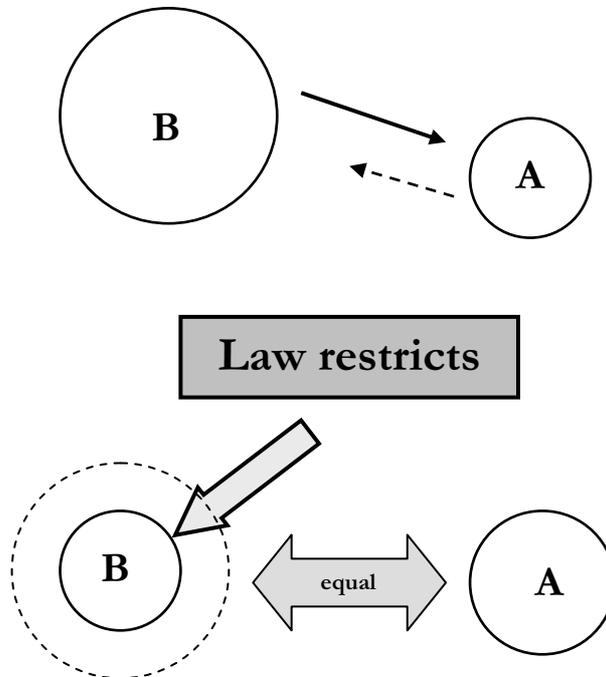
As human beings enjoy equal rights the law has to **solve the conflicts between the human rights** of each individual of society. It has to take into account the human rights of both persons who are involved in the conflict and has to **balance these rights**.

The task of lawmakers is to look at these rights and find a balance!

¹⁹ see also KID’s Study Text Book Part I “Critical Legal Thinking - Human Rights”, pages 2 – 21

II) Conditions for Restrictions on Human Rights:

To protect the freedom and human rights of one person (A) the law has to restrict the freedom of another person (B) who exercises his/her right at the expense of A's right. But because this person B also enjoys a right the restriction of his/her right must be proportionate (not stronger than necessary). So in the end the rights must be balanced.



Example:

To protect the right to live and to enjoy physical integrity of people who take part in the street traffic the law has to limit the freedom of car drivers to move around as they want by setting up a speed limit for them. But the speed limit must not be so strong that the car drivers completely lose their freedom of movement. This would be not proportionate anymore. For example a speed limit of only 2 km per hour for cars and motorbikes would be too strong because it is only necessary to limit speed down to 30 or 40 km/h) to ensure safer traffic.

To make sure that the rights and interest of both sides are respected and that only necessary restrictions on these rights are imposed the idea of human rights sets up **three conditions for restrictions on human rights**:

So when lawmakers draft a new law they always must make sure that these three principles are respected!

- **form**: human rights can be restricted only by a regulation in form of a **law** because only a law ensures that the rights of both sides are taken into account by a collective decision making process. A simple Anukret or Prakas by the government is not sufficient for this strict formal requirement.
- **purpose**: law can only pursue the purpose **to protect the freedom and rights** of other human beings as prescribed precisely in the Cambodian Constitution.
- **intensity**: the restriction imposed by the law on another human rights must be **proportionate**. The measure shall be not stronger than **necessary**.



These three conditions can be found in the Universal Declaration of Human Rights (UDHR) and in the International Covenant on Political and Civil Rights (ICCPR):

Article 29 II UDHR:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 19 II 2 a) b) ICCPR:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*order public*), or of public health or morals.

Example:

It violates the human right of freedom of profession when all karaoke bars are closed just by a simple order of the Prime Minister without any legal basis. Such a severe restriction on the freedom of profession can only be imposed by a **law** in any case no matter if the closing of bars seems to be necessary or not.

III) Stability by Non Violent Conflict Resolution through Law:

By providing a **general solution for a conflict** the law creates a **framework of rules** for the members of a society. The adoption and implementation of such rules creates a climate of security and stability which not only promotes peace within the society but also encourages investments and thus supports economic growth (see also Preamble of UDHR, of ICCPR and also of the Cambodian Constitution). Without balanced conflict solution tensions within a society grow and people who see their basic human rights not respected may turn violent to articulate their disrespected needs or will solve their conflicts by violent solutions or seek relief from pressure by exercising power and violence against weaker persons.

Example:

People kill thieves by mob killing. Men beat their wives and children.



C) Law and the Separation of Power:

I) Law Expresses the Will of the People:

Regarding the democratic principle the basic function of law is the expression of the will of the people through the lawmakers of the National Assembly.

