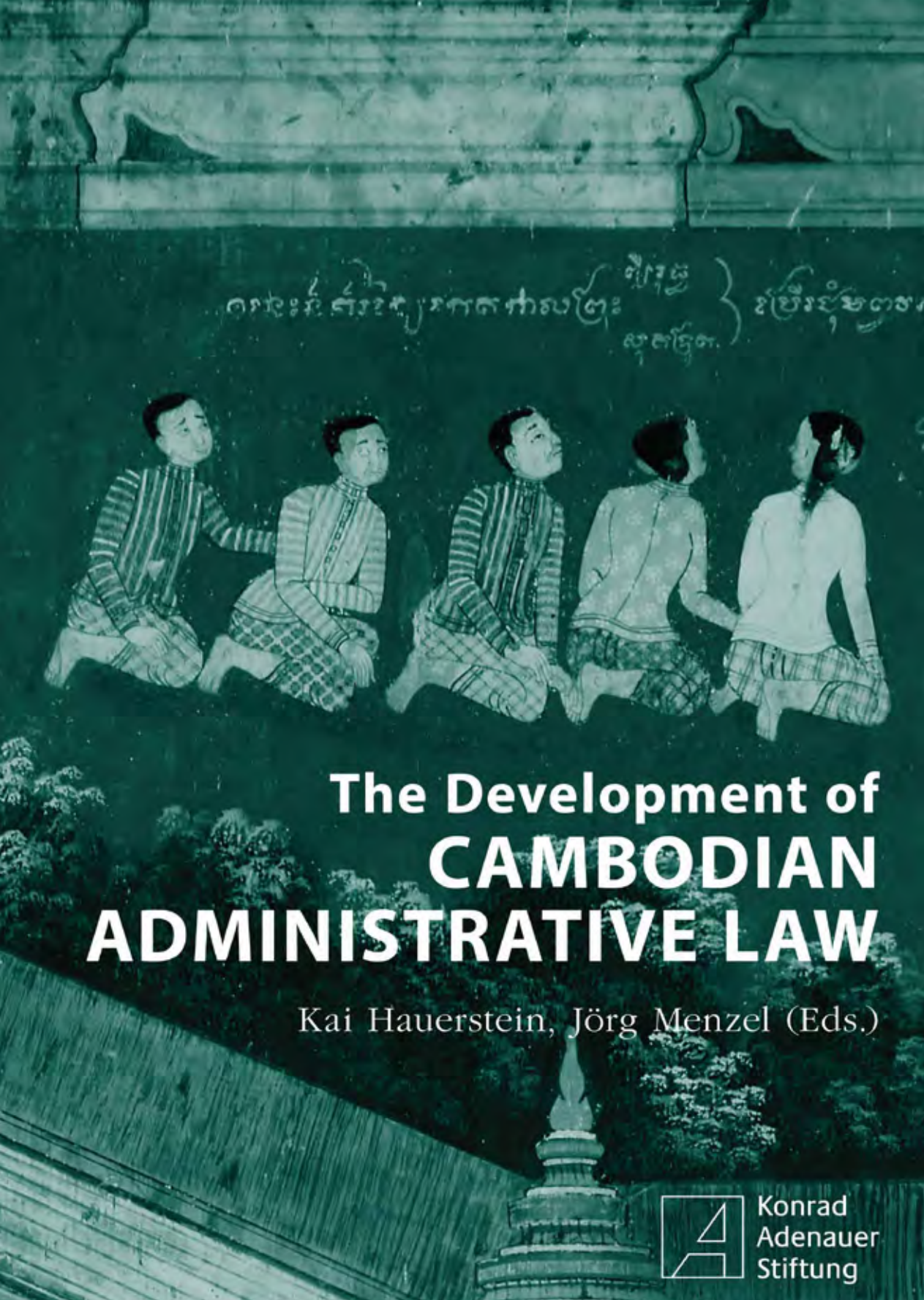


The Development of CAMBODIAN ADMINISTRATIVE LAW

Kai Hauerstein, Jörg Menzel (Eds.)

Konrad Adenauer Stiftung

The Development of CAMBODIAN ADMINISTRATIVE LAW

Kai Hauerstein, Jörg Menzel (Eds.)

Konrad Adenauer Stiftung

THE KONRAD-ADENAUER-STIFTUNG

Freedom, justice and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU). As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967) united Christian-social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany, the firm alignment of foreign policy with the trans-atlantic community of values, the vision of a unified Europe and an orientation towards the social market economy. In our European and international cooperation with more than 70 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the rule of law and a social market economy. The office in Cambodia has been established in 1994. KAS in Cambodia is mainly operating in the following fields: Administrative Reform and Decentralization, Strengthening Political Parties and Parliaments, Legal Reform, Media Development, Political Education and Social Market Economy, as well as Foreign Policy Consultancy.

© Copyright 2014 by Konrad-Adenauer-Stiftung, Cambodia

Publisher
Konrad-Adenauer-Stiftung
House No. 4, Street 462, Khan Chamkar Mon, P.O. Box 944
Phnom Penh, Kingdom of Cambodia
Tel: (855-23) 996 861/ 726 221, Fax: (855-23) 213 364
Office.Phnompenh@kas.de, www.kas.de/kambodscha

Graphic Design & Layout: Christine Schmutzler

The cover picture of the book was taken from the frescos of the Silver Pagoda inside the Royal Palace in Phnom Penh. It shows a scene from the "Reamker", the Khmer adaption of the Indian "Ramayana" epic. (*Photo: Christine Schmutzler*)

Printed in Cambodia
ISBN: 978-99950-982-4-7

CONTENTS

FOREWORD i
PREFACE iii

PART 1
The Recent Discussion about General Administrative Law

1. Aspects of Administrative Law and its Reform in Cambodia
   Kai HAUERSTEIN 9
2. General Principles of Administrative Law for a Cambodian Context
   Jörg MENZEL 57

PART 2
Selected Analysis of Cambodian Administrative Law

3. Historical development of Administrative Law in Cambodia
   Yan VANDELUXE 103
4. The Influence of Constitutional Law on Administrative Law
   TAING Ratana 115
5. Administrative Complaint Mechanisms in Cambodia
   KHLOK Dara 143
6. Solving the Complaints of Citizens at Sub-National Levels
   Alex READ 173
7. State Liability and Rights of Citizens to Claim Damages
   Yan VANDELUXE 201
8. Administrative Law and Decentralization
   Dr. Theng Chan-Sangvar 217

PART 3
Comparative Perspectives

9. Aspects of Administrative Law in France
   Jean-Luc GREGORCZYK 241
10. Structure and Development of Administrative Law in Japan
    Hiroshi KIYOHARA 265
11. Development of Administrative Law in Estonia – Lessons for Cambodia?
    Tanel KERIKMÄE, Katrin NYMAN-METCALF 283
12. Administrative Law in East and Southeast Asia.....
    Jochen HOERTH 301

ANNEX to PART 1

Constitutions of Portugal and Spain (Extracts) 333
The General Administrative Code of Georgia (Extracts) 339
The Danish Public Administration Act (1985) (Chapters 2–8) 343
The European Code of Good Administrative Behaviour 355
Glossary with Working Definitions 365

FOREWORD

Freedom, justice and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU). As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876–1967) united Christian-social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany, the firm alignment of foreign policy with the trans-Atlantic community of values, the vision of a unified Europe and an orientation towards the social market economy with an ecological orientation. His intellectual legacy continues to serve both as our aim as well as our obligation today. We encourage people to lend a hand in shaping the future along these lines. With more than 70 offices abroad and projects in over 120 countries, we contribute to the promotion of democracy, the rule of law and a social market economy. To foster peace and freedom we encourage a continuous dialogue at national and international levels as well as exchanges between cultures and religions.

One of the focal areas for the 20 KAS country offices throughout Asia, and especially for the regional 'Rule of Law' programme based in Singapore, is the promotion of the rule of law in partner countries. The heterogeneity of Asian countries is particularly apparent in the arrangement of their systems of government and systems of law. Each respective conception of legal thinking was influenced by a wide range of different factors such as culture, religion, colonial influence, and so on. However, the constitutional state is often understood rather as a 'rule by law' instead of 'rule of law'. Though the fundamental rights of citizens are laid down in many constitutions, they are of limited significance in reality since the independent institutions needed for their enforcement are missing or not functioning well.

In this context the Konrad-Adenauer-Stiftung in Cambodia focuses its rule of law-related activities on promoting pluralistic discussions around legal topics. Since 2008 it has regularly organised so-called 'Law Talks', which are currently the only regular forum for legal discussions between academia, civil society, students and the government in Cambodia.

As access to Cambodian and international legal literature is still very limited in Cambodia, Konrad-Adenauer-Stiftung contributes with different legal publications to the development and availability of legal literature about Cambodian law, and encourages Cambodian legal scholars to more regularly publish legal works to gain more visibility before national and international audiences. After the publication of the book "Introduction to Cambodian Law" in 2012 (including 20 articles on recent trends in selected legal sectors in Cambodia, http://www.kas.de/kambodscha/en/publications/31083/) this publication on administrative law is the first book in a series of planned legal publications aimed at deepening the legal debate in Cambodia around specific topics. It is the first book pub-

lished in Cambodia available on this specific topic. I hope that it will serve as a tool for law students, legal experts and the interested public to gain a better understanding and to promote administrative law in Cambodia.

Without the support of numerous Cambodian and international legal experts this book project would not have been possible. KAS Cambodia expresses its deep appreciation and acknowledgement to the two editors Dr. Jörg Menzel (formerly Senior Legal Advisor to the Senate of the Kingdom of Cambodia) and Kai Hauerstein (formerly Senior Legal Advisor to the General Secretariat of the Council for Legal and Judicial Reform) for their commitment and time devoted to this project. A special thanks goes to David Hindley and Konstanze Fuchs for the intensive proofreading and to Christine Schmutzler for her inspirations on design and format.
It should be emphasized that all opinions expressed in this book are those of the authors and do not reflect the opinion of Konrad-Adenauer-Stiftung.

Phnom Penh, April 2014
Denis Schrey
(KAS Country Representative for Cambodia)

PREFACE

Twenty years ago, on 24 September 1993, Cambodia adopted its new Constitution, which marked the end of the U.N. Transitional Authority in Cambodia (UNTAC) and the beginning of a fragile peace after decades of civil war. In this watershed moment Cambodia joined the ranks of those countries that believe in the advantages of a government limited by the rule of law, a liberal market economy, the separation of powers, the protection of fundamental rights, and a decentralized government. However, as the Constitution mainly provides the general framework and important principles, it most often cannot be applied directly, but needs institutions, laws, and procedures to become applicable for Cambodian citizens. To guarantee the realization of the Constitution in day-to-day life is an ongoing challenge in every state following the idea of constitutionalism.

In Cambodia there was and still is an additional challenge, as the whole legal system and institutions had to be rebuilt from scratch when the Constitution was adopted. Even though significant laws have been developed and numerous institutions established since 1993, some building blocks for a strong building called 'rule of law' are still missing. The development of administrative law, or more precisely, the establishment of a comprehensive administrative law system, is one example. Whereas comprehensive legislation has been adopted in the fields of civil law and criminal law in recent years (and the focus here is now more on implementation), important aspects of administrative law are still not covered by modern legislation. To create such a comprehensive system of administrative law(s) is not easy. Governments are often reluctant to deliver in this field, as modern administrative law has – to a significant extent – the purpose of limiting government and strengthening people's rights. Another difficulty is that modern administration is very complex and there is a need for tailor-made solutions in different fields. Therefore it is sometimes assumed that general legislation on administrative principles or procedure is difficult to draft, due to the different challenges in different fields. However, for good reasons many states now have some general administrative law legislation and/or principles of good administration in place, and the topic is also on the agenda of the Cambodian legal and judicial reform process. This is also the context of this publication, which attempts to facilitate discussion by providing some information and papers.

Part 1 includes two texts that have been produced by the editors during the recent discussion about administrative law reform.

In his analysis, Kai Hauerstein proposes a framework of how to structure administrative law and uses this framework to take stock of the current situation regarding administrative law in Cambodia. He also provides an overview of the current reform process, which is reflected in legal and judicial reform documents. In October 2013 this reform process gained new momentum as the Council for Legal and Judicial Reform was dissolved and the responsibility for legal and judicial reform (including administrative law reform) was

assigned to the Ministry of Justice. At the time of this publication the integration process is still ongoing. It is still unclear how the Ministry of Justice will deal with the introduction of a comprehensive administrative law system. In an appendix, Kai Hauerstein also provides some working definitions. As there are no official definitions, they mark a starting point for ongoing and future discussions.

Jörg Menzel's report on administrative principles was originally written in early 2011 and was supposed to serve as a starting point for the discussion on the substance of an administrative procedure code or a similar new kind of regulation in Cambodia. Although there are some overlappings with Kai Hauerstein's contribution, this chapter is more about the substance of reform regulation, and not so much about the process used to get there. It is based on the idea that certain principles (legality, proportionality, procedural fairness and so on) are shared in many modern jurisdictions, be they in Europe or Asia, and therefore much can be learned from a careful comparative analysis that tries to use the best concepts available as appropriate for the Cambodian context.

Part 2 of this publication provides some selected analysis on important topics in Cambodian administrative law.

Yan Vandeluxe gives an overview on the historical development of this field, as law can always only be understood as the result of a historical process. In 1993 Cambodia started to establish its legal and institutional systems from 'ground zero'. But even though Cambodia started from scratch, it still has a long administrative law history. This chapter is necessary to understand the historical background and its roots, which are still relevant today. It also answers one of the heretical questions: Does administrative law even exist in Cambodia? Yan Vandeluxe concludes that administrative law does exist in Cambodia, but like a puzzle it is fragmented and not yet systematized.

Taing Ratana examines this question from a Cambodian perspective in his chapter on the influence of constitutional law on administrative law. What are the elements of an administrative law system envisaged by the Cambodian Constitution and what is the role of administrative law to carry out this mandate? The constitutional mandate with regards to an administrative law system is set out primarily in Article 39, Chapter XIII, and Article 128 of the Constitution. Article 39 includes three essential building blocks of an administrative law system: (i) complaints, (ii) state liability/compensation, and (iii) judicial review of administrative actions. For the editors with their home base in German administrative law, the importance of this topic is more than evident. German administrative law has changed and developed massively under the Constitution adopted in 1949. Just a few years after the adoption of the Constitution, the President of the Federal Administrative Court of Germany of the time, Fritz Werner, coined a famous phrase, saying "Administrative law is specified constitutional law". We believe this to be true.

Dara Khlok addresses the massively important topic of complaint mechanisms. The advancement of mechanisms of different kinds, protection by the courts, complaints to the administration itself as well as to independent control and monitoring bodies, will be at the centre of discussion for a long time to come. The chapter describes the current legal and policy framework and identifies different types of administrative complaints procedures and analyzes their effectivity. At the end of the chapter he provides two case studies for a deeper analysis. His analysis is supplemented by Alex Reed's contribution on solving complaints of citizens at sub-national level.

Yan Vandeluxe gives an analysis on state liability and compensation. First, he defines and clarifies the underlying terminology. Second, he concludes that there is no legal framework and (ultimately) no jurisdiction in domestic courts dealing with cases concerning state liability. Finally, he proposes some ad hoc rules and regulations dealing with issues of state liability, thus establishing jurisdiction for courts to deal with state liability.

The final chapter in Part 2 by Theng Cang-Sangvar addresses the always-important question of administrative organisation. Two major issues are the laws and regulations on public service as well as the organisation of administration with all its ministries, agencies, special bodies and the context of decentralization, deconcentration and self-administration on the local level. The chapter provides an overview of the current legal framework.

In Part 3 some international comparative perspectives are provided with case studies from France, Japan, and Estonia as well as a general overview on East and Southeast Asia.
France is an obvious candidate for comparison as the Cambodian legal system has some historical roots in French law, and particularly in administrative law this is still considered crucial due to the lack of modern comprehensive legislation. Jean-Luc Gregorczyk reflects on the foundations of French administrative law and asks: Why is it based on jurisprudence when France is a country of Roman law tradition where the norms are most of the time written by parliament? How does the administrative judge use this special role to organize the relationship between the state and citizens? How does the organization of the French legal system offer a guarantee of the independence of the administrative judge? To support his reflection, his chapter highlights how these principles are put into question by some of the latest evolutions of administrative law. Among these evolutions, the article focuses on three points: (i) the debate around the establishment of a code of administration, (ii) the debate around the reorganization of the Conseil d'Etat under the pressure of European jurisdictions, (iii) a selected focus on the Conseil d'Etat's case laws concerning public liability, competition law and the principle of legal certainty.

Japan plays a similarly important role as France as a legal role model. Japan has supported the Cambodian government in developing and adopting the new Civil Code as well as the Civil Procedure Code. Numerous young Cambodians have recently studied or still study law in Japan. As there are naturally many interfaces between civil law and administrative law, the Japanese experience is of utmost interest in the Cambodian context.

Hiroshi Kiyohara points out that Japan has experienced major judicial reforms including administrative law reforms since the late 19th century. Japan has incorporated the advanced legal systems of other countries (particularly Germany) and has customized and adapted those laws to the cultural and societal factors present within the existing system. This Japanese experience contains useful and valuable knowledge that can contribute to the development of the rule of law that Cambodia is currently undertaking. For this purpose, he presents and analyses the structure and development of administrative law in Japan.

Even though Estonia is only a small country in the Baltic region of Northern Europe and doesn't play a big role in developing the Cambodian legal system such as Japan or France, it provides a good example of how a former Communist country adapted to the requirements of a liberal market economy and became a high-income economy and member country of the European Union. Tanel Kerikmae and Katrin Nyman-Metcalf provide a good example of how a former Communist country adapted to the legal framework of a liberal market economyn the Estonian Republic. The authors provide an overview of legal acts in the field of administrative law and reflect on the historical development of regulating administrative relations. The final chapter describes law reforms and concludes that administrative law systems can never be static, but should be the subject of debate in society.

At the end of the book, Jochen Hoerth provides an overview of developments in the region and outlines how administrative principles, extra-judicial and judicial control developed in East and Southeast Asia. His chapter provides the regional context for the development of administrative law in Cambodia.

We wish to thank all the authors for their contributions and the Konrad Adenauer Foundation and its Cambodian Country Office Director Mr. Denis Schrey for his strong commitment to the issue of administrative reform and to this publication. We also are grateful to David Hindley for his meticulous proofreading and Christiane Schmutzler for the great work on final design of the book. Final thanks go to all the national and international participants to a number of workshops, conferences and 'Law Talks', where we discussed the topics addressed in this book. We know that this book is not comprehensive, but hope that it will be a modest contribution to the ongoing discussion about future reform steps in Cambodian administrative law. Legal philosopher Edgar Bodenheimer once said that law is a "bridge between is and ought". We are convinced that the promises of the Constitution in particular need a strong legal system and committed institutions to translate vision into reality. Good administrative law may be a seemingly technical and bureaucratic issue on first sight, but it is essential in this context, as it is the construction plan for both effective state administration and comprehensive protection of the people's freedom.

Phnom Penh, April 2014
Jörg Menzel
Kai Hauerstein

PART 1
THE RECENT DISCUSSION ABOUT GENERAL ADMINISTRATIVE LAW

ASPECTS OF ADMINISTRATIVE LAW AND ITS REFORM IN CAMBODIA

Kai HAUERSTEIN

CONTENTS

Abstract 11
I. What is Administrative Law? 12
1. Defining Administrative Law 13
2. Administrative Processes and Proceedings 17
3. Function and Structure of Administrative Law 19
II. What are the Sources of Administrative Law? 26
1. Constitution 26
2. International Law/Obligations 27
3. Specific Administrative Law/Sector Laws 29
4. Unwritten Rules Governing Administrative Law 29
5. Academic Research 30
III. What is the Current Status on Specific Administrative (Sector) Laws in Cambodia? 31
1. Royal Gazette as the Primary Publication for Laws and Regulation Including Administrative Law 32
2. Secondary Publications of Administrative Law 33
IV. Who is Applying Administrative Law? Organizational Set-Up of the Administration 37
V. What Instruments are Available for the Administration? 38
1. General Applicable Rules 38
2. Individual Decisions 39
VI. Legal Protection: How Can Citizens Complain against Administrative Measures? 40
1. Introduction and Background 40
2. Structuring and Defining Complaints 41
3. Complaint System 43
4. Complaints Mechanisms: Legal Framework and Constraints 44
VII. State Liability: How can Citizens Claim Damages for Unlawful (Administrative) Actions? 46
VIII. What is the Status of the Administrative Law Reform? 48
1. Current Situation 49
2. Reform Leading to a Comprehensive Administrative Law System 49
IX. Summary and Conclusion 52
SELECTED BIBLIOGRAPHY 54

ASPECTS OF ADMINISTRATIVE LAW AND ITS REFORM IN CAMBODIA

Kai HAUERSTEIN *

Abstract

Cambodia is in the process of building a comprehensive administrative law system. This implies that some fundamentals are still lacking, such as a general legal framework or key terminology. Therefore, the purpose of this chapter is twofold:

- To propose a framework of how to structure administrative law. These structural principles are expressed in guiding questions, for instance, 'What is administrative law?'
- To use this framework and apply it to the Cambodian context in order to take stock of the current situation.

By providing a framework and applying it to the current situation, this chapter hopes to provide the context for the following chapters of this publication. This approach has its limitations, because it focuses more on structure than on substance. The other authors, however, will include and explain missing details or analyse sectoral aspects, and therefore will add more substance in due course.

The 1993 Constitution of Cambodia (CC) and – as a reflex – the Legal and Judicial Reform Strategy (LJRS) call for the introduction of a comprehensive administrative law system that would provide and protect citizens' rights against unlawful government action. A system like this would be a novelty in Cambodia's turbulent history and a milestone towards good governance. How do we establish a comprehensive administrative law system against the background of the Cambodian context? To answer this question, we have to ask another question first: Where are we now? This question is important, as positive change requires moving from an existing situation to an ideal situation. The purpose of this synopsis is to provide only an answer to the second question – that is, to provide an overview of the existing situation concerning administrative law in Cambodia and to contribute to an ongoing discussion of how to structure and define administrative law.

* Kai Hauerstein is a German lawyer and currently the Legal Advisor to the General Secretariat for the Council for Legal and Judicial Reform. Views expressed in this article are his views and not views expressed by government. The author is grateful to all those who provided information and advice. Any errors, misunderstandings or omissions in this report are those of the author alone.

Thus, it provides definitions and a synopsis of aspects concerning administrative law and reform in Cambodia by answering the following questions:[1]

- What is administrative law? Definitions, administrative processes, general administrative law, specific administrative (sector) law, structure and elements, history of administrative law.
- What are the sources of administrative law? Hierarchy, Constitution, international obligations, specific administrative (sector) laws, unwritten administrative law (court decisions, customary law), and academic research.
- What is the status of specific administrative (sector) laws? Publication, systematization/compilation, public service compendium.
- Who is applying administrative law? Administrative bodies, government officials, functional and territorial organizations.
- What instruments are available to the administration? Policies, plans, regulations, administrative decisions (acts), enforcement/punishment.
- How can citizens complain against administrative measures? Administrative appeal mechanisms (complaint, ombudsman), access to justice.
- How can citizens claim damage for unlawful actions?

The last section briefly analyses the current situation and concludes by answering the following question:

- What is the status of the reform process? Policy framework, current situation (burning issues/gaps), reform leading to a comprehensive administrative law system, elements and outline of options how to codify an administrative (procedure) code, proposed first steps.

I. What is Administrative Law?

This section clarifies the term administrative law. It proposes a definition of administrative law, outlines types of administrative actions and puts administrative law into context. At the end, it provides a brief evolution and history of administrative law in Cambodia and proposes a working definition.

Rationale of Administrative Law: The rationale of administrative law is two-fold. On the one side, administrative law should protect citizen's rights and on the other hand it must ensure that the administration can function effectively.[2] Thus, administrative law needs to

1 The guiding questions for structuring administrative law were taken from *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis*, (Rene J.G.H Seerden. Ed., 2007), pp 2–3.

2 Eberhard Schmidt-Assmann, *Das Allgemeine Verwaltungsrecht Als Ordnungsidee* (Berlin Heidelberg New York: Springer, 2004), 1.

balance these two interests. In Cambodia, the scale balancing these two sides leans more towards one side – the emphasis is more on empowering the administration to function effectively. In contrast with Western legal traditions organised around the understanding of autonomous right-bearing individuals, Cambodia's legal (communist) tradition emphasised social order over individual autonomy. Against this background, administrative law does not primarily protect individuals from the administration, but is an instrument to establish responsibilities and control. Under the Khmer Rouge, Cambodian citizens had to suffer tragically under the excesses of this understanding. Therefore, the new Constitution of 1993 – in theory – changed the old paradigm, and strengthened the second element, protecting the individual from the state.

Thus, there is strong correlation between the requirements set out in the Constitution and administrative law. Guiding principles such as individual rights, rule of law, and democracy need to be operationalised by administrative law. The idea that administrative law is concretised constitutional law goes back to Fritz Werner,[3] stating that most aspects of administrative law operationalises provisions of the Constitution. This article points out that the key requirements set out in the Constitution, such as the protection of individual rights, complaint against unlawful actions, judicial review, and state liability, are still not yet available and therefore need to be operationalised by administrative law.

1. Defining Administrative Law

There is no official definition of administrative law in Cambodia. The government published two volumes of an official Lexicon on Legal and Administrative Terms.[4]

Neither of the volumes defines administrative law. A non-official English-Khmer Law Dictionary defines administrative law under the term administrative proceeding, "The body of rules created by administrative agencies to implement their powers and duties." [5]

This definition only covers the literal meaning of administrative law and thus has very narrow scope. Theng Chan-Sangvar defines administrative law as "The area of public law that regulates the relationship between the citizen and the state." [6] This definition – as the previous one – appears to be too narrow, as it does not include the body of law that deals with the organisation of the administration. Therefore, the two definitions are of limited use.

3 Fritz Werner, "Verwaltungsrecht Als Konkretisiertes Verfassungsrecht," *Deutsches Verwaltungsblatt* (1959): 527.

4 "Lexicon of Legal and Administrative Terms; English, Francais, Khmer (D E F G H)," in *Lexicon of Legal and Administrative Terms* (Phnom Penh: Council of Ministers, Royal Committee for the Adoption of Legal Work, 2008).

5 Theng Chan-Sangvar, *Administrative Law and Decentralization*, ed. Kong Phallak, Hor Peng, Jörg Menzel, Introduction to Cambodian Law (Phnom Penh: Konrad Adenauer Foundation, 2012), 245.

6 "Lexicon of Legal and Administrative Terms; English, Francais, Khmer (D E F G H)."

The purpose of this chapter is to provide a wider understanding of administrative law as key element of law itself, such as criminal law or civil law.

Approaching a Definition: Administrative law is the branch of public law dealing with the actual operation of government.[7] Responsible for the actual operation of government is the administration as the permanent body of government, which implements laws in relation to citizens as well as in relation to other administrative entities. As such, administrative law can be defined as the legal framework for the:

- organization of the administration itself, as well as the
- interaction between administration and citizens and vice versa. The interaction between the two is defined by rights and obligations (see Table below) which are interchangeable, as well as the type of administration (intervening vs. servicing).

Figure 1 below illustrates the two elements of administrative law (its organisation and the interaction between the administration and citizens) as well as two sub-elements of administrative law (intervening and service administration):

- One part of administrative law governs the organisation of the administration itself, and deals with, among others things (i) the territorial organisation of the administration (decentralisation/deconcentration of authority on national and sub-national level), (ii) the functional organisation such as the role and responsibility of ministries and agencies, and (iii) the civil service.[8]
- The other part of administrative law governs the interaction between the administration and citizens and deals with the implementation and enforcement of public law. From the perspective of a citizen, this interaction can be either positive (service administration/public service provision) or negative (intervening administration). The two sub-elements are:

  - Intervening Administration: The classic 19th century type of administration has always been of intervening character. It sought to ensure public order and safety. Thus it mostly dealt with police matters and restricted citizens' rights in the public interest.[9]

  - Service Administration: In modern social welfare states administration has an additional role. It provides services to the citizen, for instance welfare, schools, hospitals, and transport.[10]

7 Stanely de Smith and Rodney Brazier, *Constitutional Law and Administrative Law* (London: Penguin Books, 1998), 504.

8 The Council for Administrative Reform (CAR) published a Handbook for Civil Servants, which provides an overview of the legal framework governing the legal status of permanent civil servants in the administration (excluding servants in the judiciary, legislature, and the armed forces). CAR in addition maintains a legal database on laws governing decentralization (see also Chapter 3, Section 3.2).

9 Nigel Foster and Satish Sule, *German Legal System and Laws*, 4th ed. (Oxford: Oxford University Press, 2010), 283.

10 Ibid, p. 284.

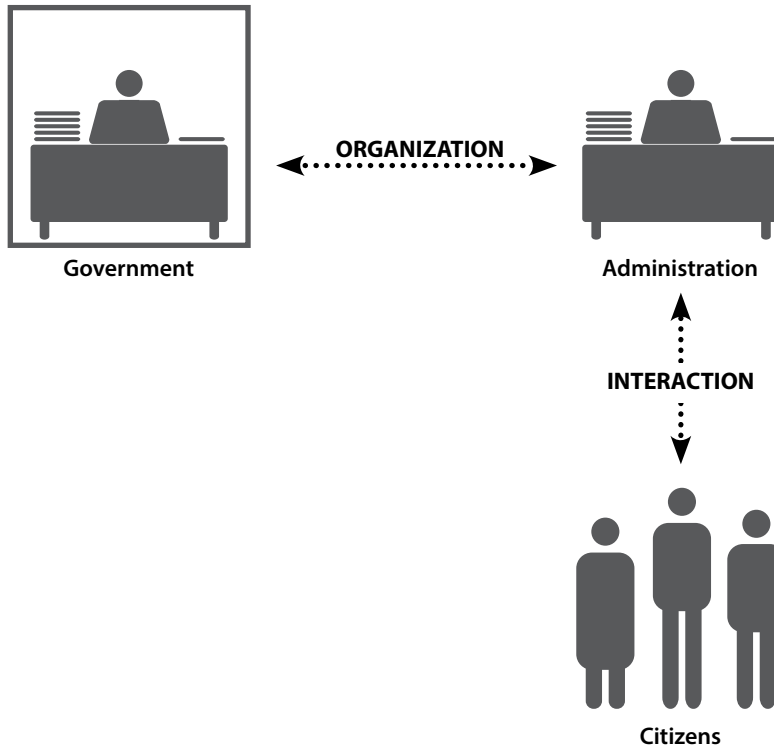


Figure 1: Two elements of Administrative Law: (1) Organization and (2) Interaction

Examples for Administrative Law and Procedure:

- A government denies the licence application for a small business (interaction between administration and citizens in the form of an negative intervention).
- A government official is being promoted (organization of the administration).
- A commune council schedules a meeting (organization of the administration).
- A transportation agency charges a bus company for operating unsafe vehicles (intervening administration). This is an example where the administration restricts the property right of a citizen in the public interest. The public interest is to protect citizens from unsafe vehicles in the name of public safety.
- The provision of public roads on the other hand is a public service provided by the government and is a typical example of the service administration.

Excluded from the scope of administrative law: What is not included in the scope of administrative law are the following elements of public law:[11]

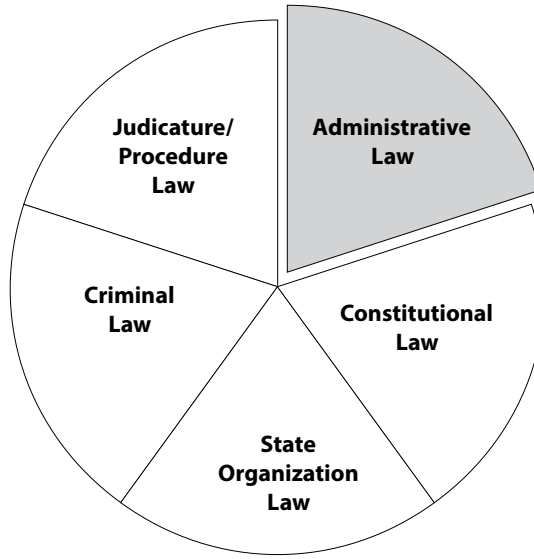


Figure 2: Overview of Public Law

Criminal law is part of public law. It provides the legal framework for criminal prosecution by defining what behaviour is criminal, setting out punishment for criminal behaviour, and setting out procedures by which crimes are investigated, prosecuted, adjudicated, and punished.

Constitutional law is part of public law. It refers to the provisions of the Constitution insofar as they provide the basic legal framework for the set-up of the legislative branch and the government of a state and for the interplay of the latter. It also comprises fundamental rights enshrined in the Constitution.

State organization law is also part of public law and concretizes the constitution by detailing the roles and responsibilities of the legislature, the judiciary, and the executive.

Judicature/procedure law within the division of public law, this area deals with the organization of judicial bodies and the process of litigation.

11 Public law is the body of law that governs the conduct of the state and the relationship between the state and citizens.

2. Administrative Processes and Proceedings

Administrative processes and proceedings breathe life into administrative law as they shape the interaction between the administration and citizens. The flow of a generic process defining the interaction between administration and citizen is outlined below. After the legislature enacts a new law, the administration adopts rules implementing and explaining the new law, publishes the new law and implementing regulations, applies the new law/implementing regulations in a specific case, reviews the decision in the case of a citizen's complaint. If the administration rejects the complaint an independent court or tribunal reverses or upholds the administration's decision. After the citizen has exhausted all legal measures, the administration enforces its decision. The generic process flow is outlined below and explained in the following sections.

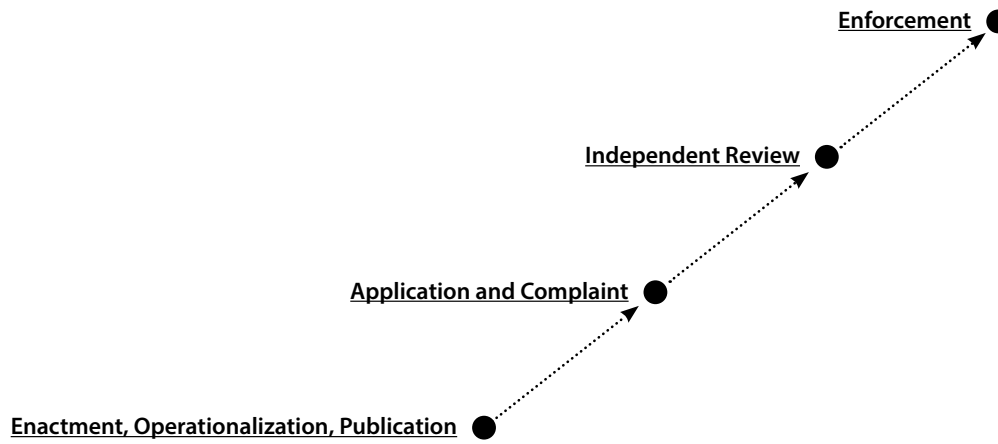


Figure 3: Process Flow of a Generic Administrative Process

Enactment, Operationalization and Publication

The starting point is the enactment of a new (public) law. In most cases, the public sector law is not yet operational as it provides only the framework for the interaction between the administration and citizens. To add technical details, the framework law authorizes a specific sector (line) ministry to issue implementing regulations for its operationalization. The authorizing law as well as the implementing regulations need to be published in an official gazette and made accessible for the citizen. In addition, the responsible line ministry is required to disseminate the information to the lower levels of the administration and – if necessary – train public service officers in applying the law.

Application and Complaint

The administrative decision-making process starts with the application of the public sector law in a specific case. There are three scenarios: an individual either applies for (i) a benefit, for example social welfare, or (ii) a licence/permit, or (iii) the administration imposes a sanction, for example it imposes the demolition of an illegal building. The procedure of this decision-making process is either regulated in the specific sector law or complemented in a general administrative procedure. This process often includes the following procedures:

- application
- hearing
- decision and respective administrative measures (e.g. administrative act)
- complaint
- costs
- notification
- enforcement.

The end of this process is either positive for the citizen as the agency approves the benefit/licence, or revokes the sanction or the decision is negative as the agency either denies the licence/benefit or imposes a sanction.

In the case of a positive decision, the agency notifies the individual, who will pay the required costs and receive the permit/benefit.

In the case of a negative decision, the individual has the right to complain and (usually) appeal to the next higher administrative body. The complaint mechanism, which is either regulated in the sector law or a general administrative procedure act, outlines the process for the complaint and allows the individual to ask for the decision to be reconsidered.

If the individual complains against a decision, the enforcement of the decision is suspended (even though there are exceptions to this rule).

In case the next higher administrative agency decides against the citizen, the citizen usually has the opportunity to bring his/her case to an administrative court or an administrative tribunal (depending on the legal system of a country).

Independent Review (Administrative Adjudication)

Most countries have a law on the organization of courts, which assigns judicial review (including appeal and revision) of an administrative measure to an Administrative Court or a similar independent institution. In addition a law on Administrative Court procedure governs the litigation process. If the administration rejects the complaint, an independent court or tribunal reverses or upholds the administration's decision.

Enforcement

If the individual has complained or the litigation process is ongoing, the enforcement process is blocked until a final decision is reached (there are, however, exceptions to the rule). After the individual has exhausted appeal/revision the decision can be enforced. The agency can enforce its own decision in case the demanded action has not been performed, or by penalty in the form of fines.

3. Function and Structure of Administrative Law

Function of Administrative Law

Throughout history the relationship between administration and citizens has changed substantially:

- **Intervening administration:** Historically, the administration had a policing function regulating private activities and enforcing control. Its main purpose was to establish law and order, if necessary with force. A typical example would be the Prussian bureaucracy in the 19th century, which had a quite detailed regulatory agenda interfering with private activities. This type of administration is therefore called 'intervening (policing) administration', because it restrains citizens' rights in the public interest. The liberal '*Rechtsstaat* (Rule of Law)' movement during this time tried to restrain administrative interventions and fought for the introduction of formal legal criteria to justify an intervention.
- **Service (welfare) administration:** The other type of administration is called service administration. Its purpose is to contribute to the overall welfare of citizens. Service administration arose with the modern social welfare state in the 20th century. Service administration provides social security, operates hospitals and schools, and builds roads.
- **Fiscal administration:** Finally, there is fiscal administration, which generates revenues through taxes and user charges to pay for, among others things, public services such as health services or infrastructure.

Depending on the function (welfare, law and order, fiscal), administrative law either restricts citizens' rights or provides rights. See also the definition above.

Structure of Administrative Law

Administrative law can be divided into: (1) general administrative law and (2) specific administrative law. General administrative law is concerned with basic rules, general principles, and concepts applicable to all aspects of administrative law, such as administrative principles, proceedings, and so on.

Specific administrative law is the body of law that deals with specific policy areas, such as maintaining public health, immigration, protection of the environment, and so on. Specific administrative law is mostly set out in public sector laws such as land law or environmental law.

In addition, the majority of civil law countries has introduced general administrative (procedure) codes that set out general standards such as administrative principles, standardized proceedings for the decision making process or the complaint process. The development of general standards is important, as administrative law should be as comprehensive and coherent as possible. General administrative (procedure) codes only provide a standard for the whole body of administrative law and apply uniformly across sectors. This standard, however, can be complemented with more specific mechanisms in sector laws.

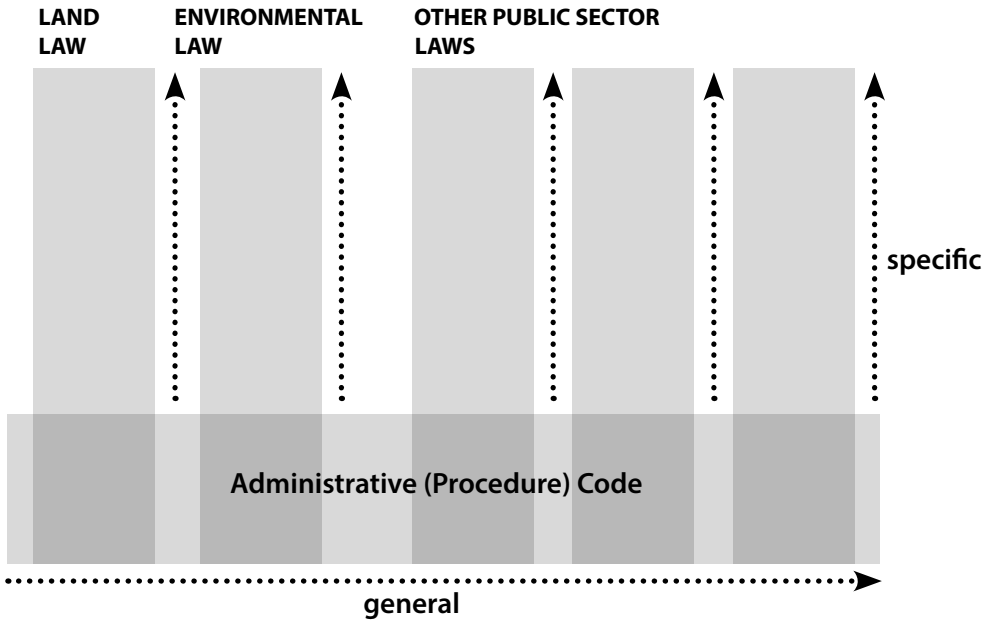


Figure 4: Relationship General Administrative Law and Specific Administrative (Sector) Law

General Administrative Law

Some countries have introduced a general administrative law, which defines:

- administrative principles[12]
- standardized proceedings in the decision making process
- standardized instruments such as the administrative act or the administrative contract
- complaint mechanisms
- enforcement of administrative decisions
- state liability.

General administrative law provides a general standard for all existing and future public sector laws and every government agency must comply with this general framework as a minimum standard. However, this minimum standard can be complemented by specific mechanisms in sector laws as long as they do not conflict with the general standard. For example, a law on land management can only specify a complaint mechanism, but cannot abolish the complaint mechanism itself.

Specific Administrative Law and Regulations

Starting from the definition of administrative law and its distinction between general administrative law and specific administrative law (see before), this sub-chapter defines in more detail specific administrative law.

Specific administrative law deals with those sectoral details that are not covered by general administrative law.

Specific Administrative Law: The main body of administrative law is specific administrative law. Specific administrative law deals with various specific policy areas such as maintaining law and order (for example, through the police), protecting public goods (such as the environment), managing development and the economy (for example, investment), providing public services (such as education). In Cambodia, administrative law is administered by sector ministries and includes:

Law on Agriculture, Law on Forestry, Law on Fishery, Law on Commerce, Law on Cults, Law on Religious Affairs, Law on Economy, Law on Finance, Law on Education, Law on Youth, Law on Sports, Law on Environment, Law on Health, Law on Industry, Law on Mines, Law on Energy, Law on Information, Law on Justice, Law on Labour, Law on Vocational Training, Law on Land Management, Law on Urbanization, and Construction, Law on Planning, Law on Posts and Telecommunication, Law on Public Works, Law on Transportation, Law on Rural Development, Law on Social Affairs, Law on War Veterans, Law on Youth Rehabilitation, Law on Tourism, Law on Water Resources, Law on Meteorology, Law on Women's Affairs, Law on Functional and Territorial Organization of the State.

12 Administrative principles will be covered in more detail in another chapter of this publication.

To structure specific administrative law, these sectors could be clustered according to the main functions of the state:

- Infrastructure and Development (Public works/transportation, land management, transport, post/telecommunication);
- Management of Natural Resources (Mines/energy, water resources, agriculture/forestry/fishery, environment, land management);
- Economic Development (Economy/finance, commerce, labour, rural development, tourism, banking, investment);
- Social Development (Religion, culture, education, health, social affairs, women, labour);
- Security and Public Order (Nationality and immigration, media and assembly, health and medicine, police, weapons, prisons and youth rehabilitation, among others);
- Organization of the Executive Branch (Civil servants, organization of the executive branch [functional], organization of the executive branch [territorial]); and
- Fiscal (Taxes, customs, international trade among others).

Regulations: Regulations are the body of law issued by the administration. The law-making function of the administration can collide with the "separation of power" principle. According to the Cambodian Constitution, the legislative and executive powers should be separated (Article 51). Thus, the National Assembly and the Senate enact laws (Chbab) and the executive implements them. The 'separation of power principle', however, is not absolute. Because the legislature cannot regulate every technical aspect in detail, it can authorize the administration to issue regulations in those areas where technical skills of respective line ministries are needed. Therefore, laws in Cambodia only provide the legal framework and delegate the authority to regulate technical details to a responsible government agency (delegated legislation). In this case the administration exercises its own legislative (rule making) power.

Regulation is often defined as administrative law in a narrow sense because it represents the law created by the administration. Specific administrative laws (sector laws) authorize a responsible ministry[13] to develop and enforce control in one specific sector. For example, the Law on Tourism authorizes the Ministry of Tourism to develop policies and plans, draft regulations and issue licences. Each sector law therefore provides for a multitude of implementing regulations, which are also part of administrative law. As a delegated legal source, a ministry mainly regulates the technical details of an authorizing law. The legal requirements for issuing regulations are vaguely defined in the Constitution

13 Ministry for: (1) Agriculture, Forestry & Fishery, (2) Commerce, (3) Cults and Religious Affairs, (4) Economy and Finance, (5) Education, Youth and Sport, (6) Environment, (7) Health, (8) Industry, Mines, and Energy, (9) Information, (10) Justice, (11) Labour and Vocational Training, (12) Land Management, Urbanization, and Construction, (13) Planning, (14) Posts and Telecommunication, (15) Public Works and Transportation, (16) Rural Development, (17) Social Affairs, War Veterans, and Youth Rehabilitation, (18) Tourism, (19) Water Resources and Meteorology, (20) Women's Affairs, (21) Interior.

and the Law on the Organization and Functioning of the Council of Ministers. Article 150 II CC states that laws and decisions made by the state must be in strict conformity with the Constitution. Articles 13 and 39 of the Law on the Organization and Functioning of the Council of Ministers list types of regulations and put them in a hierarchical order.[14]

Types of regulations:[15] The executive – the king, the government, and other national agencies – issue the following types of regulations: (1) royal decrees (reach kret), (2) sub-decrees (anu-kret), (3) decisions (sechkdey samrech), (4) ministerial proclamations (prakas), (5) circulars (sarachor), and instructions (sechkdey nernaom).

