

The Cambodian Judicial System

A) Structure, Organization and Jurisdiction of the Judicial Organs:

Dispute resolution through a mediator has generally existed in Cambodian tradition such as on the case of a dispute submitted to a prominent person in a community for settlement.

Dispute resolution through arbitration has not been expressly provided for in any existing Cambodian laws. In connection with extra-judicial settlement, Art. 20 of the Law on Investment in Cambodia stated „any dispute relating to investment affairs ... may be resolved through reconciliation ... or through any international proceedings agreed upon by parties“ which may imply that arbitration is allowed.

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 – tiered court system:

- the Municipal and Provincial Court (jurisdiction of first instance)
- the Appellate Court and
- the Supreme Court.

The Military Court is another, exceptional jurisdiction, established in 1981 by decree – law. The Military Court handles cases related to military offences.

I) Supreme Council of Magistracy (SCM, Art. 113, 115 Constitution):

The Law on the Organization and Functioning of the SCM was enacted in 1994. It provides that the SCM-membership be appointed by Royal Decree and 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 December 3rd 1997.

The establishment of the SCM is considered a crucial step in the development of Cambodia´s legal system, and the first step towards the formation of the Constitutional Council, since three of the members of the Constitutional Council must be appointed by the SCM.

One of the main duties of the SCM is to ensure the smooth functioning of the judiciary.

In this regard, 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“ (Art. 11 Law on SCM). Art 10 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“.

A „proposed law“ means a bill initiated by National Assembly members, and a „draft law“ by the government. Under Art. 10 all proposed laws and draft laws are expected to go through the Ministry of Justice to the SCM for advisory opinions. There is a question as to whether opinions on the proposed or draft laws given by the SCM are binding or just commentary.

Usually, before a law becomes enacted, the draft or proposed law must go through a particular sequence of legislative steps.

For example, a draft law initiated by the government starts from a ministerial draft and then is forwarded to the Council of Jurists of the Council of Ministers for review. At this stage the SCM may change or modify the initial ministerial draft. The next step is for the revised draft to be changed or modified again at the regular meeting of the Council of Ministers to make it fit government policy. After modification by the Council of Ministers, the draft law is forwarded to Permanent Committee of the National Assembly, and to the relevant Assembly Commission for review. Finally, the reviewed draft is sent back to the Permanent Committee for inclusion in the agenda of the Assembly’s Sessions, at which the draft will be debated and passed (or rejected).

A proposed law, which refers to those initiated by members of the National Assembly, goes first to the Permanent Committee of the National Assembly, and then through the same steps as draft law.

II) Ministry of Justice (MoJ):

The MoJ has the following duties (based on the 1994 draft sub – decree by the Ministry of Justice entitled „Sub – Decree on the Organization and the Functioning of the Ministry of Justice“):

- assure the smooth operation of the courts in civil, criminal, administrative and commercial matters
- monitor the execution of judgements through inspection of penitentiaries
- provide guidelines to judges on the application of laws or regulations in cases where they are unclear or have been misconstrued
- assure uniformity and consistency in the drafting of civil, criminal, administrative, labour and commercial laws and the implementation thereof
- maintain criminal records and issue abstracts thereof

III) Supreme Court (SC):

The SC 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 SC 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 SC, the SC tries both questions of fact and law.

Currently the SC 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 labour and commercial disputes. The Penal Chamber handles only criminal matters.

The SC has not the 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 SC is publishing a quarterly „Bulletin of the SC 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.

IV. General Prosecution attached to the SC:

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

- Office of Investigation and Supervision of Investigation:
this office assists in ensuring the legality of investigations, examining documents of investigative institutions or organizations concerning offences and violations of law, conducting its own investigation where needed, or conducting additional investigations
- Criminal Office:
this office assists and is responsible to the Prosecutor-General in affairs relating to the exercise of his or her prosecutorial rights in criminal proceedings such as reading charges, making conclusions, questioning, acting as the principle party, making or withdrawing accusations, etc.
- Civil Office:
this assists and is responsible to the Prosecutor-General in affairs involving 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.

V. Appellate Court (AC):

The jurisdiction of the AC covers the whole territory of Cambodia.
It is located in Phnom Penh.

It hears all cases appealed from a court of first instance – municipal, provincial or military.
The AC reviews both questions of law and fact. Thus 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 AC through the Clerk’s Office of the court rendering such judgement or decision. The AC will then make a new adjudication, which may uphold, modify or anul the lower court judgement or decision. The AC 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 cut down the flow of groundless or unreasonable appeals into the AC.

VI. Court 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.

1) The Provincial and Municipal Court (PC and MC):

This is the lowest trial court. In principle, the MC or PC 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.