Article 17 of the old Cambodian Constitution (1947):
The law is the expression of the national will.

The conflicts within a society shall be solved in form of a law through the elected representatives of the society members after public discussion.

II) No Substitution of Law by Governmental Prakas or Anukret:

The main decisions have to be made by the **lawmakers in form of a law** and **not by the government in form of Prakas or Anukrets**.

This is what the “Rule of Law” simply means, it does not mean “Rule of Prakas” or “Rule of Anukret”.

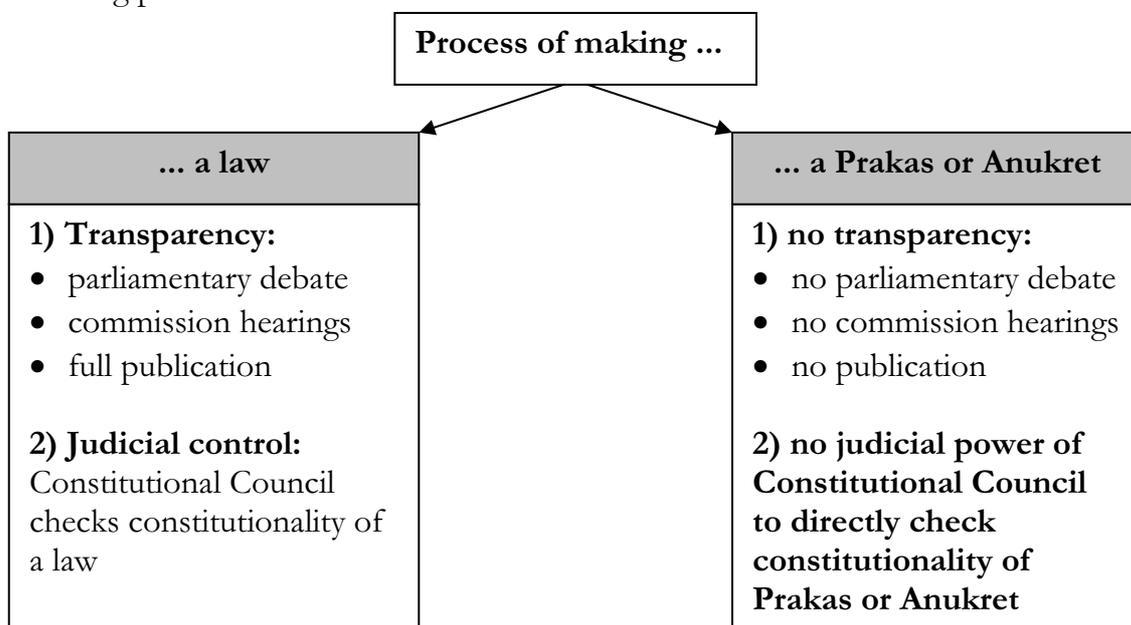
Example:

The election of the Senate, the creation of the National Congress or the succession of the throne have to be regulated by a law (see Articles 13 III, 101 and 149 II CC).

Also

- the regime of the media (Article 41 II CC)
 - the organization of trade unions (Article 36 VI CC)
 - the restrictions on the right to vote (Article 34 V CC)
- “shall be determined by a law”.

The following differences clearly show the significant advantages of a democratic lawmaking process:





The government only has the duty to protect and to preserve the law but has no right to make it. Its role in the lawmaking process is limited to its mere power to initiate but not to adopt legislation.

Article 52 sentence 2 CC:

The Royal Government of Cambodia shall preserve and protect the law and ensure public order and security

Article 91 I CC:

The Senate members, the Deputies and the Prime Minister shall have the right to initiate legislation

III) Limitation of Executive Power by Law:

The simple reason for that limited role of the government in the lawmaking process is that a law shall give instructions to the executive and limit the exercise of the executive power to protect the civil rights of the citizen. This would not be ensured if the executive branch could give itself such instructions. Self rule of the executive power easily and quickly can lead to concentration and subsequently to abuse of power which Cambodia had to experience unfortunately not only once in its history.

1) No Delegation of Lawmaking Power From Assembly to Government:

Keeping all this in mind the elected lawmakers would violate the constitutional principle of separation of power (Article 51 IV CC) if they adopted a law which leaves it to the executive branch to make the main decisions and conflict solutions in form of a Prakas or an Anukret. In this case the legislative branch would not fulfill its duty and its mandate given by the Cambodian people who elected the lawmakers.