- Royal decree (reach kret) is a government decision signed by the king (Article 21, CC). Royal decrees are issued, for instance, to appoint senior government officials, military officials, and judges.
- Sub-decree (*anu-kret*) can be used by the prime minister to exercise his regulatory power (Article 13 Law on the Organization and Functioning of the Council of Ministers). The sub-decree must comply with the Constitution as well as with the authorizing law.
- Decision (*sechkdey samrech*) is an individual decision of the prime minister, a minister, or a governor exercising another regulatory power usually to implement a royal decree or a sub-decree, but expires when the purpose is achieved. Thus, the decision has to comply with the Constitution and the authorizing sub-decree or royal decree.
- Ministerial proclamation (*prakas*) is issued by a member of the government to exercise his/her own regulatory powers. A ministerial or inter-ministerial decision is signed by the responsible minister. A proclamation must comply with the Constitution and the authorizing law.
- Circulars (*sarachor*) provide ministerial clarification of legal issues, instructions, or administrative requirements.

The sub-national administration also issues regulations. They are called *deka*. For example the provincial *deka* (*arrete*) can be used by the governor in one province to exercise his/her regulatory power. On a commune level the chief of the commune issues a *deka*.

Issue "Rule by Law" Rather Than "Rule of Law": Boundaries for the legislative authority vested in the executive are sometimes difficult to draw. According to the Constitution, the National Assembly and the Senate have the legislative authority. But the legislature can also authorize the administration to issue implementing regulations (delegated legislation). Thus, a law that delegates most of the legislative responsibility to the administration could violate the "separation of power" principle stated in Article 51(5) of the Constitution, which provides that legislative, executive, and judicial powers should be separated. It is difficult to define what belongs to legislative powers and what belongs to executive powers. Some

14 Tep Darong, "Cambodia and the Rule of Law," in *Occasional Papers Democratic Development Rule of Law*, ed. Konrad Adenauer Foundation (St. Augustin: Konrad Adenauer Foundation, 2009), 24-25.

15 Chan-Sangvar, *Administrative Law and Decentralization*, 259-60.

countries, for example Germany, have developed a rule that parliament should regulate all "essential matters". As a consequence, the more essential a matter is for a citizen and the public, the more detailed the parliament-made law has to be. This rule effectively limits the administration from issuing regulations in essential areas, for example areas in which fundamental human rights are concerned. In Cambodia, no such limits appear to exist, which in turn leads to extensive regulatory powers vested in the executive.

Summary: Against the background in this section, the following working definition for administrative law is proposed:

ADMINISTRATIVE LAW

Legal framework for (i) the organization of administration itself and (ii) the interaction between government and citizens.

(i) Legal framework for organization/ management of administration:	**(ii) Legal framework for the interaction between the administration and citizens when implementing/enforcing public law:**
Public service management (for example, Law on Public Service)	General administrative law is the background system that cuts across administrative law areas and includes, among other areas, basic processes and general principles/procedural rights
Territorial organization (for example, Law on Decentralization)	Specific administrative law (for example, Law on Land, Law on Tourism)
Functional organization (for example, Law on Ministry of Justice)	Administrative 'law making' (for example, a government agency issues a sub-decree)

Box: Historic Background on Administrative Law

Cambodia has experienced frequent and drastic changes of its legal and institutional systems. Different colonial powers and governments introduced, established, destroyed, and replaced existing legal systems. Administrative law as an integral part of those legal systems shared the same fate.

Pre-1953 (colonial rule): Under colonial rule, Cambodia introduced the French-based civil law system, but did not introduce all aspects of administrative law. Complaints, for example against administrative (colonial) actions, were not allowed. Therefore, French institutions such as the Tribunal Administratif and the Conseil d'Etat were never introduced in Cambodia. Only in 1948, judicial review on administrative matters was assigned to the Krom Viveat (a separate administrative review body with wide powers of administrative review).

1953-1970: After Cambodia's independence the Krom Viveat continued its work to review administrative law, but was finally abolished in the 1970 coup.

1975-1979: Under the Khmer Rouge all legal institutions and frameworks were destroyed, including administrative law.

1979-1993: During the time of the People's Republic of Kampuchea a socialist government model was introduced. In principle, government and people were considered the same and a legal framework that would govern their interaction was deemed unnecessary. Nevertheless, the 1982 Law on Complaints granted non-judicial review to citizens and allowed them to complain against government actions if they were considered harmful to the state, the collective interests, or the individual.

1993-today: In 1993, the (old) civil law system was re-established. The new Constitution, which requires separation of powers, judicial review, procedural rights, and decentralization of powers, provided a blueprint for establishing a comprehensive administrative law system. Since 1993 a multitude of organic laws, which shape the institutional and territorial set-up of the administration, as well as numerous public sector laws, have been enacted.

II. What are the Sources of Administrative Law?[16]

Administrative law, as a part of public law, feeds from numerous sources of law. There is debate over how to organize these sources in an appropriate order. This section structures sources of administrative law according to the hierarchy: (i) Constitution, (ii) international law (general rules and international agreements), (iii) sector laws and their implementing regulations (for example, decrees and sub-decrees), (iv) unwritten administrative law such as court rulings, customary law, and academic research.

Hierarchical Order of Administrative Law: The Constitution and the Law on the Organization and the Functioning of Cabinet of Ministers' define the hierarchy for laws and regulations. It appears that the (i) Constitution (Article 150) and the Universal Declaration of Human Rights, UN Covenants and other International Human Rights instruments (Article 31) are at the Apex; followed by (ii) international treaties approved by the National Assembly and the Senate, (Article 26); followed by (iii) statuary law (organic law and ordinary law); followed by (iv) royal decrees, sub-decrees, and (vi) prakas, circulars, decisions, and (vii) warrants.

This hierarchical order implies that lower level legislation should comply with higher-level legislation.

1. Constitution

The Cambodian Constitution[17] directly and indirectly defines administrative law. The main provisions shaping administrative law are: (1) 'Respect for law' mentioned in the preamble of the 1993 Constitution; (2) Human Rights (Articles 31-50); (3) Right to complain against government action (Article 39); (4) Right to claim compensation for illegal government action, Article 39; (5) Right to seek judicial protection from administrative malpractice, Articles 39 and 109; (6) Separation of powers, Article 51:

- **Respect for Law:** The preamble of the Constitution declares 'respect for law'. Respect for law means that the Constitution prohibits all administrative actions that do not comply with the authorizing law or the Constitution itself. In combination with the separation of powers (Article 51) it further means that administrative action should be based on a law enacted by the National Assembly/Senate. These two principles combined form what is known in other countries as the 'legality principle'. The legality principle for the administration declares two things: (1) all administrative actions should be based

16 Organic laws are part of administrative law. Organic laws establish state institutions and establish rules for their operation. As mentioned in the introduction, organic laws are not part of this review, as well as other laws on state organization and management such as public service laws and decentralization.

17 English translation of the 1993 Constitution published by Konrad Adenauer Foundation.

on law enacted by the legislature and (2) all administrative actions should comply with the authorizing legislation – no administrative action against the law.

- **Protection/Respect of Human Rights:** Articles 31-50 guarantee citizens a number of human rights, which the administration must respect. Consequently, the protection of human rights is another key element of administrative law. Respecting human rights in the relationship between government and citizens means the restraint of government power.
- **Right to complain:** Article 39 provides for every citizen the right to complain against administrative measures. The right to complain corresponds with government's obligation to provide an effective complaint mechanism, as included in some (but not all) sector laws.
- **Right to claim compensation for unlawful administrative actions:** Article 39 provides for every citizen the right to claim compensation against administrative malpractice. This is called state liability. State liability means that administrative authorities are responsible for unlawful administrative actions and that they have to compensate citizens for unlawful measures and/or non-performance.
- **Judicial review of administrative measures:** Article 39(2) also provides the right to settle citizens' complaints against administration and claims for compensation accessing independent courts.

Respect for law (the legality principle), administrative complaint, judicial protection of human rights in administrative processes, and state liability are cornerstones in the Constitution that directly shape administrative law. These principles are considered 'supreme law' (Article 150) binding administrative measures.

2. International Law/Obligations

International agreements can set out rules as well as principles, which either become directly or indirectly part of Cambodia's administrative law. International law in relation to human rights is an integral part of the Constitution and can take precedent directly over statute law (Article 31(1) of the 1993 Constitution). International agreements can become indirectly part of Cambodian law, if the legislature adopts them (Article 26). The following international agreements have had a significant impact on the creation of administrative law.

- **Legal Requirement to Good Governance:** As Jörg Menzel concludes, good governance is part of the developing modern international law,[18] which addresses issues of good governance and good administration.

18 Jörg Menzel, "Principles of Administrative Law (Unpublished Report)," (Phnom Penh: GIZ, 2011), 10.

- **Legal Requirement to fight corruption:** The Kingdom of Cambodia signed the UN Convention on Corruption,[19] which requires the government to establish legal frameworks and institutions to combat corruption. The adoption of an anti-corruption law and the establishment of an Anti-Corruption Unit are important national reflexes to comply with international obligations set out in this convention.
- **Legal Requirements to Provide Access to Information:** The UN Convention on Corruption also requires effective access to information. Article 13 stipulates: "states (ensure) that the public has effective access to information". Article 19 of the Universal Declaration of Human Rights, which Cambodia has signed and acceded to, sets out a similar requirement: "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference, and to seek, receive, and impart information through any media". Consequently, the RGC has prepared a draft law on access to information to comply with international obligations set out in international law.
- **Legal Requirements of Human Rights Treaties:**[20] To date, Cambodia is party to six human rights treaties.

  International Covenant on Economic Social and Cultural Rights (ICESCR)
  International Covenant on Civil and Political Rights (ICCPR)
  International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
  Convention on the Elimination of Discrimination against Women (CEDAW)
  Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
  Convention on the Rights of the Child (CRC).

Article 31 of the Constitution directly respects human rights treaties adopted in Cambodia. The relevance of human rights treaties for the decision making of all state institutions has also been emphasized by the Constitutional Council in its decision of 10 July 2007 (Decision 092/003/2007), which issued a ruling clarifying that the human rights treaties are part of domestic Cambodian law and should be applied by judges in the courts.[21]

19 2005 U.N. Convention on Corruption, (acceded to by Cambodia in September, 2007)ibid.; Article 13 of the Convention requires that states should "(ensure) that the public has effective access to information".

20 Cambodia has also signed the Convention on the Rights of Persons with Disabilities (CRDP) and the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (CMW). Signing a treaty signifies a commitment by the government to ratify the treaty in the near future. Cambodia has also ratified a number of optional protocols to these treaties which impose additional obligations on the government: the Optional Protocol to the Convention against Torture (OPCAT); the Optional Protocol to CEDAW; and the two Optional Protocols to the Convention on the Rights of the Child dealing with child soldiers and with child exploitation (CRC-OPAC and CRC-OPSC). Each of these treaties is guaranteed under Article 31 of the Cambodian Constitution. In 2007, after a petition from child rights NGOs supported by OHCHR.

21 Jörg Menzel, *Counstitutionalism in South East Asia*, ed. Clauspeter Hill and Jörg Menzel, 2 vols., vol. Volume 2, Reports on National Constitutions (Singapore: Konrad Adenauer Foundation, 2008).p. 60

- **Legal Requirements of ASEAN:** Cambodia signed the ASEAN Charter. While entry itself is a political event, integration into ASEAN is largely an ongoing legal endeavour. Most of the recent changes relate to commercial matters. However, some required changes could relate to administrative matters as well. For example, transparency of laws and procedures is an explicit requirement for all ASEAN members.[22] Such transparency includes the requirement that laws and procedures are disseminated and that legal procedures for decision making must be consistent and respected.
- **Legal Requirement to WTO/Transparency:** In 2004 Cambodia joined the World Trade Organization (WTO), which requires legal and institutional reforms ensuring uniform and impartial implementation of trade commitments. As part of the WTO accession package, the Cambodian authorities committed to enact 46 laws.[23] Even during the WTO accession process, member states stressed the important issue of transparency. As a result, Cambodia committed itself to 3 transparency related actions: (i) to provide at least 30 days for comments on all proposed new measures affecting trade in goods, services or the protection of intellectual properties; (ii) that no such measure will become effective until it is published in the official journal; and (iii) to make available on an official website the body of all current laws, regulations and decrees, as well as administrative and judicial rulings, relating to trade.[24]

3. Specific Administrative Law/Sector Laws

The most visible part of administrative law is the body of laws governing the public sector. See for details section 1.2 as well as section 3.

4. Unwritten Rules Governing Administrative Law

All sources of administrative law mentioned so far have been of written nature. But administrative law also recognizes unwritten rules such as (i) court rulings and (ii) customary law.

- **Court Rulings:** "In applying Administrative Law judges develop new standards and specific principles. In fact, administrative courts developed most of the general Administrative Law Principles in Continental Europe. French Administrative Law has been developed largely by the jurisprudence of the administrated courts with the State Council (*Conseil d'État*) at the top. The *Conseil d'État* was established more than two hundred years ago and it was not a fully independent court in the beginning, but it has evolved to be one and the independence of administrative courts has been clearly stated by the French

22 Jeffrey A. Kaplan, "Cambodia's Asean and Wto Integration: A Legal Perspective " in *Cambodian Legal and Judicial Reform in the Context of Sustainable Development*, ed. Soc Sopana (Phnom Penh1998), 58.

23 Soc Sopana, "The Role of Law and Legal Institutions in Cambodia's Economic Development: Opportunities to Skip the Learning Curve" (Bond University, 2008), 99.

24 Ibid.143.

Constitutional Council.[25] "In 2008 alone the Conseil d'Etat decided around 12.000 cases, the *Cours Administratives D'Appel* around 27.500 (Mestre, in: Bogdandy/Cassese/Huber, Vol III 2010, p. 113). Cambodia does not have a judiciary body reviewing administrative cases. Even though – in theory – the ordinary courts review all legal cases, including administrative ones, there were no court rulings on administrative issues since 1993.[26.] Prior to 1970, there were administrative cases first handled by the *Krom Viveat* and then by the *Counsel D'Etat* (see also historic overview), but it is doubtful whether their rulings still have a relevant influence on Administrative Law today."[27]

- **Customary Law:** Customary law can play a role in administrative law. Article 47 of the Constitution, for example, can be viewed as customary social security law as it reflects the custom that children are required to take care of their parents. Instead of challenging an administrative decision in front of the court, it may also be a custom to go to the village chief or to informally appeal to the superior of a decision maker. Another example for customary law could be the extra-judicial control by the King. Reynolds (1998) mentions a case where in 1996 the King was successfully petitioned to intervene in a dispute between a local administrative body and market stallholders regarding a rental increase.[28]

5. Academic Research

"Within *civil law systems* academic research usually plays an important role in the development and interpretation of law" states Menzel.[29] He continues that

> *law professors are involved in the preparation of laws, the interpretation of laws and in the elaboration of general principles. German Administrative Law was strongly influenced by academic elaborations, most notably Otto Mayer's two volume book on German Administrative Law, which was first published in the end of the 19th century and which has been influential in a range of jurisdictions, which have looked to Germany in the development of their own law (in Asia: Japan, South Korea, Taiwan).*[30]

In Cambodia, there is currently only limited academic research in administrative law. Whereas there are numerous textbooks on public administration and the civil service, there are only very few on administrative law itself. During the preparation of this report two relevant textbooks (both only available in Khmer language) could be identified:

- Doeuk Pidor, General Administrative Law, 2009.

25 Decision of 22 July 1980, Indépendence de la jurisdiction administrative, Rec. p. 46.
26 According to anecdotal evidence, the sex-offender Garry Glitter appealed the administrative decision to revoke his visa. The motion was said to be denied due to lacking jurisdiction.
27 Menzel, "Principles of Administrative Law (Unpublished Report)," 22-23.
28 Rocque Reynolds, "Dicey in Cambodia or Droit Administratif Meets the Common Law," The Australian Law Journal 72(1998): 210.
29 Menzel, "Principles of Administrative Law (Unpublished Report)," 23-24.
30 Ibid.

- Say Bory, General Administrative Law, 2nd ed. 2001.

Say Bory's book is the most comprehensive publication on administrative law in Cambodia, but unfortunately it is outdated. It provides a systematic approach to structure and defines administrative law. Section 1 defines administrative law, identifies entities, sources, and analyses the legality of administrative actions. Section 2 reviews administrative instruments such as administrative decisions and the administrative contract. In the second part of Section 2, Say Bory looks into state liability. Section 3 deals with the organization of the administration, in particular with territorial organization.

Besides these two books, there has been little attempt to structure and systemize administrative law. Law universities teach administrative law only as an introductory course. Some legal scholars even go so far as to say that administrative law only exists in theory but not in practice as neither institutions nor legal frameworks exist.[31] This is not the place to discuss the question of whether a body of law needs to be applied and practised to be considered law. However, the lack of academic research in this particular field of law indicates a lower level of interest.

III. What is the Current Status on Specific Administrative (Sector) Laws in Cambodia?

The major legal source for administrative law in Cambodia could be considered specific administrative (sector) law including implementing regulations (mostly sub-decrees). These laws and implementing regulations are fragmented and often not accessible.

In general, there are two forms of legal publishing, primary and secondary:

- The primary form is the systematization, collection, and updating of laws and regulations, including publication and dissemination. Primary publication is one of the core functions of the state. These are official documents and the primary legal source.
- Secondary publishing is where an organisation collects the primary material and reproduces or repackages this for sale or other form of distribution. This happens worldwide, usually as a commercial venture or as part of development projects. Secondary publishing is impermanent and is tied to the life cycle of a project or the commercial success of the publisher. It tends to involve a selection of laws relevant for a specific sector and does not attempt to have official authority. In contrast to most other countries, in Cambodia, there is
- (No) effective primary publication/dissemination of administrative law in the Royal Gazette; and
- (No) secondary compilation/systematization of administrative law.

31 This view was shared by a number of participants in stakeholder consultation sessions held between 2012-2012 and organized by the General Secretariat of the Council for Legal and Judicial Reform.

1. Royal Gazette as the Primary Publication for Laws and Regulation Including Administrative Law

In theory, the Government should publish every law and regulation in the Royal Gazette (unless it is declared urgent) as stated in the following Articles:

Article 93(2) of the Constitution states that
Laws that are signed by the King for promulgation shall be published in the Royal Gazette and announced to the public throughout the country in accordance with the time set out above.

Article 13 of the Law on the Organization of the Council of Ministers states that
All norms and standards of the Royal Government that will have general effect must be published in the Royal Gazette.

The report on 'Access to Legal and Judicial Information' prepared for the UNDP Legal and Judicial Reform Project states that administrative laws are either not published or not disseminated:

Individual Ministries make a considerable number of legislative instruments, such as Prakas. Although there are constitutional requirements to publish laws in the Official Gazette, it is clear that not all laws are published that way. The Ministries tend to retain what they consider their documents and access to these is not always easy.[32]

Raymond Leos quotes, in addition, three provisions in the current Cambodian Constitution that provide the constitutional underpinnings of a protected right of "timely and effective access to high quality and accurate information held by the Royal Government of Cambodia and other public institutions:

- Article 31 of the 1993 Constitution of the Kingdom of Cambodia pledges to "*recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's, and children's rights*". Article 35 of the 1993 Constitution also gives Khmer citizens the "*right to participate actively in the political, economic, social, and cultural life of the nation. Any suggestions from the people shall be given full consideration by the organs of the State*".
- Further, under Article 41, Khmer citizens "*shall have freedom of expression, press, publication, and assembly*".[33]

32 Michael Rubacki and Murali Sagi, "Access to Legal and Judicial Information," in *Prepatory Assistance on Legal and Judicial Reform* (Phnom Penh: UNDP, 2004).

33 Raymond Leos, "The Role of Access to Information in Promoting Democracy, Good Governance, and Development in Cambodia," in *Access to Information* (Phnom Penh: UNDP, 2010), 11.

International Obligation: In addition, ASEAN and WTO treaties require Cambodia to publish trade relevant information. Trade law is a part of administrative law as it provides the public rules for import licences, customs, duty, and tariffs. For example, ASEAN member states have committed to put a number of relevant ASEAN Trade in Goods Agreement (ATIGA) on the internet through an ASEAN Trade Repository (ATIGA Article 13). Moreover, all official communications and documentation exchanged among member states related to ATIGA shall be in English (ATIGA Article 15).

Low Level of Compliance: However, compliance with national and international regulations is low. The Royal Gazette is neither complete, nor is it published on a regular basis.[34] In addition, Cambodia's current practice of publishing laws and sub-decrees related to trade law is insufficient for ATIGA and WTO compliance.[35]

2. Secondary Publications of Administrative Law

In Cambodia, there are no secondary publications that can provide a comprehensive update on administrative sector laws. In France, for example, administrative statues and regulations are systemized and compiled in an *Administrative Code*, published by a private publisher, *Dalloz*[36].

In Cambodia, sector ministries, private organizations, development partners, as well as the Council for Administrative Reform, the Council for Legal and Judicial Reform, and the Council of Jurists have made attempts to systemize, compile, and update laws and regulations in specific fields. None of these efforts provides a comprehensive, updated, systemized legal database on laws and regulation, let alone on administrative law.

Sector Ministries: Ministries tend to retain what they consider 'their' documents, trying to secure power through concealing information. Some ministries maintain an incomplete list of legal documents on their webpages, for example the Ministry of Justice,[37] the Ministry of Tourism,[38] or the Council of Ministers.[39]

34 Daniel Adler, "Access to Legal Information in Cambodia: Initial Steps, Future Possibilities," *Journal of Law and Technology* (2006): 3.
35 Concluded by an (internal) World Bank project document to support the Ministry of Trade establishing a trade repository.
36 Dalloz is a French publisher specializing in legal matters.
37 http://www.moj.gov.kh/index.php?option=com_content&view=article&id=126&Itemid=59&lang=en.
38 http://www.tourismcambodia.org/industry/text/text_pdf/?type=legislation#comp.
39 Office of the Council of Ministers: http://www.bigpond.com.kh/council_of_jurists/somg.htm.

Donor Supported Projects in Publishing Laws: Access to legal information is paramount for achieving good governance, rule of law, access to justice, and compliance with international trade obligations. Therefore, at least five projects have supported the publication of legislation in Cambodia. None of those publications is comprehensive or updated. The most significant donor contributions include:

- The Cambodian Legal Resources Centre, funded by South East Asia Fund for Institutional and Legal Development and Canadian International Development Agency published three volumes compiling all legislation from 1993 until 2000.[40]
- The Office for the High Commissioner for Human Rights (OHCHR) publishes the most complete compilation of laws in Khmer. The fourth edition of selected laws contains laws and regulations in force from 2001–2005. A supplement to the fourth edition was issued in 2009. It contains a selection of laws and regulations adopted since the fourth edition up to the end of the Third Legislature in March 2008. In addition, a CD-ROM is available in English, which provides an electronic overview of selected laws and regulation from 1993 until 2002.
- United Nations Development Program (UNDP) Access to Justice Program funded a trilingual legal database and CD-ROM (1996–1998).
- World Bank funded a trilingual publication (1999–2001) and supported the Council of Jurist in publishing laws.
- In 2011 the German International Cooperation (GIZ), Administrative Reform and Decentralization Project started to fund a legal database on laws and regulations pertaining to decentralization, public service, and organization. Laws and regulations are collected on CD Rom, but have not yet been published on the CAR website.

Private Organizations: Some laws and regulations can also be found on private websites, such as

Leaden: http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwecam.htm
BNG Legal: http://www.bnglegal.com/legal-database.html

40 Cambodian Legal Resources Centre, The Compendium of Cambodian Laws, Volume 1: Laws and regulations adopted between 1993 and 1995; Volume 2: Laws and regulations adopted between 1995 and 1997; Volume 3: Laws and regulations adopted between 1997 and 2000; edited by Sok Siphana.

Compendium of Information on Public Services[41]: Based on the Policy on Public Service Delivery[42], the Council for Administrative Reform (CAR) and the Council for Legal and Judicial Reform published a Compendium of Information on Public Services, which attempts to systemize and standardize administrative procedures in the public (service) sector.

The Service Compendium includes four books (volumes), covering seven service clusters:

Volume 1:[43]

Cluster 1: Public services regarding state sovereignty. These are services dealing with civil status such as birth certificates, marriage licences, and so on.

Volume 2:[44]

Cluster 2: Services regarding security and public order. These include interventions and sanctions to uphold law and order. The categorization as service is misleading as these interventions typically involve prohibitions, restrictions and sanctions. These types of interventions are unlikely to be considered as 'service'.

Cluster 5: Services regarding social affairs, culture, and womens' affairs. These are classical services of the so-called welfare state. These services include the provision of teaching, health services, or the distribution of social aid.

Cluster 6: Services regarding the development of physical infrastructure.

Cluster 7: Services regarding revenue collection. The categorization as a service is misleading. See also Footnote 42.

Volume 3:[45]

Cluster 3: Services regarding judicial services and arbitration.

Volume 4:[46]

Cluster 4: Services regarding trade matters, SME development, investment environment, and public-private partnerships. These services are traditionally associated with

41 The Service Compendium creates a misleading understanding of the term 'service'. It considers all administrative actions as 'services' including sanctions, mandatory licences, and taxes. Tax collection or the issuance of a mandatory licence are examples where the meaning of service is stretched beyond its actual meaning. An administrative action that intervenes with personal freedoms or takes away a part of a person's salary/profit, can hardly be considered a service. In order to avoid misunderstandings regarding the term service, it would help to differentiate between different functions of the administration such as service administration, intervening administration, and fiscal administration (see also section 1) and only consider as services those administrative actions that provide a benefit.

42 The Royal Government of Cambodia, Council for Administrative Reform, Policy on Public Service Delivery, (2006).

43 Royal Government of Cambodia, Council for Administrative Reform, Volume 1, Compendium of Information on Public Services, Cluster 1, Government publication, (2010).

44 Royal Government of Cambodia, Council for Administrative Reform, Volume 2, Compendium of Information on Public Services, Cluster 2, 5, 6, 7, Government publication, (2011).

45 Royal Government of Cambodia, Council for Legal and Judicial Reform, Volume 3, Compendium of Information on Public Services, Cluster 3, Government publication, (2011).

46 Royal Government of Cambodia, Council for Administrative Reform, Volume 4, Compendium of Information on Public Services, Cluster 4 (Part 1), Government publication, (2010).

economic administration regulating business activities, for example through the issuance of economic sector licences.

Brief Assessment of Volume 4, Cluster 4:[47] Based on a review of Volume 4, Cluster 4 on services related to enhancing trade, a number of shortcomings are apparent. These shortcomings inhibit the achievement of the self-set goal to improve the transparency and understanding of public services. Most of the information provided is incomplete and/or inconsistent. It is unclear where to apply, where to get the required documents, and how the application process works.

- **Unclear where to apply:** The Compendium only provides the general address of the responsible ministry and the department, but not the floor or the room number where to apply. A service user needs information on opening hours, location of the room (what floor, what room), who is responsible, where to get the application form, where to pay and so on. In addition, there is no information on services provided at the sub-national level.
- **Unclear where to get required documents:** There is no information where and how to obtain required documents.
- **Unclear how to obtain a licence:** The compendium does not provide flow charts of how the licence is processed. Thus, the procedures for providing a service remain non-transparent.
- **Incomplete/inconsistent information:** Most information is inconsistent; for example, some line ministries provide information on the costs for a licence while others do not. One interview confirmed that only 10 agencies have been audited and that in all cases the given information was not correct.
- **Unlikely impact on target group.** The Compendium was not disseminated to the end users, citizens. CAR printed 8000 copies. These copies were distributed to government agencies, but not to citizens or NGOs. When this chapter was written in June 2013, information was neither available on the webpage of the line ministries nor available on the webpage of the Council of Administrative Reform.
- **Unsustainable:** Due to lack of funding an update of the service compendium is unlikely.

47 This volume is the only compendium available in English.

IV. Who is Applying Administrative Law? Organizational Set-Up of the Administration

The role of the administration, as part of the executive branch of government, is to implement/enforce public laws that apply to citizens. Another term for administration is bureaucracy, referring to the permanent body administering public law (as opposed to the government, which, in a democracy, is elected and therefore by nature is impermanent).

The Constitution names both the Royal Government as well as the administration. Article 145 of the Constitution, which addresses the administration directly, is not very specific on the role and responsibility of the administration, and seems to focus on its territorial organization. Decentralization laws stipulate the territorial organization, but they are not part of this review.

Organization: What follows is a brief overview of the organizational set-up of the administration. The administration comes under the Royal Government (through the Council of Ministers). There are currently 26 line ministries under the Council of Ministers, as well as other administrative bodies. The Law on the Organization and Functioning of the Council of Ministers was passed with the aim of defining the mission and mandate, roles and responsibilities of the government followed by a series of laws (a total of 21) organizing ministries and state secretariats.[48]

Direct/Indirect Administration (territorial/functional): The administration acts either directly or indirectly through legal bodies on different organizational or territorial levels (at national and sub-national level):

- **Direct Administration** means government implements the law through its own organization – through either a ministry or its deconcentrated branches. For example the tourism law directly authorizes the Ministry of Tourism to manage matters related to the tourism sector (Article 9, Law on Tourism).
- **Indirect Administration** means government transfers its implementation authority to an independent legal body. Independent legal bodies can be divided in (1) territorial or (2) functional administrative bodies. They carry out the implementation of a law (on behalf of the government). For example, the Law on Tourism delegates authority to sub-national administration to organize the sub-national tourism development plan (Article 9) or to issue the tourism licence (Article 38). The delegation of implementation authorities to sub-national level is called deconcentration. The delegation of authorities to sub-national level – not only the authority to implement national laws on sub-national level – is called decentralization. Decentralization can include own policy/legislative functions, budget functions, or just simply to manage own affairs with limited interference from national level. In one of his contributions Mr. Theng Sangvar will take a closer look at administrative law and decentralization.

48 Sopana, "The Role of Law and Legal Institutions in Cambodia's Economic Development: Opprtunities to Skip the Learning Curve," 100.

V. What Instruments are Available for the Administration?

The administration has a number of instruments to (i) prepare generally applicable rules such as policies, plans, and regulations and (ii) to make individual decisions such as imposing sanctions, providing a service, or issuing or refusing a licence.

1. General Applicable Rules

The preparation of generally applicable rules is the rule-making or legislative function of the administration. Generally applicable rules are:

- **Policies:** A policy sets out a goal to be achieved within in a specific sector. The Law on Tourism, for example, authorizes the Ministry to prepare policies and tourism development plans for the Kingdom of Cambodia after consulting relevant ministries, institutions, sub-national administration, Tourism Industry Association, and the relevant private sector bodies (Article 5).
- **Plans:** These are documents that operationalize a government policy. A plan often includes periods, goals, activities, and responsibilities. The Law on Tourism, for example, authorizes the national as well as sub-national administration to prepare national and sub-national development plans for tourism (Articles 5–8). The procedure of planning is relevant when realizing projects of territorial impact (spatial planning) or political impact (national development plan).
- **Regulations:** Regulations reflect the rule-making/legislative authority of administration. Most statutes authorize the administration to draft implementing regulations, which often regulate technical detail. The Law on Tourism, for example, authorizes the Ministry to issue regulations in specific fields (Article 10) by stating that:
  the Ministry of Tourism shall be mainly responsible for introducing main regulations in tourism industry in order to effectively implement the tourism development plans. These shall include: promotion of the tourism sector both within and outside the Kingdom of Cambodia; quality assurance in the tourism sector; various standards in the tourism sector; Tourism License; tourism business activities; guidance to concerned parties in the tourism sector; administration and supervision of tourism information; international cooperation in the tourism sector with neighbouring countries.

2. Individual Decisions

In Cambodia, specific sector laws provide detailed procedures leading to a decision. For example, the Law on Tourism states in Article 39 that

> *Ministry of Tourism or the sub-national administration shall inform the applicant of its decision whether or not to grant requested licence.*

An administrative decision in this sense means a legally binding decision in an individual case (unilateral). This decision can either be a sanction, for example the order to close a restaurant, or a service, for example issuing a tourism licence or providing a grant/subsidy.

Administrative Act: None of the literature on administrative law in Cambodia defines an administrative decision as what continental European countries would call an administrative act. The administrative act is the backbone of administrative law in civil law countries as this relates to substantive and procedural requirements leading to an administrative decision. In the end, it is the starting point for determining whether an administrative decision in a specific case is lawful or not. It needs to be determined whether administrative law in Cambodia directly/indirectly recognizes an administrative act as a separate instrument or not.

Conditions for lawful administrative decisions: An administrative decision is only legal if it fulfils the formal and substantial (material) requirements set out in the specific sector law. This universal rule could be deducted from the legality principle set out in the Constitution (see above under 'respect for law'). But beyond that it becomes difficult to determine whether a decision complies with formal and substantial requirements, because many legality criteria or even administrative principles have not been defined yet. Other countries have developed administrative principles, legal frameworks such as an Administrative Procedures Act, or instruments such as the administrative act, to determine the legality of an administrative decision. Cambodia has not yet developed these frameworks and instruments. This legal gap has significant consequences, because legal protection against administrative decisions, enforcement of administrative measures, and state liability all depend on the determination whether an administrative decision is lawful or not.

Penalties: Penalties can be imposed for the violation of obligations set out in specific sector law. Penalties are often delegated and stipulated in implementing regulation.

Administrative Contract: In contrast to the administrative act, which is a unilateral decision, the administrative contract is a bilateral agreement regarding a public law issue. It is used instead of a purely civil law contract where the subject matter of the contract deals with the exercise of a public duty. For example, the administration concludes a contract with an applicant stipulating that a building permit will be issued under the condition that he provides parking space. Both Theng (2011) as well as Say Bory (2001) recognize the administrative contract as an administrative measure.

VI. Legal Protection: How Can Citizens Complain against Administrative Measures?

1. Introduction and Background

Government agencies derive their power from properly enacted laws. They have limited, clearly defined powers to implement these laws. Making sure that agencies do not exceed or misuse this power is the essential role of the rule of law principle in the context of administrative law. Against this background, the purpose of administrative law is to restrain the activities of administrative bodies and prevent them from violating individual rights and interests.[49] To achieve this purpose citizens must have legal protection against the administration and its measures. The Cambodian Constitution provides the framework for legal protection against administrative measures, such as the right to complain (Article 39[1]) and the right of judicial review (Articles 39[2], 128[3]). The system envisaged by the Constitution provides citizens with legal protection against administrative measures and controls the executive power/administration through an independent judiciary. This is a new principle in Cambodian history as it establishes the supremacy of fundamental rights, which binds all public authorities. The Constitution (and administrative law as the concretization of the Constitution) declares the individual a legal subject, with subjective public rights. It also outlines a system that protects these subjective public rights. The legal basis of this system is outlined in Article 39, which states clearly that a citizen can complain against any type of administrative measure ("Khmer citizens have the rights (…) to complain"). Consequently, most administrative sector laws provide complaint mechanisms against administrative decisions. Even if a citizen does not want to complain against an administrative decision, but against a simple (inappropriate) action, or if a citizen intends to report a criminal behaviour such as corruption, other mechanisms provide additional opportunities for complaint, such as the Ombudsman (citizen officer) on sub-national level, or the Anti-Corruption Unit of national level. In the last two cases, a citizen can play an important role as a 'watchdog' or as a 'whistle-blower' to ensure accountability of government institutions.

In theory, the complaint system envisaged by the Constitution and various reform strategies is comprehensive. In practice, however, the existing instruments need to be further strengthened and integrated.

A study commissioned by the Council for Legal and Judicial Reform[50] assesses a number of complaint mechanisms such as the performance of the Ombudsman's office of Battam-

49 The other role is to empower the administration to efficiently and effectively fulfill its mandate to enforce public law.

50 Khlock Dara, "Searching for Implementing an Ombudsman System in Cambodia," (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ, 2009).p.13.

bang District, the National Authority of Land Conflict Resolution, complaint units in sector ministries such as the Ministry of Commerce, Ministry of Interior, Ministry of Industry, Mines and Energy (industrial property, patents), the Ministry of National Assembly and Senate Relation and Inspection, as well as the Anti-Corruption Unit. The study concludes:

- "There is a need for a functioning complaint system. The rising numbers of complaints confirms this.
- The more independent the complaint offices and teams are, the better the reception will be from the citizens.
- Complaint offices should be easily accessible and located in a neutral location.
- The work done by the complaint offices on citizens' complaints about the administration should be more transparent.
- The complaint offices should get more competences to investigate and solve cases."

The purpose of the following sections is to provide the context for the current system, outlining the policy framework, providing a definition for complaint, and systemizing the existing formal and informal instruments.

2. Structuring and Defining Complaints

Complaints are an integral part of the administrative law system, which governs the interaction between the individual and the administration. This interaction is complex as the administration has different means to interact with individuals. Measures can range from a simple action, such as buying a pen with public funds, to complex decisions such as issuing a licence for a nuclear reactor. Actions can include criminal behaviour such as taking a bribe, stealing public funds, or torturing a prisoner, or managing public investment projects or enacting long-term decision-making processes such as developing policies, drafting implementing regulations, or developing plans. One key question for structuring complaints is therefore: What administrative measures can be the subject of complaint?

Structuring Complaints: Complaint against What?

Complaints provide the right for citizens to object to the following administrative (negative) measures: (i) inappropriate (informal) action, (ii) negative decisions, (iii) criminal activities, (iv) illegal regulations, or (v) insufficient public management.

- **Inappropriate (Informal) Administrative Action:** Traditionally, administrative law categorizes all actions that are not directed to a legal, but to a factual outcome, as real acts or plain administrative actions.[51] Citizens may report this or claim for removal, compensation, or restitution. Typical inappropriate administrative behaviour is an insulting treatment,

51 M. Schulte, Schlichtes Verwaltungshandeln, Tuebingen, Mohr Siebeck, 1995.

a warning, or a simple action. For example, when the administration builds a road, the level of the noise as well as the time might be inappropriate. So a citizen suffering from noise pollution can either claim compensation or may insist that the level of noise is kept down.

- **Negative Administrative Decisions/Sanctions** are the result of the decision-making process outlined in specific administrative sector laws. Here the citizen applies for a licence, a service, or acts against a sanction. An example of a negative decision is when the administration denies the issuance of a licence or a permit.
- **Criminal Activities:** Government officials can be involved in criminal activities such as corruption, collusion, nepotism, theft, or embezzlement. The state prosecutes these violations in the public interest through prosecutors or special agencies such as the Anti-Corruption Unit. To prosecute these crimes, public institutions need the support of citizens. Therefore, citizens have the right to report criminal behaviour either if they are directly affected or if they gain knowledge of such behaviour.
- **Illegal Regulations:** most sector laws authorize the administration to draft implementing regulations. A regulation is a formal law enacted by the administration on the basis of legal authorization set out in respective sector laws. The administration can overstretch these legal authorizations, either by conflicting with the authorizing law itself, higher-ranking laws, or violating human rights.
- **Insufficient Public Service/Public Mismanagement:** The administration plays a key role in the development cycle at national and sub-national levels. Activities range from planning, budgeting, procurement, implementation, to monitoring and evaluation. Throughout this cycle, government can infringe a number of rights such as rights to participate, rights to access information, and rights to hold government accountable in implementing public projects or providing public services.

Defining Complaint

In Cambodia, 'complaint' seems to be the general/overall term. Against this background the following definition for complaint is proposed:

> Complaint is defined as a remedy of an individual against negative administrative measures such as (i) negative administrative behaviour (ii) negative administrative decision, (iii) administrative criminal actions such as corruption, (iv) illegal regulations or (iv) insufficient administrative public management/service provision.

Not included in the definition are complaints in the field of private law, in other words between citizens and citizens, such as labour disputes and commercial disputes. These disputes are often handled outside the court system in specific arbitration or mediation councils.

In Cambodia, the term 'complaint' has a negative connotation as it is understood mainly as complaint against the abuse of power. Thus, government officials find the implication of a complaint offensive. However, as outlined above, complaints are not only about the

abuse of power, but having a different opinion regarding the interpretation of the law and/or correcting the negative effect of an administrative decision. Other words such as 'objection', 'response', 're-consideration' or simply 'legal protection' have a more positive sound and seem to describe the nature of the request in a better way. Rather than offending a government official with critique, a complaint is more a feedback to correct a decision and/or to make a better decision.

In addition, the following definitions are either commonly used or are proposed:

- Formal/informal complaints: In the Cambodian context, formal complaints are understood as complaints handled by a court. Informal complaints are handled by the administration.

In addition, a more narrow definition of formal/informal complaints could be considered reflecting the fact that some complaints have formal requirements and legal effects and others not.

- Formal complaint (in a narrow sense) means that the complaint requires a specific certain form (written, time-bound) and has a legal effect resulting in a formal decision. Informal complaints have no formal requirements and have no legal effects resulting in a recommendation/notification.

Finally, there are complaints handled by the administration in direct relation to the citizen, and complaints that involve a third party, often to mediate a conflict. In the current cultural setting of Cambodia, external mechanisms like the District Ombudsman are more likely to be accepted and used by citizens if they are known, as they allow a citizen to speak/complain about the administration through a third/intermediary person and decrease the level of fear/respect of the complainant. Against this background the following definition is proposed.

- Internal/external complaint: Internal means that the complaint is processed directly within the responsible sector ministry. External means that a third/complementary institution/person processes the complaint.

3. Complaint System

A complaint system is a comprehensive set of different complaint mechanisms, which handle complaints. The complaint system envisaged by the Constitution is outlined in Article 39, and includes (i) administrative review and (ii) judicial review:

> *Article 39 [1] "Khmer citizens have the right to denounce, make complaints, or claim compensation for damages caused by any breach of the law by institutions of the state, social organizations, or by members of such organizations."*
> *Article 39 [2] and Article 128 [3] Article 39[2]: "The settlement of complaints and claims for compensation for damages is the responsibility of the courts."*
> *Article 128[3]: "The judiciary shall consider all legal cases including administrative cases."*

This system implies that Khmer citizens can complain against all unlawful administrative actions and that these complaints should be first resolved within the administration (administrative review). If unsuccessful, an independent court should settle the complaint (judicial review/administrative litigation). Here it should be mentioned that Khmer citizens, at this point, have no access to judicial review of complaints.

4. Complaints Mechanisms: Legal Framework and Constraints

A complaint mechanism is procedure against a specific negative administrative measure handled by an institution or a person. Currently there is a plethora of complaint mechanisms handled by different institutions/persons inside and outside of the state. Within the state there is the king, the National Assembly, the Senate, the prime minister, ministries, government agencies and the courts. Outside the state, NGOs, international organizations as well as traditional mediators such as the village chief or the head of the pagoda, handle complaints.

Legal Framework for Complaint Mechanisms

Besides specific complaint procedures in sector laws, there is a multitude of complaint mechanisms, which are the result of good governance reforms, international law, and customary law.

Public Sector Laws: The majority of complaint mechanisms are regulated in public sector laws. Whenever a citizen applies for a licence, objects to a sanction or a tax notice, or uses a public service, respective sector laws provide complaint mechanisms. The following example is a typical mechanism processing a complaint in a sector law.

The Law on Tourism states in Article 46:

> *Any person considered him/herself a victim of the decision of the Ministry of Tourism or the Sub-National Administration on the rejection, suspension, revocation and downgrading of the Tourism License or other relevant decisions as stipulated in Chapter 5 of this Law may file a written complaint to the Minister of Tourism or the Sub-National Administration within 30 (thirty) days upon receipt of the written notification of any decisions as mentioned above.*
>
> *Upon receipt of the complaint, the Ministry of Tourism or the Sub-National Administration may suspend its decision and reconsider the matters within 60 (sixty) days.*

Most sector laws provide a similar mechanism, which allows the administration to review its original decision. These complaints are formalized, because they have to be submitted in writing within a time limit of 30 days. The decision has a legal effect, because it can replace the decision of the sub-national agency and is a pre-requisite for the settlement in court.

Organic Laws: There are a number of organic laws that provide the legal framework for the set-up of a government institution and that assume the legal basis for a complaint mechanism. For example, the Senate, the National Assembly, or the Prime Minister can establish units that handle complaints.

Good Governance Reforms and Related Laws: To operationalize the mandate of the Constitution, the Royal Government of Cambodia developed a number of good governance policies such as (i) Legal and Judicial Reform, (ii) Public Administration Reform (in particular Local Government Reform and the Reform of Public Services), and (iii) Anti-Corruption Reform. To implement these reforms, several laws that serve as a legal basis for complaint mechanisms have been enacted or are in the process of being enacted.

- **Legal and Judicial Reform:** The Legal and Judicial Reform outlines a comprehensive complaint system reflected in the following priority actions (PAs) in the 2005 Action Plan:
  PA 1.6.1 Establishment Ombudsman
  PA 1.2.4: Specific complaints for women and other disadvantaged groups
  PA 2.1.1: Administrative (Procedure) Code, which standardizes complaints
  PA 2.1.4: Law on the Organization of Courts introducing an Administrative Tribunal
  PA 2.1.11: Ombudsman Office
  PA 5.4.5: Administrative Tribunal
  PA 7.2.1: Law on Ombudsman.
  Currently, none of the laws have been enacted.
- **Public Administration Reform:** Under the Public Administration Reform/Local Governance Reform, the organic Law on Administrative Management of Capital, Provinces, and Municipalities was enacted. The Ministry of Interior refers to the organic law as a legal basis for the establishment of a number of sub-national complaint mechanisms to supervise the performance of sub-national agencies and to ensure their accountability. One example is the District Ombudsman, who supervises the provision of services in one-stop shops on the sub-national level. The other is the Provincial Accountability Working Group (PAWG).
- **Anti-Corruption Reform:** Under the Anti-Corruption Reform, the Anti- Corruption Law was enacted. The Anti-Corruption Law provides the legal basis to establish anti-corruption units on a national and sub-national level to prosecute criminals in public office and allow citizens to complain about criminal behaviour. These instruments pursue a public interest to prosecute criminals holding public office as well as to discourage the misuse of public power and the misuse of public funds.