2) The Military Court:

The Military Court is located in Phnom Penh and is a court of first instance that has exclusive jurisdiction over cases involving military offenses or any offenses affecting the property of the armed forces committed by military personnel. Ordinary offences committed by military personnel are under the jurisdiction of the provincial/municipal courts. The Military Court is administratively, financially, and logistically under the Ministry of Defence.

3) Commercial Court:

The Commercial Court has not yet been created. It will only handle commercial matters. The court will probably be established in Phnom Penh. The territorial jurisdiction of this court will cover all of Cambodia.

VII. Constitutional Council (CC, Art. 117 – 125 Constitution):

The CC is not a tribunal that hears cases. Rather, it is an institution that decides only the constitutionality of laws.

The CC plays a crucial role in ensuring that the election be free and fair. Disputes arising from elections, such as those involving rights of voters, electoral rights of candidates and political parties, and election fraud and irregularities, can be submitted to the CC for final settlement.

VIII. Other fora:

1) Informal Dispute Resolution:

Aside from the legal mechanisms as described above, Cambodian people often resort to traditional dispute resolution. Reconciliation is a method that has been frequently used in many parts of the country until the present day. If disputes are not very serious, parties often submit them to elderly people, or other respected or prominent persons in their villages or communes for reconciliation. This method often produces remarkably good results.

2) Royal Hearing:

The Royal Hearing is an extra-judicial forum where citizens could submit their civil disputes to the King for settlement. It was initiated by King Norodom Sihanouk in 1993.

3) Dispute Resolution through arbitration:

Generally, parties to a contract agree in a specific clause to dispute settlement by a neutral, impartial arbitrator, based on the evidence and arguments provided by both parties. The arbitrator is chosen by the parties. The decision of the arbitrator, or award, has the same legal effect as a court judgement.

B) Court Personnel:

1) Judges and Prosecutors:

A judge involved in a trial or investigation is called a sitting judge. A judge who holds a position in the prosecution department is called a standing judge. A sitting judge can be a standing judge during his or her career in the court and vice versa. Both types of judges have equivalent rank.

2) Clerks:

Clerks play a secondary role as secretaries to judges and prosecutors. They perform the daily administrative work in the court and assist the judges in filing cases, keeping records of trials, helping to take statements during the investigation process, serving process, executing civil judgements, and sometimes participating in the reconciliation of civil disputes.

C) The Bar and Lawyers:

The Bar Association (BA) came into existence when the Bar Council was established in October 1995.

The Bar Council is the governing body of the BA. It is composed of a president and members. The President is elected for a term of two years.

The members of the Bar Council are elected by registered lawyers for a term of three years. The number of members of the Bar Council varies with the number of member of the BA (as of January **1998: 203** registered lawyers; **in 2002: 249**). The Bar Council's main duties are to prepare the internal rules and Code of Conduct that governs the legal profession, to organize the training and the registration of lawyers on the Bar List, to assure compliance with disciplinary rules, and to impose disciplinary sanctions in cases of malpractice, etc.

The Law on Bar Statutes, which was passed on June 15th, 1995, defines the role of the legal profession. It states that the „legal profession is an independent and autonomous profession involved in serving justice and may be only pursued within the framework of the Bar Association“, which is an „organization bringing together all lawyers who establish offices in the Kingdom of Cambodia“. All practising lawyers must be registered as full members of the BA. The BA has been conducting a series of training courses from trainee lawyers for a period, in principle, of fourteen months. After completion of the training, the trainees must take an

exam. The successful trainee must undergo an internship in law offices for a period of one year. When the internship is finished, the lawyer can register with the BA. Then they are awarded a „Certificate of Membership of the Bar Association“, and they can practise law.

Upon receipt of the application for legal practice, the Bar Council is convened to examine the applicant's qualifications. A simple majority of a quorum will determine whether to accept or reject the application. The President of the Bar forwards the dossier to the Prosecutor-General attached to the Appellate Court to request his or her opinion. The Prosecutor-General will concur with the application if all requirements for legal practice are fulfilled. A panel of three judges of the Appellate Court will administer an oath on a set date in the presence the President of the Bar. If the requirements are not fulfilled, the dossier will be sent back to the BA for reconsideration. If the Bar Council concurs with the Prosecutor-General's opinion, the Council will require the concerned applicant to supply the information which the Prosecutor-General found lacking. If the meeting disagrees with the Prosecutor-Generals opinion, the Bar Council may invite the concerned applicant to provide his or her opinions. Finally, if the applicant does not agree with the rejection of his or her application, he or she may appeal this decision to the Appellate Court.

(Source:
„Introduction to the Cambodian Judicial Process“ of Koy Neam
The Asia foundation, 1998)