So the **legislature can not just authorize the government and its ministries to act on behalf of the legislation quasi as sub-contractors.** To the contrary: The main decisions must be made by the law. Only minor details of the administration of the law can be left to governmental Prakas or Anukret. Otherwise the lawmaking power would just be shifted to the executive branch without any constitutional grounds.

Law articles that delegate the important decisions to the executive branch are unconstitutional!

Examples:

- In many cases the Commune Council Law leaves it up to Prakas and Anukrets of the Ministry of Interior to answer main questions of commune self rule.
Article 43 Commune Council Law gives the Khum/Sangkat administration a lot of just vaguely worded and widely ranging duties and Article 47 of the Commune Council Law subsequently says: “Roles, functions and powers as provided in Article 43 may be dealt with in detail by a sub-decree following the proposal of the Ministry of Interior”.
- Article 5 Weapon Draft Law simply generally states that exceptions from the general ban of fire-arms “can be permitted to civilians” and then regulates that “the conditions and procedure for the implementation of the rules are defined by Anukret following



the proposal of the Ministry of Interior”. So the draft law leaves it completely up to the executive branch to decide about the important question who and under what conditions at all shall get an exemption from the fire arms ban! The draft law does not even give a clue or a guideline for the Ministry what such conditions may be or may not be.

So the lawmakers always must make sure that they do not adopt law articles that shift their lawmaking power to the government!

2) Violation of Separation of Power by Legislative Passiveness:

The legislature would also violate its duties if it leaves conflicts unregulated that need to be regulated by law. In this case the **lack of law provokes a filling of this gap by not fully democratically legitimated government decrees.**

Without a clear regulation of the law the **judiciary as well will feel urged to fill gaps** at its own discretion with more or less arbitrary decisions or at best with some conclusions derived from the constitution.

Examples:

- As no “Law on the Functioning of the Notary” has been adopted yet by the National Assembly a single person was just appointed without any public or transparent selection process or even competition by a decree of the Prime Minister. This person was given far reaching powers and the law did not regulate any details about what exactly the duties and rights of this public position are.
- As there is a Press Law but still no “Media Law” the Ministry of Information just administers radio licenses and all the affairs of the electronic media by directives or direct orders to the media at its discretion.

The passiveness of legislation violates the principle of separation of power!

The lawmakers must make sure that they exercise their mandate and adopt all laws required by the constitution!

D) Basic Requirements for All Laws:

From all these abovementioned functions derive some basic requirements for any law which the lawmakers always need to keep in their mind:

A law must be:

- **just** = in accordance with human rights and the constitution
- **general** = applying not only to one or some but to all citizen and treating them equally
- **abstract** = serving as a rule for all cases not only solving a single case
- **precise** = worded clearly enough to fulfill its function as instruction for the citizens, the executive and the judiciary



I) Law Must Be “Just”:

It is not up to the lawmakers to make whatever laws they like. They have to stick to the constitution. **Every law must be in accordance with the constitution and must respect the human rights** as enshrined in the Cambodian Constitution and all the relevant international conventions.

The reason is that the lawmakers are not above human rights but have the duty not only to respect but to protect and promote them. Therefore the lawmakers – even if they have a 2/3 majority – may be able to amend the constitution but they can not abolish the basic human rights guarantees.

Article 17 of the old Cambodian Constitution (1947):

Laws guarantee to all persons the exercise of their human rights and may under no circumstances threaten these rights.

Article 150 II CC:

Laws and decisions by the State Institutions shall have to be in strict conformity with the Constitution.

Article 153 CC:

Any revision or amendment affecting the system of liberal and pluralistic democracy and the regime of Constitutional Monarchy shall be prohibited.

Therefore the constitutionality of **laws is subject to control by the Constitutional Council**. The Cambodian Constitution regulates that the Constitutional Council can:

- safeguard the Constitution and check the laws passed by the National Assembly (Article 136 I CC)
- examine draft laws before their promulgation (Article 140 I CC)
- examine the constitutionality of a law after its promulgation (Article 141 I CC)
- check the constitutionality of a law on the appeal of a citizen (Article 141 II CC)
- declare null and void any law adopted by the National Assembly that runs counter the national independence, sovereignty, territorial integrity political unity or the administration of the nation (Article 92 Sentence 2 CC).

Example:

- A Cambodian law that would have the only purpose to prohibit trade unions (like some laws in the Peoples Republic of China) would be unconstitutional. This law would not follow the purpose to protect the human right of free association and of founding trade unions (see Article 36 V CC) but would follow the purpose to abolish this right.