International Law: In addition to the previously mentioned policies are other initiatives covering complaints outlined on the basis of International Law. For example, the Cambodian Working Group for an ASEAN Human Rights Mechanism and the government-run

Cambodian Committee on Human Rights are in the process of establishing an ASEAN Human Rights mechanism that would allow citizens to complain.

Customary Law: Finally, complaints handled by the King, the village chief, or the head of the pagoda, are traditional ways to resolve conflicts based on customary law.

Constraints

The comprehensive complaint system that is outlined the Legal and Judicial Reform is not yet implemented. Key legislation envisioned by the Legal and Judicial Reform needs to be enacted, such as laws on administrative procedure, ombudsman offices, alternative dispute resolution as well as laws providing for the legal and institutional set-up of an administrative court/tribunal and litigation procedures. Because the legal and institutional frameworks are still missing, the existing complaint mechanisms are ineffective in protecting citizens against negative administrative measures.

As a functioning complaint mechanism is the basis for protecting citizens from unlawful administrative actions and thus establishing the foundation for the 'rule of law', Mr. Dara Khlok will provide a more detailed analysis on different complaint mechanisms in Cambodia. Mr. Alex Read will highlight the ombudsman as one informal complaint mechanism, providing an international comparison of models in Thailand, the Philippines and Vietnam.

VII. State Liability: How can Citizens Claim Damages for Unlawful (Administrative) Actions?

Governments must be accountable for the wrongdoings of their officials, especially if their wrongdoings cause physical or commercial damages for citizens. A deeper understanding that government officials are not above the law, but bound by law, and that governments must be accountable for their unlawful actions, provides for the development of state liability and citizen's rights for compensation.

The underlying principle for state liability is that if government acts[52] are unlawful and cause physical and/or commercial damage, a citizen should have the right to claim compensation for these damages. Thus, state liability always requires an unlawful administrative action.[53]

52 See also section 6 on Administrative Measures and Instruments.

53 State liability should not be confused with compensation as a consequence of a *lawful* action, for example the legal appropriation of land or other lawful restrictions of the right of property. This type of compensation follows different principles.

The Constitution reflects this basic understanding and consequently states in Article 39 that:

"*…every citizen (…) can claim compensation for damages caused by any breach of the law by institutions of the state.*"

As with most of principles, rights, and obligations outlined in the Constitution, they are not directly applicable, but need to be operationalized through laws and procedural rules. The mandate outlined in the Constitution requires government to establish the legal and institutional frameworks to process the rights outlined in the Constitution. The development of these legal and institutional frameworks is still in process.

Currently, Article 749 of the new Cambodian Civil Code (2012), in combination with Article 39 of the Constitution, appears to be the legal basis for claims against the government as it deals with the official liability for unlawful action of civil servants.

Article 749 states in Paragraph [1]:

"Should a public official who exercises the public authority possessed by the national government or a governmental entity intentionally or negligently harm another in violation of the law in the course of his/her public duties, the national government or governmental entity is liable for the payment of damages."

Article 749 (1) of the Civil Code (2012) relieves the official of personal liability and imposes liability instead on national government (which may reclaim damages from the official under specific circumstances – Article 749 [2]).

The requirements for compensation are: (i) a public official, (ii) breach of official duty, (iii) fault (intention or negligence), (iii) damage, and (iv) causality between breach of official duty and damage.

From the legal basis of Article 749 it follows that civil courts have the jurisdiction for handling cases related to compensation for damages resulting from unlawful administrative actions. However, the details of state liability are highly complex due to overlaps between public and private law. And, in the absence of respective jurisprudence, codification is required.

Mr. Yan Vandeluxe will further highlight aspects of state liability in his chapter.

VIII. What is the Status of the Administrative Law Reform?

Administrative law reform is essential to operationalize the 1993 Constitution and is an integral part of achieving good governance within the Rectangular Strategy (Phase II).[54]

Policy Framework: The key policy priorities and actions related to administrative law reform are set out in the Updated National Strategic Development Plan (2009–2013)[55]. Main reform initiatives are included in the Legal and Judicial Reform[56] as well as the Administrative Reform.[57]

Reforms: The Administrative Reform addresses specific issues in relation to the organization and management of the administration itself, such as public service delivery[58], civil service reform as well as decentralization. Thus, Administrative Reform addresses the part of administrative law which deals with the operation of government itself (see also Figure 1) whereas, the Legal and Judicial Reform addresses, in more general terms, gaps in the legal and institutional frameworks, in particular those aspects of administrative law that deal with the interaction between:

- administration and citizens
- citizens, judiciary, and the administration.

Reforming the Reform: In October 2013 the Council for Legal and Judicial Reform as well as the Council for Administrative Reform have been dissolved and the responsibility for the reforms were transferred from the Council of Ministers to the respective line ministries.[59] The Ministry of Interior and the newly founded Ministry of Public Function are responsible for elements of the Administrative Reform. The Ministry of Justice is now responsible for the Legal and Judicial Reform.[60] The Government is still in the process to develop details of the new regulatory and the institutional framework governing the Legal and Judicial Reform. At the time of this publication the integration process is still ongoing. However, it is expected that the Government as well as the newly formed Committee for

54 The Rectangular Strategy is the national poverty reduction strategy, with a good governance approach at its core. Elements of this approach are: the Legal and Judicial Reform, Administrative Reform (including decentralization), the fight against corruption, and the reform of the Armed Forces. After the election in July 2013 the new Government will review and update the Rectagular Strategy.

55 As with the Rectangular Strategy, the new Government will enact an updated NSDP for the new legisative period.

56 "Legal and Judical Reform Strategy," (Phnom Penh: Royal Government of Cambodia, 2003). The Council of Ministers approved the Legal and the Judicial Reform Strategy in 2003 and the Plan of Action in 2005.

57 The Council for Administrative Reform developed a National Program for Administrative Reform (2010–2013) and a policy draft on human resource development and management.

58 The Council for Administrative Reform, Policy on Public Service Delivery, (Royal Government of Cambodia 2006). The policy on public service provision is not yet adopted by the Council of Ministers.

59 Royal Decree on Dissolving the Supreme Councils of State Reform dated October 1, 2013.

60 Prime Minister Decree on the Establishment of a Committee for Legal and Judicial Reform dated October 24, 2013.

Legal and Judicial Reform will carry on with key elements of the Legal and Judicial Reform. The following section describes the reform of the administrative law system for the past, not knowing what the future "reform of the reform" will bring. The focus of the following section is on the Legal and Judicial Reform as outlined in the Plan of Action (2005).

1. Current Situation

It seems fair to conclude that constitutional provisions and key reforms concerning administrative law need to be further developed and implemented. Until then, administrative law in Cambodia remains in its infancy. In order for administrative law to grow into adulthood the following gaps/burning issues need to be addressed:

Legality and Protection of Human Rights

- There is no specific legislation in important fields such as the Law on Police, Access to Information.

Access to Information

- There is no systemized, updated compilation of public sector laws.

Administrative Decision Making Process/Complaint

- There is no general administrative law defining administrative principles or standardizing administrative proceedings; and as a consequence,
  - There is no criteria determining the lawfulness of an administrative measure.
  - There are no methodologies to define administrative decisions such as the administrative act.
- There is no effective complaint mechanism.

Administrative Adjudication:

There is no access to administrative justice.

Enforcement:

There are no established rules on enforcement and state liability.

2. Reform Leading to a Comprehensive Administrative Law System

To address these burning issues the Legal and Judicial Reform has outlined a comprehensive administrative law system.

Comprehensive Administrative Law System: The 1993 Constitution and the Plan of Action for Implementing the Legal and Judicial Reform Strategy envisages a comprehensive administrative law system, which includes the introduction of the following legal frameworks and institutions:

- Administrative code[61]
- complaint mechanism[62]
- state liability[63]
- organic law on administrative and judicial institutions such as an administrative tribunal or administrative appeal court[64]
- Law on the Access to Information[65]
- Law on Administrative Court Procedures.[66]

The new system, if put into action, will tie government action closer to the rule of law as it is stated in Cambodia's Constitution and could provide citizens with more rights and protect them against administrative actions.

A key element of the envisaged comprehensive administrative law system is to provide a legal framework that governs the relationship between the administration and citizens, in particular about previously unregulated matters such as administrative principles, standardized proceedings, state liability, and enforcement. The other key aspect is the preparation of a legal framework governing the judicial review of administrative action and to establish respective institutions.

Introducing an Administrative Code: The Legal and Judicial Reform Strategy calls for the codification of administrative law (see 2.1.1 AP and Article 39 CC). For the ease of discussion, codification of administrative law means an administrative code. Depending on the country, an administrative code can either mean the compilation and systematization of existing administrative law or the creation of new general administrative law through statute law, for example an administrative procedure code, or through soft law. Depending on the country, there are different options how to codify administrative law.

A brief outline of options to codify general administrative law is summarized in the following bullet points:

- **No Codification:** Most countries in Asia such as Indonesia, Cambodia, Laos, and Vietnam have no administrative code whatsoever, neither a separate updated compilation of administrative law nor an administrative procedure code. This could reflect the traditional Asian view where law exists not to empower and protect individuals, but

61 "Plan of Action Implementing the Legal and Judicial Reform," ed. Council for Legal and Judicial Reform (Phnom Penh: Royal Government of Cambodia, 2005). Priority action 2.1.1 Plan of Action Implementing the Legal and Judicial Reform Strategy (2005) states, "Drafting, adoption, and implementation of the Administrative Code, Procedural (sic) Code, including rules for court appeal".

62 Article 39(1.1) CC states that "Khmer citizens have the rights to denounce, make complaints". Article 39(2) states that "the settlement of complaints (…) is the responsibility of the courts."

63 Article 39(1[3]) CC states that "Khmer citizens have the rights to claim for compensation for damages caused by any breach of the law (…)."

64 Priority action 2.1.4 , 2.1.5, 5.4.5; 7.1.1 AP-LJR.

65 Priority action 3.1.1 AP-LJR.

66 Priority action 2.1.1 second half-sentence, 7.2.1 AP-LJR.

as an instrument of governmental control, emphasising responsibilities over rights.[67] Recent developments in Thailand,[68] the Philippines[69] and Malaysia[70] where codified general administrative law is starting to take root, may reflect a new trend in ASEAN.

- **Compilation/Systematization:** In France, the term administrative code is used for a compilation of laws in the field of administration, published by *Dalloz*[71].
- **Semi-Formal Option:** EU member states set out semi-formal rules such as the Code of Good Administrative Behaviour. "Internationally the term "Code" is sometimes also used for semi-formal rules or soft law. An example is the EU's "Code of Good Administrative Behaviour", which is no hard law (as it is not strictly legally binding), but a set of principles that shall guide administrative behaviour. Its legal relevance is similar to "Codes of Ethics", which are adopted in many countries with respect to the conduct of judges, members of parliament, etc. These rules cannot be enforced in court, but in the case of the European Code, the European Ombudsman monitors their observation. Furthermore, they might help to establish certain standards and be a first step towards real legal codification".[72]
- **Formal Option:** Most civil law countries have codified aspects of general administrative law. In particular, they have enacted general administrative procedure codes that stipulate administrative principles, proceedings, complaints, and so on. Examples would be Germany, and in Asia, Japan, Thailand, and South Korea. Besides a general administrative procedure code, these countries have compiled specific administrative law in systemized and updated law compilations, for instance in Germany in a compilation called *Satorius* published by C.H. Beck.

  Only a few countries have codified into one comprehensive law most aspects of general administrative law such as decision-making processes, organization, and liability – the Netherlands and Georgia are examples.

Each of these options has trade-offs that have to be assessed in detail. They need to be considered in the Cambodian context, in particular in terms of compliance and implementation. The Royal Government of Cambodia has assessed some of these options, but has not yet adopted a formal policy.

67 Tom Ginsburg, Judicial Review in New Democracies (Cambridge: Cambridge University Press, 2003), 15.
68 Administrative Procedure Act (1996).
69 Administrative Code (1987).
70 Gan Ching Chuan, Malysian Administrative Law: Commitment to the Rule of Law ed. Clauspeter Hill & Jochen Hoerth, Administrative Law and Practice from South to East Asia (Singapore: K onrad Adenauer Foundation, 2008), 169.Chuan mentions the following decision as case law for administrative principles in Malaysia: Council for Civil Service Union v. Minister for Civil Service [1985]AC374.
71 Dalloz is a French private publisher specializing in legal matters.
72 Ibid. Menzel, 10.

Judicial Review of Administrative Actions: One of the rationales of an administrative code is to empower and protect citizens from the state/administration by providing them with specific procedural rights and limiting the power of the administration by introducing principles and procedural requirements. Independent (administrative) courts are essential to protect citizen's rights and to make sure that the administration complies with procedural requirements and administrative principles. Therefore, providing rights to citizens and protecting these rights through independent courts are two sides of the same coin. They are like Siamese twins that cannot be separated.

The Constitution, as well as the Plan of Action Implementing the Legal and Judicial Reform, foresees the establishment of an independent judiciary, including the establishment of an administrative tribunal. Fundamental laws pertaining to the judiciary are in the process of being drafted. Consequently, there are no legal frameworks and institutions to review administrative actions yet. It is expected that those processes – to introduce an administrative code and to establish an independent institution to monitor the application of the administrative code – will soon merge and become an integrated part of a comprehensive administrative law system, envisaged by the Constitution and the Legal and Judicial Reform Strategy.

IX. Summary and Conclusion

The figure below illustrates the blueprint for a comprehensive administrative law system as envisaged by the Constitution and the current Legal and Judicial Reform Strategy as well as the Plan of Action for Legal and Judicial Reform. The process is ongoing and essential building blocks are still under construction.

- **Improved Publication and Access to Information:** The first essential building block is access to information. Citizens have to know the legal basis for a public service as well as related costs. The Service Compendium prepared by CAR is a good starting point, but as a secondary (unofficial) source of information is insufficient (see above). The Law on Access to Information is in the pipeline and the underlying policy is currently being discussed with stakeholders. These are important measures. But the most important thing is to compile, update, and disseminate specific administrative law as a primary official source.
- **Fair and Transparent Process** (Administrative Procedure Code): The second building block is to establish administrative principles and standardized proceedings governing the administrative decision-making process. Currently this process is fragmented and nontransparent. The process of including administrative principles and standardized proceedings are important measures to address these constraints. The draft policy on reforming administrative law and procedures is addressing these constraints and provides options for introducing an administrative code.

- **(Independent) Administrative Adjudication:** The third building block is to reform existing complaint mechanisms and to introduce an independent judicial review of administrative actions. This requires a standardized complaint mechanism as well as the institutional establishment of a court system that includes an administrative tribunal. Fundamental laws pertaining to the judiciary are currently being drafted. In addition, administrative litigation procedures need to be developed, including different types of action. For ease of discussion, the figure below outlines an action to issue a decision. Other actions include: action to annul a decision, action to order a certain performance, action to review administrative regulations and by-laws.
- **Enforcement:** The final step for reform is to introduce a law that governs the enforcement of administrative decisions.

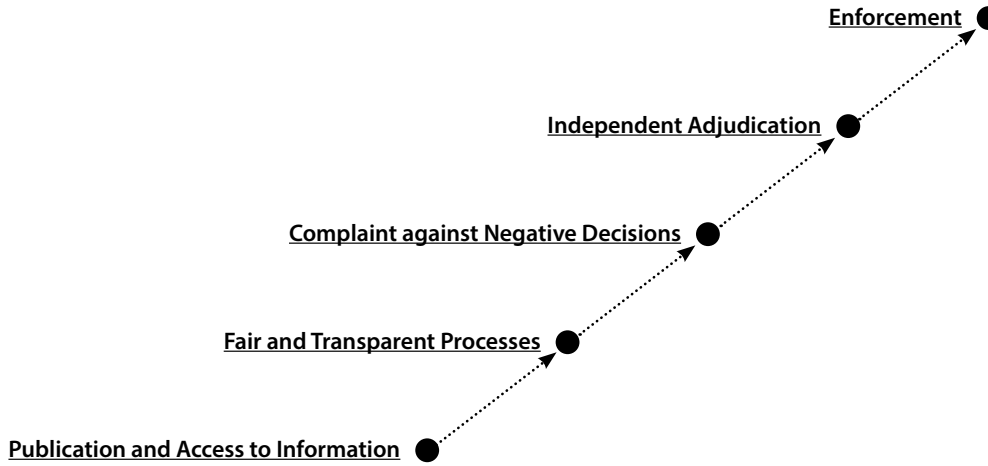


Figure 5: Comprehensive Administrative Law System

Positive change requires moving from an existing situation to an ideal situation. The Constitution, the Legal and Judicial Reform Strategy, and the Plan of Action provide the road map to establish a comprehensive administrative law system. Now, the building blocks need to be developed and assembled. Common wisdom, however, suggests that a strong base should be built prior to adding the roof. Therefore, the systematization and compilation of administrative law should be the first step. The next step is to discuss in more detail principles of administrative law and their application to the Cambodian context.

SELECTED BIBLIOGRAPHY

– Adler, Daniel. "Access to Legal Information in Cambodia: Initial Steps, Future Possibilities." *Journal of Law and Technology* (2006).
– Brazier, Stanely de Smith and Rodney. *Constitutional Law and Administrative Law*. London: Penguin Books, 1998.
– Chan-Sangvar, Theng. *Administrative Law and Decentralization*. Introduction to Cambodian Law. edited by Kong Phallack, Hor Peng, Jörg Menzel Phnom Penh: Konrad Adenauer Foundation, 2012.
– Chuan, Gan Ching. *Malysian Administrative Law: Commitment to the Rule of Law* Administrative Law and Practice from South to East Asia. edited by Clauspeter Hill & Jochen Hoerth Singapore: Konrad Adenauer Foundation, 2008.
– Danwitz, Thomas von. *Europäisches Verwaltungsrecht*. Springer. Berlin Heidelberg2008.
– Dara, Khlock. "Searching for Implementing an Ombudsman System in Cambodia." Phnom Penh: Council for Legal and Judicial Reform supported by GIZ, 2009.
– Darong, Tep. "Cambodia and the Rule of Law." In *Occasional Papers Democratic Development Rule of Law*, edited by Konrad Adenauer Foundation. St. Augustin: Konrad Adenauer Foundation, 2009.
– Eberhard Schmidt-Assmann. *Das Allgemeine Verwaltungsrecht Als Ordnungsidee*. Berlin Heidelberg New York: Springer, 2004.
– *English-Khmer Law Dictionary*. Phnom Penh: Asia Foundation 1997.
– Ginsburg, Tom. *Judicial Review in New Democracies*. Cambridge: Cambridge University Press, 2003.
– Kaplan, Jeffrey A. "Cambodia's Asean and Wto Integration: A Legal Perspective " In *Cambodian Legal and Judicial Reform in the Context of Sustainable Development*, edited by Soc Sopana. Phnom Penh, 1998.
– "Legal and Judical Reform Strategy." Phnom Penh: Royal Government of Cambodia, 2003.
– Leos, Raymond. "The Role of Access to Information in Promoting Democracy, Good Governance, and Development in Cambodia." In *Access to Information*. Phnom Penh: UNDP, 2010.
– *Lexicon of Legal and Administrative Terms* Phnom Penh: Council of Ministers, Royal Committee for the Adoption of Legal Work, 2010.
– *Lexicon of Legal and Administrative Terms* Phnom Penh: Council of Ministers, Royal Committee for the Adoption of Legal Work, 2008.
– Menzel, Jörg. *Counstitutionalism in South East Asia*. Reports on National Constitutions. edited by Clauspeter Hill and Jörg Menzel 2 vols. Vol. Volume 2, Singapore: Konrad Adenauer Foundation, 2008.
– "Principles of Administrative Law (Unpublished Report)." Phnom Penh: GIZ, 2011.

– "Plan of Action Implementing the Legal and Judicial Reform." edited by Council for Legal and Judicial Reform. Phnom Penh: Royal Government of Cambodia, 2005.
– Reynolds, Rocque. "Dicey in Cambodia or Droit Administratif Meets the Common Law." *The Australian Law Journal* 72 (1998).
– Sagi, Michael Rubacki and Murali. "Access to Legal and Judicial Information." In *Prepatory Assistance on Legal and Judicial Reform*. Phnom Penh: UNDP, 2004.
– Schmidt-Assmann, Eberhard. *Das Allgemeine Verwaltungsrecht Als Ordnungsidee*. Berlin Heidelberg New York: Springer, 2004. 2nd Edition.
– Sopana, Soc. "The Role of Law and Legal Institutions in Cambodia's Economic Development: Opprtunities to Skip the Learning Curve." Bond University, 2008.
– Sule, Nigel Foster and Satish. *German Legal System and Laws*. 4th ed. Oxford: Oxford University Press, 2010.
– Werner, Fritz. "Verwaltungsrecht Als Konkretisiertes Verfassungsrecht." *Deutsches Verwaltungsblatt* (1959).

GENERAL PRINCIPLES OF ADMINISTRATIVE LAW FOR A CAMBODIAN CONTEXT

Jörg MENZEL

CONTENTS

I. Introduction 59
1. Background, Purpose and Scope of this Report 59
2. Methodology 60
3. Terminology 61
II. International Standards and Comparative Overview 65
1. International Standards of Good Administration 65
2. European Examples 68
3. Asian Examples 73
III. Current Cambodian Administrative Law 75
1. Preliminary Remarks: Cambodia's Legal System 75
2. Sources 76
3. Some Challenges in the Development of Good Administrative Law 80
IV. Principles of Administrative Law to be Considered 87
1. Legality 88
2. Proportionality 89
3. Equality and Absence of Discrimination 90
4. Impartiality, Independence, Objectivity and Fairness 91
5. Openness, Transparency and Confidentiality 93
6. Good Administrative Procedure 93
7. Complaint, Remedy, Control and Monitoring 96
8. Accountability and Liability 97
9. Effectiveness and Efficiency 97
SELECTED BIBLIOGRAPHY 100

GENERAL PRINCIPLES OF ADMINISTRATIVE LAW FOR A CAMBODIAN CONTEXT*

Jörg MENZEL **

I. Introduction

1. Background, Purpose and Scope of this Report

This report is about general principles of administrative law, and is part of the cooperation between the Council for Legal and Judicial Reform (CLJR) and GIZ. In 2009 the CLJR requested the German organization CIM to send an integrated expert to support this institution in drafting an administrative procedure code. As the identification of an expert took time it was agreed between the CLJR, GIZ and this author to start the process with a consultancy on administrative principles. The idea was to provide, in close cooperation with the CLJR, a comparative analysis on administrative principles and analyse existing Cambodian administrative law to develop proposals for administrative principles in the Cambodian context. Fortunately, after this agreement was made a CIM expert was identified and contracted: Mr. Kai Hauerstein arrived in Cambodia in early 2011. It was therefore possible for the author of this report and the new CIM expert to work together for some time, in particular with respect to two full-day workshops held in Phnom Penh, organized by the CLJR and supported by GIZ, which took place in February and March 2011. These workshops brought together a group of experts on administrative law, including officials of the CLJR and various government institutions, legal academics and foreign experts for a first discussion of an administrative law reform process and administrative principles.

The purpose of preparing a catalogue of principles of administrative law is to provide a starting point for discussion on some core provisions for the future development of this

* This report was submitted to the Council for Legal and Judicial Reform of the Royal Government of Cambodia in May 2011. The report was logistically and financially supported by the German development cooperation GIZ and German Federal Ministry of International Cooperation. The substance of the original report is unchanged, only technical adjustments have been made for this publication.

** Dr. Jörg Menzel is associated to the University of Bonn, Germany (Privatdozent) and a Visiting Professor at Pannasastra University in Phnom Penh. He currently represents a chair in Constitutional History and Legal Theory at the University of Erfurt, Germany. He was a legal advisor to the Senate of the Kingdom of Cambodia for six years until early 2010.

important field of law and precondition for good governance. Such principles can be used either within informal, semi-formal or formal approaches, or those approaches combined:

- Informal approaches, for example:
  – academic research
  – teaching at universities, the Academy for Public Administration, and so on
  – public debate.
- Semi-formal ('soft law') approaches, for example the adoption of a code of (good) administrative behaviour or a code of conduct/ethics for public servants.
- Formal (legislative) approaches, for example new legislation such as:
- a general administrative code (law)
- an administrative procedure code
- future sector legislation in the field of administrative law (police law and so on).

Regarding the scope of this report, two remarks shall be made:

- The focus of this report is administrative law itself. It does not address in detail the procedure of how to organize any drafting process or how to decide between different policy options, as these questions are already a main aspect of the work of the CIM expert at the CLJR (see Kai Hauerstein's chapter in this publication).
- It should be noted at the beginning that this report will not discuss issues of decentralization or the organizational structure of the Cambodian administration (apart from recommending that structures as clear as possible should be developed). These questions have been intensively discussed in recent years and many projects have taken place. It is not the topic of this project.

Finally I would like to thank the Council for Legal and Judicial Reform and its Secretary General H.E. SUY Mong Leang for the excellent cooperation in this project. My thanks also go to GIZ and its team leader Mrs. Katharina Hübner. Furthermore, I am particularly grateful to all the speakers and participants at the two workshops as well as all other experts in Phnom Penh who shared their knowledge and experiences on administrative law questions during this project.

2. Methodology

This report intends to provide some basic information to help in the discussion about the development of administrative law in Cambodia. As mentioned, it was agreed with the Council for Legal and Judicial Reform to have it based on comparative analysis, with an emphasis on the German experience, as well as a preliminary analysis of existing Cambodian law. The report is based on deskwork, discussions with Cambodian and international experts and the two workshops held in February and March 2011. Administrative law systems in Europe and Asia and respective reform processes were researched. Regarding Cambodian law, relevant legislation that was available in English was collected

and analysed. Preliminary results on 'principles of administrative law' were presented and discussed, in particular during the second workshop held in March.

It should be emphasized that this report is an analysis by an author who has been in Cambodia for some years and who is to some extent familiar with its legal system, but who is not originally 'at home' in the Cambodian legal system and who, despite some knowledge of Cambodia, can in particular not read and analyse legal documents in the Khmer language. Therefore it is an outsider's perspective. As such it is hopefully helpful. In comparative law literature it is now often emphasized that analysis by 'outsiders' sometimes contributes largely because the outsider often notices aspects of a system an accustomed insider would not realise because he or she is so accustomed to the system from the outset. However, the outsider's perspective should mainly serve as a starting point for discussion with and among experts within Cambodia. The discussions, the two 2011 workshops organized by the Council for Legal and Judicial Reform and supported by GIZ, as well as my guest lecture at the Royal University of Law and Economics in April 2011, were attempts to stimulate this necessary discussion process. From my perspective the discussion about administrative law principles should not only be promoted, but also be as open as possible, and any drafting process of a law or code should be transparent and inclusive. This should also be an opportunity to increase the interest of legal academics in the field of public law as well as other legal experts and students in those issues. Such increased interest will result in progress independent from the choices made and policy options taken regarding any kind of codification in the field of general administrative law.

3. Terminology

As many terms used in the discussion of administrative law are somewhat unclear and usage varies internationally and even from author to author, a clarification is needed on how terms are used here. The definitions used here do not claim to be the only possible ones, and debates about terminology should not be overestimated. It is, however, important to clarify what one is speaking about when using crucial terms. I recommend developing a comprehensive glossary of terms that are relevant for administrative law, including definitions and the most appropriate Khmer translations of the terms.

The draft glossary prepared by CIM advisor Kai Hauerstein should be a good starting point for such a glossary, which can be further developed step by step.

At this point, I only want to highlight a few important terms and explain my understanding (which is largely similar to that of Kai Hauerstein, with whom some questions regarding terminology were discussed earlier in the process):

Administrative Law

Administrative law is the field of law that is specifically concerned with the work of state administration and all administrative bodies as well as the relationship between administrative organs and the people.

- Administrative law is to be distinguished from private law, although it is often difficult to draw the precise line between both fields. Some established fields of law have private law and administrative law aspects. Economic law, labour law and environmental law are some examples. Furthermore, the state often acts within private law, for example when buying equipment or employing staff. However, sometimes one single contract can have private law and public law elements. To give an example: If the police buy cars they will typically buy them according to normal contract law (which is private law), but in addition there might be some specific regulations in place regarding public procurement (which is administrative law).
- Administrative law will also be distinguished from constitutional law. Both together are part of public law and constitutional law principles are often important for the development of administrative law. Most importantly, major principles of administrative law are often based in the Constitution, most notably the principles of legality, basic rights and proportionality. Modern administrative law very often can't be understood and properly developed without focus on its constitutional foundations. I will elaborate later on that according to my analysis this is not only true in Germany and many other countries, but also in Cambodia under its Constitution of 1993.

Principles of Administrative Law / Good Administration

Principles of administrative law are *general* rules that apply in the field of administrative law. Nearly all developed legal systems have such a set of rules. Some of those rules are typically binding for all state action because they are embedded in the state's constitution. Apart from this, administrative law principles can be codified in an administrative code or administrative procedure code, or they can be developed by courts and tribunals or by influential legal scholars. In France the work of the *Conseil d'Etat* has been very influential, in Germany many such principles have been developed by the higher administrative courts since the 1870s, and – beginning even earlier – by scholars, long before such principles were codified in significant form. Such principles serve as guidelines for all legislation, decision-making and action in the administrative field.

Administrative Code

The term 'code' or 'administrative code' can be used in different ways. In Cambodia the term code is mostly used for important pieces of legislation that are designed to provide the framework for an important field of law (Civil Code, Penal Code). This follows the French terminology in the tradition of the famous *Code Civil*. In the field of administrative law comprehensive codifications are rare. In many countries there are general adminis-

trative procedure codes, but these do not normally contain all aspects of administrative law. Examples for quite comprehensive general administrative codes can be found in the Netherlands and in Georgia.

The term code is also used in other ways:

- In **France**, the term administrative code (*code administratif*) is traditionally used for a compilation of laws in the field of administrative law provided by the private publisher Dalloz. **It is not a codification** in the legal sense and France has not so far codified its administrative law. The same terminology for similar publications is used in other states influenced by the French tradition (Belgium and Luxembourg for example).
- In the **United States** the term administrative code is also used for compilations of laws in the field of administration, but there it is often an official compilation, provided according to state legislation. The Administrative Code of Texas therefore is again not a law, but only a collection of laws, officially published in order to increase access to information in the field of administrative laws.
- Internationally the term code is sometimes also used for semi-formal rules or soft law. An example is the **European** Code of Good Administrative Behaviour, which is not hard law (as it is not strictly legally binding), but a set of principles that guide administrative behaviour. Its legal relevance is similar to codes of ethics that are adopted in many countries with respect to the conduct of judges, members of parliament and others. These rules cannot be enforced in court, but in the case of the European Code their observation is monitored by the European Ombudsman. Furthermore, they might help to establish certain standards and be a first step towards real legal codification.

Administrative Procedure Code

The term administrative procedure code is ambiguous. In analogy to the terms criminal procedure code and civil procedure code it can be used with regard to the procedure in court litigation in administrative law cases. In Georgia, for example, the terminology is used like this. It seems that the Action Plan for Legal and Judicial Reform of the Cambodian Government has used the term in this way. However, in Germany the term administrative procedure is used with regard to the rules of decision making of administrative bodies. In Germany (and many other countries) the Administrative Procedure Code therefore does not consider court procedure, but only the procedure within the administration. Court procedure is addressed in another law, which in Germany is called Administrative Court Law (Verwaltungsprozessordnung), which might also be translated into English as 'Administrative Litigation Act'.

In order to distinguish the two topics this report will also address administrative procedure and questions of court procedure separately. According to the terminology used here

- Administrative procedure law addresses procedure leading to administrative decisions and complaint mechanisms within the administration

- Administrative litigation law addresses the question of procedure in court regarding administrative matters.

It should be noted that this is only a question of terminology. Every legal system will eventually have to address both administrative procedure and court procedure in administrative matters.

Administrative Litigation

The court procedure with respect to administrative cases typically needs some specific regulations in comparison to the normal court procedure. Those countries that have special administrative courts (such as Germany, Indonesia or Thailand) therefore normally have special administrative litigation acts. Such laws can be fairly short, because with respect to many details they can refer to a civil procedure code. Such a drafting technique seems particularly advisable in the case where no specialised administrative courts are established, but only specialised chambers within the ordinary court system (as, for example, in Georgia or Japan).

Administrative Act

In the **French** legal tradition the term *acte administratif* unilateral is used for decisions of the administration, which can be either general *(acte administrative réglementaire*) or individual (*acte administrative individuel*).

In the **German** legal tradition the term administrative act (*Verwaltungsakt*) is only used for an individual decision made by the administration. In the German Administrative Procedure Code the Administrative Act is defined as follows (Article 35):

> *"An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large."*

The administrative act is not a law or a generally applicable governmental regulation, but a decision made in a specific case (for example, the issuing or denial of a licence, the revocation of a licence, the ban of a demonstration, the individual order to close a shop and so on). The English term administrative act, which is the literal translation of the German and French terms, seems therefore somewhat misleading, as the word 'act' is often used for a law in the English language.

II. International Standards and Comparative Overview

In a time of general globalization legal systems are not developing in national isolation. In fact they never did. The history of law is, in other words, a history of legal transplantation and migration of legal concepts. To give some examples:

- Modern German law is based to a large extent on the adoption/adaptation of Roman law from around half a millennium ago. More recently it was also influenced by developments in France (particularly in the field of administrative law), by international human rights and European Community Law.
- Japanese law is not only based on its own traditions, but also on the self-determined decision to adopt certain principles from outside (in particular Germany, but also to some extent, from the USA after 1945).

As far as the author of this report understands, Cambodian law has for most of the time been influenced from outside as well – from India in earlier times, from France during the colonial period, from the concepts of the socialist law tradition (Soviet Union, Vietnam) from 1979, and so on. Recently there have been multiple influences from various foreign jurisdictions, most notably from Japan (in private law) and France (in criminal law).

1. International Standards of Good Administration

International Law

Good administration can be considered to be a part of the larger topic of good governance, which has been very much under development in international law in recent decades (Rudolf, 2006).

- Good governance was picked up as a topic within development organisations just at the time when Cambodia transformed from a socialist state to a liberal democracy. The World Bank started the discussion in 1989, but was soon joined by other development organisations. UNDP developed good governance strategies as well as the European Union in its development cooperation. Where, for the World Bank, good governance has (due to its purpose) basically been a condition for economic development, for UNDP and the European Union it has also become an end in itself, ensuring the realisation of freedom and basic rights by human beings. This is not the place to discuss the details, but it is obvious that governance has become more and more important in development cooperation ever since, partly in form of conditionality, partly as the topic of development cooperation itself.
- On a more general level the UN Millennium Declaration focused on 'Human Rights, Democracy and Good Governance' (Part V).
- Without going into details here it is obvious that aspects of good administration can

be found in the provisions of global human rights treaties. Consequently, the UN Commission on Human Rights has also addressed questions of good governance. In a resolution of 2005 it based its approach not only on the same criteria as UNDP (participation, transparency, accountability), but added responsibility and responsiveness to the needs of the people (UN-HR Comm. Res. 2005/68, 20 April 2005).

It can reasonably be concluded that good governance is part of a developing modern international law. Accountability, participation, transparency and supremacy of the law have been identified as the main elements of this principle so far (Rudolf, 2006), all of which obviously have much to do with the question of **how administration works**. Many aspects of good administration (for example, access to information) are addressed by general human rights treaties, international trade regimes (WTO) and special treaties (UN Convention against Corruption, and so on). This topic shall be explored in more detail later.

European Union

The administrative principles that have been developed in the European Union are interesting even far away in Cambodia for at least three reasons:

1. They are modern. The European Union is a young institution and the development of its administrative law principles is even more recent.
2. They are based on the comparison of legal systems and not based on sometimes strange particularities of individual national systems. The principles have been discussed and developed by the member states of the European Union with all the different administrative traditions. They include common law and civil law concepts, English, French, German and Scandinavian concepts, and so on.
3. They have not only been developed in the decisions of the European Court, but also been codified in a 'Right to Good Administration' in the European Charter of Fundamental Rights (Article 41) as well as in a (soft law) Code of Good Administrative Behaviour under the authority of the European Ombudsman. Therefore they are stipulated in clear and short provisions. It might be useful to have those provisions translated into Khmer language in order to facilitate discussion.

Article 41 Charter of Fundamental Rights: Right to Good Administration

1. "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

European Code of Good Administrative Behaviour

The following codified principles seem to be interesting as potential model provisions in the Cambodian context:

- Article 4: Lawfulness
- Article 5: Absence of Discrimination
- Article 6: Proportionality
- Article 7: Absence of Abuse of Power
- Article 8: Impartiality and Independence
- Article 9: Objectivity
- Artice 10: Legitimate expectations, consistency and Advice
- Article 11: Fairness
- Artice 12: Courtesy
- Article 14: Acknowledgement of receipt and indication of competent official
- Article 16: Right to be heard and to make statements
- Article 17: Reasonable time-limit for taking decisions
- Article 18: Duty to state the grounds for decisions
- Article 19: Indication of the possibilities of appeal
- Article 20: Notification of the decision
- Article 21: Data protection
- Article 22: Requests for information
- Articel 23: Requests for public access to documents
- Artice 24: Keeping of adequate grounds
- Article 25: Publicity of the Code

(The full text of the Code is reprinted in this book.)

ASEAN

ASEAN has not developed common standards of administration in detail yet, but it should be noted that the new ASEAN Charter commits the Association of Southeast Asian Nations to the following purposes and principles:

- Article 1 (7): The Purpose to "strengthen, democracy, enhance good governance and the rule of law and to promote and protect human rights and fundamental freedoms"
- Article 2 (h): The Principle of "adherence to the rule of law, good governance, the principles of democracy and constitutional government"

It is obvious from these provisions that ASEAN has committed itself to purposes and principles that are highly relevant for the work and conduct of administration bodies. ASEAN is still far away from adopting precise standards comparable to those in the European Union, but with the ASEAN Charter a significant step has been taken and it is clear that it has committed itself and its member states to the principles of good governance and rule of law, for which a coherent administrative law is crucial.

2. European Examples

France

The French administrative law system is of particular interest for Cambodia as it is widely acknowledged that Cambodian law in general as well as its administrative law in particular has been influenced by the legal concepts of this former colonial power. However, for the process of drafting any general administrative code or administrative procedure code, France can hardly be a model, as such **codifications do not exist in France**. As already mentioned, the so-called *Code Administratif* is just a compilation of laws in place in that field. It is not an official document, but a publication produced by the private publishing company Dalloz. Such compilations also exist in Germany (for Federal Public Law the most established one is the Sartorius, produced by private publisher Beck), but they must not be confused with codes published by lawmakers or even informal codes that summarize certain principles and rules in the form of soft law.

French administrative law has been developed to a large extent by the jurisprudence of the administrative courts with the *Conseil d'État* at the top. The *Conseil d'État* was established more than two hundred years ago and it was not a fully independent court in the beginning but it has evolved to be one, and the independence of administrative courts has been clearly stated by the French Constitutional Council.[1] In 2008 alone the *Conseil d'Etat* decided around 12,000 cases, the *Cours administratives d'appel* around 27,500 and the *Tribuneaux administratives* around 27,500! (Mestre, in: Bogdandy/Cassese/Huber, Vol III 2010, p. 113). It is therefore evident that a core element of French administrative law currently has no equivalent in Cambodia.

Germany

German administrative law has developed over a long time. Major steps were the establishment of an administrative court system starting in the 1870s and the publication of a famous scholarly treatise by Professor Otto Mayer in the 1890s. His book (which was much inspired by French principles of administrative law of the time) has also influenced administrative law in Asian countries such as Japan and South Korea. Similar to France, in Germany the major principles of administrative law were not developed first

1 Decision of 22 July 1980, *Indépendence de la jurisdiction administrative*, Rec. p. 46.

in specific legislation in certain fields, but through the work of legal academics and the jurisprudence of the courts. Codification came at the end of a process, which altogether took around 200 years.

Today Germany's administrative law is by and large regulated by legislation, but it is not codified in a single document. As Germany is a federal state, many laws exist on the federal level and in the sixteen states. Often they are mostly similar in all states, but sometimes there are significant differences. There are administrative procedure codes in all states and on the federal level, but there is only one federal Administrative Courts Code, which also applies to procedure in state courts. Apart from these laws there are also laws on the execution of administrative acts and on costs of administrative actions. There are also laws on civil servants and in all the fields of administrative law (police law, educational law, public economic law, environmental law, social law, tax law and so on). The general administrative codes only apply as long as they are not overridden in specific legislation. Some areas are still not codified at all, most notably important parts of the law on state liability, which is based on some constitutional provisions, occasional legislation and judge-made law. Germany has a system of administrative courts with three levels (administrative courts, higher administrative courts, federal administrative court). The German Constitution contains a guarantee that **every** restriction of individual rights can be challenged in court (Article 19 (4)). These principles have been vigorously enforced by the Constitutional Court and therefore the right to challenge in court together with the principles of legality and proportionality are considered the be the main reasons for the constitutionalization of German administrative law since 1949.

Netherlands

The Netherlands are interesting for our purpose as they have a modern and comprehensive general administrative code, called the General Administrative Law Act (GALA). It was adopted in 1992, has been in force since 1994, and has ten chapters. It contains general principles, administrative procedure rules and court procedure rules. It was adopted in an attempt to codify existing principles as developed in case law and in order to achieve more clarity and simplicity in administrative law.[2] As in German administrative law, one of its main concepts is the administrative decision (similar to the German Administrative Act). It also contains a range of administrative principles.

The codification of Netherlands' general administrative law in one single code (GALA) illustrates that it is possible to codify most of the general aspects of administrative law (including court procedure) in one administrative code. However, even that code is not fully comprehensive, and with respect to Cambodia it would be very difficult to realize such an ambitious code in the near future. But it has been concluded by scholars that GALA has produced an increased scholarly interest and it has been taken very serious-

2 Seerden/Stoink, in: Seerden (2007), p. 157.

ly by the administrative bodies in the Netherlands. A similar effect might be produced through a much leaner code (see the Denmark example below), be it formally adopted as a law or only as a guideline.
A potentially interesting detail and experience from the Netherlands is that GALA is still a work in process. It was adopted with the intent to add additional chapters and the work is going on. Such an approach could also be considered in Cambodia. Germany followed a similar approach in the field of social law, which was from the beginning designed to be developed step by step in one code (*Sozialgesetzbuch*), which will finally contain ten separate pieces of legislation with a general part in the beginning and nine special laws for the various fields.

Denmark

The state of Denmark is interesting for our purpose because in 1985 it adopted a lean general law regarding the administration, the Danish Public Administration Act (DPAC). It is also worth considering for the fact that Scandinavian countries (which are currently among the wealthiest in the world) have been forerunners in the field of good administration, beginning with provisions on access to information in the 18th century (!) to the invention of the concept of the ombudsman.

The DPAC consists of only 37 Articles (called 'Sections') and covers the following topics:

- Chapter 1: Scope
- Chapter 2: Disqualification (in case of the official's potential personal interest)
- Chapter 3: Advice and Representation etc.
- Chapter 4: Access to files by parties to a case
- Chapter 5: Hearing the parties
- Chapter 6: Grounds etc.
- Chapter 7: Advice on the right to appeal
- Chapter 8: Obligation to maintain secrecy etc.
- Chapter 9: Entry into force, relationship to other legislation, etc.

The principles provided in Chapters 2–8 can all be regarded as core topics of modern administrative law principles and Denmark was able to codify them in short but meaningful provisions. It is highly recommended that Cambodia take this law into consideration as a good example.
(The full text of Chapters 2–8 of this law can be found in the Annex to this report.)

Portugal and Spain

Portugal and Spain are countries of the civil law tradition, and fairly new democracies by Western European standards. After times of authoritarian government, Portugal put an emphasis on good administration in its Constitution, which makes it interesting for a comparative approach. Portugal has some of the most comprehensive guarantees of principles of good administration in any Constitution (at least in Europe, but maybe globally).

It is not recommended to consider such provisions as an amendment of the Cambodian Constitution, but the provisions illustrate that it is possible to clearly stipulate crucial administrative principles in a few clear words, as in IX. Public Administration:

- Article 266: Fundamental principles
- Article 267: Structure of the Administration
- Article 268: Citizens' rights and guarantees
- Article 269: Rules governing Public Administration staff
- Article 270: Restrictions on the exercise of rights
- Article 271: Liability of state staff and agents
- Article 272: Police

(For the full text of these provisions (and the respective provisions in the Spanish Constitution) see the Annex.)

In order to specify those principles, Portugal has also enacted an Administrative Procedure Code (1991) and an Administrative Court Proceedings Code (2002). As with the Danish Public Administration Act, it is recommended that Cambodia seriously considers the wording of the principles laid down in the Portuguese Constitution.

England

England is the motherland of the common law legal system and, as it is widely known, common law historically has a very different approach to administrative law, which has its culmination in the famous dictum of A.V. Dicey that an administrative law would not exist at all in England. Although today it is widely accepted that Dicey was wrong (he himself corrected his position later on), there are differences in style and structure.

However, as the challenges are often the same, so are – in substance – many of the results. Basic principles, such as the obligation to follow the law and proportionality, are followed in England as much as in continental Europe. Furthermore, in common law we find to a large extent a procedural approach, being based on the assumption that good procedure provides legitimation (and should also improve substantial results). This approach has also been strengthened in the civil law system during recent decades.

For our purpose, a look to England is mainly helpful because of its very instructive and perfectly drafted **Code of Principles of Good Administration** which was prepared by the Ombudsman, confirmed in a general consultation and published in 2006. **It is not a law**, but a guideline for administrative behaviour, although many of the detailed sub-principles have also a basis in law (and could easily be adopted as legal provisions in an administrative procedure code). From my perspective there is nothing specifically 'British' in these principles – they are concepts of universal value. It seems therefore worthwhile to read and consider them carefully when drafting any kind of administrative principles in Cambodia.