- A law that allows the police to search a house without search warrant even in cases when there is no immediate threat of a crime would violate the constitution because it would be not proportionate any more but limit the freedom of a private sphere (Article 40 IV CC and Article 17 I ICCPR) stronger than necessary.

II) Law Must Be “General”:

The law text must apply to **all citizens** not only to one person or just some persons. The reason is that the basic human right is the right of **equality**. If a law would only apply to some persons but not all members of the society it would be unjust and would grant privileges (for example exemptions of the rule of law).

Article 31 II CC:

Every Khmer citizens shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.

Article 49 I CC:

Every Khmer citizen shall respect the constitution and laws.

The Indian Supreme Court once said: **“Be you ever so high the law is above you”** thus expressing the idea that the law is the result of a collective decision making that has to apply to all members of society. Therefore according to the Constitution neither the King nor the members of the government or of the assembly or of the Constitutional Council are above the law but they have to respect it and the law also applies to them.

Example:

Annex VII CC shows that the King and the Government have to take an oath on the constitution which to respect they have to promise. Article 126 CC shows that also members of the government can be hold accountable for crimes they commit during their duty. Article 10 III Law on the Functioning of the Constitutional Council states that any member of the Constitutional Council who has been sentenced by a criminal court for misdemeanour and felony shall automatically be removed from position. Article 80 III CC regulates that members of parliament as well do not have the right to violate laws as they like but can loose their immunity in severe cases with approval of the assembly.

So if the lawmakers draft a law they always have to make sure not to grant exceptions of that law which would violate the principle of equality. If they make distinctions between different groups of people these distinctions must always be justified by a reason. The high social status of these persons, their origin, race or other personal characteristics as mentioned in Article 31 II CC are no reasons to justify an exception or special treatment.

Example:

A law stating that all citizens “except high ranking officials” are subject to criminal punishment for violation of the criminal code is not general but violates the constitutional principle of equality. It is unconstitutional.



III) Law Must Be “Abstract”:

The law must provide a general rule that can be applied to all different cases that fulfill the conditions of the law article. It must give a general solution to a problem and must give an instruction how to solve a common conflict. So the law **must not just deal with a single case but with all similar cases that may occur in the future**. Otherwise the law would not provide a predictable and stable conflict solution and a frame work of rules that give guiding and instruction to the people.

Example:

A “Law on the Notary” which only names and appoints a single person like: “From now on Mr. X shall be the Notary General” is not abstract. It only solves the current problem that there is a need to have a Notary General. But it does not provide any solution how to choose such a person in the future and what to if the appointed person fails, dies or is absent. Furthermore such a law must include provisions which give a general frame work of rights and duties for everyone who may hold this position in the future.

IV) Law Must Be “Precise”:

The most important requirement for a law is that its **formulation has to be as precise as possible**. There are two main reasons for this condition:

One reason is that the law must give

- instructions to the citizen about what they must do and what they shall not do
- instructions for the executive branch what to do
- guidelines for the judiciary about what is prohibited and what is allowed.

As the Cambodian Constitution claims from the citizens (Article 49 I CC) and from the government (Article 52 sentence 2 CC) to respect the law and claims from the judiciary to protect the rights and freedoms (Article 128 II CC) it **must be clear for all citizens and for these institutions what is legal and what is illegal according to the law**. Otherwise they can not act properly because the orders the law gives are simply not precise enough to understand. Furthermore inaccuracy leaves open the limits and restrictions the law imposes on human rights.

So unclear expression of the will of the people in the law text leaves the conflicts unsolved although the law should solve it. It even causes more conflicts due to misunderstanding, different interpretation and unpredictability of rights and duties.

The other reason to require a precise law text is that any unclear wording of the law text would **open doors for any arbitrary interpretation of the law text by the executive or the judiciary**. Thus the principle of separation of power would be violated because unclear decisions of the lawmakers invite these two other powers in case of conflict to fill the gaps or unclear parts of the law text with their own ideas. Finally this would lead to injustice due to unequal administration and handling of the law. If there is no clear guideline in the law text one case may be solved like this by one administration officer and a similar case may be solved in a different way by another administration officer.



Example: The Weapon Draft Law (Article 3 and 4) stipulates exceptions of the general prohibition to possess and use fire arms for “judicial officials”
But the law does not exactly define what “judicial official” means. These could be judges, prosecutors, or just the court clerks or also simple civil servants working at the Ministries. If definitions remain unclear as shown in the Weapon Draft Law anyone chooses the most suitable individual interpretation for him/herself. This contradicts the law being abstract, general and just.



Rule of Law

Function of Law:	Protection of Human Rights	Separation of Power	Requirements for all Laws
<p>1) concerning human rights Law: <ul style="list-style-type: none"> • solves conflict by balancing human rights • limits purposes and intensity of restrictions on human rights </p> <p>2) concerning separation of power Law: <ul style="list-style-type: none"> • expresses the will of the people • limits the executive power • serves as a yardstick for judiciary </p>	<p>1) Law solves conflicts between different human rights Lawmakers must:</p> <ul style="list-style-type: none"> • recognize the human rights • take them into account • and find a balance between conflicting human rights (=solution that protects both human rights equally) <p>2) Law imposes restrictions on human rights: Conditions for restrictions:</p> <ul style="list-style-type: none"> • only in form of a law (not just Prakas or Anukret) • only for the purpose to protect freedom of others (or those purposes explicitly mentioned in constitution) • only proportionate intensity (restriction on human right not stronger than necessary) 	<p>Expression of the will of the people</p> <p>Main problems must be solved by NA through LAW (not by government through Prakas or Anukret)</p> <p>No delegation of law making power to the executive (no law articles that leave main decision to government)</p> <p>Lack of law opens door for government and judiciary</p>	<p>Law must be:</p> <ul style="list-style-type: none"> • just constitutional, respecting human rights • general shall not only apply to some persons but to all citizens • abstract providing a rule for all similar cases in the future not just solving one single case • precise clear words



Study Question 13

- a) What does the preamble of Universal Declaration of Human Rights say about the “rule of law”?
- b) What does Article 29 of the Universal Declaration of Human Rights say about the function of law? Please quote precisely and give a short description of the function of law!



Study Question 14

Cambodian laws which are adopted by the National Assembly have to be compatible with the Cambodian Constitution.
Please quote precisely (!) at least two articles of the Cambodian Constitution which show that laws must be constitutional.



Study Question 15

All the important problems of society have to be solved and regulated by a law. Please quote precisely (!) five articles out of Article 31 – Article 50 CC which explicitly state that a problem “shall be determined by a law”.



Study Question 16

Read the following summary of Cambodian Daily’s article of September 11, 2003.

The government’s practice not to recruit disabled teachers but to ban them from working in public schools provoked an outcry of NGOs, disabled teachers and disabled children who consider this practice as a human right violation. Undersecretary of State at the Ministry of Education, Mr. Chey Chap said that the government stopped recruiting disabled teachers in 1993 because from then on Cambodia had enough teachers without handicaps and that it would be in the interest of the students to be taught by teachers in good physical conditions. Contrary to that NGOs, disabled teachers and children themselves made the experience in “Lavalla”, a private school in Kandal province, which employs disabled teachers, that these teachers in particular are considered as positive role models by the children and are – more than teachers without handicaps – able to encourage the children to struggle in their lives.

- a) Does the government’s ban on disabled teachers restrict any human right(s)? Please quote the exact human right(s) and the (national and international) law texts and articles!



b) Open the following web-page:

Go to www.online.com.kh/users/kid,

→ then to “**Related Links**”,

→ then on “**International Institutions and Law Texts of International Constitutions and Treaties**”,

→ then to “**University of Minnesota**”,

→ then to “**Treaties and other Instruments organized by subject matters**”

and → then to “**Disabled Persons**”.

Please find the UN-Declaration which covers the above mentioned teacher’s case. Which article of this Declaration is relevant – please quote only one article!



Study Question 17

The government wants to collect a fee from car drivers for using the national roads. Is it necessary to regulate the collection of such a road fee by a law adopted by the National Assembly? Or can the government decide about this by itself without a law?

Please give a legal reason for your answer!



Study Question 18

Imagine the lawmakers have drafted a new "Law about the Street Traffic of Cars in Cambodia".

Would it be constitutional if they adopt an article of this law that reads as follows:

“Every car must have a license number. The details about size, colour and the license number combination shall be regulated by a Anukret of the Ministry of Transport”?

Please give a legal reason for your answer!



Study Question 19

Many Buddhist Cambodians feel disturbed by foreign Christian missionaries who come to their house, knock on their door and try to convince them that they should become Christians.

Imagine the lawmakers adopt a “Law on Missionary Activities” which would include an article that reads as follows:

“Section I: The purpose of the law is to protect the peace of daily life of Cambodians.

Section II: All activities of foreign Christian missionaries in Cambodia (no matter at what time or in which way such activities are carried out) are totally prohibited from now on.”

Would such a law article be constitutional or not? Please give a legal reason for your answer!