The six main **Principles of Good Administration** (with more precise three to five sub-principles each) are:

1. **Getting it right**
   Acting in accordance with the law and with regard for the rights of those concerned.
   Acting in accordance with the public body's policy and guidance (published or internal).
   Taking proper account of established good practice.
   Providing effective services, using appropriately trained and competent staff.
   Taking reasonable decisions, based on all relevant considerations.
2. **Being customer focused**
   Ensuring people can access services easily.
   Informing customers what they can expect and what the public body expects of them.
   Keeping to its commitments, including any published service standards.
   Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances.
   Responding to customers' needs flexibly, including, where appropriate, coordinating a response with other service providers.
3. **Being open and accountable**
   Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
   Stating its criteria for decision making and giving reasons for decisions.
   Handling information properly and appropriately.
   Keeping proper and appropriate records.
   Taking responsibility for its actions.
4. **Acting fairly and proportionately**
   Treating people impartially, with respect and courtesy.
   Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
   Dealing with people and issues objectively and consistently.
   Ensuring that decisions and actions are proportionate, appropriate and fair.
5. **Putting things right**
   Acknowledging mistakes and apologising where appropriate.
   Putting mistakes right quickly and effectively.
   Providing clear and timely information on how and when to appeal or complain.
   Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.
6. **Seeking continuous improvement**
   Reviewing policies and procedures regularly to ensure they are effective.
   Asking for feedback and using it to improve services and performance.
   Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.

3. Asian Examples

Georgia

Georgia is an interesting example for administrative law reform in the post-socialist era after the collapse of the Soviet Union. Two major pieces of legislation were drafted and adopted with the help of international (including German) legal advisors:

- General Administrative Code of Georgia (1999)
- Code of Administrative Procedures (2000) (dealing with court procedure only!)

The **General Administrative Code** with its 220 articles might be too comprehensive to be an exact model for Cambodia at this time. Cambodia still struggles to bring into practice the four big codifications adopted in recent years (Civil and Penal Code, Civil and Criminal Procedure Code) and for the time being it seems a good option to envisage lean legislation. However, the Georgian Code codifies important principles and can be seen as an example of a modern approach to administrative law. The General Administrative Code provides for Administrative Procedure Principles in particular in Articles 4–13:

- Article 4: Equality before the law
- Article 5: The exercise of authority pursuant to law
- Article 6: The procedure for exercising discretionary power
- Article 7: The balance of public and private interests
- Article 8: Impartial resolution of the case
- Article 9: The right to legitimate trust
- Article 10: Openness
- Article 11: Confidentiality
- Article 12: The right to apply to an administrative agency
- Article 13: The right to be heard

(The full text of these provisions can be found in the Annex to this report.)

The **Code of Administrative Procedures** also seems interesting for Cambodia as it is based on the concept of administrative jurisprudence through ordinary courts, meaning that Georgia, which is a civil law country, does not have specialized administrative courts. It is also a very short law (35 articles), largely relying on principles of civil procedure, a concept that can also be found in Japan and might be a serious option for Cambodia as long as no separate administrative court system is established.

Japan

Japanese administrative law is particularly interesting for Cambodia, as Japan has been a model for the new Civil Code and Civil Procedure Code already. As the whole legal system should be systematic, it seems reasonable to consider as well principles applied in Japan in the field of administrative law.

To a certain extent this leads back to German administrative law again, as Japanese administrative law has been influenced by German concepts. There is, however, a more modern codification of administrative procedure (1993) in Japan. Generally, a significant number of modern administrative laws were drafted in recent years, for example, a law on access to information (1999), a law on administrative organization (2001) and a major modernization of the Administrative Litigation Act (2005). One difference with Germany is that Japan has no system of specialized administrative courts any more – the ordinary courts have full authority to judge on administrative actions.

The following generally accepted principles were reported by the Japanese expert in the workshop in Phnom Penh in 2011:[3]

- rule of law
- fairness
- transparency
- accountability
- protection of the rights and interests of the citizens.

Singapore

Singapore is the only Southeast Asian state that has the status of a fully developed country. Singapore is also interesting with respect to administrative law as it is generally considered one of the least corrupt countries in the world with a strong rule of law approach. Singapore is, however, exceptional in Southeast Asia not only because of its wealth, but also as a small city-state. Also the 'order-mentality', which seems now to be part of the collective gene pool in Singapore, makes it difficult to transplant its concepts in other countries with different traditions. Furthermore, it is a common law country, which makes it more difficult to learn immediate lessons for the Cambodian context.

Indonesia

Indonesia is an interesting case study within Southeast Asia as it has been undergoing a constitutional and administrative reform process since 1998. Although Indonesia is different from Cambodia in size, religion, population and history, there are remarkable similarities in the challenges regarding rule of law and administrative reform. Therefore it seems interesting to compare Indonesian and Cambodian experiences. It should be noted in this context that Indonesia established a system of administrative courts in 1991 and a constitutional court with the constitutional reform in 2002.

With respect to administrative principles, the following have been reported as formalised by Mr. Kai Hauerstein in his presentation on Indonesian administrative reform during the workshop in February 2011:

3 Presentation by Mr. Hiroshi Kiyohara at the CLJR Workshop, 10 February 2011.

- Revised Article 53, Law 9/2004 amending the Administrative Court Act, introduces a fixed set of principles such as legal certainty, free of KKN (collusion, corruption, nepotism), transparency, proportionality, accountability.
- Additional criteria stipulated in Article 20 Law 32/2004. The government administration is run by general principles of state administration such as legal certainty, public interest, transparency, proportionality, professionalism, accountability, efficiency, effectiveness.

Again it seems obvious that there is no visible difference between the principles in Europe and an Asian country.

Other States

It has been noted that generally there is a tendency of judicialization in administrative law in Asia.[4] This development is also taking place in Southeast Asia. Constitutional courts and administrative courts have (as in Indonesia) been established in Thailand. Interestingly, in Thailand it is the administrative court system that has gained a good reputation, whereas the balance of the Constitutional Court is often questioned.[5] Thailand's experiences with administrative law reform and the establishment of administrative courts might be an interesting subject for study in the Cambodian context. Judicialization is also taking place in Vietnam where there is now even a serious discussion on introducing some kind of constitutional court system. In common law jurisdictions, administrative law cases are usually dealt with by ordinary courts, but here as well there is some strengthening, for example in Malaysia. In the Philippines the Supreme Court is traditionally a strong force.

III. Current Cambodian Administrative Law

1. Preliminary Remarks: Cambodia's Legal System

Modern national legal systems are typically either part of the civil law tradition or the common law tradition. The common law was born in England and exported from there to all the former colonies. The civil law tradition has its basis in continental Europe, with France and Germany being the most influential sub-systems within that family. The differences between both systems are much less significant today in comparison to a century ago – in common law countries there is plenty of parliament-made legislation, in civil law countries court decisions (particularly the jurisprudence of the highest courts) mostly play an important role in the development of the law. The difference is more in style and methodology than in substance and results. It is clear, however, that court deci-

4 See Albert H.Y. Chen, in Ginsburg/Chen (2008), pp. 359–380.

5 On Administrative Justice in Thailand see Harding/Leyland (2011), pp. 189–216; on Thailand's administrative law see also Ruthai Hongsiri, in Hill/Hoerth (2008), pp. 211–229.

sions are still the core of common law thinking, whereas parliament-made law is in the core of the civil law system. It should be noted, however, that in Germany judge-made law is largely influential (not only, but very visibly, in constitutional law), and in France the decisions of the *Conseil d'Etat* have shaped the development of administrative law.

Today Cambodia, a former French colony, is generally regarded as a civil law country. After a period of lawlessness (1975–1979) and socialist legal concepts (1979–1989) its system again has the typical features of a civil law country, most importantly the absence of the central position of court decisions but central position of codes (recently put into reality through adoption of the major codes in private and criminal law) as the core of the law. It has been suggested occasionally that the absence of specialized administrative courts in Cambodia would constitute a common law element (Reynolds, 1998). This seems to be an exaggeration. Whereas it is true that common law countries typically do not have separated administrative courts, numerous civil law countries also have a unified court system (for example Japan and Georgia). Germany and France have specialized administrative courts. Cambodia, as a civil law country, until now has had no separated administrative courts, and the constitution seems to stipulate for such a unified system (although that is not entirely clear), but this does not change its nature as a civil law country.

2. Sources

The Constitution

The Cambodian Constitution is a modern constitution (adopted in 1993), based on Cambodian constitutional traditions, in particular the Constitutions of 1947 and 1989, as well as foreign concepts. It is based on the principles of monarchy, liberal democracy, human rights and rule of law. It has been amended six times since 1993, with the establishment of the Senate being the most significant amendment. The core values of the Constitution have remained unchanged.

The Cambodian Constitution is not very specific on administrative law. The main provisions that directly address the administrative system only focus on the territorial organization of the country (Articles 145, 146). In addition, the following provisions are relevant:

- Article 39: 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 the their duties. The settlement of complaints and claims shall be the competence of the courts.
- Article 128 (3): The Judiciary shall consider all legal cases including administrative cases.

~~The fact that administrative principles as such are not stipulated in a direct way does not mean that they are not part of the Constitution. To~~ the contrary, they may effectively be deduced from general principles such as the concepts of basic rights as well as rule of

law. This is by and large the same situation as in Germany, for example. In Cambodia, aspects of rule of law are stipulated in numerous provisions of the Constitution:

- The preamble forcefully declares the "respect for law" as one of the primary goals of the whole constitution.
- "Rule according to the constitution" (Article 1) is guaranteed.
- Separation of powers (Articles 51) is stipulated.
- Extensive basic rights (Articles 31 to 50) are guaranteed. In various provisions it is made clear that restrictions of basic rights need a basis in law (see for example Article 38 (2), 44 (3)).
- Among the main duties of the government is to "protect and preserve legality and ensure public order and security" (Article 52).
- The independence of the judiciary is clearly stipulated as well (Article 128).

Rule of law is, we can conclude, among the cornerstones of the principles of the Cambodian Constitution. It is not only a policy, but the "supreme law" (Article 150 of the Constitution) and state practice shall fulfill the promises provided by this Constitution. This is particularly relevant for administrative law, as administrative law is about the work of state institutions, which are all bound by the basic rights and other guarantees of the Constitution.

Cambodia's International Obligations

Cambodia has adopted most of the universal human rights treaties. It is a member of the United Nations, the WTO and ASEAN. All the principles that have been developed in those institutions, therefore apply in Cambodia.

Although the Cambodian Constitution does not clarify the rank of customary international law, it can be assumed that because of its general decision in favour of international openness, a general respect is intended. More specifically, Article 31 of the Constitution clearly expresses this respect for all human rights treaties adopted by Cambodia. The relevance of human rights treaties for the decision making of all state institutions has also been emphasized by the Constitutional Council in its decision of 10 July 2007 (Dec. No. 092/003/2007).[6]

Administrative Laws and Regulations

Cambodian administrative law is currently not well developed by any international standard. Most laws that were adopted in the phase from the early 1990s are about the establishment of ministries and institutions. While the Civil Code, Civil Procedure Code, Criminal Code and Criminal Procedure Code were developed in extensive cooperation with Japan and France over many years, initially there was no systematic approach to

6 See also Menzel, in: Hill/Menzel (2007), p. 60.

codify general administrative law (with exception of the field of decentralization). Although there are many specific laws in place in the field of administrative law, there are still gaps in special fields (police law) and general (administrative code). Furthermore, even where it exists, specific legislation often does not address administrative procedure in any detail. Mostly there are no provisions on how to apply for a decision, on hearing rights, on the duty of the administration to give reasons and about complaint procedures. These are the typical topics of general administrative procedure codes around the world (including Asia), and currently they are often not addressed in existing Cambodian laws. This might be one of the reasons that speak in favour of a general law on administrative procedure/administrative principles, which could fill this gap on a generalized basis and which could be applied in conjunction with existing and future sectoral laws.

Accessibility of laws and, in particular, relevant government regulations (sub-decrees, prakas and so on) might be seen as another problem regarding Cambodian administrative law.[7] However, good administration depends on the accessibility of relevant legal documents as part of the overall transparency of state administration. Laws should be easily accessible in print and online in Khmer and as much as possible also in English language translation in order to facilitate discussion with partner countries and the international community.

Court Decisions

One significant obstacle in the development of principles of administrative law in Cambodia is the absence of significant court jurisprudence at least since the early 1970s. As mentioned, the Constitution provides for such jurisprudence by the ordinary courts and in addition the Constitutional Council would have a role to play (by assessing the constitutionality of administrative laws), but until now almost no cases are reported in the field. This makes it particularly difficult to see Cambodia in the French tradition of administrative law (as often suggested), because in France the decisions of the *Conseil d'État* have been the cornerstone of the administrative law system and its development since Napoleon's days. For the time being, the absence of court decisions is an important restricting element when it comes to the development of general principles in Cambodian administrative law.

Academic Research

Within civil law systems academic research usually plays an important role in the development and interpretation of law. Law professors are involved in the preparation of laws, the interpretation of laws and in the elaboration of general principles. German administra-

7 D. Adler, 'Access to Legal Information in Cambodia: Initial Steps, Future Possibilities', 2005 (2) *The Journal of Information, Law and Technology* (JILT), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_2/adler/.

tive law was strongly influenced by academic elaborations, most notably Otto Mayer's two volume book on German administrative law, which was first published at the end of the 19th century and which has been influential in a range of jurisdictions that have looked to Germany in the development of their own law (in Asia: Japan, South Korea and Taiwan).

In Cambodia, there is currently only limited academic research in administrative law. Whereas there are numerous textbooks on public administration, there are only a very few on administrative law. Within the preparation of this report two relevant textbooks – both only available in Khmer language – could be identified:

- Doeuk Pidor, *General Administrative Law*, 2009.
- Say Bory, *General Administrative Law*, 2nd ed. 2001.

(It should be noted as well that, to my knowledge, no foreign textbooks have been translated into Khmer in order to allow Cambodian experts Cambodian and foreign concepts in the field of administrative law.)

As mentioned above, academic research, which is crucial for the development of all law including administrative law, is still under development. This is not the place to analyze in detail the reasons for the current situation. It is widely known, however, that academics in Cambodia still lack opportunity and incentives for publication. Due to copying of books, almost no money can be earned from publications, and universities have no tradition of demanding regular research activities by their staff. There is also no legal journal where smaller research results can be published within Cambodia. Furthermore there might also still be some reluctance to publish legal research, particularly in the field of public law, as it might be considered politically sensitive, for example when it comes to discussion of the constitutionality of laws, the correctness of court decisions or the lawfulness of administrative actions. All those activities are cornerstones of administrative law development in countries like Germany, France or Japan, but are still to be developed in the Cambodian context.

At the same time it seems that the situation is gradually improving. The author of this report has, in cooperation with Konrad Adenauer Foundation and the Senate, organized a series of so-called 'Law Talks', during which topics of public law in Cambodia have repeatedly been discussed. Furthermore, the Cambodian Society of Comparative Law, which since recently holds annual conferences in Phnom Penh does not only publish a yearbook (two editions so far), but it also had administrative law on the agenda for a full session in early 2011.

3. Some Challenges in the Development of Good Administrative Law

The following will only highlight a few aspects which seem important (from my perspective) in the development of good administrative law, and should therefore be kept in mind in any discussion on administrative law reform and the development of administrative law principles.

At least two major aspects of a good administrative system are not further discussed here, because they are outside the scope of this report:

- **Good organizational structure**, in particular a clear system of jurisdiction and responsibilities on the horizontal level (within the Royal Government and between ministries and other institutions) and the vertical level (between the Royal Government, provinces, districts, communes).
- **A good civil service**, staffed with skilled, appropriately paid staff who fulfill their duties on the basis of high ethical standards ensuring that legal obligations to resist any kind of illegal influences (political pressure, nepotism, favouritism, corruption, and so on) are followed in practice. It should be clear that good administrative law is important to set those standards and also to develop instruments improving their effectiveness. Good law therefore is important. But it should also be clear that in practice, laws are often only as good as the skills and work ethics of the people in charge of executing them.

Constitutionalization

Constitutionalization of the legal system is a term that is visible in many jurisdictions around the globe. It is an outcome of the fact that the concept of the constitutional state is on the rise. A constitutional state is a state which not only has a constitution, but in which the constitution is really a binding, relevant and respected supreme law of the state. Cambodia has clearly opted for this constitutional state (see, for example, Article 150).

Experience from comparative constitutional law shows, however, that young constitutional states need time to constitutionalize, and it takes time to adjust the whole legal system (including administrative law) to new constitutional standards, or to the simple fact that constitutional promises now have to be taken seriously. In Germany, which already had a fairly strong rule of law tradition before 1933, but only had short experience as a democratic state between 1919 and 1933, it also took time after the adoption of the constitution in 1949 to fully explore and establish the principles of that constitution and the consequences for administrative law. Administrative law had to change: laws had to be amended or replaced, attitudes of judges and administrative organs had to change, and legal academics had to embrace those new principles as well. In Germany today we speak of the 1950s– 1970s as the years of transformation of administrative law.

Two famous quotes stand for the new approach:

- Otto Mayer, the most famous German administrative law professor of his time, stated in a new edition of his administrative law book, which was published after the revolution of 1918 and the abolishment of monarchy and its replacement by democracy: "Constitutional Law passes away, Administrative Law persists." He basically wanted to say that not much had changed (and not much needed to be changed in his book) after the replacement of monarchy by democracy.
- Fritz Werner, a former president of the Federal Administrative Court, wrote an article in a legal journal in 1959 titled: 'Administrative Law as Applied Constitutional Law'. He basically stated that now most principles of administrative law were actually consequences of provisions of the constitution. Ever since, this has been the general wisdom – only in recent time has there been an assumption by some that now administrative law is probably evenly shaped by European Union law in addition to constitutional law.

The only reason why I refer to this German development is because it seems that there are, despite many differences, similarities to the Cambodian situation now, where, after a substantial change in the constitutional structure and severe absence of rule of law, the legal system (and in particular the administrative law system) needs to be adjusted to the new normative framework of the liberal democratic constitution step by step. It is also no surprise that in Europe the phenomenon of constitutionalization of administrative law has been particularly observed in many countries that experienced a significant sudden change in the constitutional structure towards liberal democracy (Spain, Greece, Eastern Europe and so on), whereas in some countries with long democratic and rule of law traditions, administrative law and constitutional law have remained somewhat more separated (England, Sweden).

Developing a Comprehensive and Coherent Administrative Law System

Administrative laws in place in Cambodia have increasingly come from a time after the adoption of the current constitution in 1993. However, differently from many countries in the former Eastern bloc, there was no early attempt to draft and adopt general administrative laws. Whereas in private law and criminal law comprehensive codes were developed in Cambodia from the 1990s, legislation in administrative law has remained sectoral for a long time and the development of general legislation seems to have been a policy goal only since 2005.

To give some examples from different fields, even within sectoral legislation there are still significant gaps in legislation. There is still (as of early 2011):

- no police law
- no law on construction
- no law on waste management.

All these are highly important topics that affect the rights of people and most relevant fields of state intervention. In all these fields it seems therefore advisable (if not constitutionally required) to have the major decisions regulated in a parliament-made law, and not only in governmental regulations (sub-decrees and so on).

An important challenge for general administrative law legislation is the question of how it will be connected with the existing legal system. In broad terms, the adoption of a general law on administrative procedure is not a big problem. In fact, wherever such legislation has been adopted, it has been in addition to existing laws already regulating topics of administration. And general legislation will most often not be entirely comprehensive or without exceptions.

- In many countries with general administrative procedure codes there are specific laws that affect procedure, such as laws on data protection or access to information.
- Standard procedures stipulated in a general administrative procedure code will occasionally be replaced by special procedural rules with regard to certain topics, if the standard procedure is inappropriate or insufficient. Most administrative procedure codes therefore have general provisions clarifying whether special procedural rules in sectoral laws are still applicable after the adoption of general provisions.

It will be a challenge, but an important task, to develop any new legislation in a way that improves the coherence of the whole system of administrative law in Cambodia.

Developing Procedural Standards for Administrative Decision-making

There has been increased attention to procedural standards in most countries based on constitutional democracy in recent decades. Even in countries such as Germany that have traditionally been very results-oriented, procedural rules have been strengthened over time. There might still be provisions that procedural mistakes can be 'healed' if mistakes are 'repaired' at a later time, but the proper procedure would not have changed the result even if the affected person does not complain in time. However, procedural rules (the right to be heard, right to get advice, duty to give reasons and so on) are now increasingly a standard in administrative procedure. This is particularly true for individual decision-making (administrative acts), but increasingly also for the making of governmental regulations (sub decrees and so on) or local by-laws, which should also ideally be organized in an open and transparent process. Japan, for example, has recently adopted legislation stipulating public participation during the process of the making of sub decrees.

In Cambodia, the administrative decision-making procedure is not standardized through legislation. As mentioned, there is no Administrative Procedure Act. Sectoral laws often do not address the relevant questions in a systematic way, although some laws address procedural issues. (See more detail below in the explanations of the 6th principle.)

As far as this author knows, there are also no legal regulations on the making of sub-decrees. There are various standard procedures for the process within the government, but generally no requirements for public consultations, reasons and so on. Within a com-

prehensive approach to a reform of administrative procedures, the issue of delegated legislation could also be addressed, but this report will mostly concentrate on the procedure of individual administrative decisions.

Making Complaint Mechanisms and Remedies Effective

One serious problem of current administrative law in Cambodia is the lack of effective remedies. This is not only unfortunate for individuals affected by decisions, but also for the system as such, because remedy is a driver for good administration. If there is a possibility to effectively complain and challenge a decision, any decision-maker will have a strong incentive to follow the law and proper procedure. Therefore a differentiated system of effective remedies is the best way for government to make sure that its administration properly follows the rules.

As mentioned above, the Constitution (Article 39) provides for a right to complain against breaches of the law and it clearly stipulates the competence of the courts to decide on these complaints. Some laws repeat this jurisdiction of the court, but do not specify about procedure.

See, for example, the

- **Law on Education** (2007), Article 40.
- **Law on Land Traffic** (2006), Article 59.

See also the **Law on the Common Status of Civil Servants** (1994):

- Article 58: "Any Civil Servant shall be entitled to call upon a court to handle litigation related to civil service. However, he/she shall previously exhausted all administrative remedies."
- Article 59: "The administrative organ having competency to deal with litigation related to the civil service shall be a permanent committee called the "Conciliation Committee on Litigation related to the Civil Service", presided over by the Secretary of State for the Civil Service. The composition of the referred committee shall be determined by anukret."

There is a more precise provision in the **Law on Protected Areas** (2008):

- Article 52: "Any person who disagrees with the decision made by the Nature Conservation and Protection Administration as outlined in this law, except transaction fines as stated in article 52, 56, and 57, shall have the rights to make a written complaint to the Head of the central Nature Conservation and Protection Administration within at most thirty (30) days as of the date a decision by the local Nature Conservation and Protection Administration or the court is received.

  The Head of the central Nature Conservation and Protection Administration shall make decisions on this complaint within at most thirty (30) days as of the date the complaint is received.

If upon the complaint, a decision made by the Head of the central Nature Conservation and Protection Administration is still not acceptable by the plaintiff, he/she can file a complaint to court within thirty (30) days at most.

- Any complaint made under this Article shall not affect the authority of, or stay the process of enforcement by the Nature Conservation and Protection Administrative officers under this Law."
- Another example can be found in the recent **Law on Tourism** (2009), Articles 54 and 55: According to them, a special dispute resolution mechanism shall be established through prakas, with the possibility of addressing the 'competent court' in case the Committee for Tourism Dispute Resolution can't mediate the case.

However, even recent draft legislation sometimes does not address the question of complaints or remedies at all.

- See the **Draft NGO Law** (translation as of March 2011), which seems not to provide for any remedy or access to court against any decision by the authorities. Critics argue that the few procedural safeguards, which were part of the first draft (Article 18 First Draft), were eliminated in the second Draft. In Article 49 and 50 the Draft Law seems to imply that courts might be involved in the dissolution of NGOs, but again there is no specification of any kind and in the draft version available there was no provision guaranteeing a right to complain or even address the court, if for example registration is refused.

Occasionally, alternative ways of dispute resolution are stipulated, without indicating a possibility to address the courts.

- See the **Law on Peaceful Assemblies** (2009), where Articles 12 and 13 provide for the 'decisive opinion' of the Minister of Interior, not indicating a possibility to challenge a decision of the authorities in court.

As mentioned, according to the constitution as well as provisions in a significant number of laws, the courts shall have power to decide on administrative law conflicts. However, until now this option seems largely to exist only on paper. De facto it does not seem to be an exaggeration to say that the constitutionally-guaranteed competence of the courts in administrative matters is largely theoretical. There seems to be a widespread assumption in Cambodia that despite the provisions of the constitution and some laws, the courts are not yet authorized to handle administrative case because the laws on court procedure do not address these kinds of cases yet. As a result, there are hardly any reported administrative law cases. A rare exception is the (unsuccessful) attempt of infamous British former musician and pedophile Gary Glitter to challenge his deportation from Cambodia at the end of 2002.

The author of this report is not aware of any successful administrative law case in a Cambodian court since 1993. It might be necessary to further investigate this question, but even an occasional case would not change the obvious evaluation of the general situ-

ation that administrative litigation is theoretical. From my observation there even seems to be a widespread assumption among officials and judges that administrative cases legally can't be handled yet, because there are no special legal provisions for such cases (or even special administrative courts or administrative chambers). From a constitutional and legal perspective this assumption seems to be incorrect, but such an attitude obviously has its impact on court practice. It is therefore obviously advisable to envisage some kind of legal provisions that confirm the authority of the courts (provided by the constitution), to decide on administrative cases.

Another general challenge that does not affect just the courts, but also other complaint mechanisms, is the lack of trust the public has in those mechanisms and even some fear to use them.

- The lack of trust in the court system was also mentioned as a challenge by the prime minister in his 'Rectangular Strategy II' speech in 2009. If the public does not trust the courts in general because, among other points, they perceive them to be open to political influence, they will in particular not have confidence that the courts will help them in cases against state administration. It will probably need empirical evidence (successful cases against state authority reported in the media), before such an attitude will change.
- A similar problem might exist with non-judicial complaint mechanisms. The 2009 report on the establishment of an ombudsman system, which was prepared by the CLJR, found an overall skeptical balance in the reception by the public of recently introduced complaint mechanisms. As a possible reason it mentions, for example, the fact that such offices are often located within the respective ministries and difficult to find. There is obviously widespread skepticism about the independence of such institutions and their capacity to substantially help. Here again, only success stories may finally help.

Control, Accountability, Liability

Cambodia has an increasing number of institutions and mechanisms that are assigned to control administrative bodies not only on the basis of individual complaints, but on their own initiative. For example:

- Both houses of parliament shall monitor the government, not only by receiving complaints, but also as part of their original obligation as a modern parliament. However, special investigative powers are less developed in comparison to other parliaments around the world, but this is outside the scope of this report.
- The Audit Authority was established in 2000.
- The National Council on Anti-Corruption was established in 2010.

- Ombudsmen have been introduced on the provincial level (at Siem Reap and Battambang first). (The CLJR has also prepared a report on the development of the Ombudsman Concept in Cambodia, based on a comparative study, in 2009.)
- On the provincial level, the Provincial Accountability Working Groups (PAWG) have been established.

There is a widespread assumption, however, that official watchdog bodies, although increasingly established, are mostly lacking teeth and necessary political independence. As most of those institutions are still new, there should still be an opportunity to convince the public of their effectiveness.

Accountability and liability are obviously also core challenges for the development of administrative law in Cambodia, but this is a multi-faceted task which will be explored later in detail. Any catalogue of principles of administrative law should at least, however, emphasize the importance of those concepts.

Limiting Restrictions, 'Red Tape' and Costs

Any administrative law system needs to rely on licences as one instrument to control (potentially) dangerous behaviour. Chemical factories, for example, can't be allowed to operate without proper licensing procedures. At the same time it is well known that licences are a burden for people affected as well as the administration. They are 'red tape' and typically impose financial and other burdens on the 'customers' of the administration. Therefore reducing red tape including thing such as licensing requirements has been a major policy in many countries in recent time. Throughout the European Union, licensing requirements have been reduced in recent years.

This author understands that in Cambodia, where necessary control over certain activities is still to be advanced, the introduction of new licence requirements are to some extent unavoidable. At the same time, over-regulation should be avoided. It should also be considered that in developing countries with very low official salaries for civil service officials and significant corruption, licensing requirements often provide opportunity not only to raise official fees but also unofficial ones. It should be taken into account too that licensing procedures do not only have financial and economic impacts, but might also affect the exercise of other rights.

In Cambodia, recent legislation and policies seem to send mixed messages to a certain extent. On the one hand, for example, there have been significant attempts to promote one window concepts, which are based on the idea of reducing the burden of licensing requirements. On the other hand, some recent pieces of legislation seem questionable with respect to the amount and comprehensiveness of licensing requirements (see for example the Law on Tourism (2009) and also the discussion around the draft NGO-Law). Within this report a comment on such cases is not possible or necessary, but from a general administrative law perspective it should be emphasized that licensing requirements and other

red tape solutions should be restricted to cases where there is a serious need for such requirements. In addition, strict rules are required which give the applicant clear rights in the process, and alternatives to licensing (such as notifying rules) should be considered.

Punishment and Penalties as last Resorts

Punishment should not be the priority solution in administrative law. Criminal punishment, particularly imprisonment, is a severe restriction and should be restricted to serious offences against the law. Excessive punishment is not only problematic from a basic rights perspective, it is also expensive for the state and poses difficult challenges, as prisons in Cambodia are seriously overcrowded and prison conditions make it even more difficult to re-socialize the offenders. Even monetary penalties are only second best responses, as primarily the law should achieve compliance. Threat of punishment also discourages people from using their skills by opening and running businesses or enjoying their constitutional rights.

However, if penalties and punishment are imposed (which to some extent is unavoidable), this is a significant restriction of rights and liberties and the respective rules shall be clear. It is no surprise that protection against arrest and confiscation of property are among the oldest basic rights recorded in the word. Clear regulations and their strict application are the only way to avoid confusion, abuse and corruption.

An example for problematic provisions can be found in the recently adopted Law on Tourism (2009): According to its Article 66, any violation of Article 48 can be subject to penalty, as defined in a prakas by the Ministry of Justice. Article 48 includes obligations as such as compliance with a Code of Ethics (which normally is defined by being not strictly binding), or things like "protect the national interest and tourist interest". There is a wide array of obligations, and according to Article 66 all violations can be subjected to penalty on the basis of a prakas. Furthermore, the law does not specify if and how a person affected can complain against such penalties.

IV. Principles of Administrative Law to be Considered

The following is just a preliminary proposal for discussion of administrative principles which might be considered in the Cambodian context. This is not intended to be a draft for legislation at this point. As mentioned in the introduction, such principles can be used in different kinds of codifications or pieces of legislation, namely a 'soft law' regulation, such as:

- a code of (good) administrative behaviour or
- a code of conduct/ethics for public servants.

Or real legislation, for example in the form of:

- a general administrative code (law)

- an administrative procedure code
- future sector legislation in the field of administrative law (police law and so on).

The wording of some of the principles proposed here is close to the European Code of Good Administrative Behaviour (ECGAB), which is a modern compilation of administrative principles based on the common concepts of the member states of the European Union. All of those principles can be found, however, in codes of conduct and administrative law legislation around the globe.

1. Legality

Principles:

1. All state action shall be according to the Constitution of the Kingdom of Cambodia and binding international law. All actions of the executive branch and the judiciary shall also be according to the laws of the Kingdom of Cambodia.
2. All decisions that affect the rights or interests of individuals shall have a basis in law and their content shall comply with the law.

Explanations:

1. The principle of legality reflects a common standard of constitutional states in Europe, Asia and around the world. It is a cornerstone of rule of law. (See also Article 4 ECGAB.)
2. Two principles can be distinguished:
   a. Priority of the Law (No. 1 and 2)
   b. Necessity of the Law (No. 2)
3. The Cambodian Constitution reflects those principles:
   a. The Supremacy of the Constitution is clearly stipulated in Article 150. According to Article 49, every Khmer citizen shall respect the Constitution and the laws. This must evidently apply in particular for all public servants.
   b. According to Article 39, Khmer citizens can challenge any breach of the law by institutions of the state, which is an expression and consequence of the general obligation of those institutions to follow the law.
   c. According to many provisions in the Constitution, limitations to basic rights need a basis in law, see for example in the Chapter on Basic Rights Article 31 II 3, 34 V, 37, 38 II/III/40 IV, 41 II, 42, 44, II/III, 49 III. See also Article 56 II (economic system), 57 II (budget and financial system), 58 II (state properties).
4. In the civil law tradition (which is the basis of Cambodian law), the law is mainly defined by laws adopted by parliament. Important decisions have to be made by such laws, whereas technical details can be dealt with in government regulations (such as sub-decrees). The German Constitution, for example, has a clear provision stating that government regulations need a basis in parliament-made law. 'Delegated legislation' is also limited in many common law countries.

2. Proportionality

Principles:

1. When taking decisions, the state shall ensure that the measures taken are proportional to the aim pursued. The state shall in particular avoid restricting the rights of individuals or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued.
2. When taking decisions, the state shall respect the fair balance between the interests of private persons and the general public interests.

Explanations:

1. The principle of proportionality is increasingly recognized in most modern constitutional systems. The wording chosen here is close to Article 6 ECGAB. The term 'rights of the citizen' was replaced by 'rights of individuals' as it should be evident that everybody is entitled to proportional state action, not only citizens.
   The doctrine of proportionality was originally developed centuries ago by the Prussian administrative courts in Germany. It can be found in scholarly work of the 18th century and it was further developed by administrative courts in the 19th century.
   Today it is a global standard. It has been influential in many countries as well as on the international level. It is applied in the European Union, European Convention on Human Rights, the decisions of the WTO panels, nearly all Constitutional Courts and many Supreme Courts (with the only significant exception of the United States, where a variety of 'tests' is applied instead).
   The full proportionality test is typically fourfold: To be justifiable, state action has to be
   a. legitimate in goal (pursuing a goal which is acceptable)
   b. suitable (able to achieve or at least promote that goal),
   c. necessary (the mildest option available),
   d. appropriate (not out of proportion in relation to the goal).
   Take a simple textbook example: If a boy who is stealing a piece of fruit in the market is running away and can only be stopped by shooting him, such shooting:
   - has a legitimate goal: preventing a successful theft
   - may be considered suitable: by shooting the boy, he is stopped and the fruit can be returned to its rightful owner
   - may be considered necessary: there is no other way to stop him than shooting him because the boy can run faster than the policeman
   - but is inappropriate: killing or even risking seriously injuring a small boy just for preventing theft of a piece of fruit is out of proportion.

   Obviously the proportionality test is often much more difficult than in this example, but it is indeed the cornerstone of legitimate state action in many constitutional and administrative law systems.

The core of the principle can be summarized with a famous German administrative law saying: 'Don't shoot sparrows with cannons'.

2. The proportionality test applies to legislation as well as executive and judicial action:
   - **A law** shall not stipulate non-proportional restrictions, sanctions or other limitations of freedom. For example, no outrageous punishment in the case of minor offences, no excessive licensing requirements if not necessary for specific reasons, no criminal sanction if an administrative solution is sufficient.
   - **The application of the law** shall always consider the principle. In particular, the use of discretion always has to reflect it.
3. The principle of proportionality is a consequence of the presumption for freedom, which is the basis of the Cambodian Constitution (in a liberal democracy). Although the Cambodian Constitution does not express the principle of proportionality in explicit terms, the liberal concept of the constitution clearly implicates its application.
   It shall be noted in this context that the principle of proportionality is also not clearly stipulated in the German Constitution, but generally accepted as consequence of basic rights and the rule of law. In this area the constitutional settings in Germany and Cambodia are very similar. Under German law, the principle of proportionality is actually widely considered to be the most significant aspect of the rule of law (Rechtsstaat) principle and, as mentioned, it has been developed step-by-step through court decisions over more than two centuries.

3. Equality and Absence of Discrimination

Principles:

1. The state shall respect the constitutional right to equality.
2. State action shall not distinguish on the grounds of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status (Article 31 CC).
3. People who are in the same situation shall be treated in a similar manner. Differences can only be made when they are justified by objective relevant features of the particular case.

Explanations:

1. The principle of equality is another cornerstone of modern constitutionalism and human rights law around the world. In principle, it is widely accepted, but in practice, it is often violated in many countries.
2. Although Cambodia historically was a hierarchical society, in which serious differences in rights were recognized according to status, sex and so on, the Constitution of 1993 is very clear in providing equal rights (see for example Articles 31 II, 34, 35, 36, 45). Cambodia has also embraced the principle through ratification of numerous human

rights treaties. It is also generally embraced in recent legislation (see for example Articles 4 and 6 of the new Civil Code).

3. Equality and absence of discrimination does not necessarily mean total equality of each individual case. In particular it is accepted in many modern constitutional systems that disadvantaged groups (for example, women and members of minorities) may be 'privileged' under certain circumstances in order to achieve the overall goal of equality of the group within society (through, for example, a quota for females or members of minorities in politics, scholarships and the like). There might often be dispute in many countries over how much reverse discrimination or affirmative action should be allowed, but it should be understood this is a balancing act between individual non-discrimination and collective non-discrimination in society as such.
   For example, although Article 31 II stipulates that everybody shall be equal before the law regardless of wealth, it is obviously justifiable to exclude rich people from certain university scholarship programs, because such programs might need to concentrate on people who cannot afford studies on their own budget.

4. Impartiality, Independence, Objectivity and Fairness

Principles:

1. Every official shall act impartially, fairly and reasonably. The official shall stay away from any preferential treatment. His or her conduct shall in particular not be guided by personal, family or political interest.
2. When making decisions, state institutions and officials shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration.
3. An official shall not take part in a decision in which he or she, or any close member of the family or anybody else personally close, has a financial or otherwise special interest.
4. Every official shall fulfill his obligations with integrity and shall not bring the public service into disrepute through private activities.

Explanations:

1. These are evident standards of modern state administration. The wording is partly taken from Articles 8, 9 and 11 ECGAB, but tries to avoid redundancies in those provisions. No. 4 is also inspired by the example for an informal codification of behavioural standards of public servants, which is the New Zealand Public Service Code of Conduct (http:///www.ssc.govt.nz). This Code elaborates on three principles:
   - First Principle: Public servants should fulfill their lawful obligations to the Government with professionalism and integrity.
   - Second Principle: Public servants should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues.

- Third Principle: Public Servants should not bring the Public Service into disrespute through their private activities.

2. The duty to impartiality and neutrality is also part of Cambodian law and policies, although it is widely acknowledged that these are principles that are still difficult to establish in the everyday practice of administration. Low salaries, patronage, political pressures and insufficient education are some reasons widely mentioned when it comes to the reasons for such problems. It should always be recognized that such problems might to some extent be bigger in the context of a developing country without a strong public service tradition in Max Weber's terms, staffed with highly educated and paid civil servants, but that they exist nearly everywhere and even the most developed countries need severe legislation to reduce them to the minimum possible.

In Cambodia, from a legal perspective, Article 37 of the **Law on the Common Status of Civil Servants (1994)**, for example, stipulates in clarity:

"Any civil servant shall be neutral when exercising his/her functions and shall forbid himself/herself use his/her position and the State facilitates to undertake the following political activities:

- to work for or against a political candidate,
- to work for or against a political party.

Any behaviour contrary to this Article shall constitute a transgression or a professional breach."

The principles of neutrality are also expressed in the Code of Ethics for Judges (2007) and the Code of Judicial Ethics of the Extraordinary Chambers in the Courts of Cambodia (2008). From my perspective, some parts of the Code of Ethics for Judges could serve as a model for a Code for Public Servants or respective provisions in an Administrative Code.

5. Openness, Transparency and Confidentiality

Principles:

1. The administration shall be as transparent as possible with respect to its general activities and all regulations in place. Regulations (sub-decrees, prakas and so on) shall be made publicly available. Access to information shall be provided according to special legislation.
2. No official may disclose or misuse secret or confidential information obtained in his or her position.

Explanations:

1. These are two principles that on first glance might seem to be contradictory. However, transparency and confidentiality are both necessary administrative principles and both have their basis in public interest as well as basic rights. Generally there seems to be no justification for not making general legal regulations, which affect individuals, generally accessible. **Therefore all general governmental, ministerial and general regulations on decentralized levels should be publicly available**. Guaranteeing accessibility has become much easier and cheaper through the possibility of posting documents on government websites.
2. The wording chosen here is only preliminary and should be replaced by a more precise one after further discussion.

6. Good Administrative Procedure

Preliminary Remarks: *This is the longest and most complex of principles proposed for discussion here. It will probably be the task of a law on administrative procedure to identify and specify the principles that are modern, standard, constitutionally valid and practical under Cambodian circumstances. To draft such a law will be difficult in substance and process, but from the perspective of this author it is very important to step into this process of discussing the substance of such principles as soon as possible, because it will take time to achieve a good result. There is no doubt that:*
Good administration and good governance need good administrative procedure.

The procedural principles proposed here seem to be common standards of good administration around the world and might therefore be a starting point for the discussion in Cambodia. They are 'rights' of the citizens. This corresponds to duties of the administration.

Principles:

1. General Principles:
   In any administrative procedure, the administration shall follow the law, consider proportionality of all action, act neutrally and impartially, and act with according to the goal of better serving the people.
   In administrative procedure, the following specific principles shall also apply:
2. Receipt of complaints and applications:
   The Administration has to receive complaints and applications. An acknowledgement receipt shall be provided whenever possible and requested.
3. Speedy but considerate decision-making:
   The Administration shall decide on procedures in a speedy but considerate way.
4. Transparent procedures and costs:
   The procedure of decision-making shall be transparent for everybody. Fees for licences and other decisions shall be fixed, general, and made public.
5. Hearing, advice and information:
   Whenever possible, the administration shall hear the affected person(s) before a decision is made. The administration shall give advice how the affected person can safeguard his/her rights and interests. It shall provide all necessary information.
6. Courtesy:[8]
   The official shall be service-minded, correct, courteous and accessible in relations with the public.
7. Representation:
   In administrative procedure, everyone shall have the right to be represented by a person of his/her trust or a lawyer.
8. Due exercise of discretion:
   Discretion shall be applied in a neutral and consistent way, considering the limits and the purpose of the discretion provided to the authority.
9. Providing reasons:
   Administrative decisions shall give reasons when stipulating obligations or negatively affecting the rights or interests of the addressed person or interested third parties.
10. Information about complaint mechanisms and remedies:
    A person who is directly affected by an administrative decision which stipulates an obligation or may affect rights or interests shall without request be informed about any complaint mechanisms and remedies.

Explanations:

1. Whenever the administration is involved with citizens, the basis of such contact shall be respect and the fundamental wisdom that **'the state is there for the people'** (and not

8 Article 12 (1)(1) ECGAB.

vice versa). Individuals shall experience the administration as an institution which is providing service to the people. They shall encounter clear proceedings and help. In democracies around the globe there has been a shift in recent decades from a culture of 'command and control' by the administration to a philosophy of providing service, according to which the individual has to be treated like a welcomed customer. And even where 'command and control' is still necessary, it shall be executed in a respectful way, independent of the social status or wealth of the individual.

2. In Cambodia in 2006 the Royal Government adopted a policy paper on public service in order **'to better serve the people'**, and in 2010 **a Handbook for Civil Servants** was published with the same sub-title. This reflects that the concept of the 'serving' administration is also part of the policy of the Royal Government in Cambodia. The same approach can be found in the **National Strategic Development Plan Update** (2009–2013), where under No. 52 it is mentioned as a priority to 'change the attitude and behaviour of civil servants from administrators to service providers'.

   Despite this approach, administrative laws in Cambodia often still seem to be rooted in the tradition of stipulating obligations, but not rights or protection. As it was recently put:

   "From the beginning of the reconstruction of Cambodian law in 1993, a vast majority of rules have been adopted to essentially organize the administrative institutions and to give them powers to enact regulations upon people. However, there are only very few rules that help to protect the people against administrative abuse." (THENG, 2011)

   Maybe as a consequence, Cambodian administrative law seems not to have developed general standards on administrative procedure yet, although aspects of the rights above can be found in various laws and policy initiatives. Administrative law doctrine in Cambodia seems to focus on generalized decision-making (in the form of sub-decrees, prakas and so on) and administrative contracts, whereas the unilateral act in individual cases (in French, acte administratif individuel) is rarely discussed. But for the individual this administrative procedure leading to that 'individual administrative act' is crucial. This seems to be a real 'construction site' in Cambodian administrative law.

3. There are examples of provisions establishing certain procedural standards and rights in recent Cambodian legislation. One such case is the recently adopted Law on Peaceful Assemblies (2009). Although this law certainly concerns a politically sensitive topic and was adopted on the background of a more restrictive previous law and an even more restrictive practice over some years (which basically did not allow demonstrations for some years), it introduces some potentially effective procedural standards:
   - Article 5 only demands notification, not permission.
   - Article 8 requests that the authority shall acknowledge receipt, post notification in a publicly visible way and notify it to relevant local and other authorities.
   - Article 10 makes clear that a lack of response by the authorities implicates approval.

- Article 11 stipulates a duty to immediate consultation in case of concerns regarding the assembly.

These are important procedural protections of the constitutional right to assembly, if they are taken seriously in practice. One remaining problem still is that the Law on Peaceful Assemblies seems not to respect the final authority of an independent court to decide on the legality of an assembly as it gives authority for final decision to the Minister of Interior. We will return to this question when discussing the next principle. Advanced procedural rules, which can't be discussed here in detail, can also be found in the recent **Law on Expropriation** (2009), which, in a point of difference from the Law on Peaceful Assemblies, also provides for the possibility to address the competent court, if the procedure at the Complaint Resolution Committee ends in an unsatisfactory way (Article 34).

4. The precise arrangement and wording of principles still needs further discussion, therefore I have abstained from making a precise proposal at this time, but only added a short explanation about what is meant by each principle.

7. Complaint, Remedy, Control and Monitoring

Concepts to be discussed:

1. Right to complain to independent courts within the judicial system.
2. Right to complain against administrative decisions to the authorities (authority who made the decision, higher authority).
3. Right to address specialized conflict resolution bodies as established by law
4. Right to complain to external monitoring bodies (commission in parliament, ombudsmen and so on).
5. Duty of the state to establish independent control and monitoring mechanisms (which are not necessarily relying on individual complaints).

Explanation:

The question of complaints, remedy, control and monitoring is crucial for a set of administrative principles.

1. Because of the clear provisions of the Cambodian Constitution and as a consequence of general international standards, effective independent court procedures have to be established. This can be achieved by establishing procedural rules applicable within the ordinary courts (for example, by the establishment of specialized chambers) or by establishing a separate concept of administrative courts. In any case, full judicial independence has to be guaranteed.

2. Specific sectoral complaint mechanisms outside the judicial system (already in existence according to various laws) shall follow certain procedural standards. It seems, however, that they typically cannot replace the final possibility of addressing the courts under current constitutional law.
3. Standard procedures for complaints against administrative decisions (complaint to the deciding authority and/or to the higher authority) should be developed.
4. The state should also permanently improve internal and external mechanisms of control and monitoring, which are not dependent on individual complaints.

All details need further discussion, before precise principles can be properly proposed.

8. Accountability and Liability

Concepts to be discussed:

1. Officials shall be accountable for their action, be it on duty or in private. There shall be no impunity.
2. If an official causes damage on duty, the state shall be liable to compensate for the damage. The official shall be liable to the state for the damage in case of serious negligence.

Explanation:

The questions of accountability and liability are crucial for a general administrative law and will need further discussion before a precise set of principles can be proposed. Whereas Cambodian law to some extent has legal provisions on compensation for legal action (expropriation), compensation for illegal action seems to be largely unregulated. However, clear liability seems to be crucial, because it is a core element of the constitutional liberties of the people, but also necessary in order to improve responsible behaviour of all civil servants. The details of such principles have to be subject to further discussion.

9. Effectiveness and Efficiency

Concepts to be discussed:

1. Administrative regulations shall be practically effective (realistic).
2. Administrative action shall be effective
3. Regulations shall only be made when necessary, helpful and proportional.
4. Regulations shall avoid all unnecessary bureaucracy.

Explanation:

The questions of effectiveness and efficiency might also be part of a set of administrative principles, although they are often not mentioned in detail in such catalogues around the word.

1. Effectiveness is important to make sure that intended goals are indeed achieved. Before every legislation, rule-making and other state action is taken, an impact assessment should be made (which might be comprehensive in the case of major legislation, or informal but honest in the case of everyday administrative action).

   Effectiveness is also important regarding the citizen's respect of the rule of law and state authority. Although 'perfect' implementation is not the standard around the world (even in Singapore pedestrians sometimes cross the road despite a red traffic light) and would even give a bad reputation (as a 'police state'), a certain seriousness in enforcing the law is crucial for the general respect for law.
2. Regarding efficiency, administrative law has to be efficient from the perspective of the state and the perspective of the people. Rules and procedure that produce unnecessary costs are either a burden for the state budget or citizens.

As mentioned above, red tape seems to be a significant problem for people doing business in Cambodia (affecting everybody from foreign investors to local micro-businesses). Regulations that eliminate or reduce possibilities for corrupt procedures are also crucial in this respect. Data from surveys that confirm the problems of red tape and corruption are abundant and the problem is acknowledged by the Royal Government. Some legislative and organizational steps have been taken to reduce those problems. However, in the long run intelligent solutions in administrative law are needed to tackle those problems. Although law alone is not enough to overcome such difficulties, without good law sustainable solutions are difficult to achieve.

The precise wording of the principles mentioned here will need further discussion.

Recommendations

This version of the report, which is only a starting point for the process of developing, adopting and implementing principles of administrative law in Cambodia, makes the following recommendations for the next steps:

3. Further develop the substance of possible contents of:
   - Principles of Administrative Law
   - Good Administrative Behaviour
   - Rules of Administrative Procedure in the Cambodian context.
4. Further develop the following materials:
   - A glossary of terms relevant to administrative law (English and Khmer)
   - A systematic collection of administrative laws/regulations (English and Khmer)
5. Analyse the various policy options and make decisions on how to develop general administrative law. The following three main options should be discussed:
   - Systematization of the existing law.
   - Drafting general administrative laws which will be in force in addition to sectorial laws, such as a General Administrative Act, Administrative Procedure Act, Administrative Litigation Act, State Liability Act and so on.
   - Drafting and adopting informal (not strictly legally binding) codes of good administrative behaviour, good administration, and so on (a 'soft law' approach).

   It seems important to note that there is no need to choose between these options, but consider each of them, as they can (and maybe should) at some point be all combined.
6. Promote and increase the professional and academic discussion on all the questions above through conferences, workshops, lectures, teaching materials for university courses, publications and other means.
7. Establish a permanent organizational structure and process (working groups, advisory groups), consisting of officials from CLJR and other institutions, academics and other Cambodian as well as foreign experts in order to work on the further steps mentioned above.

Further recommendations might be made after more discussion and feedback to this report.

SELECTED BIBLIOGRAPHY

– Bell, John, Sophie Boyrom and Simon Whittaker (2009), *Principles of French Law*, 2nd ed., Oxford University Press.
– Bell, John S. (2006), 'Comparative Administrative Law', in: Mathias Reiman / Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, pp. 1259–1286.
– Foster, Nigel and Satish Sul (2010), *German Legal System and Laws*, 4th ed., Oxford University Press.
– Ginsburg, Tom and Albert H.Y. Chen (eds.) (2008), *Administrative Law and Governance in Asia*. Comparative Perspectives, Routledge.
– Hill, Clauspeter and Jochen Hoerth (eds.) (2008), Administrative Law and Practice from South to East Asia, Konrad Adenauer Foundation, Singapore.
– Hill, Clauspeter and Jörg Menzel (eds.) (2010 2nd/2008/2010), *Constitutionalism in Southeast Asia*, Vol. I/II/III, Singapore, Konrad Adenauer Foundation, Singapore.
– Peters, Guy B. and Pierre Jon (2007), *The Handbook of Public Administration*, Sage Publications.
– Reynolds, Rocque (1998), 'Dicey in Cambodia or *Droit Administratif* meets the Common Law', 72 *The Australian Law Journal* 204–215.
– Rudolf, Beate (2006), 'Is "Good Governance" a Norm of International Law?', in: *Festschrift für Christian Tomuschat*, N.P. Engel Verlag, pp. 1007–1028.
– Seerden, René J.G.H. (ed.) (2007), *Administrative Law in the European Union, its Member States and the United States. A Comparative Analysis*, Intersentia.
– Theng, Chan-Sangvar, 'Administrative Law and Decentralization' (2012), in: Hor Peng, Kong Phallack and Jörg Menzel (eds.), *Introduction to Cambodian Law*, Konrad Adenauer Foundation, Phnom Penh.
– Trebilcock, Michael J. and Ronald J. Daniels (2008), *Rule of Law Reform and Development*, Edward Elgar Publishing.

In German language, among others, the following major books on Comparative Public Law were used:

– Bogdandy, Armin von, Sabino Cassese and Peter M. Huber (eds.) (2007–2011), *Handbuch Ius Publicum Europaeum*, 4 Volumes (so far), C.F. Müller Verlag.
– Schneider, Jens-Peter (ed.) (2007/2009), *Verwaltungsrecht in Europa*, 2 Volumes (so far), V&R Universitätsverlag.
– Trute, Hans-Heinrich, Thomas Groß, Hans Christian Röhl and Christoph Möllers (eds.) (2008), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, Mohr Siebeck.

PART 2
SELECTED ANALYSIS OF CAMBODIAN ADMINISTRATIVE LAW

HISTORICAL DEVELOPMENT OF ADMINISTRATIVE LAW IN CAMBODIA

Yan VANDELUXE

CONTENTS

Abstract 105
I. Definition and Controversy over Administrative Law in Cambodia 106
II. Conception of Administrative Law in Cambodia during the Pre-colonial Time 107
III. Introduction to Administrative Law during the French Colonial Period 109
IV. Continuity and Rupture of Administrative Law after the Sangkum Reastr Nyum Regime 111
V. Reestablishment of Administrative Law in Cambodia and its Current Status 112
VI. Conclusion 113
SELECTED BIBLIOGRAPHY 114

HISTORICAL DEVELOPMENT OF ADMINISTRATIVE LAW IN CAMBODIA

Yan VANDELUXE *

Abstract

To understand the history of administrative law within a country, we should firstly define what 'administrative law' is and question whether it exists within that country. Therefore, before broaching the history of administrative law within Cambodia, firstly we need to clarify its definition and determine its existence. Once those points are clarified, we can focus on the nature of administrative law within Cambodian legal history. The final question to address is how administrative law will develop in the Cambodia legal system.

Administrative law has a long history in Cambodian society, which predates the legal codes introduced under the French protectorate of the 19th and 20th centuries. After independence from France, administrative law as introduced under the protectorate continued in Cambodia during the regime of *Sangkum Reastr Nyum* because of the ongoing influence of the French legal tradition. The change of political regime in Cambodia from democracy to socialism affected the status of administrative law in accordance with the socialist legal tradition. The 1991 Paris Peace Agreement brought Cambodia back to democracy along with the return of an administrative law even if it is not strictly separated from the private one. The Constitution of the Kingdom of Cambodia promulgated on 23 September 1993 endorses this agreement by affirming specific rules governing state administration, separate from the area of law dealing with private matters. Even though the borderline between administrative and civil laws is not clearly defined (some provisions regulating administrative activities are prescribed in the same law for private parties), the constitutional provisions as well as specific laws regulating specific activities of the Cambodian administration are sufficient to affirm the existence of administrative law in Cambodia.

* Yan Vandeluxe is a doctor of public law from the Université Lumière Lyon2 (France). He is a professor of public law at the Royal University of Law and Economic (RULE) and also advisor to the secretariat general of the Senate of Cambodia. The analysis and opinions expressed in this chapter are his own and do not represent in any way those of the organizations he is working with.

I. Definition and Controversy over Administrative Law in Cambodia

We must first define administrative law before discussing it. 'Administrative Law' is generally defined as **a set of rules taken by an administration to govern citizens in a state, aiming at assuring the organization and public order of that society**. Some authors try to define administrative law in simplistic terms. In that sense, some French or European authors have defined administrative law as the "law of administration of a state"[1] or the "law that concerns relations between the administration (governments) and private individuals".[2] In addition to those definitions, we should not ignore the important role of judges in controlling administrative activities and subsequently regulating administrative activities. The application of administrative law is important to achieve sound democratic governance through maintaining the rule of law over the rule of man, as administrations must submit to the rule of law, just like citizens and other institutions. Therefore, administrative activities must be under the control of judges as are matters between private persons. In controlling these administrative activities, judges could produce rules within their jurisdictional function of interpretation or fill gaps in the law, contributing to the development of administrative law. This is the approach adopted by French judges for the development of administrative law that is always seen as *'droit prétorien'*,–a set of rules established by judges' jurisprudence. So **administrative law is not only a set of rules developed by the administration but also includes case law (jurisprudence) created by judges in order to control administrative activities.**

Within the current legal framework of Cambodia, a controversy is noticeable. Dr. Say Bory states in his administrative law book that administrative law in Cambodia does not yet exist due to the absence of coherent rules governing relations between the administration and citizens.[3] Moreover, other Cambodian administrative law books, when dealing with administrative law in Cambodia, do not provide any definition of what Cambodian administrative law is.[4] With this in mind, Kai Hauerstein states in his chapter: "there is no official definition of administrative law in Cambodia".[5]

Those statements seem to demonstrate that administrative law is absent or does not exist in Cambodia. However, if we consider administrative law as **a set of rules taken by an administration to govern citizens in a state, aiming at assuring the organization and public**

1 Pierre-Henry Chalvidan and Christine Houteer, *Droit administratif*, Nathan, 1996.

2 Rene Seerden and Frits Stroink (eds.), *Administrative law of the European Union, its members states and the United States, a comparative analysis*, Intersentia Utigevers Antwerpen-Groningen, 2002, p. 1.

3 Say Bory, *General Administrative Law*, 3rd edition, 2002, Blossom Lotus, p. 2.

4 Hence, the administrative law book written by Dr. Duk Rasy in 1994 took French administrative law as foundation for explanation without elaborating any definition of what is administrative law of Cambodia. See Duc Rasy, *Administrative law*, Ecole Royale d'Administration, 1994.

5 See in this book, Kai Hauerstein, 'Aspects of administrative law and its reforms in Cambodia'.

order of that society as cited above, every society including Cambodia needs indispensably a minimum set of rules governing administrative activities in assuring the public interest and public order. Therefore, it is incorrect to say that Cambodian administrative law is absent or nonexistent. However, it is not incorrect to state that administrative law in Cambodia is not yet coherent and well developed as it does not yet have autonomy from private law. From that perspective, **administrative law in Cambodia does exist**. Some authors try to give a personal understanding of the definition of administrative law. Dr. Theng Chan-Sangvar defines it as "the branch of public law dealing with the actual operation of government".[6] From the same definition, Kai Hauerstein separates two elements of administrative law, which are the organization of the administration itself and the interaction between administration and citizens and vice-versa.[7]

As Cambodia's legal system is heavily influenced by the French civil law system, administrative law in the Cambodian context means '*Droit administratif*' from the French literature and not '*Loi administrative*'. So administrative law does not refer only to laws or regulations adopted by parliament and branches of government but refers also to judges' jurisprudence in controlling administrative activities. As a branch of public law, administrative law is deemed as one of the fundamental foundations of it, close to constitutional law.

II. Conception of Administrative Law in Cambodia during the Pre-colonial Time

Cambodia is one of the oldest countries in the world. Without entering into detail of the history of Cambodian law in ancient regimes, we can look at its law and, in particular, its administrative law from the beginning of Cambodian society. Cambodian traditional society begins with two periods: **Funan** (1st-6th century AD) and **Zenla** (6th-9th century AD).

During those periods, the law governing Cambodian society is supposed to be the doctrine of Hinduism and Buddhism with the influence of Indian laws.[8] According to this traditional legal system, the king concentrated great powers in his hands. He was the head of state and government. He was not only the lawmaker/administrator setting rules governing society, but he also played jurisdictional roles as well. However, he lacked complete command over the territories comprising Funan society as those territories enjoyed a variety of statutes, that is to say that they enjoyed more or less autonomy in their relations with the central administration. However, those territories were still under the

6 Theng Chan-Sangvar, *Administrative law and decentralization*, ed. Kong Phallak, Hor Peng, Jörg Menzel, *Introduction to Cambodian Law* (Phnom Penh: Konrad Adenauer Foundation, 2012), p. 245.

7 Kai Hauerstein, *op. cit.*

8 It is said in history that Funan society follows a concept by a Brahmin named Kaundiny. As Funan society had close commercial relations with India and China, it was progressively influenced by the rules of those countries. See Beatrice Balivet (coordinator), *Introduction au droit Cambodgien* (Introduction to Cambodian Law), Presse Universitaire du Cambodge, 2005, p.3–4.

government of the king in the sense that the latter assigned his representatives to control all those territories.[9] Hence the rules that were put in place to govern the administration of Funan society came essentially from the King or from various territories.

The **Zenla** society that succeeded **Funan** maintained continuity from that regime. The legal tradition was retained. There were not many changes: the king was still a key actor in producing administrative decisions over the 30 territories, and judged cases presented in front of him by setting case law.

The period succeeding **Zenla** is the **Angkorian period**. It is considered the apogee of Cambodian civilization and extended from the 5th to 15th centuries AD.

The law during the Angkorian period came from a mixture of three practices: **moral values**, **customs** and **royal orders**,[10] which regulated more or less the administration of the Kingdom. The law was compiled in codes, and one of them was *Manavadharmasatra* or *Manusmrti* or *Manu* Code. The main purpose of this code was to regulate relations between individuals, but it also contained some principles relating to administrative affairs of the king. The most visible area of law having the greatest impact on administration of the Kingdom were the **royal orders**. In the concept of the concentration of all powers, the king was the head of jurisdictional, legislative and executive powers. However, the absolute powers of the king were checked in a sense as the king too was expected to respect societal norms such as moral values or customs. According to Jean Imbert, the powers of the king were "quasi-unlimited" but were moderated by "the respect of religious precepts and the strict observance of the law and customs".[11] Hence, as a judge, the king could make decisions in accordance with the law of society. The legislative and executive powers are confused: the king could make royal orders to assure public order and to regulate administrative activities, but those orders must not contradict the law or customs of the country. From this perspective, even though the powers were not clearly separated, the hierarchy of law in Cambodian society, referred to in modern administrative law theory as the 'principal of legality', was supposed to have existed.

Successive political regimes after the Angkorian period brought many changes to the Cambodian legal system. The process of codification, called *kram* or code started, which more or less marks the establishment of Cambodian public law. According to some historians, the *krams* of the Kingdom of Cambodia were initiated during the reign of King Chey Chetha around 1620 because the King had seen "a lot of violations and injustice in the Court system" of his kingdom.[12] This work was pursued until the commencement of the French Protectorate. The last king before the protectorate, Ang Doung, requested

9 Ibid, p. 4.
10 Ibid, p. 6.
11 Jean Imbert, *Histoire des institutions khmeres*, Annales de la Faculte de Droit de Phnom Penh, 1962, p. 28.
12 Beatrice Balivet (Coordinator), *Introduction au droit Cambodgien* (Introduction to Cambodian Law), Presse Universitaire du Cambodge, 2005, p. 13.

a revision of the existing *krams*. The content of the reform is uncertain.[13] The contents of the supposedly 52 *krams* too are unclear. However, some historians who have tried to search for the exact nature of those *krams* have concluded that most of them dealt with the compilation of jurisdictional decisions made by kings within their jurisdictional power as well as "some tracks are supposed to say that they [the *krams*] don't have effect on Cambodian people as a whole but rather than to a small group of the population holding a function".[14] From this perspective, the modern concept of civil servants was established, who were supposed to be regulated by a special law different from that applicable to private individuals.

III. Introduction to Administrative Law during the French Colonial Period

The French protectorate, formally started in 1863 and ended by the proclamation of independence in Cambodia in 1953, introduced a new legal tradition. From 1911, the process of modernization of the Cambodian legal system started with the introduction of new *krams*. Three major *krams* were introduced: Criminal *Kram*, Criminal Procedure *Kram* and *Kram* on the Organization of the Courts. They entered into force on 1 July 1912. It is that point that some jurists see as the beginning of the civil law tradition in Cambodia.[15] Those *krams* were more or less modified later.

It is correct to say that Cambodian legal tradition derives from the civil law tradition. According to this tradition, one of the most important points distinguishing it from common law is the distinction of law into two main branches: public and private laws. From that concept, particular laws aimed at regulating the public administration of Cambodia were introduced during the French colonial period.

One of the characteristics of a public law is the conception of a cadre of civil servants employed in the public administration and distinct from other private employees. This was established by the *kram* dated 8 June 1953, the General Statute of Civil Servants (793 N.S). According to this statute, civil servants of the Kingdom of Cambodia were recruited by competition ('*concours*') and when they were recruited, they were classified into four main levels: *Krom kar*, *Anouk Montrey* (small civil servants), *Vorac Montrey* (medium civil servants) and *Oudam Montrey* (high civil servants.[16] They enjoyed various advantages such as jurisdictional immunity from any pursuit without authorization or guarantee of a

13 Khin Sok proposed that the King Ang Doung, inspired by the Buddhist precepts, seemed to want to soften some penalties in the criminal law. *See* Khin Sok, *Le Cambodge entre Siam et Vietnam*, Collection de textes et de documents sur l'Indochine, EFEO, 1991.

14 Beatrice Balivet (Coordinator), *Introduction au droit Cambodgien* (Introduction to Cambodian Law), Presse Universitaire du Cambodge, 2005, p. 14.

15 *Ibid*, p. 15.

16 Notes et Etudes Documentaires, *Les institutions du Cambodge*, 1 July 1969, La documentation Française, p. 14.

life career. Hence, the characteristic of a public function coming from a system of career civil servants different from the spoils system was introduced and asked for a set of special rules different from the private ones.

Another characteristic of a specific law governing public administration is a set of rules aimed at guaranteeing the normal functioning of local administration of the Kingdom. This local administration was divided into three main levels: *Khet* at the biggest level, *Srok* as the intermediate level and *Sangkat*, (called *Khum* until 1967) at the smallest level. Five municipalities or *Krungs* (*Phnom Penh, Kep, Bokor, Sihanoukville* and *Tioulongville*) enjoying special rules were established. The organization of those local administrations demanded a set of particular rules. The main one was the royal ordinance or *Kram* dated 13 July 1934 regulating the organization of the *Khets* and their relations with their subordinated administrations such as *Sroks* and *Sangkats*. Other regulations, including a decision of the governor general of France in Indochina dated 28 April 1926 determining the statute of the capital Phnom Penh, Royal Ordinance 29 dated 13 July 1934 determining the statute of *Srok*, and *Kram* 340 dated 1 September 1959 determining the statute of *Sangkat*, contributed to a local administrative law in Cambodia.

Furthermore, from the state liability and administrative litigation point of view, a *Kram*[17] in April 1933 created the '*Sala Krom Viveat*' (Litigation court) within the court system of Cambodia to deal with disputes relating to the statute of civil servants, taxation, elections of mayors and complaints for compensation relating to the discharge of civil servants' duties; the appeals against its decision could be lodged with the Council of Ministers. This was the first sign showing, firstly the separation of jurisdictional function from the executive one and, secondly, the existence of a particular court dealing with administrative litigation.

The emergence of administrative litigation became clearer when this court was granted more jurisdiction to hear cases on the legality of administrative decisions in 1948, and with the creation of an Administrative Appeal Court in 1953 and of a *Conseil d'Etat* in 1957.[18] Even though those courts were not effective in practice, the track of separation of court systems in Cambodia was seen and, as a consequence, the need and intention to develop a law particularly applicable to public administration (called administrative law), different from private law, became visible in Cambodia as it is in civil law system countries. However, it is still a theoretical statement and, in practice, the distinction between public and private laws was still vague.

17 In Khmer literature, *kram* has two meanings. It could be a decision made by the King or a code. *Kram* here refers to the first meaning and not a code.

18 See more details in the same book, Yan Vandeluxe, *State liability and rights of citizens to claim damages*.

IV. Continuity and Rupture of Administrative Law after the Sangkum Reastr Nyum Regime

The political rupture following a coup d'Etat organized by general Lon Nol, with support from the United States of America, transformed the Kingdom of Cambodia into the Khmer Republic, but the civil law system was still maintained even though some American legal traditions were nominally progressively introduced.

The replacement of the Khmer Republic by the Khmer Rouge regime, also known as the Pol Pot regime, with the support of China, marked a complete rupture of administrative law in Cambodia and of the Cambodian legal tradition as a whole. The new authority, inspired by communist-Maoist doctrine, founded a conception of absolute equality between citizens by abolishing all private property as well as the legal system in Cambodia. Administrative decisions regarding the governance of society were made in secret and in a dictatorial manner by a small group of individuals, known as '*Angkar*', generally acknowledged by most historians as the permanent committee of the Cambodian communist party. In practice, the Khmer Rouge regime was a lawless state.[19]

The atrocious and extremist regime of Pol Pot lasted only 3 years, 8 months and 20 days. Without any popular support, it was overthrown by a new communist regime on 7 January 1979 with the support of Vietnamese troops. The Marxist-Leninist communist regime declared a new Constitution in 1981 under the name of the 'Socialist Republic of Kampuchea'. A new legal system was consequently introduced. Based on the socialist legal tradition, law was considered as an instrument to transform society and to achieve the objectives of the revolution. Hence, private property was abolished and replaced by collective ownership. As a consequence, private law was non-existent and law was derived from state authority. The principal of legality was not recognized. This is especially grave as administrative decisions are the main sources of laws that assure the regular functioning of society. It is therefore hard to discuss the existence of administrative law in that period as there was a confusion of laws and no jurisdictional control was established.

The process of national reconciliation between different political factions in conflict in Cambodia led to the transformation of the Cambodian legal tradition. The transformation from the Socialist Republic of Kampuchea to the State of Cambodia led to the adoption of a Constitution in 1989 that moderated communist legal tradition with reforms of a court system and recognition of new rights in which private property was progressively recognized and there was a progressive extinction of collective properties. However, there were not many changes in terms of legal system.

19 Beatrice Balivet (Coordinator), *Introduction au droit Cambodgien* (Introduction to Cambodian Law), Presse Universitaire du Cambodge, 2005, p. 18.

Finally, the Paris Peace Agreement between the four main political factions of Cambodia[20] of 23 October 1991 set guidelines for a Kingdom of Cambodia as a democratic pluralist country. The new constituent assembly established by direct and general elections of Cambodian citizens adopted a new Constitution on 21 September 1993 and this was promulgated by the king on 24 September 1993.

V. Reestablishment of Administrative Law in Cambodia and its Current Status

The latest Constitution of the Kingdom of Cambodia derives from a mixture of various traditions such as traditional Khmer customs, communist practices and democratic and liberal traditions. However, the establishment of a democratic pluralist system is the main consideration for the emancipation of the country from the communist legal tradition and was intended to establish a democratic legal tradition and, in the context of the current situation of Cambodia, within the continuity of the civil law tradition. As a result, there is a theoretical need for a distinction between public law (which includes administrative law) and private law.

Although administrative law in Cambodia is still in its infancy, and not yet well developed or coherent, the future development potential is encouraging. The process of administrative code drafting and the constitutional demand for jurisdictional control over administrative activities are signs of the development of a comprehensive and coherent administrative law in Cambodia.[21] It is now time to define the road map for its development: the question is whether it will be accomplished through written law (the codification process) or through unwritten law (court jurisdiction) in the same manner as the French administrative law. Both approaches are appropriate in the current situation. Even if there is not yet an administrative code, the current courts could rely on existing laws to deal with administrative conflicts and, as a consequence, set out rules for the state administration to comply with. The process of developing an administrative code should also be accelerated in order to assist judges in dealing with administrative issues presented in front of them.

20 They are the Cambodian Peoples Party (CPP– the current ruling party), the FUNCIPEC (established by former King Norodom Sihanouk and later led by his son Norodom Rannaridh), the Democratic, Liberal and Buddhist Party (comprised mainly of former republicans and led by Son San) and the Kampuchea Democratic Party (known as the Pol Pot party).

21 See in this book, Kai Hauerstein, 'Aspects of administrative law and its reforms in Cambodia'.

VI. Conclusion

Administrative law in Cambodia relies heavily on the Cambodian legal tradition. Within its history, the law governing state administration was included in the powers of the king as an absolute monarch. The king used his administrative decisions to administer Cambodian society. These decisions were therefore considered as the main instrument of government. But the effects of decentralized administration are also evident in Cambodian history.

Following this era, the French Protectorate introduced an administrative law concept during the colonial period. The civil law tradition brought logically the concept of a particular law applicable in public administration that is different from private law. This tradition was disrupted by successive political doctrinal changes before the establishment of the current Cambodian Constitution in 1993, which set out guidelines for a complete, comprehensive and coherent administrative law in Cambodia.

SELECTED BIBLIOGRAPHY

– Beatrice Balivet (Coordinator), *Introduction au droit Cambodgien* (Introduction to Cambodian Law), Presse Universitaire du Cambodge, 2005.
– Duc Rasy, *Administrative law*, Ecole Royale d'Administration, 1994.
– Jean Imbert, *Histoire des institutions khmères*, Annales de la Faculte de Droit de Phnom Penh, 1962.
– Kai Hauerstein, *Aspects of administrative law and its reforms in Cambodia* (in this book).
– Notes et Etudes Documentaires, *Les institutions du Cambodge*, 1 July 1969, La documentation Française.
– Pierre-Henry Chalvidan and Christine Houteer, *Droit administratif*, Nathan, 1996.
– Rene Seerden and Frits Stroink (eds.), *Administrative law of the European Union, its members states and the United States, a comparative analysis*, Intersentia Utigevers Antwerpen-Groningen, 2002.
– Say Bory, *General Administrative Law*, 3rd edition, 2002, Blossom Lotus, p. 2.
– Theng Chan-Sangvar, *Administrative law and decentralization*, ed. Kong Phallak, Hor Peng, Jörg Menzel, *Introduction to Cambodian Law* (Phnom Penh: Konrad Adenauer Foundation, 2012).
– Yan Vandeluxe, *State liability and rights of citizens to claim damages*, (in this book).

THE INFLUENCE OF CONSTITUTIONAL LAW ON ADMINISTRATIVE LAW

The Influence of the Constitutional Council's Decisions on the Administration in Cambodia

TAING Ratana

CONTENTS

Abstract 117
I. Introduction 118
II. Overview Concerning the Legal Theory of Constitutional Law and Administrative Law 118
1. Constitutional Law 118
2. Administrative Law 122
III. The Supremacy of the Constitution in the Cambodian Legal System 123
1. Shall the Constitution be placed over all Domestic Laws in Cambodia? 123
2. Shall the Constitution be placed over International Instruments? 124
IV. The Linkage of Constitutional Law and Administrative Law 126
1. The Constitutional Background for the Organization and the Functioning of Legislative, Executive and Judicial Powers 126
2. Constitutional Law is the Guide for other Administrative Laws 127
V. The Constitutional Review in Cambodia and its Importance 129
1. Administrative Affairs in Examining the Constitutionality of Law 130
2. How to examine the Constitutionality of Law 131
3. The Importance of the Constitutional Review in Cambodia 132
VI. The Influence of Constitutional Interpretation on the Administration 132
1. The Influence of the Constitutional Council's Decisions on Legislative Powers 132
2. The Influence of the Constitutional Council's Decision on the Executive 134
3. The Influence of the Constitutional Council's Decisions on Judicial Powers 138
VII. Conclusion 140
SELECTED BIBLIOGRAPHY 141

THE INFLUENCE OF CONSTITUTIONAL LAW ON ADMINISTRATIVE LAW

The Influence of the Constitutional Council's Decisions on the Administration In Cambodia

TAING Ratana *

Abstract

The main objective of this chapter is to provide details of the relationship between constitutional law and administrative law in the context of the Cambodian legal system, particularly the influence of the Constitutional Council's decisions on the administration. This work will focus on one of the important mandates of the Constitutional Council of Cambodia related to the interpretation of the Constitution.

The chapter tries to show the influences of the decisions of the Constitutional Council in terms of the interpretation of the Constitution on legislative, executive, and judicial power. The explanations come with an analysis of case studies which the author has been involved within his work for years at the Constitutional Council.

Besides that crucial area, this chapter will also discuss questions of legal theory of constitutional law and administrative law, the supremacy of the Constitution in the Cambodian legal system, the relationship between constitutional law and administrative law, and the constitutional review in Cambodia and its importance.

* Mr. Taing Ratana is a Chief of Bureau III, Department of Legal Affairs and Litigation, the Constitutional Council; Legal advisor to the Theravada Buddhist Order of the Kingdom of Cambodia; Professor of Law, Paññasastra University of Cambodia (PUC). He is a holder of various degrees: Executive Master of Advanced Studies (MAS) in Development Studies from the Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland; LL.B and LL.M from Royal University of Law and Economics (RULE), Phnom Penh; and DDS from University of Health Sciences (UHS), Phnom Penh.

I. Introduction

The King promulgated the Cambodian Constitution on November 21, 1993 after the approval of the Constituent Assembly. It became the sixth Constitution of this Kingdom since the first one was adopted in 1947. It is a supreme law in terms of theory and practice that has influenced much on the work of the three branches of power in Cambodia's administration.

The Constitution influences the administration as an important guideline and as a key tool for promoting the rule of law and administrative development in Cambodia.

The meaning of the Constitution's articles must be clear and therefore open questions shall be answered the Constitutional Council. The interpretation of the Constitutional Council shall be final without recourse, and shall have the authority overall the powers stipulated in the Constitution. This interpretation also takes crucial part in creating constitutional jurisprudence for the administration.

II. Overview Concerning the Legal Theory of Constitutional Law and Administrative Law

1. Constitutional Law

Most countries in the world consider a constitution as the supreme law in their state. A constitution is regarded as 'holy text' for modern states in guiding administrative affairs. The constitution strongly benefits the administration and people in those states. It brings social, political, and economic stability to a country.

A constitution can be defined in different ways according to the different aspects of administration. It has also different characteristics in term of spirit and concept. A democratic state has its own concept for constitution-making, while a socialist state has another constitutional concept. Sometimes it seems to be difficult to judge which one is better. Differences of culture, religion, political system, social behavior and social concepts all contribute to this difficult judgment.

Constitution in the Western Concept

There are many works of authors on the concepts of a constitution. Those authors define a constitution with different opinions. The main concepts are based on the rules established to govern a government. K.C. Wheare, author of *Modern Constitution*, explains in his book that the term 'constitution' is commonly used in at least two senses in many ordinary discussions of political affairs.

He explains that a constitution is used to describe the whole system of government of one country because it is the collection of rules that establish and regulates the gov-

ernment (K.C. Wheare, 1966:1). The term rules here refers to legal rules that a court of law will recognize and apply, while non-legal rules or extra-rules take the usages, understandings, customs, or conventions that the courts do not recognize as law. Non-legal rules have less effect in regulating the government than legal rules. Therefore, Wheare defines a constitution as "A selection of legal rules which govern the government of that country and which have been embodied in a document".[1]

Wheare raises the wider meaning of a constitution by using the explanation of Bolingbroke when he wrote an essay 'On Party': "By constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason…that compose the general systems, according to which community had agreed to be governed" (K.C Wheare, 1966:2). Based on this explanation, constitutional law shall be valued as a crucial supreme law, which plays an important role of guidance in administrative affairs.

The law dictionary edited by Steven H. Gifis provides the definition of constitution as "the organic law framing a governmental system; the original and fundamental principles of law by which a system of government is created and according to which a country is governed. A constitution represents a mandate to various branches of government directly from the people acting in their sovereign capacity. It is distinguished from a law, which is a rule of conduct prescribed by legislative agents of the people and subject to the limitations of the constitution." (Steven H. Gifis, 1996:100).

A Constitution in the Khmer[2] Concept

Khmer people traditionally call the term constitution in their language *rathadhammanunh*. This term is defined in the Khmer Dictionary of Samdach Chuon Nath[3] as a legislative law of each country that is considered as a core of written law to govern the country, and is established by the constituent assembly (Chuon Nath, 1968:976).

Most Khmer terms are influenced by the *Pali* language[4]. Therefore, one who knows Pali will easily find the original root of the term *rathadhammanunh*. It originates from the Pali language and is composed of three different terms: *ratha* means country, *dhamma* means law, *manunh* means good. Thus, *rathadhammanunh* means a selection of good law to govern a country. The term law here can refer to an ancient constitution and to a modern constitution of the Kingdom.

1 K.C. Wheare, *Modern Constitution*, page 2

2 The term *Khmer* is officially used in the Cambodian Constitution of 1993. It refers to Cambodian citizens.

3 Samdach Chuon Nath was the supreme patriarch of the Mohanikaya Buddhist Order. He was the author of the Khmer Dictionary, which is officially recognized for official use in the administration of Cambodia.

4 Pali is a Middle Indo-Aryan language that is in the Prakrit language group and was indigenous to the Indian subcontinent. It is a dead language that is widely studied because it is the language of many of the earliest extant Buddhist scriptures as collected in the Pali Canon, or *Tripitaka*, and it is the liturgical language of Theravada Buddhism.

It is difficult to find evidence for when this term was first used in Khmer society, but by 1947, when the first Constitution of the Kingdom of Cambodia was created, the term *rathadhammanunh* was in use. This term is currently used for Thai and Laos Constitutions[5] as well, but it has a tonal difference from the Khmer sound. Similar to people's concepts in other countries, Khmer people consider a constitution as a 'holy text' that shall be respected by all actors of the nation.

It is right to say that all the Constitutions of the Kingdom of Cambodia of modern time, from the first one adopted in 1947 to the last one adopted in 1993, are influenced by Western concepts in general, and particularly by the French Constitution. But, if we have a look through Khmer legal concepts found in the history of this Kingdom, we will find the notable concepts for the Constitution in what can be called 'Khmer legal concepts of ancient constitutions'.

Referring again to the meaning of *rathadhammanunh*, Khmer legal concepts of good laws to govern the country have existed for centuries. We should have a discussion on two principles that are both characterized as constitutional concepts for Khmer constitutional law. The first one is *Brahmaviharadhamma* and the second one is known as dasapitrajadhamma. Both principles have been the common rules for leaders and Khmer citizens from past times to the present.

The Principle of Brahmaviharadhamma is one of the concepts in Buddhism related to the administration. There are four principles of Brahmaviharadhamma as specified in the following four sublime conditions of the mind:

- *metta* means compassionate loving-kindness
- *karuna* means compassionate sympathy
- *mutita* means compassionate joy
- *ubeka* means equanimity.

These four principles have been very popular in Khmer society. They have spread throughout the social classes in the Kingdom. Most people said "Parents shall have Brahmaviharadhamma for their children, and the rulers shall give such treatment to the people as well". In Khmer culture, the concept of Brahmaviharadhamma is symbolized by 'The four faces of Brahma'[6].

This concept has been an influence on Khmer architectural concepts as well. During the Angkor period, the King Jayavaraman VII built Bayon Temple by using this concept for the structure of the temple; hence we can see that all towers of Bayon temple are shaped by the four faces of Brahma representing *metta, karuna, mutita*, and *ubeka*. The use of this concept in architectural structures is not only as an art decoration but it also expresses its profound meaning related to the law to govern the country. According to

5 Constitution (RTGS: Rattha Thammanun)

6 Brahma is one of main gods in Hinduism. Brahma is considered as God of Loka creation

Maha Dhamma Kosala Prak Prum[7], the middle tower of Bayon temple symbolizes the king, while the other surrounding towers symbolize all levels of government officials and people. In this concept, the King Jayavaraman VII intended the architecture to guide himself, all his officials, and people to respect and to fulfill the principles of *Brahmaviharadhamma* in daily life.

Interestingly, the four faces of Brahma are found today in art form in two main buildings in Phnom Penh. The first building is *Maha Prasat Devavinichhay*[8] in the Royal Palace while the second one is the palace of the National Assembly. Both institutions are closely related to law making affairs in Cambodia. It is not a coincidence that both building are shaped with the four faces of Brahma on the main towers of the buildings.

Maha Prasat Devavinichhay is reserved for the throne hall, where the king presides over the meetings of his high-ranking officials. *Devavinichhay* means 'meeting of gods'. Once again, this symbol aims at alerting the king and high-ranking officials, who are considered as gods in Khmer people's beliefs, to play roles as good rulers with *Brahmaviharadhamma*. In the past, this *Maha Prasat* was reserved as a place of law-making and a court as well.[9]

The palace of the National Assembly is also shaped with four faces of Brahma on the main tower of the building. This symbolism alerts all the members of the National Assembly to perform good functions in their mandates in order to benefit the people.

The last notable point is the coat of arms of the Constitutional Council. An image of a famous statue of Brahma[10] of Bayon style has been selected as the symbol of this institution. The adoption of this symbol aims to show that the Constitutional Council is neutral and independent. Thus, the religious-cum-legal meanings of this symbol represent ancient constitutional concepts in the Cambodian legal system.

The Principles of Dasapitrajadhamma are considered as law of the king or of rulers, who are the main actors in providing peace and happiness for the people. In the past people strongly believed that rulers with crucial laws would lead the country into peace and development.

There are ten principles of this law:

- *dana* means sharing benefit
- *sila* means practising good morals
- *pariccaga* means making selfless sacrifice for the common good

7 Prak Prum was a Professor of Buddhism at Preah Sihanouk Raja Buddhist University, Phnom Penh. He passed away in 2010. The author was trained Khmer tradition and Buddhist philosophy by this professor.

8 The official name of throne hall in the royal palace.

9 In the past, the kings of Cambodia played important roles in making such laws (*Preah Reach Panhat*), and played a role as a supreme court.

10 The original statue of this Brahma is kept in the Guimet Museum in Paris, while a replica is installed next to the Buddhist institution in Phnom Penh.

- *ajjava* means loyalty
- *maddava* means being gentle
- *tapa* means having a simple life
- *akkodha* means being compassionate, not getting angry
- *avihimsa* means not causing harm to living things
- *khanti* means being patient
- *avirodhana* means not breaking laws or other rules (Chuon Nath, 1968: 415).

These concepts contribute to the legal concepts of Khmer ancient constitutions. These two principles are also found in the modern Constitution of Cambodia. The notions of these legal concepts are beneficial for the Constitution and law-making.

2. Administrative Law

It is not easy to see the real picture of administrative law. Most authors believe that administrative law deals with the work of the administration and other related powers of administrative organs. Thus, the administration is the main source of administrative law. To better focus on administrative law, the term administration will be defined and analyzed.

What is Administration?

Professor Charles Debbasch defines administration as "the structure created by a state for governing public affairs".[11] According to this definition, administration can be used only for the public sector and not the private sector. Public affairs are the work of government for public interest. People can benefit from administration. Professor Debbasch also classified the functions of administration in four different aspects: administration as information organ, administration as prevision organ, administration as preparation organ, and administration as execution organ.

Based on the aforementioned definition, there are two concepts for administration. It can be used to refer to the 'action' or 'organ' of a government. The term action here is used to explain the administrative affairs of a government while the term organ refers to the government itself, which is the highest organ in a state, and to the governmental organs such as ministries, authorities, departments and so on. Thus, administration, in both meanings of action and organ, can be applied to structures and affairs of the three branches of power. Those are administration of legislative power, administration of executive power, and administration of judicial power.

11 Charles Debbasch, Droit Administratif, page 5: L' administration est la structure créée par l' état pour gréer les affaires publiques".

What is administrative law?

The law dictionary edited by Steven H. Gifis provides the definition of administrative law as "a law created by administrative agencies by way of rules, regulations, orders, and decisions" (Steven H. Gifis, 1996:12).

According to this definition, administrative law is created for ruling administrative works of the government. For example, the king of Cambodia promulgates the law on the organization and the functioning of the Council of Ministers after adoption by the National Assembly, review by the Senate, and an examination of the constitutionality of the law by the Constitutional Council.

III. The Supremacy of the Constitution in the Cambodian Legal System

The question related to the supremacy of the constitution of a state is still a big topic for discussion. For a state, the constitution is the supreme law. This is the status of the constitution among the domestic laws. A big discussion would be to look at the status of the constitution in relation to international instruments. Some constitutions determine clearly their supremacy and status among international instruments, while some others do not mention this point. Here, the 1993 Cambodian Constitution should be an interesting topic under the following questions:

1. Shall the Constitution be placed over all Domestic Laws in Cambodia?

It is not difficult to answer such an easy question. Article 150 (new – it was formerly Article 131) states "The present Constitution is the supreme law of the Kingdom of Cambodia. All the laws and decisions of all the state institutions must be absolutely in conformity with the Constitution."[12]

This article states clearly the status of the Constitution of Cambodia among domestic laws. The term 'supreme law' means that no other laws will be higher than the Constitution. And the term 'laws and decisions of all state institutions' refers to all kind of laws adopted by the National Assembly, the administrative orders from the government, and decisions from the courts and other national institutions.

The administrative orders shall be in the forms of royal decree made by the king, sub-decree made by the prime minister, proclamation or prakas made by the ministers, circulars and other administrative regulations made by administrative authorities. As a result, all the laws and decisions from the legislative, executive, and judicial organs shall

12 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

be consistent with the 1993 Constitution, otherwise they will be declared as unconstitutional and will not be implemented. This is the supremacy of the Cambodian Constitution among the domestic laws of the Kingdom.

2. Shall the Constitution be placed over International Instruments?

This question has been a hot topic for debate among constitutional experts. Some of them believe that the present Constitution of Cambodia shall be placed over international instruments. But some others claim that it is not really true to say that this Constitution has supremacy over international instruments. Until now, there is no jurisprudence from the Constitutional Council to answer this question. Thus, a real answer has been elusive.

The following discussion is based on debate in a book, Droit Administratif Général (Third edition) of Dr. Say Bory,[13] who tried to discuss the supremacy of the present Cambodian Constitution among international instruments that were already ratified by the king of Cambodia. In order to find an answer to this question, Dr. Say Bory considered monism theory and dualism theory.

Monism Theory is a theory that denies the existence of a distinction or duality between national law and international laws. This theory accepts the direct implementations of international instruments in the national legal system. There are two tendencies in this theory (i) Monism with the supremacy of the national law, and (ii) Monism with the supremacy of international law.[14]

Is the Khmer legal system monistic?

In order to find the answer we should have a look at separate parts in the provisions of the Cambodian Constitution, (i) parts related to international human rights, and (ii) parts non-related to international human rights.

For parts related to international human rights, paragraph 1 of Article 31 of the Constitution states "The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human Rights and all the treaties and conventions related to human rights, women's rights and children's rights."[15] Based on this Article, in terms of international human rights, the Khmer legal system is monistic with the supremacy of international law. Because this article shows that the international human rights law is a part of the Cambodian Constitution, it has

13 Dr. Say Bory has played many important roles in Cambodia such as professor of law, senior advisor to former King Norodom Sihanouk, and was a former member of the Constitutional Council of the Kingdom of Cambodia.

14 Dr. Say Bory, *Droit Administratif Général* (Third edition), page 35

15 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

constitutional value in Cambodian law. All the laws have to be consistent with the provision of Article 31 of the Constitution.

For parts non-related to international human rights: Article 26 (new) states "The King signs and ratifies international treaties and conventions after their approval by the National Assembly and the Senate." This article shows clearly that all the international instruments shall be included in national laws of Cambodia after the ratification from the king. Thus, those international instruments are considered as ordinary laws, which shall be placed under the present Constitution of Cambodia. This is another piece evidence to prove that the Khmer legal system is monistic with the supremacy of national law.

Dualism Theory is a theory that adopts the division of the national law and international laws. This theory divides separately the national law from the international law. Both laws shall have different logics and autonomies.

Is the Khmer legal system dualistic?

In order to answer this question, Dr. Say Bory raised two articles in the Cambodian Constitution for discussion.

Article 55: "Any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be abrogated."[16]

Article 92: "Any adoption by the National Assembly contrary to the principles of safeguarding the independence, the sovereignty, the territorial integrity of the Kingdom of Cambodia, and affecting the political unity or the administrative management of the nation, is reputed to be null. The Constitutional Council is the sole organ competent to pronounce this nullity."[17]

The provisions of these two Articles explain that the Khmer legal system is not dualistic because they do not clarify the separation of national law from international law. They rather can be characterized as monistic.

Finally, Dr. Say Bory made an uncertain conclusion that the Khmer legal system is monistic, but he is not sure it is monism with the supremacy of national law or monism with the supremacy of international law. The certain answer, that may come in the future, should be made by the Constitutional Council.

16 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012
17 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

IV. The Linkage of Constitutional Law and Administrative Law

The administration of a state shall follow a certain hierarchical form and be consistent with the provisions provided by the constitution. The constitution plays a very important role in guiding all the organizations and the functioning of administrative institutions and administrative affairs. One can say that the constitution is an umbrella for the administration in a state. An administration without the constitution shall be an administration with anarchy and chaos. Therefore, either a written constitution or unwritten constitution shall be regarded as a main pillar for any administration and for a rule of law process. The following are some points of the relations between both types of law:

1. The Constitutional Background for the Organization and the Functioning of Legislative, Executive and Judicial Powers

Professor Charles Debbasch states that numerous constitutional provisions are direct sources of administrative law.[18] (Debbasch, 2002:86). It means that Professor Bebbasch expresses the relationship between constitutional law and administrative law in terms of a hierarchy of law. Constitutional law provides direct sources for administrative law in the same way as water flows from a river into canals. The constitution plays the role of guiding administrative law. The constitution shows the main ways to organize and to perform the functions of the National Assembly, of the government, and of the court systems. Therefore, the constitution characterizes the administration in the three branches of power as the most important organic law[19] in Cambodia. Here are some articles to prove this statement.

Article 76 of the 1993 Cambodian Constitution determines that the total membership of the National Assembly shall comprise at least 120 members. This Article also mentions the means of how to form the National Assembly, that the members of the National Assembly shall be elected by a universal, free, equal direct suffrage and secret ballot. The National Assembly's members can be re-elected. It also determines the rights of Khmer citizens in the process of forming the National Assembly. Khmer citizens of both sexes enjoy the right to vote, and those aged at least 25 years and who have Khmer nationality by birth, have the right to be candidates to the National Assembly.

Article 119 new (formerly Article 100) of the Constitution provides how to form the Royal Government of the Kingdom of Cambodia. It states that upon the proposal of the president of the National Assembly in agreement with the two vice-presidents, the king

18 Original French version: De nombreuses dispositions de la Constitution sont la source directe de régles de droit administratif.

19 Organic Law is defined by Law Dictionary of Steven H. Gifis as: The fundamental law of a country, state, or society; the law upon which its legal system is based, whether that law is written, such as a Constitution, or unwritten.

assigns a high-ranking person among the members of the National Assembly from the winning party to form the Royal Government. This assigned high ranking person, accompanied by his/her colleagues who are members of the National Assembly or members of the parties represented at the National Assembly and who are in charge of ministerial functions within the Royal Government, solicits the confidence of the National Assembly. Once the National Assembly has voted on confidence, the king signs the kret appointing the whole Council of Ministers. Before taking office, the Council of Ministers shall take an oath according to the text written in annex 6.

Article 128 new (formerly Article 109) explains the independence, duties, and functions of judicial power in Cambodia. Judicial power is an independent power. Judicial power is the guarantor of impartiality and the protector of citizens' rights and liberties. Judicial power covers all litigations, including administrative litigation. This article also shows the main organs in judicial powers that are responsible for this duty. This power is entrusted to the Supreme Court and to the jurisdictions of the various categories.

Moreover, the Constitution is the core foundation for other laws and normative acts of the administration in Cambodia. For instance, Article 158 new (formerly Article 139) of the 1993 Cambodian Constitution reassures that laws and normative acts in Cambodia that guarantee the state properties, the rights, the liberties and the legal properties of private persons and that are in conformity with the national interests, shall remain in force until the new texts are made to amend or to abrogate them, except the provisions contrary to the spirit of the present Constitution. This Article guarantees the implementation of other laws and normative acts that are beneficial for administrative affairs and for the public or private interest.

2. Constitutional Law is the Guide for other Administrative Laws

Even though the Constitution is the main legal text or the supreme law, which cannot be ignored in administrative affairs, the Constitution alone will not provide the effective and full implementation of laws for the management of administrative affairs. We really need a great amount of other supporting laws as well to run an administration, in the same way that a house needs not only pillars but also other structures in order to be balanced. The Constitution is only the main guidance of the administrative work. For details, guidelines shall be determined in supporting legal texts or subordinated laws. As a result, we can see that after a constitution is adopted, many laws under the provision of the Constitution shall be established as well. Proof of this statement can be found in the provisions of the 1993 Cambodian Constitution[20].

20 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

Article 13 (new) on the composition of the Crown Council is considered as guidance for the law on the organization and the functioning of Crown Council. Paragraph 2 of this law states, "The organization and functioning of the Crown Council shall be determined by law". Once the Crown Council assembles its members to elect the king, it shall be acting in accordance with this law. This law is the main source for the administrative work of the Council.

Article 24 (new) determines the role of the king in relation to the Supreme Council of National Defense; it guides the administration of Cambodia in creating the law on the organization and the functioning of this Supreme Council. Paragraph 1 of this Article states, "The King is the President of the Supreme Council of National Defense, which shall be created by a law".

Article 57 covers the administrative management of tax and the national budget of the Kingdom of Cambodia, and guides the administration to create law for tax collection, a law on the national budget, and laws on monetary management and the financial system. This Article states, "Tax can be collected only when it is authorized by a law. The national budget shall be laid down and carried out in accordance with the law. The monetary management and the financial system shall be determined by the law."

Article 58 provides the duty of the Cambodian government to manage all the state properties such as land, underground resources, mountains, sea, seabed, under-seabed, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centres, national defense bases, and other building facilities belonging to the state. This Article guides the government to create laws as Paragraph 2 states, "The administration, the utilization and the assignment of State's properties shall be determined by the law".

Article 76 guides the administration to create law related to the organization and the preparation of the election of the National Assembly. Paragraph 5 of this article states, "The organization in charge of preparing the elections, their modalities and functioning shall be determined by the electoral law."

Article 94 guides the National Assembly to create a Rule of Procedure to support the functioning of its administrative affairs. This article states, "The National Assembly creates various necessary commissions. The organization and the functioning of the National Assembly shall be stipulated in the National Assembly's Rules of Procedure."

Article 101 (new) guides the administration to create law related to the election of senators. This article states, "The modalities of the organization and the functioning of the appointment and the elections of the Senators as well as the determination of the voters, the electoral colleges and the electoral constituencies must be determined by a law."

Article 117 (new) guides the National Assembly and the Senate to create law on the organization and the functioning of the Congress. This article states, "The important issues of the country as provided in the Article 116 new, as well as the organization and functioning of the Congress, shall be determined by a law. "

Article 127 new (formerly Article 108) guides the administration to create law on the organization and functioning of the Council of Ministers. This Article states, "The organization and functioning of the Council of Ministers are stipulated by a law."

Article 134 new (formerly Article 115) guides the administration to create an organic law related to the Supreme Council of Magistracy. This Article states, "The Supreme Council of Magistracy shall be created by an Organic Law, which determines its composition and attributions."

Article 135 new (formerly Article 116) guides the administration to create the statutes of judges and public prosecutors. This Article states, "The statutes of judges and public prosecutors and the judicial organization shall be stipulated in separate laws."

Article 144 new (formerly Article 125) guides the administration to create law on the organization and the functioning of the Constitutional Council. This Article states, "The organization and the functioning of the Constitutional Council are subject to an organic law."

Article 146 new (one) guides the administration to create laws related to the elections and the administrative management of the territorial administration. This Article states, "Reach Theany, Khet, Krong, Srok, Khan, Khum and Sangkat are administered according to the conditions provided by an organic law."

Lastly, article 149 (new) guides the administration to create law on the organization and the functioning of the National Congress. This article states, "The organization and the functioning of the National Congress shall be stipulated by a law." But such a kind of law will never be created because this law would be contrary to the principle of the representative democracy in Cambodia. A National Congress can be applied to a society with direct democracy but not one with representative democracy. Thus, we should address some questions such as: Is it necessary to keep Chapter 14 new on the National Congress in the 1993 Cambodian Constitution? Why was this chapter created while Cambodia implements representative democracy? Nobody can provide the answer except the Constitution makers of 1993.

V. The Constitutional Review in Cambodia and its Importance

The constitutional review is a crucial means to guarantee adherence to the Constitution, to check whether or not a law, after its adoption by the legislature, is in conformity with the constitution. Normally, there is one institution that is invested with the power and jurisdiction of the constitutional review. In some countries this competence is given to the Supreme Court, for instance the United States, some have a specialized Constitutional Court, for instance Germany, and some others give this competence to the national assembly. Cambodia empowers the Constitutional Council with this jurisdiction. The Con-

stitutional Council holds the constitutional review through the mean of the examination of the constitutionality of laws.

The Constitutional Council interprets the constitution and the laws, in the framework of the examination of the constitutionality, when requested by the king, the president of the Senate, the president of the National Assembly, the prime minister, one fourth of the senators, one tenth of the National Assembly members or by the court (for promulgated laws only).

Within the aforesaid mentioned conditions, the Council can examine the constitutionality of laws before (a pririori) or after (a posteriori) their promulgation, except organic laws, the rules of procedures of the Senate and of the National Assembly, which shall be examined before their promulgation (or their implementation).

1. Administrative Affairs in Examining the Constitutionality of Law

The request for the examination of the constitutionality of a law shall be done by the aforesaid dignitaries. Once the letter of request is submitted to the Council the Bureau of Administration, it will notify the secretary general of the Council. The secretary general will notify and send it to one of the bureaus[21] of the Department of Legal Affairs and Litigation. The chief of that bureau makes a notification to the director of department through the deputy director of department. The director of the department submits this notification to the deputy secretary general through his assistant, then to the secretary general, and finally to the president of the Council.

Once the president of the Council received the notification, he assigns one of the members of the Council to be a rapporteur and some other officials of the Department of Legal Affairs and Litigation to be assistants. The rapporteur in this case shall draft a report and decision for sessions of the Council. Then three sessions will be arranged as follows:

Group session: The rapporteur convenes his group members[22] for a meeting to discuss the draft report and draft decision. The three members of the group share their opinions on both documents. The assistants, generally one chief of bureau and an official, assist this session in making notes and providing other assistance.

Preliminary session: After the group session has finalized the drafts, the rapporteur informs the president for preliminary session arrangement. Then, the president shall invite all the members of the Council for this session through a formal invitation letter attached to an agenda. The quorum for this session shall be more than a half of its members[23].

21 There are three bureaus (i) bureau I (ii) bureau II (iii) bureau III of the Department of Legal Affairs and Litigation, which handles the cases on a rotating basis.

22 The nine members of the Constitutional Council are divided into 3 groups composed of 3 members, one from the King, one from the National Assembly, and another one from the Supreme Council of Magistracy.

23 Article 12 (new) of the rules of procedure of the Constitutional Council.

The members of the Constitutional Council attend this session to review the report made by the rapporteur and already approved by the group members. An assistant counsel composed of 6 members will assist this session. Normally, the members of the assistant counsel are: The secretary general, the deputy secretary general, director of department, deputy director of department, chief of bureau, and an official from the interested bureau. This session is arranged for examining and discussing the request.

Plenary session: Again the president of the Council will invite the members for this session after the successful discussion in the preliminary session. The invitation and agenda will be made in the same form as those in the preliminary session. The quorum of this session shall be also more than half of its members[24]. The same assistant counsel of the preliminary session shall again assist this session. The members of the Constitutional Council will attend this session to discuss and to decide on the cases. The vote for the adoption of the decision shall be by absolute majority[25].

Once the decision has been adopted, six original copies will be sent to institutions for their information. One copy will be sent to the Minister of the Royal Palace for informing the king. One copy will be sent to the secretary general of the Senate to inform the president, vice-presidents, and all the senators. One copy will be sent to the secretary general of the National Assembly to inform the president, vice-president, and all members of the National Assembly. Another copy will be sent to the director of the Department of Administration and Finance of the Supreme Court to inform the president of this institution. And the last two copies will be sent to the secretary of the Royal Government to inform the prime minister and for publication in the Royal Gazette.

2. How to examine the Constitutionality of Law

The examination of the constitutionality of law is a way to check the consistency of an adopted law with the provisions of the Constitution. We can normally say that it is the way to examine the provision of one law with the provision of the Constitution in order to make sure that all the provisions of that law conform to the provisions of the Constitution. In order to check the constitutionality of a law, the Constitutional Council shall focus on two main parts

(i) *Legal form*: the Council will consider Article 113 (new), and Article 140 (new) of the Constitution, and Article 16 (new) of the law on the amendment of the law on the organization and the functioning of the Constitutional Council. Article 113 (new) of the Constitution covers the adoption process of a law. Article 140 (new) covers the competent persons who have jurisdiction to ask for examination of the constitutionality of law.

24 Article 12 (new) of the rules of procedure of the Constitutional Council.
25 Article 18 (new) of the rules of procedure of the Constitutional Council.

(ii) *Legal ground*: the Council will carefully review all the provisions of the law and find the points that are considered a 'point of consistency' or a 'point of contrast' to the Constitution. In order to do this, the Council has to review the meaning of the provisions in both laws. Not only the provisions but also the terms used must be consistent with those stated in the Constitution. The method of the examination should be appropriate to the kind of law. If the law comprises many articles, the examination can be done by chapters, while with one that has few articles, the examination can be done article-by-article.

3. The Importance of the Constitutional Review in Cambodia

The examination of the constitutionality of law must be done for the rules of procedure of the National Assembly, the rules of procedure of the Senate and the organic laws; and can be done in the forms (i) *a priori* and (ii) *a posteriori* for ordinary laws. This is important to guarantee the adherence to the constitutionality of law. The Constitution itself describes this importance. It is the best means to keep good order in the law-making process. Respect for the legal hierarchy is beneficial for the administrative order.

The examination of the constitutionality of law in Cambodia shall be done in order to guarantee the respect of :(i) the rights and freedoms of Khmer citizens (ii) the constitutional monarchy (iii) the separation of power and (iv) the policy of liberal multi-party democracy in Cambodia.

VI. The Influence of Constitutional Interpretation on the Administration

The Constitutional Council has ruled on many cases since 1998 related to constitutional interpretation, legal interpretation, examination of the constitutionality of law, and electoral litigation. All the decisions on those cases have influenced all levels of administration. The following case studies will cover the influence of the decision of the Constitutional Council on the administration of the legislative, administrative, and judicial powers.

1. The Influence of the Constitutional Council's Decisions on Legislative Powers

A case study on the interpretation of Article 112 (New) of the Constitution (A case related to the function of the Senate in coordinating the work between the National Assembly and the Royal Government).

Background

The president of the Senate wrote a letter dated 16 October 2000 requesting the Constitutional Council to interpret Article 112 (new) of the Constitution, and this letter was received by the secretariat general of the Council on 18 October 2000. The president of the Senate pointed out the term 'coordination' in this Article, which was not clear for the Senate in fulfilling its function as the coordinator for the National Assembly and the government of the Kingdom of Cambodia.

The background of this case concerns a recommendation from the regal counsel of the Senate in their process of amending the rules of procedure of the Senate. The secretary-general of the Senate wrote a letter dated 16 October 2000 to first vice-president of the Senate to inform that in order to facilitate the process of the amendment of the rules of procedure of the Senate, Mr. Philippe Pejo and the legal counsel recommended the Senate ask for the interpretation of Article 112 (new) of the Constitution on the duty of the Senate in coordinating the work between the National Assembly and the Royal Government.

Interpretation

Through decision N. 038/004/2000 CC.D dated 8 November 2009, the Constitutional Council interpreted this Article as follows:

Article 112 (new) states, *"The Senate has the attribution to coordinate the work between the National Assembly and the Government."*[26]

The Council points out in its decision that Article 112 (new) of the Constitution shows the political function of the Senate as follows:

- The Senate has the attribution to coordinate the work between the National Assembly and the government in order to find the political conflict resolution in case they meet this conflict at any time. This attribution could not be limited by other legal regulation, and could not be determined in more detail rather than Article 112 (new) of this constitution.
- The Senate has rights and power to intervene, with no limitation, in either small or great political conflict between the National Assembly and the government by all means and at any time. This Article provides the honor and confidence to the Senate with a very crucial political function of coordination in order to benefit the nation.
- The Senate is considered as a full political experience organ; hence the Senate's political coordination function should be valued by the National Assembly and the government.
- The Senate's coordination function has no legal force on the National Assembly and the government. The coordination by the Senate shall be considered as positive result unless the National Assembly and the government agree this resolution.

26 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

Analysis

The Constitutional Council determines the functions of the Senate in term of political function, to intervene with no limitation, and at any time in cases where there is conflict between the National Assembly and the government. It is clear that the Senate is not a legislative organ but a mediator for the political conflict. This function could not be determined in more detail other than the provision provided by Article 112 (new) of the Constitution because no one can predict the forms of the political conflict that could happen. Therefore, one can see that the Senate has a crucial function in the political resolution because it plays role as mediator in conflict resolution.

However, the Senate has no force to put pressure on the parties in the political conflict as clarified in the decision of the Constitutional Council. Thus, it is true that the resolution of the Senate will be nonsense if there is no consent from the National Assembly and the government. It is just a right to deal with but not a decision making power to decide over any kind of conflict between the parties.

2. The Influence of the Constitutional Council's Decision on the Executive

A case study on interpretation of Article 4 and Article 43 of the Constitution (The case related to a conflict of ideas between the Minister of Cults and Religion and the Theravada Buddhist Order of the Kingdom of Cambodia on the meaning of the term 'religion' in the motto of the Kingdom of Cambodia).

Background

The President of the National Assembly sent a letter dated 15 December 2009[27] requesting the Constitutional Council to interpret Article 4 and Article 43 of the Constitution. The letter was received by the secretariat general of the Constitutional Council on 16 December 2009. This request was made in accordance with a proposal in a letter from the Theravada Buddhist Order dated 13 December 2009[28] requesting the president of the National Assembly to ask the Constitutional Council to interpret Article 4 and Article 43 of the Constitution.

27 Letter of Samdach Akak Moha Ponheachakrei Heng Samrin to The Constititutional Council

28 Letter of Samdach Preah Moha Sometheadipadi Nunt Nget, Patriarch of Theravada Buddhist Order, dated 13 December 2009 to Samdach Akak Mohaponheachakrei Heng Samrin, the President of the National Assembly.

The background of this case concerns a conflict of ideas between the Minister of Cults and Religion and the Theravada Buddhist Order[29] on the term 'religion' in the motto of the Kingdom of Cambodia. The Minister interpreted this term in favor of religion in general, while the Theravada Buddhist Order interpreted in favor of Buddhism. The distinction of views led to a serious conflict of ideas between the Ministry of Cults and Religion and Theravada Buddhist Order. It was not a simple issue by that time, but it could cause religious conflict if the problem was not solved properly. This conflict influenced the administrative relationship between the Ministry of Cults and Religion and Theravada Buddhist Order. Finally, it was solved through the mechanism of the Constitutional Council.

Interpretation

Through decision N. 107/003/2009 CC.D dated 23 December 2009, the Constitutional Council interpreted those two articles as follows:

Related to Article 4 of the Constitution, it stipulates, "The motto of the Kingdom of Cambodia is Nation, Religion, King."[30]

For this article, the Constitutional Council interpreted that the motto of the Kingdom of Cambodia is only a condensed formula, specifying the objectives determining the activities of the persons, including individuals and legal entities domiciled with an address in the Kingdom of Cambodia. All those persons shall respect the nation, the religion and the king. Concerning the religious practices, they are stipulated in the provisions of the various articles of the Constitution.

For Article 43, composed of 3 paragraphs that provide the right of Khmer citizens to believe, the Constitutional Council interpreted as follow:

Paragraph 1 stipulates, "The Khmer citizens of both sexes shall have the full right to believe." [31]

This paragraph means that Khmer citizens of both sexes have the full freedom of belief or of the practice of their belief and religion in accordance with their conscience at all times and circumstances.

29 On 11 December 2009 Theravada Buddhist Order consulted the author, who is a legal advisor to this institute, on this case. The author advised that only the Constitutional Council could officially interpret those articles. Thus, the author recommended the Theravada Buddhist Order to ask the Constitutional Council to interpret those articles. By law, Theravada Buddhist Order is not qualified to ask for a constitutional interpretation. Thus, the author advised the Theravada Buddhist Order to ask for an interpretation through the President of the National Assembly. The author believed that this mechanism would be the best way for both parties because the decision of the Constitutional Council is final without recourse, and has power over all the instituted powers stipulated in the Constitution.

30 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

31 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

Paragraph 2 stipulates, "The Freedom of belief and religious practice shall be guaranteed by the State, provided that such freedom and religious practice do not impinge on other beliefs and religions, on public order and security." [32]

This paragraph means that the state shall guarantee the freedom of belief and religious practice to be able to proceed as usual, but this freedom and worship shall also have limitations. The exercise of freedom and the practice of belief and religion must not impinge on other beliefs or religions, and must respect the freedom and the practice of beliefs or religions of other people as well. Furthermore, the exercise of freedom and the practice of belief and religion must not impinge on public order and security at all costs.
Paragraph 3 stipulates, "Buddhism is State's religion."

The Constitution is the supreme law of the Kingdom of Cambodia. Since paragraph 3 of Article 43 of the Constitution has so stipulated, therefore the provisions of other Articles of the Constitution and of the laws, as well as of minor laws, are determined in accordance with the above-mentioned spirit, Buddhism being the state's religion. Therefore:

- In the Kingdom of Cambodia, the state assists, supports and elevates Buddhism to be worthy of a state's religion, by being developed, grand, and glorious. That is the reason why, in the royal ceremony of the coronation of the King of Cambodia, there is the presence of supreme patriarchs of the two Buddhist Orders in accordance with the royal rites. Moreover, the main Buddhist festivities, in particular those of Meak Bochea and Visak Bochea, are made national holidays.
- The *Māhānikāya* supreme patriarch and the *Dhammayutikanikaya* supreme patriarch[33] are members of the Crown Council as stipulated in Article 13 (new) of the Constitution. The supreme patriarchs of both orders preside over important oath ceremonies as stipulated in the annexes of the Constitution, and in the national anthem the third verse says: "In all the temples echoing the voice of the Dharma, chanting with joy, remembering Buddhism with gratitude, may we as true and sincere believers follow the path of our ancestors, so that the Tevadas may assist and grant prosperity to the Khmer Land as a Great Nation."
- The state shall help propagate and promote the Pālī schools and Buddhist education in accordance with the paragraph 3 of Article 68 of the Constitution.
- And the great majority of the Khmer people in the Kingdom of Cambodia have raised the national flag, the Buddhist flag, and the royal emblem side by side, with the conscience in the belief that the wheel of the state and the wheel of Buddhism must turn evenly, and then the nation can prosper and be glorious.

32 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012
33 Cambodian Theravada Buddhism is devided into two orders: *Mahanikaya* and *Dhammayutikanikaya*

Analysis

In the aforementioned decision, the Constitutional Council did not clearly state whether the term 'religion' in the motto refers to Buddhism or refers to religion in general. This interpretation seems not to be clear for the concerned parties to this case. However, the council considers that the meaning is clear enough for 'Nation, Religion, and King' in the motto. There should have to be no more interpretation. But the following provisions in Article 43 of the Constitution clarify already about the meaning of Article 4.

Article 43 of the Constitution was interpreted in favor of the adherence of the rights and freedoms of citizen (paragraph 1 and 2), but it seems to value more weight on Buddhism (paragraph 3). The interpretation recognizes the full freedom of belief or of the practice of belief and religion, the term 'belief' being very broad in meaning. Beliefs can be found in religions such as Buddhism, Hinduism, Christianity, and in the traditional beliefs of Khmer citizen in the spirits of their ancestors, Neak Ta.

Even though the Constitutional Council did not define clearly the meaning of 'religion', in the interpretation of paragraph 3 of Article 43, the Council re-alerted Khmer citizens at the end of interpretation that "…in the belief that the wheel of the State and the wheel of Buddhism must turn evenly, and then the Nation can prosper and be glorious". In this sense, it seems that the Constitutional Council prioritized Buddhism. Besides this, the Council raised important roles of Buddhism in crucial ceremonies of the Kingdom such as the coronation of the king, the Meak Bochea and Visak Bochea, for instance.

As a result, we can conclude that even though the Council did not explain clearly the kind of religion referred to in the motto as demanded by the parties to this case, Buddhism has benefited from the interpretation. This interpretation provides clear guidance about the roles of the government and Khmer citizens in promoting Buddhism as the state's religion. The Council has to play its role as a neutral and independent institution, so it was very hard for the Council in ruling this case. The Council was in the middle between the concepts of 'Freedom to believe' and 'Buddhist culture in Khmer Society', which are both provided by the Constitution. Thus, the Council balanced the universal principle and national value.

3. The Influence of the Constitutional Council's Decisions on Judicial Powers

A case study on the interpretation of Article 33 of the Constitution (A case related to a conflict of ideas concerning the jurisdiction of the Cambodian courts on the case of Khmer Rouge leader Ta Mok).

Background

Forty-one members of the National Assembly wrote a letter dated 6 April 1999 requesting the Constitutional Council to interpret Article 141 (new) of the Constitution. This was received by the secretary-general of the Council the same day.

The background of this case concerns the conflict of idea among the national and international communities, press organizations, and NGOs, who had discussed the procedure for prosecuting Ta Mok.[34] The main point of this discussion was the jurisdiction of the court that would have the competence to rule on Ta Mok's case. Should it be a national court or an international court?

Interpretation

Through decision N. 03. CC.D dated on 28 April 1999, the Constitutional Council interpreted this Article as follows:

Paragraph 1 of Article 33 of the Constitution stipulates, "Khmer citizen shall not be deprived of his/her nationality, exiled, or arrested to be extradited to a foreign country, except in case of mutual agreement."[35]

This Article strongly aims to protect the rights and interests of all citizens, especially protecting them from any forms of deprivation of Khmer nationality, from exile, or from arrest to be extradited to any foreign country. Thus, all the forms of extraditing Khmer citizens to be convicted or punished outside Cambodia shall not be accepted according to the legal framework of Article 33 of the Constitution except in the case of mutual agreement.

Analysis

During the 1990s, there was a very notable event related to the Khmer Rouge topic. The government of Cambodia suggested that the United Nations would help to form a tribunal for ruling on Khmer Rouge top leaders and the most responsible persons during the

34 Ta Mok is one of Khmer Rouge leaders who was captured by the government on 6 May 1999. He passed away before he could be sent to the Extraordinary Chamber in the Cambodian Court (ECCC).

35 *The Constitution of the Kingdom of Cambodia*, version supervised by the Constitutional Council, 2012

period of Democratic Kampuchea[36]. Both parties had a long discussion on the creation of such a tribunal. The main obstacle in this discussion was on the form of tribunal. The United Nations preferred, at that time, a form of international court while the Government of Cambodia liked a national court within the jurisdiction of Cambodian legal system. During the discussion, some Khmer Rouge leaders including Ta Mok were arrested by the Government of Cambodia. Thus, the jurisdiction of the court for ruling on those accused became a hot topic.

The interpretation of the Constitutional Council was short. The Council pointed out what was already provided by Article 33 of the Constitution. The Council did not make a decision on the jurisdiction of the court because Article 33 has the phrase "…except in case of mutual agreement…", so the Council could not interfere in the rights of the government. The decision on the form of tribunal ruling on Khmer Rouge cases was a political one for the government.

However, the mutual agreement between the Government of Cambodia and the United Nations must be consistent with the Constitution of Cambodia otherwise it shall not be implemented. In this case the Constitution shall declare the nullity of the mutual agreement consistent with Article 55[37] and Article 92[38] of the Constitution of Cambodia.

36 Official name of the Khmer Rouge regime.

37 Article 55: "Any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be abrogated."

38 Article 92: "Any adoption by the National Assembly contrary to the principles of safeguarding the independence, the sovereignty, the territorial integrity of the Kingdom of Cambodia, and affecting the political unity or the administrative management of the nation, is reputed to be null. The Constitutional Council is the sole organ competent to pronounce this nullity."

VII. Conclusion

It is not hard to show a clear influence of constitutional law on administrative law. Constitutional law can be seen as administrative law, but the supreme one. Constitutional law can be considered as the trunk of a tree while the administrative law can be seen as branches of that tree. The branches of a tree can grow strong and healthy because of a healthy trunk.

The Cambodian Constitution is a core document for the administration of Cambodia. All the administrative laws and regulations must be consistent with this law; otherwise they cannot be implemented. The Constitutional Council plays a very important role in guaranteeing this consistency. All the decisions of the Constitutional Council contribute to constitutional jurisprudence in Cambodia. All of the decisions influence the administration in the tree branches of the power stipulated in the Constitution.

As result, the decisions of the Constitutional Council are considered as crucial guidance for the administration in case it meets any difficulty in its implementation related to the constitutional context. The essence of those decisions is guaranteed by the Constitution and the law on the organization and the functioning of the Constitutional Council. It is important to have such an institution in the Cambodian legal system.

SELECTED BIBLIOGRAPHY

– André de Laubadére, *Traité de droit Administratif*, Paris (1977)
– Calvin C. Jillson, *Constitution Making*, University of Colorado (1988)
– Charles Debbasch, *Droit Administratif*, Edition Economica, Paris
– Chuon Nath, *Khmer Dictionary*, Buddhist Institute, Phnom Penh (1968)
– Constitutional Council, *Constitution of Cambodia*, Phnom Penh (2010)
– Clauspeter Hill/Jörg Menzel (Ed.), *Constitutionalism in South East Asia* (2008)
– Jean Michel de Forges, *Droit administratif*, Presses Universitaires de Paris (1983)
– Kathleen Foley, *The Australian constitution's influence on the common law* (2003)
– K.C.Wheare, *Modern Constitution*, Oxford University Press, London (1966)
– M.J.C. Vile, *The constitutionalism and the separation of power*, Liberty Fund (1998)
– Neil Hawke, *Introduction to Administrative Law*, London (1996)
– Owen E. Hughes, *Public Management and Administration*, Melbourne (2002)
– Raoul M. Jenna, *The Cambodian Constitutions (1953-1993)*, White Lotus (1995)
– Say Bory, *Administrative Science* (1st ed.), Phnom Penh, Editions Angkor (2007)
– Say Bory, *Droit Administratif Géneral* (3rd ed.), Phnom Penh, Editions Angkor (2002)
– Steven H. Gifis, Law Dictionary, Barron's Educational Series Inc (1996)
– Valentina Barbateanu, *The influence of the constitutional jurisdictions on the basic laws*, study paper (2012)

ADMINISTRATIVE COMPLAINT MECHANISMS IN CAMBODIA

The Current Situation and its Challenges

KHLOK Dara

CONTENTS

Abstract 145
I. Introduction 146
II. Overview of the Current Administrative Complaint Structure 147
1. Legal and Policy Framework 147
2. Types of Complaints/Structure 149
III. Assessing the Current Administrative Complaint Structure 152
1. Complaints against Decisions of the Administration 153
2. Complaint against the Provision of Services 159
3. Complaints against Corruption and other Forms of Abuse of Power 164
4. Complaints against Illegal Regulations and Misbehaviour of Administration 168
IV. Conclusion and Remarks 169
SELECTED BIBLIOGRAPHY 170

ADMINISTRATIVE COMPLAINT MECHANISMS IN CAMBODIA

The Current Situation and its Challenges

KHLOK Dara *

Abstract

A good relationship between citizens and the public administration is a core requirement for good governance of a country. A citizen should have the right to clarify or complain about any unclear decision/regulation or wrongful action from the administration, and consequently the administration has to be open and responsive to the citizen's claim or complaint in an effective manner. To have such an accountable, transparent and responsive administration, effective complaint mechanisms should be established.

This principle of Good Governance has been stipulated in the Rectangular Strategy of the government, where the administration needs to fulfill all important requirements for providing better services to citizens, including effective complaint resolution mechanisms. The rights to review and clarify the decisions and actions of the administration seem limited in the Cambodian context, even though the constitution envisages clearly these rights in Article 128[2-3] and other sector laws. The mechanisms are fragmented, which makes it very difficult for citizens to access justice in administration matters even in ordinary cases. Therefore, this chapter will study the current situation of administrative complaints mechanisms in Cambodia, focusing only on the mechanisms inside the administration in order to find out the challenges and issues for improving and building effective mechanisms to ensure citizens' rights and trust. To do this, the chapter will highlight first the current legal and policy framework, the type of administrative complaint and its structure, and finally assess the current type of administrative complaint by focusing on two specific cases for deeper analysis. At the end, the chapter will provide some recommendations for improving the existing mechanisms.

* Mr. Khlok Dara holds a Master of Public Management (MPM) degree from Germany, LLM from Japan and M.A in Political Science from Cambodia. Currently he is the Head of Division of Human Rights and Arbitration of the Council for Legal and Judicial Reform and a part-time lecturer of law and political science and public management in Pannasastra University of Cambodia (PUC).

I. Introduction

In 1993, Cambodia adopted a liberal multi-party democratic system. Since then many reforms have been introduced and implemented. The Rectangular Strategy provided a comprehensive legal and judicial reform and public administrative reform program. One of the key areas is to improve institutions related to the organization and operation of the public administrative system, including those that "regulate the relationship between the State and its citizens."

The mechanism for the settlement of citizens' complaints is one of the essential institutions in the relationship between the state and society. There is a need for the government of Cambodia to seriously consider the development of effective mechanisms that can improve the relationship between the citizens and public administration, especially building trust.[1] The improvement of these mechanisms will contribute to enhancing the effectiveness and efficiency of public administrative practices, and simultaneously promote the implementation of citizens' civil and political rights.[2] The administration needs to be open, transparent and accountable to citizens.

The Constitution of Cambodia (1993) provides all citizens full rights to complain against wrongdoing by the administration.[3] Currently many complaints have been filed against the administration in both individual and collective manners. However, citizens are not satisfied with the settlement of their complaints. There are no clear, properly functioning mechanisms in place and citizens don't know where to file their complaints and how the process of the complaint should be followed since the mechanisms that do exist are without systematic arrangement.[4] Most of the complaints are lodged with the highest institutions of the state such as the prime minister, office of the Council of Ministers, king, National Assembly, Senate or main donors and international organizations.

Given this fact, the government has tried very hard to enhance and strengthen the existing systems. Despite some improvements, there are still many challenges and issues that the government needs to address at a time when it is working to develop the country. The improvement and strengthening of an effective complaint mechanism to deal with maladministration is behind schedule. It needs more effort from all relevant stakeholders to contribute to this reform process.

1 Khlok Dara, 2009, *Searching for Implementing an Ombudsman System in Cambodia*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ).p.13.
2 Legal and Judicial Reform Strategy, p. 6–7
3 Constitution, 1993, Article 39 [1]
4 Khlok Dara, 2009, *Searching for Implementing an Ombudsman System in Cambodia*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ), p. 26

This paper will study the current mechanisms for settling administrative complaints in Cambodia and the challenges they face. In doing so, the paper will first highlight the current legal and policy framework supporting the mechanisms, the types of complaint and structure, and finally assess and analyze two specific cases of complaints against decisions and provision of services. The assessment will focus on four questions:

1. Is the institutional set-up clear or is the mandate doubling-up/overlapping?
2. Is the complaint process easy to understand and to comply with?
3. Is the conflict resolved in an effective and efficient manner?
4. Can a citizen appeal against a decision?

II. Overview of the Current Administrative Complaint Structure

1. Legal and Policy Framework

Constitution

The Cambodian Constitution provides full rights to all citizens to exercise their rights to complain against the administration as stipulated in the two famous articles, Article 39 and Article 128, explained below. These rights can be exercised through the competent institutions that are responsible for handling the administrative complaint and, if complainants are dissatisfied, they can appeal to the court for a final decision.

Article 39 [1] states:

Khmer citizens have the right to denounce, make complaints, or claim compensation for damages caused by any breach of the law by institutions of the state, social organizations, or by members of such organizations.

Article 39 [2] and Article 128 [3] state:

Article 39[2]: "The settlement of complaints and claims for compensation for damages is the responsibility of the courts."

Article 128[3]: "The judiciary shall consider all legal cases including administrative cases."

Laws

Sector law provides rights to citizens or any interested person to complain against actions of the administration. Some sector laws establish their own special institutions for handling complaints from citizens, such as the law on electricity in Article 7 [6], providing the power to the Electricity Authority of Cambodia (EAC) to handle complaints on behalf of the Ministry of Industry, Mines and Energy. Other sector laws provide the power to settle complaints to the respective line ministry such as Law on Tourism, which provide this power to the Ministry of Tourism as mentioned in Article 46 of the Law on Tourism:

Any person considered him/herself a victim of the decision of the Ministry of Tourism or the Sub-National Administration on the rejection, suspension, revocation and downgrading of the Tourism License or other relevant decisions as stipulated in Chapter 5 of this Law may file a written complaint to the Minister of Tourism or the Sub-National Administration within 30 (thirty) days upon receipt of the written notification of any decisions as mentioned above.
Upon receipt of the complaint, the Ministry of Tourism or the Sub-National Administration may suspend its decision and reconsider the matters within 60 (sixty) days.

Again, the sector law not only stipulates the rights of citizens to complain and the place where citizens can lodge a complaint, but the law also mentions sanctions for harmful actions, namely the traffic law, which clearly defines the punishment for police who abuse their power during their performance.[5] There are provisions on sanctions outlined in the chapter on punishment provision.

The organic law provides rights to the citizen for filing complaints against maladministration as well. The Law on Administration Management of Capital, Province, City, District, and Khan Article 85 clearly envisages the rights of citizens to complain against a territorial administration. However it is still unclear whether complaints can be filed by all citizens even they don't have residence in the place where they want to complain.

Article 85 of the organic law stipulates, "…Any person or persons who have been adversely affected by, or have paid taxes or service charges because of illegal actions or decisions, may submit their claim to the council to provide compensation and pay back in full amount. Any person or persons whose claim for compensation has been rejected or has not been paid by the council within a two month-period, that person may inform and make a complaint to the Minister of the Ministry of Interior to coordinate and solve the problem. In the event that the person does not agree with the solution made by the Minister of the Ministry of Interior, that person has the right to file their complaint."

5 Law on Traffic, 2006, Article 72 mentions that "Any officials or agents responsible for traffic order used their power to confiscate the driving icense, number plate, identification card or keeping the driver's vehicle, shall be jailed from 6 (six) days to one (1) month and or fined from Riel 25,000 to Riel 200,000. In case the vehicles are damaged or lost any parts due to the detaining, the entity shall be responsible for the payment. If the level of violation of the police officers or the traffic agents is too serious, the entity can demand the compensation from the police officers or traffic agents. The police officers or traffic agents shall be imprisoned from one (1) year to three (3) years and/or fine from two millions (2,000,000) Riels to six millions (6,000,000) Riels to any traffic officers or traffic agents that:
• Forced and demanded the fining money against the amounts set by the law
• Obtaining money by using the incorrect fining tickets or do not issue fining tickets to the fined driver.
• Shall be punished by jailing from one (1) year to three (3) years and or fine from two millions (2,000.000) Riels to six millions (6,000.000) Riels to any government staff or staff working directly or those who have duty or task in managing the driving schools or engaging in the issuance of the driving license and vehicle identification card and have committed wrong to the article 40 or 48 of this provision."

Legal and Judicial Reform

Supporting the Constitution and sector laws, the improvement of the relationship between citizen and administration and the rights of citizens to claim for justice in the framework of administration is a strong commitment of the government. Improvement in this area is a priority action in the legal and judicial reform program adopted by the Council of Ministers in 2003.

A detailed Plan of Action Implementing the Legal and Judicial Reform Strategy was adopted in 2005 by the Council of Ministers. The plan includes 93 priority actions. Among them are seven priority actions that were clearly defined to establish a comprehensive and effective mechanism to settle administrative complaints. The priority actions (PA) are:

1. PA 1.6.1 on establishment of an Ombudsman
2. PA 1.2.4 on specific complaints for women and other disadvantaged groups
3. PA 2.1.1 on an administrative (procedure) code, which standardizes administrative litigation as well as complaints procedures
4. PA 2.1.4 on Law on the Organization of Courts introducing an Administrative Tribunal
5. PA 2.1.11 on establishment of an Ombudsman's Office
6. PA 5.4.5 on establishing an administrative tribunal
7. PA 7.2.1 on the law for an Ombudsman.

2. Types of Complaints/Structure

Complaint Against What?

In principle, citizens can complain against all aspects of administration action such as abuse of power, corruption, decisions, provision of public services, illegal regulations issued by the administration, and misbehaviour. Administrative complaints can be divided into five main types, which include complaints against:

1. administrative decisions
2. service provision
3. corruption and abuse of power
4. administration behaviour
5. administrative regulations.[6]

Complaints against administrative decisions refer to administrative complaints from citizens who are not satisfied with the decision from the administration in terms of getting a licence or any other decision that can harm rights of citizens, such as the decision to vacate the request for a marriage certificate or a request to organize a wedding ceremony.

6 Hauerstein, Kai, 2013, *Aspects of Administrative Law and Its Reform in Cambodia*, p. 41

The complaint against the provision of services from the public administration refers to administrative complaints about the services that government provides to citizens such as education, health care, electricity, and so on. Citizens can file a complaint to public administration agencies regarding their dissatisfaction with the services provided by the administration, for example health care service provision.

Complaints against criminal activities/corruption are complaints against the collusion or bribery of public administration officers or agencies. It addresses criminal actions for which the administration is accountable. However, criminal responsibility is mostly envisaged as referring to the officer who committed the crime.

Complaints against administrative behaviour allow citizens to complain about any action of an administration agency which does not perform well in its duties. All interested citizens can complain to the court about the misbehaviour of police while carrying out their duties. So far this type of complaint seems not regulated clearly in Cambodian law and regulations. This paper will not cover this type of complaint.

Complaints against administrative regulations allow citizens to complain against illegal provisions established by the administration (executive power). In general, the administrative agency gets the delegation of power from the authorized law provided by the legislative branch. If the provision issued by the administration is against the authorizing law or any other regulations, citizens have the rights to clarify the legality of the regulation. In Cambodia this type of complaint seems to be not clearly provided for in the legal framework.

Complaints to whom? Institutional set-up: internal/external

Currently, citizens can file administrative complaints with sector ministries, sector law institutions, public enterprises and other authorities, committees, councils, cabinet of prime minister, office of the Council of Ministers, and the king as well as bodies outside the legislative branch such as the National Assembly, Senate and courts.

We can categorize these mechanisms into three kinds: (1) court, (2) intra-administrative or internal complaint mechanisms and (3) external monitoring mechanisms like the parliamentary system, and ombudsmen (see table below).[7]

7 Jörg Menzel agreed in his presentation on international formal and informal frameworks to settle administrative complaints from citizens against administration action that in general there are three mechanisms for dealing with administrative complaints, which include (1) court, (2) intra or internal mechanisms, and (3) external mechanisms. (3–4 June 2013, Sokha Hotel, Siem Reap Province, Cambodia.)

Internal (intra-administration)	External	Court
• Ministry of National Assembly-Senate and Inspection • Sector ministry • Sector law institutions • Territorial administration	• Anti-Corruption Unit • Cambodian Human Rights Committee	• Normal court (there is no specialized court or chamber for administrative cases yet in Cambodia)

Table 1: Summary of administrative complaint mechanism structures in Cambodia

Court

Lodging a complaint with the court on administrative matters is a classic method that citizens can use to review administrative maladministration. However the procedure on how to conduct the administrative complaint seems not clearly defined yet, even though the Constitution clearly envisages full rights of citizens to file complaints against the administration in Articles 39 [1] and 128 [2–3]. So far, no administrative complaints have been filed with courts.

Internal Administration

Complaints to internal administrations are normally allowed to citizens or any interested person, who can file a complaint inside the administration. Normally the process of handling the complaint is carried out by the administration of the respective institution that the complaint was addressed to. In this regard, there are four main mechanisms for handling the complaint:

1. Ministry of National Assembly-Senate and Inspection (MONASRI)
2. Sector ministry[8]
3. Sector law institution
4. Territorial administration[9]

MONASRI has a special mandate to deal directly with administrative complaints on corruption, abuse of power and administrative decisions.[10] The jurisdiction is provided to

8 There are 23 ministries in Cambodia

9 The territorial administration divides into three layers (1) capital and province, (2) city/district/khan, and (3) commune/sangkat

10 Sub-decree on Organizing and Functioning of the Ministry of National Assembly-Senate and Inspection, 1999, Article 2

the General Department of Inspection of the Ministry. The jurisdiction for handling the administrative complaint seems to cover the whole administration.

Most sector laws provide the power to respective sector ministries to handle complaints within the scope of the sector. Generally, each sector ministry has at least one section called the Inspectorate Department within the ministry to receive and handle complaints from citizens. In addition, each ministry has one office or department in charge of internal audit, which mostly has similar power to the Inspectorate section of the ministry to deal with the complaint.

External Administration

External mechanism refers to mechanisms outside the institution of a sector ministry or sector law.[11] Currently there are two main external mechanisms in Cambodia:

Anti-Corruption Unit

Cambodian Human Rights Committee

This does not include extra mechanisms inside the legislative branch, such as the commission in the National Assembly and one commission in the Senate.

Beside the internal and external and court mechanisms, citizens or any interested persons can file administrative complaints to the highest political institutions like prime minister, Office of the Council of Ministers, and the king. These complaints are mostly made by collective complainants and on sensitive issues such as human rights violations.

III. Assessing the Current Administrative Complaint Structure

This section will evaluate only the three main types of complaint against administration decisions, provision of services, and corruption and abuse of power of administration. The other two complaints, on misbehaviour of the administration and illegal regulation by the administration, are not really defined clearly in the Cambodian context. The section will raise for deeper analysis and evaluation a specific case of complaint against trademark registration decisions in the type of complaint against administration decisions, and another case of a complaint against electricity services in the type of complaint against provision of services, since these two types of complaint are the most frequently used in Cambodia.

11 Jörg Menzel, 2013, *International formal and informal frameworks to settle the administrative complaint from the citizens against administration action*, a presentation in the seminar on 3–4 June 2013 in Sokha Hotel, Siem Reap Province, Cambodia.

1. Complaints against Decisions of the Administration

This complaint is about the dissatisfaction of citizens on the decision of administration when they apply for a licence or permission. There are many mechanisms in place to deal with these complaints. The complaints are mostly against decisions where the administration wants to restrict the complainants' rights and freedom for doing something in the country.

Legally, each line ministry applies specific sector laws under its jurisdiction and therefore decisions are mostly related to implementing sector laws, which include (i) sanctions or (ii) issuing/not issuing licences/permits. Citizen's rights are mostly provided to file the complaint when they don't agree with the objection of application for licence or permission or decision of the administration. In general, each sector law stipulates one chapter or articles, which provides citizen's rights to file a complaint against the administration when a decision does not satisfy them. For example, the Law on Taxation from 1997 sets out the rights of taxpayers to complain and the process for handling the complaints in chapter 5, section 8 from Articles 120 to 124.[12]

Currently, citizens can complain to the respective sector ministry or the special agency created by the sector. Sometimes it can be both, sector ministry institutions and special institutions created by sector law. For the sub-national level, citizens can bring their case to the respective sector department at the sub-national level and some of the special agencies that have operations at the sub-national level. However, citizens can bring a complaint to the Ombudsman's office at district level against the decision of the One Window Office or any other offices in the district level. Citizens can also file the case to the Provincial Accountability Working Group at provincial level on the decisions of the administration at both district and provincial level.

For the purpose of the paper, the author will take one example of a decision on trademark registration in the Ministry of Commerce for evaluation and analysis of the current situation.

Trademark Registration Case

All citizens or any interested persons who want to get protection for their trademark need to register in the Department of Intellectual Property Rights of the Ministry of Com-

12 Law on Taxation, 1997, Articles 120–124. The law provides the rights only to the taxpayer but not for third parties to file a complaint. The complaint must be in written form. The process is to first complain directly to the department Director of Taxation Administration who made the decision or action within 30 days, and the taxation administration has to respond within 60 days. If there is no agreement, appeal can be made to the Taxation Conciliation Committee of the Ministry of Economic and Finance within 30 days after decision of the taxation administration; finally the complainant can appeal to court within 30 days from the decision of the Committee if they do not agree with the decision of the Committee. These provisions were stipulated in the *Handbook on Rights and Duties of Tax Payers*, 2010 by the Ministry of Economy and Finance, pages 28–32.

merce.[13] The requirement is mentioned in Article 3 of the law on Marks, Trade Names, and Acts of Unfair Competition.

The application process begins with the filing of an application form, fifteen specimens of the mark, and if filed by an agent, an original notarized power of attorney. Unless the application is rejected and requires an appeal, it usually takes about four months from filing to issuance of the final certificate.

Legal Basis

When the application is denied by the registrar's office of the Department of Intellectual Property Rights of the Ministry, the applicant can file a complaint to the registrar's office of the Department for clarification.[14] The Department is responsible for dealing with the complaint from the interested party who is not satisfied with the decision of the department.[15]

The law on trademarks does not mention rights of the applicant for the trademark registration to file a complaint against the decision of objection of trademark registration. However, there is an implementing sub-decree. It seems to conflict with the principle of legality. Instead, the law provides the rights to claim to the court if the interested party does not agree the decision of the Ministry of Commerce. Article 62 states:

> *Any decision taken by the Ministry of Commerce may be the subject of an appeal by any interested party before the Courts and such appeal shall be filed within three months of the date of the decision.*[16]

Articles 17 and 18 of the Sub-Decree – issued by the prime minister – stipulate briefly the procedure for receiving and handling the complaint against the trademark decision. The law provides rights to complain, however the complaint must be made it in written form to the registrar's office of the Department of Intellectual Property Rights.[17]

Beside the two articles of the Sub-Decree, there are no others laws or regulations or procedures for a complaint handling process. The two Articles 17 and 18 of the Sub-Decree state:

Article 17: "Objection to or Conditional Acceptance of Application and Hearing

1. If, upon examination in accordance with Article 8 (a) of the Law, the Registrar decides to make objection to the application for registration of a mark, he/she shall notify the applicant in writing of this objections with all detailed information relevant to this decision and invite the applicant to amend the application, then to submit the response

13 Law on Marks, Trade Names, and Acts of Unfair Competition (2001), Article 3
14 Sub-Decree on the Implementation of the Law Concerning Marks, Trade Names and Acts of Unfair Competition, 2006, Articles 17–18
15 Sub-Decree on Organizing and Functioning of Ministry of Commerce, 2007, Article 21
16 Law on Mark, Trade Name and Acts of Unfair Competition, 2002, Article 62
17 Sub-Decree on the Implementation of the Law Concerning Marks, Trade Names and Acts of Unfair Competition, 2006, Article 17 [3]

in writing back to the Registrar or to apply for a hearing within forty five (45) days starting from the date of receiving the notification. If the applicant does not comply with the notification, he/she shall be deemed to have withdrawn his/her application.

2. If, upon examination in accordance with Article 8 (b) of the Law, the Registrar decides to accept the application subject to amendments, modifications, conditions, disclaimers (on any element(s) of the mark) or limitations or other conditions, he/she shall communicate this decision to the applicant in writing. If the applicant objects to the amendments, modifications, disclaimers or limitations or other conditions, he/she shall, within sixty (60) days starting from the date of receiving the notification of the Registrar, apply for a hearing or submit his/her observations in writing. If the applicant does not object to such amendments, modifications, disclaimers or limitations or other conditions, he/she shall notify the Registrar in writing and amend his/her application accordingly. If the applicant does not response in one way or the others as mentioned above, he/she shall be deemed to have abandoned his/her application.
3. The request for a hearing shall be made in writing to the Registrar. Upon receiving this request, the Registrar shall notify the applicant, in writing, at least one month before the date on which the applicant will be invited to be heard."

Article 18: "Refusal of Application or Conditional Acceptance of the Registrar to which Applicant objects

1. If, after hearing or after consideration on the applicant's amendments or observations in writing, the Registrar still refuses the application or accepts it subject to any amendments, modifications, disclaimers or limitations or other conditions to which the applicant objects to this refusal or conditional acceptance, he/she shall communicate his/her refusal decision to the applicant in writing. The applicant may, within one month from the date of such communication, request the Registrar to confirm in writing the grounds of his/her decision and the referred materials used by the Registrar in making this decision.
2. The applicant is entitled to appeal against the Registrar's decision to refuse the application to the Appeal Board of the Ministry of Commerce or to the competent court within three (03) months counting from the Decision date.
3. Pursuant to Article 62 of the Law, interested party is entitled to appeal against the Appeal Board's decision to the competent court within three (03) months counting from the Decision date."

Responsible Department

Legally, the law on trademarks provides a mandate to the Ministry of Commerce to handle the registration of the trademark as well the mandate to handle the complaint from the

applicant who is registering the trademark.[18] The responsible Department of Intellectual Property Rights of the Ministry is in charge of handling the complaint from the interested party as stipulated in the law. However, the study of the Council for Legal and Judicial Reform in 2009 found that there were at least three other departments in the Ministry who typically receive and handle complaints as well. The three departments are the Department of Legal Affairs, the General Inspectorate Department, and Cabinet of the Minister.[19]

The Department of Legal Affairs mostly claims to have a single office to handle complaints. The Department established an officer to handle the complaint for the Ministry, however it seems to be not working well as it is too small an office in which there are only two officers in charge and the complaint-receiving was low.[20]

The General Inspectorate Department has a broad mandate to handle mostly the internal complaints within the Ministry, however, the Department mostly exercises its power to handling other complaints. Most of the complaints have been received and settled in the Cabinet of the Minster.

Complaint Handling Procedure

The interested party can complain against the administration of the Department of Intellectual Property Rights of the Ministry of Commerce in three different situations:

- First, in cases where the registration of trademark is in the process of proceeding for registration in the Department of Intellectual Property Rights of the Ministry
- Second, in cases where the registration of trademark is rejected
- Third, in cases where the registration of trademark is finished and it has already been published in the official gazette of the Ministry of Commerce.

Given the facts from the two Articles 17 and 18, the complaints handling process can be divided into four main steps:

- The first step starts with the complaint from the interested party who applied for the trademark registration. In the case where the application has been rejected by the Department, the interested party can file a complaint for hearing within forty-five (45) days from the date the notification was received from the registrar's office of the Department. If the applicant objects to amendments requested by the registrar, the applicant has sixty (60) days from the date of the notification received to file a complaint for hearing.
- The second step is receiving and hearing the complaint from the interested party by the registrar's office. Upon receiving the complaint the registrar's office has to notify the complainant within one month before an invitation for a hearing.

18 Sub-Decree on Organizing and Functioning of Ministry of Commerce, 2007, Article. 21

19 Sub-Decree on Organizing and Functioning of the Ministry of Commerce, Articles 7, 21, and 23 and Khlok Dara, *Pre-assessment of complaint mechanisms and ombudsman systems in Cambodia*, 2009

20 Khlok Dara, 2009, *Pre-assessment of complaint mechanisms and ombudsman systems in Cambodia*

- The third step applies if the applicant is not satisfied with the decision of the registrar's office. In this case the applicant can appeal to the Appeal Board of the Ministry of Commerce or directly to court within three months from the date of the decision of the registrar. So far the Appeal Board of Ministry of Commerce is not established, therefore the appeal must go directly to the court, although the court does not yet have a clear procedure in place either.
- There is a fourth step if the applicant appeals to Appeal Board of the Ministry of Commerce without filing directly to the court, and the applicant does not agree the decision of the Appeal Board. In this case the applicant can appeal to the court within three months after the decision of the Appeal Board of the Ministry of Commerce.

The procedure for handling complaints seems to be not yet developed clearly by the ministry. Normally the ordinary administrative complaint process has been used to settle the complaint. When the complaint comes, the receiving office (all offices in the ministry can receive and handle complaints regardless the jurisdiction or mandate) will make a report with recommendations and submit this to superiors for a decision. However, the procedure will normally take a long time, and there is no system of reply or notice or any other clear reference on whether the complaint has been received by the administration of the ministry.

The final decision reached depends on the decision from the superior, whether the superior agrees for mediation or conducts more investigation into the case. There is no specific rule or any other guideline on the procedure of handling the complaints in place yet, even in the special department that is supported by some donors, for example, the Department of Intellectual Property Rights.

Analysis

The mechanism for handling trademark registration decisions within the ministry is clearly defined in the legal framework of the sector law on trademarks. However, in practice, the jurisdiction for handling complaints seems fragmented inside the Ministry of Commerce.[21] It is not clear enough for the interested party who is affected by the decisions of the administration since within the ministry, there are couple of departments that provide a possibile path for complaint handling. The Department of Legal Affairs has an office to receive and handle complaints where the jurisdiction seems to cover all matters under the Ministry of Commerce, including trademark registration decisions. In addition the General Inspectorate Department of the ministry seems to have the power to deal with all issues under the ministry too. The Cabinet of the Minister is mostly seen as the main entrance for all issues, including complaint handling.

21 Khlok Dara, 2009, *Searching for Implementing an Ombudsman System in Cambodia*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ) p.48

There is no rule or any guideline mentioning clearly the process for dealing with complaints. Citizens or interested persons who are not satisfied with the decisions of the administration don't have any clue or idea on what process or procedure they should follow. They don't know where they should complain to as the ministry doesn't provide any clear signal or information for the complainant. The complainant most of the time goes to the administrative office or cabinet or respective department that issued the decision.

It takes a long time for the complaint to be dealt with and sometime there is no notice from the administration of the ministry – no clear reference on whether the complaint has been received and registered by the ministry or not, even though there is a rule that the registrar's office, after receiving the complaint, will notify the complainant one month before the hearing starts. The complainant just lodges the complaint without knowing whether their complaint will be processed or just kept without processing. Most of the time, the complainant needs to contact the administration of the Ministry again and again to take action on their complaint otherwise there is no progress.

There is no clear jurisdiction for handling the complaint and there is no rule on how the decision should be made by the registrar's office of the Department or the Appeal Board of the Ministry of Commerce during the hearing process. In general, when the administration gets the complaint it will make a report and recommendation to a superior for a decision, and if the superior doesn't do anything then the case will be kept without action as long as the complaint reconfirms again and again to the administration that they do not want to drop the complaint.[22] Even if there is a decision from the superior to process the case, the procedure to settle seems to work very slowly since there are no rules or guidelines on the hearing process.

The law provides rights to an interested party to appeal to the Appeal Board of the Ministry of Commerce when the party does not agree with the decision of the registrar's office, but the Appeal Board has not been established yet.

There is no clear procedure on how to conduct an investigation or clarification before the decision for accepting or rejecting the complaint on the decision of the administration. The sub-decree on the Implementation of Concerning Marks, Trade Names, and Acts of Unfair Competition does not provide a clear process on the investigation step. Information on the procedure of settlement of the complaint seems invisible to the complainant. They cannot access or know what process they should follow next or how to do it. Furthermore, the statistics of complaints handling within the Ministry are even more difficult to access.

The legal framework supporting the process dealing with the complaint seems not established, and even the existing legal framework in the Ministry doesn't provide clear jurisdiction and mandate for each responsible department.

22 Khlok Dara, 2009, *Searching for Implementing an Ombudsman System in Cambodia*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ) p.48

2. Complaint against the Provision of Services

This category of complaint refers to complaints against the administration that provides public services to the citizens, where the service provision does not satisfy the citizens. In Cambodia public services delivery includes education, health care, welfare services, electricity, water, and so on. The complaint can be filed to the respective office or department or sector ministry that provides the service and other institutions provided in sector law. In general, the responsible mechanisms for complaint handling are located inside the administration and use or follow the ordinary administrative procedure for handling complaints. There is some overlapping of complaint handling functions among the department inside the sector Ministry. The complaint handling functions of the Department of Legal Affairs, Cabinet of Minister and General Inspectorate Department commonly overlap. The report of a baseline survey on legal units and law making capacity of ministries/institutions by the Council for Legal and Judicial reform in 2009 found that most of the legal affairs departments of the ministries/institutions had the function to settle complaints for which they had jurisdiction under the ministries/institutions.[23]

The power to handle complaints in mechanisms located in the sector ministry and the specific institution is mostly provided by the specific sector law, for example the Ministry of Education, Youth, and Sport as mentioned in the Education Law in Article 40:

> *Right to request, right to protest, right to complain, right to solution:*
> *Parents or guardians, learners and educational personnel, whose rights specified in this law, are violated, have the right to request or protest to the competent educational authority at different levels as well as to the court. The Ministry in charge of education shall issue regulations on procedures for requests, protests and solutions.*

The following section provides an example of a complaint against the provision of electricity services.

Electricity Services Case

Electricity provision is a main service that the government of Cambodia needs to ensure for its citizens. Any missing or ineffective service or any bad service in the electricity provided by the government is subject to filing for clarification or complaint from citizens or consumers. The government under the jurisdiction of the Ministry of Industry, Mines and Energy gives the power to the Electricity Authority of Cambodia (EAC) as the responsible agency to ensure the effective provision of electricity to citizens.[24] However the EAC has to cooperate with the Ministry in terms of technical support.[25]

---

23 Council for Legal and Judicial Reform, 2009, *Baseline survey on legal units and law making capacity of ministries/institutions*, p. 13
24 Law on Electricity, 2001, Article 1
25 Law on Electricity, 2001, Article 3

Legal Basis

Sometimes a citizen or consumer is not satisfied with the service provided by the supplier or disputes the correctness of the meter, meter reading or the bill in relation to the supply, or the cutting off of the electricity without reason. In such cases the citizen or consumer can file a complaint first with the supplier which is located nearest to the place where he lives. To file complaints and resolve disputes efficiently and transparently, EAC has the power to handle these issues within their approved Procedures and Regulations to be followed by consumers and suppliers.[26]

The Law on Electricity envisages the power to settle an administrative complaint around service provision by any agency that provides electricity in either private or public sectors.[27] Citizens can complain against any provision decision of EAC within thirty (30) days from the date they receive the decision.[28]

The power to deal with the complaint is found in the procedures of complaint handling of EAC:[29]

1. *Under Electricity Law of the Kingdom of Cambodia, the duties of Electricity Authority of Cambodia (EAC) include evaluation and resolution of consumer complaints and contract disputes involving licensees to the extent the complaints and contract disputes relate to violation of the conditions of license.*

2. *The Electricity Law provides that any licensee or consumer, who is party to a dispute regarding the provision of electric power services, under an EAC approved tariff or under a contract, may refer the dispute to EAC for resolution; provided that the related License requires such dispute to be referred to EAC.*

3. *Any interested person may file to EAC a written complaint against a licensee alleging a violation of any provision of the Electricity Law. EAC shall investigate this complaint and determine whether there may have been a breach of the Electricity Law.*

4. *The Electricity Law also provides that EAC may investigate any facts, natures, actions or matters which it may find necessary or proper to determine whether any person has violated or is about to violate any provision of the Electricity Law or any Sub-Decree, regulation, order, or judgment of EAC.*

Responsible Institution

There are two institutions that are responsible for handling complaints, which are the private supplier who is licensed by EAC to provide an electricity service (the supplier) and the EAC. The Department of Legal Affairs of the secretariat of EAC is responsible for receiving and handling complaints from citizens or customers about electricity provi-

26 Procedure for Filing Complaint to EAC and for Resolution of EAC, 2004
27 Law on Electricity, 2001, Article 7-f
28 Law on Electricity, 2001, Article. 18
29 Procedure for Filing Complaint to EAC and for Resolution of EAC, clause A

sion.[30] However the guidelines for the complaint handling process of EAC do not mention that specific Department when citizens want to complain. It just mentions that any interested person who is affected by the electricity services provision can complain to the supplier or EAC.[31]

Complaint Handling Procedure

It is different from other mechanisms which are located in the sector Ministry or even in specific institutions of the sector, where the complaint handling procedure for the settlement of the provision of electricity service is mentioned clearly in two guidelines:

1. Guidelines for the Information of Consumers about their Rights to Complain to the Supplier or Electricity Authority of Cambodia (the Guidelines)
2. Procedure for Filing Complaints to EAC and for Resolution by EAC (the Procedure).[32] Beside the two main important complaint handling procedures, EAC has established other Standards of Performance of Licensees relating to the quality of supply and services, which mention the obligations of suppliers or EAC to handle consumers' complaints.[33]

Both the Procedure and the Guidelines provide clear complaint handling processes which include within their jurisdiction subjects that citizens can complain about, the modality of making a complaint, phases of receiving and resolution of complaints, documentation, and rights to appeal. According to the procedure for settlement of complaints against the electricity service provision of EAC, all citizens can complaint to EAC after 30 days of the decision of any electricity provider. The Procedure and Guidelines for settlement of the complaint by EAC provide two options for complaints where the complaint can first filed directly with the electricity supplier (the supplier who is licensed by EAC) or directly to the EAC. If it is filed with the electricity supplier and the complainant does not agree to the decision from the supplier, they can then file the complaint to EAC.

Consumers who want to file a complaint directly with the supplier can complain on only six subjects as mentioned in the Guideline for the Information of Consumers about their Rights to Complaint to Supplier or EAC.[34] When the complainant does not agree with the decision of the supplier, the complainant can appeal to EAC. All thirteen (13)

30 Report of EAC, 2010, p. 14

31 Procedure of settlement of complaint of EAC mentions only that all interested citizens can complain against the agencies that provide electricity services to EAC. The procedure does not mention a specific unit or office, which is responsible to receive and deal with the complaint.

32 Procedure for Filing Complaint to EAC and for Resolution of EAC and Guidelines for the Information of Consumers about their rights to Complaint to the Suppliers or EAC.

33 Overall Performance Standard for Electricity Suppliers in the Kingdom of Cambodia mentions 13 standards for suppliers when dealing with consumers.

34 The Guideline for the information of consumers about their rights to complain to the supplier or EAC mentions six categories of complaint against the electricity service provision, which are (1) complaint on voltage, (2) complaint on interruption/failure of supply, (3) complaint about meters and meter reading, (4) complaint about non-receipt of energy bill or receipt of incorrect bill, (5) complaint on disconnection or reconnection, and (6) complaint on delay in giving new connection.

subjects of electricity service provision, including the six subject matters for complaint as mentioned in the Guideline, can be the subject of a complaint filed directly with EAC[35]. It means that all subject matters stipulated in the Procedure can be the subject of complaint about electricity services.

Given the facts from the Guideline and Procedure for complaint handling by EAC, the complaint settlement procedure is divided into five (5) phases.[36]

First, filing of complaint and notice to the defendant. When the complaint is submited to EAC, the responsible unit will register it and provide notice within 15 days from receiving it whether they accept the complaint or not. The complaint must be in written form with relevant attachments. The complaint should contain (1) information about the complainant, (2) information about the defendant, (3) details of the complaint such as the subject of the complaint, (4) specific reference to relevant law and regulations or any rules, (5) prayer of the complainant, (6) relevant attachments, and (7) signature of the complainant.

When the complaint is received by EAC, EAC will send the complaint to the defendant to give clarification in a reply within the period specified by EAC. If no reply is received within the specified period, it will be deemed that the defendant has no comments to of-

35 (1) The supplier has an obligation to give power supply to consumers in its authorized area of supply and can refuse to give power supply to a consumer only under certain conditions stated in the General Conditions of Supply. If the Supplier refuses to serve an applicant, he/she must inform the applicant the reason of its refusal. If the applicant is dissatisfied with the decision of the supplier, he/she may file a complaint with the EAC, giving copies of the decision of the supplier, other correspondence related to this complaint and the reason of considering the decision of the supplier incorrect. (2) For giving a new connection to a Medium Consumer, if extension/ upgrading of the network is required, the supplier indicates the participation amount in network extension/ upgrading cost to be paid by the consumer. If any difference or dispute arises as to the participation amount, the consumer can file a complaint to EAC for resolution of the dispute, giving copies of the letters in the matter and the reason of disputing the amount. (3) The General Conditions of Supply provide that if the supplier finds out that any person is taking supply without authorization or dishonestly, the supplier shall issue a bill for the electricity used with authorization. If the consumer disputes the bill, he/she may file a complaint with the EAC giving full reasons for disputing the bill. (4) Apart from raising the bill as stated above, the supplier may also file a complaint to EAC to impose a monetary penalty on the consumer under Article 68 of the Electricity Law of the Kingdom of Cambodia, giving full justification for this. (5) Any interested person may file to EAC a complaint against a licensee alleging a violation of any provision of (i) the Electricity Law of the Kingdom of Cambodia, Rules and Regulations issued under the Electricity Law (ii) the licence issued by EAC or (iii) regulations made by EAC. The person in their complaint should clearly state the provisions of the Law, Rules or Regulation that have been violated. (6) When a reference is made to EAC by the Ministry of Industry, Mines and Energy or the Local Authority about violations by a licensee, or when EAC decides to start proceedings against a licensee or consumer for violations that came to its notice from information derived from any other source, EAC shall designate an officer of EAC not below the rank of Office Manager to act as Complainant. (7) Complaints relating to contract disputes can be filed by a party to the dispute provided the related licence requires such dispute to be referred to EAC. The party in its complaint shall state the provisions of the licence that require the dispute to be referred to EAC and details of the dispute.

36 Procedure for Filing Complaint to EAC and for Resolution of EAC, 2004

fer and a decision on the complaint shall be taken by the EAC as deemed fit and proper unless the time for receiving the reply is extended in writing by the EAC.
Second, conciliation: if the reply does not satisfy the complainant, the reconciliation process will start after the agreement from the chairman of EAC. The reconciliation officer will be appointed for this. The agreement of both parties will be documented.
Third, investigation: If agreement is not reached in the conciliation stage, EAC starts to conduct an investigation. There is no specific duration for the investigation. In addition there is no rule mentioning how the investigation process will be done.
Fourth, session of EAC and Judgment: EAC will conduct a final meeting with participation from the three members of EAC to decide the case. Before the trial starts, EAC has to give notice 15 days in advance to the complianant and other relevant parties. Three members of EAC will decide on a majority basis. EAC decision will be documented in the EAC. All relevant documents will be made available in the EAC and all interested parties can access the information. However, there is no information on the EAC website regarding complaint handling data.
Fifth, appeal to court: If the complainant does not agree with the decision of EAC, they can appeal to the court within three months of the decision of EAC.

Analysis

From the case described above, the process for handling complaints against the provision of services is in general quite well organized, mostly in state owned enterprises, which operate independently from the government, particularly in term of budgeting. However, complaint mechanisms are not working well in sector ministries.[37] Some specific sector law institutions who have the power to settle administrative complaints are not working well either, since mostly they are not independent from the government budget. EAC is an independent institution, which gets a separate budget from the government. Therefore, EAC works quite well. But so far there are no statistics on the handling of complaints.[38]

The power of handling complaints seems mostly to be given to the chairman of EAC to decide on behalf of the other two members of the EAC. The reconciliation process cannot start without the agreement from the chairman of EAC as mentioned in the procedure for complaint handling.[39] The power is still centralized even in the independent public enterprise institutions such as EAC. In addition, the chairman has the power to

37 There is no clear law or procedure on how a complaint against education service provision should be handled. The Law on Education provides the power to receive and settle complaints to the Ministry of Education, Youth and Sport and the Education Council. (See more in the Law on Education and Sub-Decree on Organizing and Functioning of Ministry of Education, Youth, and Sport)

38 There are many annual reports in which there is no statistic mentioned on the number of complaints handled. The author tried to make contact by phone and email to get statistics on complaint handling but the responsible officer in EAC said that there are no statistics to report.

39 Procedure for Filing Complaint to EAC and for Resolution of EAC, 2004, clause D [25]

appoint an investigation officer, where this power should be kept in the Department of Legal Affairs, the body that gets a full mandate from EAC for complaint handling.

The power to make decisions to solve the complaint is not really clearly defined even in EAC law or any regulations, even though there is a clear and quite detailed procedure for handling cases. There is no clause that mentions on what extent the jurisdiction of decisions can be made.

Even the power to conduct an investigation seems clearly defined in EAC but it seems not to define clearly how the power of investigation should be exercised. The procedure just provides the rights to the investigator appointed by the chairman of EAC to conduct the investigation, and all relevant parties should cooperate with the officer. The process of investigation should clearly define the jurisdiction of EAC or any responsible officer. In the Procedure, the chairman has the power to appoint one of the officers of EAC not below the rank of office manager as the investigating officer, who may be assisted by other officers of EAC. If considered necessary, experts or consultants may be asked to assist in the investigation. The responsible Department of Legal Affairs who gets the mandate for the complaint handling seems not to be involved in this process.

The way consumers can make a complaint is rather limited since the complaint needs to made in writing and there is no rule allowing the citizens to complain to EAC by any others options. In addition, there is no clear timeframe for how long the investigation should be conducted.

There is a clear rule that all relevant documents of complaint handling, including the statistics of complaint handling, should be made public where all interested persons can access them, but the information is not available for access on the EAC website. At least the information on how to complain or who to complain to should be available on the website of the EAC where interested persons can learn about the process.

3. Complaints against Corruption and other Forms of Abuse of Power

This category refers to a complaint against the collusion or any other bribery of public administration officers or agencies. It involves criminal action, for which the administration is required to be responsible. However, normally the criminal responsibility applies to the personal officer who commits the crime.

Citizen can complain to both internal administration institutions and external institutions. Currently, there are at least five institutions in which two mechanisms are external mechanisms and three institutions are internal mechanisms.

The mechanisms include

(1) Anti-Corruption Unit (ACU),[40]

40 Law on Anti-Corruption, Articles 2,3, 13

(2) Ministry of National Assembly-Senate and Inspection (MONASRI)[41]
(3) Cambodian Human Rights Committee (CHRC)[42]
and the subnational administration institutions
(4) Provincial Accountability Working Group (PAWG)
(5) District Ombudsman (DO).[43]

Legal Basis

This type of complaint relates to specific criminal activity where the punishment is mostly covered in the Criminal Code and the process of complaint handling is mostly stipulated in the Criminal Procedure Code. The Criminal Code mentions the punishment in clauses from Articles 278–283. Regarding the punishment of administration abuses of power during their performance, some sector law provides clear clauses on punishment. For example, the Law on Traffic provides:

> *Any officials or agents responsible for traffic order used their power to confiscate the driving license, number plate, identification card or keeping the driver's vehicle, shall be jailed from 6 (six) days to one (1) month and or fined from Riel 25,000 to Riel 200,000. In case the vehicles are damaged or lost any parts due to the detaining, the entity shall be responsible for the payment. If the level of violation of the police officers or the traffic agents is too serious, the entity can demand the compensation from the police officers or traffic agents.*
>
> *The police officers or traffic agents shall be imprisoned from one (1) year to three (3) years and/or fine from two millions (2,000,000) Riels to six millions (6,000,000) Riels to any traffic officers or traffic agents that:*
>
> *— Forced and demanded the fining money against the amounts set by the law*
>
> *— Obtaining money by using the incorrect fining tickets or do not issue fining tickets to the fined driver.*
>
> *— Shall be punished by jailing from one (1) year to three (3) years and or fine from two millions (2,000.000) Riels to six millions (6,000.000) Riels to any government staff or staff working directly or those who have duty or task in managing the driving schools or engaging in the issuance of the driving license and vehicle identification card and have committed wrong to the article 40 or 48 of this provision.*[44]

41 Sub-Decree on Organizing and Functioning of Ministry of National Assembly-Senate and Inspection, Article 2

42 The mandate of the Committee covers mostly the human rights violation protection, including any complaint regarding corruption and abuse of power by the administration. However while the mandate is for receiving the complaint, this institution is not the complaint handling institution. They receive the complaint and study and then make a report with recommendations on the jurisdiction of the complaint for a decision by a superior.

43 PAWG is established within the framework of working and monitoring the performance of subnational administration, including corruption in procurement issues at the district level. DO is a citizens office that is responsible for monitoring the performance of One Window Office at district level and its mandate has been expended to the whole district performance monitoring, including the corruption issue.

44 Law on Traffic, Article 72

Complain to Whom?

As mentioned above, complaints can be filed to internal and external mechanisms. However, if we look at MONASRI, the Ministry envisages three different departments handling complaints. The first department is called the Department of Receiving and Investigating the Complaint; the second is the Department of Litigation; and the last department is the Department of Legal Affairs.[45] Another four institutions at both national and subnational level have specific departments for handling complaints.

The complaint can also be filed with an external mechanism such as ACU or CHRC. The ACU has jurisdiction for the whole country. All citizens or any interested person can complain against corruption at the national level with an ACU office located in the capital or a province.[46] Besides complaining in person in the ACU, citizens can complain by phone, fax, post box, email or where a box is installed publicly. Similarly, MONASRI has jurisdiction covering the whole country as well through their delegated capital/provincial departments and district/Khan/city offices. CHRC is not a resolution mechanism, however its role is to receive complaints on human rights issues, including corruption and abuse of power by the administration, and then CHRC staff will study and identify the jurisdiction, making a report and recommendation of the jurisdiction to a superior for a decision.[47]

Complaint Handling Procedure

The complaint handling procedure can be divided into three categories according to the nature of the responsible institution. The first procedure for handling the complaint in the MONASRI follows the ordinary administrative process. After receiving the complaint, the complaint will be studied to identify the jurisdiction and there will be a report with recommendations that goes to a superior for a decision. If the superior agrees to more investigation, then the investigation will start and finally a report with recommendations for a decision will again go to the superior. It is similar to the process in the CHRC, where the complaint handling procedure is the same as the ordinary administrative process, but CHRC is not a resolution institution. CRHC can just receive the complaint and send it to the responsible institution[48].

Most of the complaint handling by ACU follows the Criminal Procedure Code, except for measures that are not stipulated in the Code.[49] The process is divided into three phases:

1. First is receiving complaint. The complaint can be made in person, dropped into ACU boxes, through electronic form, post office, phone, fax or email.

45 Sub-Decree on Organizing and Functioning of Ministry of National Assembly-Senate and Inspection, Articles 7, 14, and 15

46 Law on Anti-Corruption, Article 22

47 Khlok Dara, 2009, *Searching for Implementing an Ombudsman System in Cambodia*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ), p. 51–52

48 *Ibid*,.

49 Law on Anti-corruption, Article 21

2. Second, the complaint will be studied by the Complaint Analysis Center of the ACU who then make suggestions to the president of ACU for a decision before any action (such as transfer to court). If the president of ACU agrees then, the investigation starts in cooperation with the court.
3. Finally after the investigation is completed in cooperation with the prosecutor, the case will be transferred to the court for final decision-making.[50]

This is just a temporary procedure that needs to be established more clearly by ACU in the near future, as an ACU officer said.

PAWG and DO set up their own procedure for complaint handling. The procedures are clearly defined with a detailed process from receiving the complaint through to the decision-making.

Analysis

There are five institutions that are responsible for dealing with corruption and abuse of power complaints. The jurisdiction is not clearly separated among the government institutions. Even inside MONASRI, there are many departments in charge of handling complaints.

Even though there are some good developments in combating corruption, there is no clear guideline or procedure the ACU should follow. Even the anti-corruption laws mention that the procedure for dealing with corruption can follow the process stated in the Criminal Procedure Code.

There is no clear timeframe for the process of dealing with complaints. Transparency of information is not provided for the public, as the public cannot get access to all the necessary information such as how to file a complaint properly. Complaints can be made through email, phone, post office or dropping in a white box, but there is no certainty whether the complaint will be taken up for action or not.

There are no statistics on complaints handling so far. Access to information is very limited in Cambodia in general. ACU is an institution that should be open and transparent for the public to access necessary information. However, the situation is the same as with other public institution where access to information is still questionable. Information regarding complaint-handling statistics was disseminated sometimes by the news media, but the website of ACU does not have this data. According to the news, there were 800 cases received in 8 months in 2012 and half of them were processed. The complaint numbers increased from 700 cases in 2011.[51]

50 *Ibid.*, Article 25

51 DAP Website: http://www.dap-news.com/en/index.php?option=com_content&view=article&id=9623:-cambodias-anti-corruption-unit-receives-800-complaints-in-8-months&catid=1:local-news&Itemid=18, access on 24 June 2013

4. Complaints against Illegal Regulations and Misbehaviour of Administration

Currently there is no clear law or any rules that provide citizens with an avenue to make a complaint against misbehaviour of the administration. Most sector laws provide the rights to complain against wrongdoings of the administration where the jurisdiction is rather broad whether it covers misbehaviour of administration or not.[52] Again a process to complain against illegal regulations seems not to be mentioned in any laws yet. The regulations here mean any law created by execution. It covers royal decrees, sub-decrees, prakas (proclamations), circulars, and decisions of the government, as well as Deka (by-laws issued by the territorial administration). There are some provisions that ensure the principle of legality of administration through the principle of hierarchy of law where the regulations cannot be made above or beyond the higher law and regulations.[53]

A draft Circular on Procedure on Law and Regulations Making process was adopted by the Council of Ministers meeting on 10 June 2013. The Circular covers royal decrees, prakas (proclamations), circulars, government decisions and is legally binding. However there are still questions on the legal binding for some other administrative acts such as announcement letters from the Office of the Council of Ministers. Which institution has the power to check the legality of the regulations or administration acts? The Constitutional Council can check both constitutionality of law or legality of any regulations of ministries/institution when the case is in the court.[54] However, there seems to be little clarity of who has jurisdiction over administration organizations or even the court system.

Even though the Constitution authorizes ordinary courts to act, there is no procedure or law which stipulates the process for doing so.[55] Many other countries use courts to clarify the validity of a regulation or act from the administration. Dr. Bory agreed that the full jurisdiction for conducting this judicial review is generally given to the court as mentioned in Article 128 of the Constitution.[56]

52 Law on Taxation Article 18 and 120 mentions that if the taxpayer doesn't agree with any decision or wrong doing of the taxation administration, they can file a complaint with the administration.

53 Law on Organizing and Functioning of the Council of Ministers, Article 29 and Say Bory, *General Administrative Law*, Third Edition, Blossom Lotus Printing, 2002, p. 109–127

54 Law on Organizing and Functioning of the Constitutional Council, Article 19

55 Constitution, Article 128 [2–3]

56 Say Bory, 2002, *General Administrative Law*, third edition, Blossom Lotus Printing, p. 139–140, 166, 200

IV. Conclusion and Remarks

The administrative complaint mechanisms in Cambodia are not yet well organized. They are still fragmented inside and outside the administration. Each institution or administration office can play a role in dealing with all types of administrative complaints. There is no standard rule in any law that stipulates how the mechanisms should be organized and managed within the administration. Each sector law and sector ministry produces different standards of procedure. The right of citizens to file a complaint is still limited. The power and functions of each mechanism are still blurred, with some of them overlapping, even inside one ministry or institution. Each ministry has at least three overlapping sections (the Department of Legal Affairs, General Inspectorate Department, and Cabinet of the Minister) that have a similar mandate dealing with administrative complaints. There is no coordination in the system, systematic coordination noted as a very important factor for good government and public management.

To improve these challenges, commitment from all relevant stakeholders, in particular the government, is essential. What is needed:

- First, set up a legal framework that provides clear rights to citizens to file a complaint against the administration.
- Second, there must be a clear mandate for each government ministry/institution to reform. A functional mapping and functional review should be undertaken to ensure sound public management. The starting point for functional mapping and functional review of delegating the power and function to sub-national administration is a good step already begun by the National Committee for Sub-National Democratic Development (NCDD). However, this process should start at the national level as well.
- Third, at least a simple procedure for administrative complaint-handling should be produced for short-term implementation. A comprehensive Administrative Procedure Code should be considered in the long term.
- Last but not least, there is a need to not only improve the internal mechanisms but also to improve and establish effective external mechanisms. ACU should be improved in term of setting up a clear complaints handling procedure that is transparent and accountable to the public. In addition, setting up a National Ombudsman as mentioned in the priority actions of the Legal and Judicial Reform Strategy should be seriously considered to complement the court system where the administrative court/chamber does not yet really exist.

SELECTED BIBLIOGRAPHY

Policy, Law and Regulations

– Circular on Procedure and Rules of Law and Regulations Making process, (Office of the Council of Minsters, 2013)
– Constitution of Cambodia, 1993
– Guidelines for the Information of Consumers about their rights to Complaint to the Suppliers or EAC
– Law on Anti-Corruption
– Law on Education
– Law on Electricity
– Law on Marks, Trade Names, and Acts of Unfair Competition
– Law on Taxation, 1997
– Legal and Judicial Reform Strategy, 2003
– Ministry of Economy and Finance, *Handbook on Rights and Duties of Tax Payers* 2010
– Plan of Action for Implementing Legal and Judicial reform Strategy, 2005
– Procedure for Filing Complaint to EAC and for Resolution of EAC
– Sub-Decree on Organizing and Functioning of Ministry of Commerce
– Sub-Decree on Organizing and Functioning of Ministry of Industry, Mines, and Energy
– Sub-Decree on the Implementation of the Law Concerning Marks, Trade Names and Acts of Unfair Competition, 2006

Research/Studies and others

– Bory, Say, *General Administrative Law*, Third Edition, Blossom Lotus Printing 2002
– Council for Legal and Judicial Reform, *Baseline survey on legal units and law making capacity of ministries/institutions*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ) 2009
– DAP website http://www.dap-news.com/en/index.php?option=com_content&view=article&id=9623:-cambodias-anti-corruption-unit-receives-800-complaints-in-8-months&catid=1:local-news&Itemid=18, accessed on 24 June 2013
– Dara, Khlok, *Pre-Assessment of Ombudsman and other Complaint System in Cambodia*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ) 2009
– Dara, Khlok, *Searching for Implementing an Ombudsman System in Cambodia*, (Phnom Penh: Council for Legal and Judicial Reform supported by GIZ) 2009
– Electricity Authority of Cambodia, *Overall Performance Standard for Electricity Suppliers in the Kingdom of Cambodia*

– Kai, Hauerstein, *Aspects of Administrative Law and Its Reform in Cambodia* 2013
– Menzel, Jörg, *International formal and informal framework to settle the administrative complaint from the citizens against administration action,* Presentation for the seminar on 3-4 June, 2013 in Sokha Hotel, Siem Reap Province, Cambodia. 2013
– Report of Electricity Authority of Cambodia, 2010

SOLVING THE COMPLAINTS OF CITIZENS AT SUB-NATIONAL LEVELS

Parliamentary Institute of Cambodia (PIC)

Alex READ

CONTENTS

Abstract 175
I. Introduction – Importance of Sub-National Accountability 176
II. Provincial and National Accountability Working Groups 177
III. One Window Service Office and District Ombudsman Mechanism 180
IV. Other Ways in which Citizens can Complain 183
V. The Role of Parliament in Handling Complaints from Constituents 186
VI. Research Findings 186
SELECTED BIBLIOGRAPHY 189
Annex A 192
Annex B 197

SOLVING THE COMPLAINTS OF CITIZENS AT SUB-NATIONAL LEVELS

Parliamentary Institute of Cambodia (PIC)

Alex READ *

Abstract

Accountability involves not just a relationship between two actors, but also the mechanisms, rules and resources to enable citizens to question and oversee the actions of their local authorities. In Cambodia public accountability is a relatively new concept, and accountability mechanisms and practices may still not be fully understood both by officials and by citizens. There are two main complaint mechanisms at sub-national levels: the Provincial Accountability Working Groups (PAWG) and the District Ombudsmen (DO). These mechanisms represent a shift towards greater public accountability and show that the government is working towards improvements in transparency of decisions and actions by the public administration.

Although PAWGs are now well established, the number of complaints submitted has risen and they have successfully dealt with problems of corruption, misconduct and poor administrative practices, problems with the mechanism still exist. There is still confusion over the mandate of PAWGs and further education for the public is required. Funding is insufficient for travel and equipment and PAWGs would benefit from more training and guidance from higher levels and sharing of best practices. Procedures for collecting and scrutinising complaints should also be streamlined.

District Ombudsmen (DO) are neutral citizen representatives who monitor the performance of local officials. Over time, the Ombudsman's office has improved transparency, curbed corruption and ensured the efficient and transparent running of the One Window

---

* Mr. Alex Read is Research Manager at the Parliamentary Institute of Cambodia (PIC). PIC was established in February 2011 with the aim of supporting and enhancing the capacity and helping to improve the performance of the Cambodian Parliament in its development into an effective democratic institution, assisting legislators in realizing their potential, and sharing its experiences with partner organisations and other Parliaments in the sub-Mekong region and beyond. PIC's capacity building services focus on the provision of expertise in international-quality research, organising workshops, seminars and training, providing tailored courses in English-language skills for parliamentary staff, and assisting in the development of management and procedural tools. This paper was produced with assistance from Ms. Malika Chea, PIC Researcher; Mr. Seth Suon Visal, Research Intern from the Cambodian National Assembly; and Ms. Pyseth Kanika, Research Intern from the Cambodian Senate.

Service Offices, at which citizens can obtain a number of local government services, permits and licences. They have helped to build trust between the administration and citizens by providing a neutral place where problems between citizens and the administration can be resolved. As with PAWGs, there is still confusion over their mandate and citizens may also not trust a mechanism that involves meeting somebody face to face. DOs may also suffer from a lack of professional expertise and limited financial and human resources.

Overall, it must be noted that the DO and PAWGs are very new, and evidence suggests that contacting commune councils through village representatives remains the most common and timely method that citizens use when submitting complaints. Official mechanisms may have to overcome problems of overlapping or unclear mandates, trust, resource, capacity and procedural problems in order to be fully effective.

I. Introduction – Importance of Sub-National Accountability

Accountability, as defined by Eng and Craig (2009),[1] is a personal, administrative and political value embedded in all formal institutions. It involves not just a relationship between two actors, but also the mechanisms, rules and resources that enable a governance system to function more responsibly, and to enable citizens to question and oversee the actions of their local authorities. For this to occur, not only must authorities understand their obligations and be receptive to the needs and problems of citizens, but there must be ways in which local authorities either respond to citizen complaints about administrative actions directly or are compelled to respond by independent agencies. This must occur through a clear and understandable process. However, public accountability of officials in Cambodia is a relatively new concept and accountability mechanisms and practices may still not be fully understood both by officials and by citizens.

Article 39 of Cambodia's Constitution states that "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". Citizens have the right to ask for decisions to be explained by their elected representatives in councils, however this concept does not have a long history in Cambodia and in reality they are unlikely to do this unless there are strong mechanisms functioning that empower them and ensure that they do not feel threatened. Effective mechanisms to let them submit complaints are particularly important in Cambodian culture, where there is an emphasis on status and deference is often paid by villagers to those of a higher status.

1 Eng, N. & Craig, D. (2009). *Accountability and Human Resource Management in Decentralized Cambodia*. CDRI Working Paper Series No. 40. (CDRI; Phnom Penh, Cambodia)

There are three key principles of accountability mechanisms: awareness and education; prevention of wrongdoing; and investigations, sanctions and enforcement.[2] It is critical for the effective functioning of these mechanisms that citizens are aware of how to make complaints; who they are complaining to; how this differs according to the issue they are complaining about; and that these mechanisms are easily accessible. Mechanisms must be designed to ensure that complaints are reviewed according to a due and clear process, in a timely manner, and that authorities are compelled to take action and citizens are informed of decisions made. There are two key complaints mechanisms at the sub-national level: Provincial Accountability Working Groups (PAWG) and the District Ombudsman's (DO) system.

II. Provincial and National Accountability Working Groups

Established by the National Committee for Sub-National Democratic Development (NCDD), the Provincial Accountability Working Group (PAWG) mechanism exists to support administrative reform at the sub-national level by increasing accountability of public investment. This mechanism lets the national and international community see that the local government has a trusted and transparent way to ensure that local investments are management with accountability as per the principles of democratic development. PAWGs are supported by National Accountability Working Groups (NAWG). These bodies can propose redress in the case of complaints, however they do not have legal power. Accountability Working Group responsibilities are to:

- collect and handle complaints related to misuse of the sub-national budget
- identify mistakes/faults of local officials and propose sanctions
- follow up, monitor, evaluate and publicise the solutions for different cases.[3]

Officials from ministries in the public sector make up the NAWGs while the PAWGs are composed of a mix of public and private sector representatives, including the provincial governor, deputy provincial governor, line ministry representatives, commune/sangkat representatives and the private sector. PAWGs have their own budget for solving complaints, but that budget is low. The role of the NAWG is to support the PAWGs. They are not mandated to solve complaints but to give advice and training and follow up and investigate how complaints are resolved at the provincial level.

It is possible to submit complaints to PAWGs where citizens feel that the commune/sangkat fund (CSF) has been used incorrectly, or where they feel there have been abuses of

2 Graham, P. (2010). Final Report of Extension of the Contract for the Design of the Complaint Investigation Handbook and Training for the Accountability Working Groups To include Assessment of National and Provincial Accountability working group and its complaint Mechanism. (National Committee for Sub-National Democratic Development; Phnom Penh, Cambodia)

3 Knowles, J.N. (2007). *Final Report-Assessment of the Accountability Working Group*. (Rural Investment for Local Governance project; NCDD)

power or other issues of local governance that citizens may not be satisfied with. Citizens can make complaints in person or in writing through the 2545 accountability boxes that exist at numerous locations and levels throughout Cambodia's provinces.[4] Complaints boxes are positioned at all provincial, district and commune offices, and at the offices of some Community-Based Organisations (CBOs). Leaflets are available with contact details of PAWG members at each accountability box, and citizens can also receive information about PAWGs from posters and the media. Aside from submitting complaints through the boxes, citizens can also contact PAWG members by phone or in person. Accountability boxes are locked, which allows for anonymity of complaints.[5]

Accountability boxes are opened every month, the complaints transferred into an envelope and transported to the PAWG. Complaints are taken out and read at monthly meetings. Following this they are investigated if they are considered a fair complaint, or submitted to relevant ministries if they fall outside the mandate of the PAWGs. The PAWG has to study and investigate cases that are presented to it. Rather than individually sanctioning those who are investigated, the PAWG recommends action to be taken or refers cases to entities or relevant institutions that can then take punitive measures or solve the case according to relevant legislation on the issue. Resolution is based on investigative reports submitted to the PAWG. The PAWG support group is empowered to give the decision of the PAWG to the relevant body, which has 15 days to decide whether to authorise disciplinary action, reporting back to PAWG on their decision. After investigation, an announcement about any punishment is made within 15 days.[6] The support group has to collect reports from those who were appointed to follow up on the decision and the PAWG checks and discusses the report.

Where the investigation does not show up evidence of misconduct, the case can be referred to department heads for improvement of procedures or reprimand.[7] Feedback to complainants is key and feedback to district and commune levels takes place after a decision is made to investigate and after any sanction has been authorised. Members of the PAWG that are possibly involved in the complaint or that are involved in the dispute may not enter the complaints solving process.

Overall, figures show that the numbers of complaints submitted through the accountability boxes has risen. Comparing the first two quarters of 2011 and 2012, there were 476 complaints in 2012 compared to 346 in 2011, a rise of 38%. Of these, 65% were investigated and reported on. 99% of complaints were submitted using the accountability boxes, showing that citizens value the anonymity that this provides. By far the highest number of complaints in the first six months of 2012 were regarding the role and duties of ministries,

4 Information obtained through interview with National Accountability Working Group, NCDD. 31 August 2012
5 Graham (2010)
6 Ibid.
7 Ibid.

institutions and other authorities that work under local administrations (70%), followed by complaints about the role and duties of commune/sangkat members and staff (14%).[8] Further details of complaints submitted through the PAWG can be found in Annex A.

According to an assessment of the structures, responsibilities and mandates of PAWGs undertaken in 2010 by an independent consultant on behalf of NCDD, key achievements of the PAWG mechanism are:[9]

- PAWGs are well established and people know about the system and use it in growing numbers. This has helped promote the concept of public accountability despite this concept being unfamiliar to many citizens.
- The accountability box is a good way to offer anonymity to citizens when they complain, as citizens may still be afraid to be singled out as complainants.
- Problems of corruption and misconduct and poor administrative practices are being addressed, investigations conducted and wrongdoers sanctioned and disciplined.
- The public is receiving information about complaint resolution, although it may not yet be completely understood.

However, some issues with the mechanism included:

- There is still confusion over the mandate of the PAWGs. The numbers of complaints submitted in different areas is evidence of this. For example, in Stueng Treng province in 2010, of 99 complaints received, 88 were seen as 'to be resolved' and 11 'not to be resolved'. However, in Kratie, of 122 complaints 15 were 'to be resolved' and 107 'not to be resolved'. As complaints were submitted in similar numbers, this indicates that mandates may be interpreted differently in different areas.[10]
- Practices to disseminate information and details of resolutions should be improved. In many locations, leaflets may not be available around complaint boxes. Only 12% of respondents to the 2009 survey felt that information was well distributed.[11]
- Funding for salaries and equipment is very low for PAWGs. Each PAWG in 2009 received only $632 and PAWG respondents felt that funding may be too low for investigators to travel in order to investigate complaints.[12]
- There is not enough lateral communication between provinces and best practices are not shared consistently or often enough.[13]
- There is a continued lack of legal research material available to PAWGs and investigators. Other equipment such as computers and communications equipment is also often lacking.[14]

8 Information taken from *Second trimester report 2012 of Accountability Working Group*
9 Graham (2010)
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.

- There should be more guidance, training and information coming from NAWGs and top levels flowing down to PAWGs.[15]
- Often complaints are made because local people do not understand certain procedures governing business and the public sector and require guidance on these. Therefore, education for the public is required so that they understand how to use complaint boxes effectively. In the 2009 survey, only 14% of citizen respondents said that they were aware of how to make a complaint.[16]
- The process for collecting and scrutinising complaints is currently too long. In many cases, it takes a minimum of three weeks for the investigation to begin because of the procedures involved and also because some provinces are very large and transport times are a factor. Where complaints are submitted just after the monthly collection, they could take up to six weeks to be investigated and up to three months to be resolved. This may cause citizens to lose confidence in the process. More frequent collection of complaints would assist in this, but this is not occurring under current PAWG systems.[17]
- PAWGs need to be more consistent with when they meet. 40% of respondents to a 2009 survey said that meetings were not held consistently. However, a majority of respondents felt that meetings when held were very useful.[18]
- Accountability boxes are currently in disrepair in many locations and this might dissuade citizens from submitting their complaints.[19]

III. One Window Service Office and District Ombudsman Mechanism

One Window Service Offices (OWSO) are an innovation in service delivery in Cambodia, allowing for the provision of varied administrative services to citizens and businesses in one location in a rapid and transparent manner. The OWSO has been created in 17 provinces at the district level. Alongside the OWSO is the District Ombudsman's (DO) office. DO were piloted under the Konrad-Adenauer-Stiftung project co-funded by the European Union in two districts in Siem Reap and Battambang in 2004–2007. Under the World Bank-funded Demand for Good Governance project, seven new DO were inaugurated in Kandal, Kampong Thom, Sihanoukville, Banteay Meanchey, Kratie, Kampong Cham and Prey Veng provinces.[20]

15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Information taken from planning documents for DFGG Project: Terms of Reference for Consultant on One Window Service and Ombudsman Project (OWSO) Study on the Alignment of the District Ombudsman (DO) and the Provincial Accountability Working Group (PAWG)

Ombudsmen are neutral citizen representatives who monitor the performance of local officials and improve the accountability, transparency and responsiveness of administration. The DO is mandated to seek acceptable resolutions for citizens and businesses. The increased complexity of economic and social life and in some areas the lack of full transparency of the actions of public officials has meant that an ombudsman's system is of growing importance in Cambodia in order to enhance trust and engagement between citizens and local authorities and to ensure that the law is upheld. The role of the DO is to:

- monitor and deal with complaints regarding services from the OWSO
- advise on and attempt to target malpractice by public officials, and handle any other complaints about the district administration
- conciliate between parties to solve complaints
- build good relations between the business sector, civil society organisations and the administration.

DO have the power to seek all relevant documents to solve a complaint, to mediate between citizens and authorities, and to send recommendations to the district governor (or to the provincial governor if the complaint relates to the district governor's position). The Ombudsman at the district level is selected by and accountable to a committee of representatives from the district council, the business community and civil society. The Ombudsman is an independent entity and he/she is selected by an election committee composed of all members of the municipal or district council; three representatives of the local business community; and three representatives from registered local NGOs acting from the municipal and district base. All members of the election committee have the right to nominate two candidates to stand for the Ombudsman election.[21] Over time, the Ombudsman's office has been seen as effective in improving transparency, curbing corruption, and ensuring the efficient and transparent running of the OWSO. It has helped to build trust between the administration and citizens, allowing for a neutral place where problems between citizens and the administration can be resolved.[22] Neutrality is a key aspect of the functioning of the DO, and represents an important innovation in complaints mechanisms in Cambodia. The ability of citizens to take their concerns and complaints directly to a neutral and elected representative can be seen as a move towards a mechanism that addresses problems of limited access to information for citizens and public transparency, which is in many cases not provided to citizens through their local government. An independent citizens office also represents a step towards better governance in Cambodia.

21 Information taken from presentation by Mr. CHAN Sothea, Project Manager, Ombudsman's Office
22 Council for Legal and Judicial Reform (2009).

However, some of the problems with the Ombudsman mechanism at present include:

- Complaints are often not submitted in the correct field, indicating that citizens may be confused about the role of the Ombudsman. Although DO are mandated to deal with complaints regarding the OWSO, a review of the complaints between 2006 and 2009 showed that only two were registered and resolved, while other complaints submitted were out of the competency of the DO.[23] In 2011 less than 10% of the correspondence received by the DO related to complaints in the field intended.[24] Complaints received mainly revolve around dissatisfaction about service provision and service providers (such as municipalities and line departments) and complaints that services from the OWSO are limited.[25]
- Despite awareness campaigns including leaflets and radio programmes, citizens may not be aware of the office: in a 2007 survey only 5% were aware of its existence.
- Within the DO there is a lack of professional expertise and limited resources, including financial and human resources.
- There may be a lack of trust between citizens and the Ombudsman's mechanism, evidenced by the eagerness of citizens to submit complaints through accountability boxes but not through the Ombudsman's office.[26]
- Citizens also may be afraid of submitting complaints to the Ombudsman as they cannot go to visit him/her unobserved. They may also feel that the Ombudsman cannot help them in a conflict with the administration.
- There is no direct translation for the word Ombudsman in Khmer, and many believe this negatively impacts understanding. Other possible words to explain it could be 'complaints receiving office' or 'office for serving citizens'.
- Ombudsmen are at present only located at the municipal/district level.
- A case study in Battambang also found that the office was not clearly visible to citizens and not well signposted.[27]

23 Information taken from planning documents for DFGG Project: Terms of Reference for Consultant on One Window Service and Ombudsman Project (OWSO) Study on the Alignment of the District Ombudsman (DO) and the Provincial Accountability Working Group (PAWG)

24 Information taken from presentation by Mr. CHAN Sothea, Project Manager, Ombudsman's Office

25 Information taken from planning documents for DFGG Project: Terms of Reference for Consultant on One Window Service and Ombudsman Project (OWSO) Study on the Alignment of the District Ombudsman (DO) and the Provincial Accountability Working Group (PAWG)

26 Research by GIZ on the Ombudsman system in Battambang and Siem Reap, 2007

27 Council for Legal and Judicial Reform (2009).

IV. Other Ways in which Citizens can Complain

Direct Submission of Complaints to the Commune Council

The clearest way for citizens to voice their concerns about a local issue is through the removal from office of their elected representatives on the commune council. However, commune councillors are also frequently challenged to deal with complaints on a wide range of issues, the most common of which are small-scale complaints from citizens about land, domestic violence, inheritance disputes and loan repayment issues.

Normally, local authorities only solve complaints about civil cases. They are not mandated to make decisions about winners and losers of such cases, rather to make compromises by giving comments, advice and guidelines to the parties contesting the case. If the communes/sangkats cannot solve the problem themselves they can transfer the case to the district level or to the courts. Commune councils have powers to conduct monitoring, control and intervention in association with officials at the provincial/municipal, district/khan territorial levels.[28] Complaints must be submitted to the council in writing by all parties, which must permanently reside in the jurisdiction of the council.[29] Monitoring, control and interventions to solve complaints include actions such as investigation and evaluation, and complaints can be resolved through the issuance of written instructions to the commune/sangkat council to carry out duties required by law.[30]

To adequately deal with disputes, councillors must have time available to visit villages regularly, which is often difficult where distances are very large and budgets are low. Sometimes citizens may be reticent to approach commune councillors as they may feel that unless there is a village network to provide information or the complaint occurs in a village where the commune council office is located, it is difficult for commune councils to adequately resolve problems occurring in villages.[31]

A survey by CDRI in 2011 showed that overall, resolution of complaints was improving quite considerably despite some of the problems stated above. When citizens were questioned about the capabilities of commune councils to resolve complaints, 81% felt that they managed to solve conflict in the villages, up from 55% in 2005; 91% felt that complaints were taken seriously by authorities; and 99% felt that they could approach commune councils if they had a problem, showing that confidence in complaint resolution by commune councils has significantly improved. This could indicate that that de-

28 Royal Kram 0301/05, Chapter 5 Article 53. In addition, Article 49 of Royal Kram 0301/05 shows that "the resolutions [of complaints] of a commune/Sangkat shall be effective for the implementation within its territory only. The resolutions of a commune/sangkat shall not be contradictory to the Constitution, laws, Royal decrees, sub-decrees and proclamations and concerned legal instruments shall be abrogated".

29 Royal Kram 0508/017, Section 6 Article 91.

30 Royal Kram 0301/05, Chapter 5 Article 55

31 Mansfield, C. and Macleod, K. (2004). *Commune Councils and Civil society*. (Pact Cambodia; Phnom Penh, Cambodia)

centralisation reform has successfully managed to resolve conflict at the local level and reduced the gap between local authorities and citizens.[32]

Complaints about Land Issues

In 2006, the National Authority of Land Conflict Resolution (NALCR) was established, and by the end of 2008 there were 1500 complaints registered with the authority. NALCR takes complaints regarding land from citizens and forwards them to the relevant offices and ministries. Its role is to coordinate all land disputes, and the general secretary of NALCR can conduct investigations and inspections following complaints and halt work on land where conflict has taken place. There is little evidence available on whether complaints were satisfactorily resolved or which types of complaints were resolved.

The Ministry of National Assembly and Senate Inspection and Relations (MONASRI) and other Government Ministries

MONASRI works to ensure accountability and transparency in other ministries and institutions. The general department of inspection has a full mandate to conduct inquiries and inspections and mediate in complaints against the administration. The complaints department fields all complaints against public institutions and tries to investigate and solve them, compiling a file to hand to the prime minister to make the final decision. Most cases regard land issues. MONASRI also does substantial work in checking on the performance of government institutions, especially regarding expenditures.

There are also internal complaints/inspections departments in national-level ministries. Handling of internal complaints generally follows the same procedure: complaints are firstly verified by the inspection department; then a hearing is held between the parties; then the department delivers a recommendation with the final decision made by the minister. Where cases are complex and hard to resolve, a working group is set up to investigate. Problems within these departments include the lack of public information and systematic processes that transmit information about the work that these offices undertake, and the lack of available statistics on the types of complaints received and their resolution.

Business-related Complaints

There is also a complaints office (the Dispute Settlements Office) in the Ministry of Commerce that can be used for businesspeople who do not agree with the decisions of the Ministry. However, indications are that this office is not widely used, is difficult to locate and as yet it has not been issued with clear regulations regarding resolving disputes.[33] Businesspeople can also address complaints to the relevant ministry responsible for licensing, which are then dealt with following similar procedures as normal complaints to

32 Ojendal, J. and Sedara, K. (2011). *Real Democratization in Cambodia? An Empirical Review of the Potential of a Decentralization Reform*. (ICLD; Swedish International Centre for Local Democracy)

33 Council for Legal and Judicial Reform (2009).

ministries, or can call a special hotline for business-related complaints. This allows them to register complaints quickly and without long waiting times or administrative processes, and complaints are then forwarded to the relevant office.

Civil Society Organisations

NGOs and civil society organisations can play a vital role in a number of areas and help resolve disputes about different issues such as land claims, domestic violence, inheritance and repayment of loans. They can create networks of other NGO partners and commune councils and help commune councils to link together to learn from actions taken in different areas and promote information flow between local authorities and civil society. They can also help to inform commune councils and citizens about official mechanisms to submit complaints, about legislation and ways to address different issues. They can offer advice to citizens and monitor the progress of complaints and cases under review.[34]

Civil society organisations such as LICHADO aim to work within complaints guidelines, advising citizens on how to submit complaints to the relevant authorities. However, if the cases are related to their areas of competency in human rights issues they can help citizens by advising them how to complain through the legal process in court and can provide them with lawyers to assist them in the complaint-resolution process. ADHOC aims to assist in complaints resolution by conducting investigations to collect evidence and then intervening with the relevant ministry or institution should the case fall within ADHOC's working fields. If this does not happen, ADHOC provides citizens with advice and allows them to consult with ADHOC staff about how their case can proceed. They can also make contact with lawyers and offer a service where victims are given advice free of charge.

The Office of the High Commissioner for Human Rights (OHCHR) receives many inquiries and complaints and requests for legal advice and assistance in disputes. It mainly fields complaints about land, domestic violence, the situation in prisons and other human rights abuses. It gives information to citizens about where they can find recourse for such complaints and supports NGOs that address these different issues. Representatives of the OHCHR feel that citizens do not trust other complaints mechanisms, and therefore citizens turn to NGOs and other institutes when they complain.[35]

34 Ayres, D. and Macleod, K. (2004). *Partnership Handbook*. (Pact Cambodia; Phnom Penh, Cambodia)
35 Council for Legal and Judicial Reform (2009).

V. The Role of Parliament in Handling Complaints from Constituents

Parliament plays a key role in assisting the government to conduct examinations on the performance of government ministries or institutions in order to ensure accountability and transparency to assist the people. The Ministry of National Assembly and Senate Inspections and Relations (MONASRI) is one way in which parliament can become involved in complaint resolution, as it is the government body mandated to address complaints, and has full power under the general department of inspection to investigate and mediate complaints against the administrative bodies raised by citizens.[36]

Parliament can also ensure accountability of public authorities through playing its representation role. The National Democratic Institute (NDI) assessed representation activities undertaken by parliamentarians that aim to uncover the priority issues of citizens at local levels. Following these dialogues, parliamentarians submit a report to prepare themselves to find solutions to the problems raised. NDI observed that these were successful and that parliamentarians worked to follow up on complaints raised by citizens at the local level by fielding reports or writing letters to relevant government institutions, although in certain cases parliamentarians intervened directly and met with local authorities to find solutions to disputes.

VI. Research Findings

It must be noted that most complaint mechanisms – the DO and PAWG – are very new and that they are not yet well established in the eyes of citizens. Many were established at the end of the 2000s and as yet are not functioning in a fully effective manner. However, they represent a significant shift towards greater accountability at all levels and show that the government is making firm efforts towards greater transparency and to give citizens the possibility to check on key decisions made by the public administration. Despite this, evidence suggests that contacting commune councils through village representatives remains the most common and timely method that citizens use when submitting complaints, and official mechanisms may have to overcome trust, resource, capacity and procedural problems in order to be fully effective.

There may be a need for an overall national accountability authority. Many complaints directed to PAWGs are similar to those submitted to other organisations with responsibilities to resolve problems between the public and authorities, so these efforts should

36 Council for Legal and Judicial Reform (2009)

be better coordinated. This would give cohesion to accountability efforts and ensure that different authorities have the resources they need.[37]

It would also answer one problem regarding the overlapping roles of the DO and the PAWG. At present the types of complaints submitted shows that there is possible confusion over their mandates. Issues to be resolved if this does take place include:

- How to design a reporting system that allows for the dual roles of the DO, as an independent arbiter of administrative complaints, and an elected person responsible to an election committee primarily determined by the district/municipal council.
- What aspects of the mandate can be combined and what aspects should be kept separate. There should either be a clear division of labour or each mechanism should be assigned types of complaints based on its comparative advantage. For example, complaints that may require independence and neutrality are best resolved through mediation by the DO; those that are more technical may be better addressed by the PAWG.
- Independence issues, specifically how to balance the fact that DO are independent but accountable to local authorities yet the PAWGs are composed of local authority members. It is important that further linkage of the PAWG and sub-national councils is established to enhance democratic accountability of the PAWG to local levels and citizens. Ways should be explored to link together the PAWG and the commune councils in resolving complaints under their mandates.
- How to overcome differences in coverage across the country between the two mechanisms.[38]

Other recommendations include:

- More information need to be made available to citizens regarding the mandates of both the PAWGs and the DO as at present, many complaints are submitted to both institutions that fall outside their mandates. Citizens should know that there are other authorities as well that can field complaints on issues such as irregular business practices and land.
- Communication practices between PAWGs and DO in different provinces should be enhanced to allow those working at the sub-national level to learn comparative best practices.
- Funding should, at a minimum, ensure that complaint investigators can adequately travel to investigate complaints and that legal material and communications equipment should also be made more available to ensure adequate investigation of a complaint.
- The process for complaint resolution for PAWGs should be speeded up. This will

37 Graham (2010)

38 DOs are active in only 17 municipalities (out of 195 district/municipalities/khans); PAWGs are active in all 23 provinces and the capital. Information taken from planning documents for DFGG Project: Terms of Reference for Consultant on One Window Service and Ombudsman Project (OWSO) Study on the Alignment of the District Ombudsman (DO) and the Provincial Accountability Working Group (PAWG)

involve redesigning the complaint system itself. Options include using lower levels of authority to collect and deal with complaints more frequently, such as sub-groups at the district level or the complaint resolution committees at commune level, which are often seen as quicker and more effective.

- The way the DO operates could be improved by including a box for submission of complaints in public areas where it is clearly visible. This could be in collaboration with PAWG boxes with DO responsible for collection of complaints in their jurisdiction. However, how this works in regard to the DO being neutral and the PAWG comprising representatives from the local administration would have to be considered. Moreover, there should be further information about the Ombudsman's role, and a possible expansion of the competencies of the Ombudsmen.[39]
- Civil society organisations should interact more frequently with representatives from the DO and the PAWG and with parliamentarians in forums at the local level. These could be used to discuss: common citizen complaints; where complaints are generally submitted to; why citizens may not use complaint mechanisms; problems that complaint mechanism members have in fielding complaints and how parliament can become better involved in dealing with local problems.

39 Council for Legal and Judicial Reform (2009)

SELECTED BIBLIOGRAPHY

- ANSA (2011). *The Evolving Meaning of Social Accountability in Cambodia*. East Asia Pacific
- Ayres, D. and Macleod, K. (2004). *Partnership Handbook*. Pact Cambodia
- Burke, A. and Nil, V. (2004). *Options for increasing social accountability in Cambodia*. DFID and World Bank
- Council for Legal and Judicial Reform (2009). *Pre-Assessment on Ombudsman and other Complaint Systems in Cambodia*
- Care (2006). CARE International in Cambodia Complaints Mechanism Case Study
- COMFREL (2007). *Final Assessment and Report on 2007 Commune Council Elections*
- Commonwealth Ombudsman (2009). *Better Practice Guide to Complaint Handling*
- Evans, H., Ngin, Ch., Lang, H. and Min, M. (2010). Final Evaluation of PSDD. UNDP
- Emergency Capacity Building project (2007). Impact Measurement and Accountability in Emergencies. *The Good Enough Guide*
- EIC. (2010). Report of the Second Citizen Satisfaction Survey in Target Communes of the LAAR project
- Eng, N. and Craig, D. (2009). *Accountability and Human Resource Management in Decentralized Cambodia*. CDRI working paper 40
- Graham, P. (2010). Final Report of Extension of the Contract for the Design of the Complaint Investigation Handbook and Training for the Accountability Working Groups To include Assessment of National and Provincial Accountability working group and its complaint Mechanism. NCDD
- Grimsditch, M. and Henderson, N. (2009). *Untitled: Tenure Insecurity and Inequality in the Cambodian Land Sector*. Bridges Across Borders Southeast Asia, Centre on Housing Rights and Evictions, Jesuit Refugee Service
- Gruber, R. and Khlok, D. (2009). *Ombudsman and other Complaint systems*. GTZ
- Horng, S. and Craig, D. (2008). *Accountability and Planning in Decentralized Cambodia*. CDRI working paper series No.39.
- Hughes, C. and Kim, S. (2004). *The Evolution of Democratic Process and Conflict Management in Cambodia: A comparative study of Three Cambodian Elections*. CDRI working paper 30
- Hammer, M. and Cumming, L. (2011). Accountability Assessment 2011/2012 Result. The World Bank
- Heng, S., Kim, S. and So, S. (2011). *Decentralized governance in a Hybrid Policy: Localisation of Decentralization Reform in Cambodia*. CDRI working paper 63.
- Knowles, J. N. (2007). *Final Report-Assessment of the Accountability Working Group*. NCDD

– Kim, S. and Ojendal, J. (2007). *Where Decentralization Meets Democracy: Civil society, Local Government and Accountability in Cambodia*. CDRI working paper 35
– Mansfield, C. and Macleod, K. (2004). *Commune Councils and Civil society*. Pact Cambodia
– MONASRI (2008). Project proposal *Demand for Good Governance (Law dissemination and complaints handling)*
– Meerkerk, D., Hean,S. and Lanjouw,S. (2008). *Survey of Citizen and council perceptions of commune councils*. Center for Advanced Study
– NCDD (2009). *Procedure of Investigation and Solving complaint of Accountability Working Group* (Khmer version)
– NCDD (2010). Cambodia: Rural Investment and Local Governance project (RILGP)
– Ojendal, J. and Kim, S. (2011). *Real Democratization in Cambodia? An Empirical Review of the Potential of a Decentralization Reform*. ICLD (Swedish International Centre for Local Democracy)
– Pak, K., Hong, V., Ann, S., and Ngo Ngoun, Th.(2005). *Strengthening Provincial governance in Cambodia's Decentralization and De-concentration Reforms: Accountability in the new management reform system*. CDRI
– Pak, K., Hong, V., Eng, N., Ann, S., Kim, S., Knowles Noelle, J. and Craig, D. (2007). *Accountability and Neo-patrimonialism in Cambodia: A Critical Literature review*. CDRI working paper 34
– Pak, K. and Craig, D.(2008). *Accountability and Public Expenditure Management in Decentralized Cambodia*. CDRI working paper 38
– UNDP (2010). S*trengthening Democracy and Electoral Process in Cambodia*.
– Sieng, D., Hor, Ch. and You, S. (2006). *Local Public Services Performance and Unofficial Fees*. EIC
– World Bank (2009). *Cambodia Linking Citizens and the State*

Internet resources:

– Brief report in PSO meeting. (2010) http://www.google.com.kh/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBoQFjAA&url=http%3A%2F%2Fwww.ncdd.gov.kh%2Fimages%2Fstories%2Fncdd%2F2010%2Fawg%2F1st_PSO_Meeting_Report.pdf&ei=P-50UOC5C6qfiAf_qIGIAQ&usg=AFQjCNGZ-soYT0E6xjgimhr2iGQzWOv1Yw
– NCDD, Accountability. http://www.ncdd.gov.kh/en/accountability-working-group
– CCSP. (2011). D&D Bulletin, Cambodia civil society partnership, from http://www.ccspcambodia.org/index.php/resourcecenter/bullitenapublication

– CCSP. (2010). D&D Newsletter, D & D Analysis: Perspectives on the Engagement of Civil Society With Provincial & District Councils, from http://www.ccspcambodia.org/index.php/resourcecenter/bullitenapublication
– Martin,V. (2010). Literature Review: Complaints Mechanisms and Handing of Exploitation and Abuse, from http://www.un.org/en/pseataskforce/documents/hap_literature_review.pdf

Interviews:

– On 28 August 2012 with Ms. SAO Chamhorm and Mr. AM Sam Ath, Monitoring Coordinator and Monitoring Technical Supervisor. LICAHDO
– On 31 August 2012 with Mr. DOUK Nareth, Accountability Consultant and Mr. HUOT Leappiseth and Mr. CHEA Vannda, National Support Officer. NCDD
– On 5 September 2012 with Mr. NY Chakrya, Inquiries Program Manager. ADHOC
– On 11 September 2012 with Mr. LEE Sothearayuth, Program Manager. NDI

Annex A

Complaints submitted through PAWG, DO and Civil Society Organisations

PAWG mechanism

Complaints received and resolved in 2010 and the first two quarters of 2011.[40]

	Number of complaints received	Number of complaints within PAWG's mandate	Number of complaints resolved
2010	**1,216**	**639**	**224**
Jan. - Jul. 2011	**346**	**98**	**21**

Between April and June 2012, 220 complaints were submitted using different methods, with accountability boxes seen to be the most popular way of submitting complaints.

Complaints submitted using different methods

	First Quarter 2012		Second Quarter 2012	
	Number	**%**	**Number**	**%**
Accountability Box	**258**	**99%**	**218**	**99%**
Phone	**0**	**0%**	**0**	**0%**
Other methods	**2**	**1%**	**2**	**1%**
Total	**260**	**100%**	**220**	**100%**

Source: Second trimester report in year 2012 of National Accountability Working Group

The complaint selection was followed by an investigation procedure and complaint resolution. The result of the complaint selection is as follows:

Complaints that were settled or not settled

	First Quarter 2012		Second Quarter 2012	
	Number	**%**	**Number**	**%**
Complaints that were settled	**177**	**68%**	**117**	**53**
Complaints that were not settled	**83**	**32%**	**103**	**47%**
Total	**260**	**100%**	**220**	**100%**

Source: Second trimester report in year 2012 of National Accountability Working Group

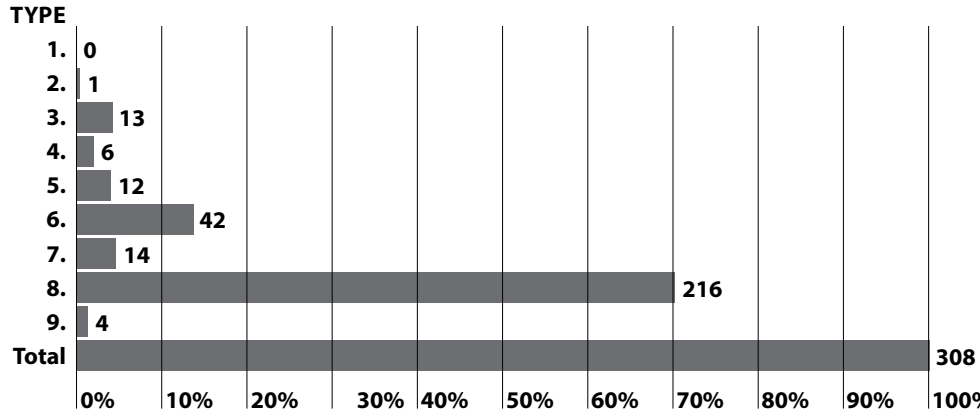
40 Information taken from planning documents for DFGG Project: Terms of Reference for Consultant on One Window Service and Ombudsman Project (OWSO) Study on the Alignment of the District Ombudsman (DO) and the Provincial Accountability Working Group (PAWG)

Overall, there were nine types of complaints that were most commonly submitted:[41]

1. Irregularities in use of the budget in the capital and provinces
2. Irregularities in use of the budget in the cities and districts
3. Irregularities in use of the budget in the commune/sangkat councils
4. Complaints about the role and duties of capital and province administration members
5. Complaints about the role and duties of city, district and khan administration members (council member, administrator group and staff of commune/sangkat council)
6. Complaints about the role and duties of commune/sangkat members (council members and staff of commune/sangkat councils)
7. Complaints about the role and duties of commune/sangkat assistants/staff
8. Complaints about the role and duties of ministries, institutions and other authorities that work under local administrations
9. Complaints about the role of NGO partners at capital and provincial level.

The graph and table show details of which types of complaints were most common in the first half of 2012:

Complaints classification (January - July 2012)



Source: Second trimester report in year 2012 of Accountability Working Group

41 Interview with Accountability Working Group

January - July 2012

Type	Classification	Number	%
1.	Irregularities in use of budget by capital and province	**0**	**0%**
2.	Irregularities in use of budget by city and district	**1**	**0%**
3.	Irregularities in use of budget by commune/sangkat councils	**13**	**4%**
4.	Complaints about the role and duties of capital and province administration	**6**	**2%**
5.	Complaints about the role and duties of city, district and khan administration members (council members, administration group and staff of commune/sangkat councils)	**12**	**4%**
6.	Complaints about the role and duties of the commune/sangkat (council members and staff of commune/sangkat councils)	**42**	**14%**
7.	Complaints about the role and duties of commune/sangkat assistants/staff	**14**	**5%**
8.	Complaints about the role and duties of ministries, institutions and other authorities that work under local administrations	**216**	**70%**
9.	Complaints about the role of NGO partners at capital and province level	**4**	**1%**
	Total	**308**	**100%**

Source: Second trimester report in year 2012 of Accountability Working Group

District Ombudsman Mechanism[42]

Data on the complaints submitted through the DO mechanism show that based on data in the first half of 2011, fewer complaints were being received in 2011 than in 2010

Complaints received through the District Ombudsman mechanism

	Number of complaints received	Number of complaints within PAWG's mandate	Number of complaints resolved
2010	**1,216**	**639**	**224**
Jan. - Jul. 2011	**346**	**98**	**21**

Topic of the complaints received

	Complaints received	Number	%
1.	Dissatisfaction about service provision	**31**	**8%**
2.	Complaints about too limited services provided by OWSO	**69**	**17%**
3.	Complaints about other service providers (for example, municipalities and line departments)	**7**	**2%**
	Sub-total	**107**	**27%**
	Other communications		
4.	Expression of admiration	**75**	**19%**
5.	Request for information about OWSOs' and other services	**216**	**54%**
	Sub-total	**291**	**73%**
	Total	**398**	**100%**

Source: Second trimester report in year 2012 of Accountability Working Group

42 Information taken from planning documents for DFGG Project: Terms of Reference for Consultant on One Window Service and Ombudsman Project (OWSO) Study on the Alignment of the District Ombudsman (DO) and the Provincial Accountability Working Group (PAWG)

Complaints to Civil Society Organisations

LICHADO: Complaints in the first 6 months of 2012: [43]

Cases already solved:

- Human rights: 180 cases:
- 3 cases solved through the courts, 40 cases solved through the local authority (police, commune sangkat).
- Cadastral committee related to land: 3 cases

Cases in the process of being solved: 131 cases:

- 78 cases solved at the local authority; 49 cases solved at the court
- Cadastral committee related to land: 4 cases
- Case related to gender: 108 cases: domestic violence 67 cases, rape 38 cases, indecent assault 1 case and acid attack 1 case.
- Case relate to children: 120: rape 99 cases and 21 other cases.

ADHOC: Complaints in 2011[44]

According to reports on 532 cases surveyed by ADHOC in 2011, domestic violence remains a serious issue. Most victims who suffer from domestic violence are women and children who are vulnerable. In the same year there were 476 cases of rape. There was a decrease of around 501 cases since 2010.

In 2011 cases of violations of male/female migrant workers' rights increased twofold from 2010. In 2010, there were only 51 cases while the figure reached 102 cases in 2011. These cases are based on complaints received by ADHOC and investigation and interventions it carried out through its 24 offices throughout Cambodia's provinces/municipalities.

National Democratic Institute

NDI have the Constituency Dialogues Program to enhance parliamentary accountability and provide an avenue for more meaningful engagement between citizens and their elected representatives. Currently NDI holds dialogues in the following provinces: Banteay Meanchey, Battambang, Kampong Cham, Kampong Chhnang, Kampong Speu, Kampong Thom, Kampot, Kandal, Kratie, Prey Veng, Siem Reap and Takeo. Across 12 provinces, dialogue participants echoed the same three problems affecting their lives: land conflicts, infrastructure and irrigation needs, and corruption and unequal enforcement by local authorities.

43 Interview with LICADHO 29 August 2012
44 ADHOC Report, 2012. Women's and Children's Rights in Cambodia: Situation report 2011

Annex B
Advice for Parliamentarians on Handling Citizen Complaints

1. Information gathering regarding the complaint

Parliamentarians can assist citizens in submission of complaints by informing them of how to ensure that their complaints are handled in the most effective way. They should inform citizens that they should:

- include names of any witnesses and anyone else involved where possible
- include the date and time of any incident
- describe the area where it happened
- if the complaint is about the commune, citizens can use the district or provincial complaints boxes, or ask a local CBO to submit it for them
- keep any documents related to the complaint.

2. Following up on complaints

It is very important not to lose the information learnt during representation activities, if this happens the public will become apathetic and will be less likely to participate in future consultations. Even if there is no resolution to a particular complaint, if the public is to have faith in the public consultation process, it is vital for them to know why there is no solution and what has been tried. Therefore, complaints must be transferred by parliamentarians to relevant line ministries if necessary, and the issues discussed must be acted upon and the results of the action made public. This can happen in a number of ways:

Letter writing

If an issue can only be solved by the executive branch, parliamentarians should write letters to the relevant line ministries detailing the issue(s) and the views of those at the public consultation. This should be completed no more than a week after the consultation has taken place. However, writing letters is just the beginning, politicians need to:

- Make sure that the copies of those letters are delivered to the concerned communes and individuals through the Provincial/Regional Offices.
- Follow-up with relevant line ministries about the action they have taken or propose to take on the issue(s).
- Follow-up with the provincial governor's office about the action they have taken or propose to take on the issue(s).

Although these measures would involve a lot of work, over time they would give the representational role of parliament strong credibility and generate deep trust from the people towards their parliamentarians.

Roundtables

Letter writing alone is not sufficient for results of public consultations to be adequately followed up as they can often omit important information. It is also necessary for parliamentarians to meet with the relevant line ministries to get full explanations of issues raised in public consultations, and to report back their findings to constituents. After a public consultation in the field has taken place, a roundtable should be organized to discuss the results of the consultation, with specialists from the executive branch and other relevant institutions. The roundtable would help to validate the result and information analysis from the field visit and to disseminate the results to other stakeholders. After the roundtable, a plan of action should be drawn up between the relevant line ministries, parliamentarians and public consultation organizers to act upon the issues raised at the public consultation, and to choose from different communication strategies to publicize the results of the follow-up action.

Provincial office services

The POs are vital for feedback and follow-up action from public consultations to reach the public. PO services should include gathering the results of the feedback initiated by parliamentarians with the relevant line ministry and disseminating the results to the public, using a communication strategy based on the communication methods listed above.

3. Performing casework

Citizens need an individual who can help them when they have problems with bureaucratic issues, or to assist with shared local problems. Parliamentarians have a broad knowledge of public administration and they and their staff should be sympathetic people with human faces who can use their authority to solve problems. Solving individual queries on an individual case basis is called 'casework'. Casework allows parliamentarians to acquire a first-hand understanding of the way in which parliament and government is working, or not working, for their constituents. Casework also lets constituents know that parliamentarians care about the impact of parliamentary decision-making on their daily lives. It may help to have the problem or request written down to keep a permanent record and for follow up purposes. A parliamentarian faces four general options in deciding how to address a constituent request:

Option 1: Refer the case

Most parliamentary offices refer cases that are not within their jurisdiction to the appropriate government agency. In many situations, citizens do not have a basic understanding of where they can go for help or how they should solve the problem. In such cases, a parliamentary office can offer some friendly advice to confused and frustrated citizens. However, it is important that parliamentarians do not refer the case unless they are sure that the authority they have referred the case to can adequately answer it.

Option 2: Tell the person there is nothing you can do.

Saying 'no' is often the hardest thing for a parliamentarian, but in the long run most parliamentarians believe it is politically unwise to hold out false expectations. This is especially important for issues over which the public sector has no control.

Option 3: Try to solve multiple problems of constituents at a later date

Sometimes it is easier and more efficient to solve problems that are shared amongst constituents collectively at public meetings or forums. Joint submissions/applications could be completed by those attending and the parliamentarian could send a letter to the office responsible for resolving the issue stating what the legislator would like to see done with the complaints and how they would like to see any problems resolved.

Option 4: Play the role of an advocate

If a parliamentarian determines that a case should not be referred or rejected, there are variety of ways in which they can play an advocacy role. Firstly, they can open the case by giving the person a chance to tell his/her story in his/her own words. The meeting in this case should be personal and as short as possible. At the end of the meeting the citizen should be informed of the steps the parliamentarian plans to take to try to resolve the issue. It is important to keep good records of all efforts made to help a citizen.

Often after exploring various ways to resolve a problem, a parliamentarian's efforts may be unsuccessful. In these cases, it is vital that they provide an honest and clear answer to the constituent without hiding behind bureaucratic language, making it clear that often the parliamentarian is not the final decision-maker. Often cases will have negative outcomes since citizens usually request the assistance of their parliamentarian as a last resort and have probably already exhausted most of the alternatives for resolving their problems. However, if the case is handled with a human approach, the citizen will have had at least one positive experience with the Cambodian system of democratic governance. When a parliamentarian works on a case, they take small steps to empower people to find solutions to their problems.

(taken from the Cambodia-Canada Legislative Support Project (CCLSP) *Public Consultation Guidelines*. Funding support from the Canadian International Development Agency (CIDA))

STATE LIABILITY AND RIGHTS OF CITIZENS TO CLAIM DAMAGES

Yan VANDELUXE

CONTENTS

Abstract 203
I. Current Framework of Law of State Liability 205
II. Principles of State Liability 206
III. The Competent Jurisdiction for Administrative Liability 210
1. History of Competent Courts in Adjudicating Administrative Litigation 210
2. Current Legal Framework of Court Organization in Dealing with Administrative Cases 213
IV. Conclusion 215
SELECTED BIBLIOGRAPHY 216

STATE LIABILITY AND RIGHTS OF CITIZENS TO CLAIM DAMAGES

*Yan VANDELUXE**

Abstract

Administrative law is generally defined as **a set of rules taken by the administration governing citizens in a state, aiming at assuring the organization and public order of the society**. Some authors define administrative law as the "law of Administration of a state"[1] or as "the law that concerns relations between the administration (governments) and private individuals".[2] However, we must add to these basic definitions that administrative law is overseen and administered by courts, in order to ensure its conformity to the rule of law, democracy and principles of legality.

Thus, **administrative law is not only a set of rules taken by an administration but includes also case law (jurisprudences) taken by judges in controlling those rules**.

The existence of administrative law in Cambodia is subject to controversy. Some writers purport that administrative law in Cambodia does not yet exist due to the absence of coherent rules governing the relations between its administration and citizens.[3] While it is correct to say that Cambodian administrative law is not yet coherent, going so far as to claim that it does not exist is certainly stretching a point, as in every state or society, a minimum set of rules regulating state activities or protecting public order are indispensable needs, clearly in existence in one form or another. From this point of view and from the above definition, we can see that administrative law in Cambodia does exist, albeit not yet in a coherent or well-developed form. It can be seen in a number of special rules dealing with specific topics that have been adopted by the parliament of the Kingdom of Cambodia, or issued by the government in order to assure the normal functioning of the central government and the administration of state territory. However, these regulations are still in their infancy and not yet coherent due to the fact that each provincial and local

* Yan Vandeluxe is a doctor of public law from the Université Lumière Lyon 2 (France). He is a professor of public law at the Royal University of Law and Economics (RULE) and also advisor to the secretariat general of the Senate of Cambodia. The analysis and opinions expressed in this chapter are his own and do not reflect those of the organizations he works with.

1 Pierre-Henry Chalvidan and Christine Houteer, *Droit Administratif (Administrative law)*, Nathan, 1996.

2 René Seerden and Frits Stroink (eds.), *Administrative law of the European Union, Its members States and the United States, a comparative analysis,* Intersentia Uitgevers Antwerpen-Groningen, 2002, p.1.

3 Say Bory, *General Administrative Law*, 3rd ed., 2002, Blossom Lotus, p.2.

administration applies them according to its interpretation and makes regulations according to its powers. Furthermore, the administrative litigation process is still incipient, not yet clearly separated from civil cases and still under the jurisdiction of civil courts.[4] Citizens are reluctant to take administrative bodies to court. Rather than through legal action, a clear preference exists to settle disputes by negotiation. This situation is not favorable for the development of administrative law in general and for state liability law in particular.

When dealing with state liability law, terminological clarification is needed. A state is generally understood as "community of persons living within certain limits of territory, under a permanent organization which aims to secure the prevalence of justice by self-imposed law".[5] This constitutional law context is not the purpose of this chapter. The state here is to be understood in an administrative law context as an **administration**, emerging from the relationship between legislative and executive powers. Cambodia is a unitary state underwritten by principles of pluralist democracy. Therefore, the function of 'administration' in both contexts is required to regulate the relationship between the legislative and executive powers.

Regarding a state's 'liability', we can understand the term as similar to 'responsibility' or 'answerability' but including an important nuance: "A state is said to be 'liable' to any individual who has a legal right against it; to be 'responsible' or 'answerable' to him only if, in addition to the right, he has an adequate remedy".[6] Thus, state liability here is to be understood in terms of a state administration's liability for tort and for any damages caused by its unlawful decisions.

Under current Cambodian administrative law, the law of state liabilities is not yet distinct from administrative law due to the lack of specific and coherent rules, and also an absence of court decisions that articulate the law and develop its coherent application. Thus, Cambodian laws of state liability are currently incorporated within its administrative law, which can be considered as a part of it.[7]

Although there is neither an Administrative (Procedure) Code[8] nor any courts specifically charged with adjudicating administrative litigation, we nevertheless see some *ad hoc* rules and regulations dealing with issues of state liability or asking the court to deal with

4 Even the School of Judges was recently created, but special training for administrative judges does not exist yet. As a consequence, there are not specialized judges on administrative cases. Some cases, involving agents of administration, are considered and treated as normal civil cases.

5 Black's Law Dictionary, 9th Edition.

6 John M. Maguire, 'State liability for Tort', *Harvard Law Review*, Vol. 30, No 1, November 1916, p.20.

7 From the French perspective, the principal of state liability took root and progressively affirmed its autonomy from the 19th century. The first example can be seen in a famous jurisprudence decided by the *Tribunal des Conflits (Tribunal of conflicts)*, dated 8 February 1873, "*Blanco*". According to this jurisprudence, "*The liability that could be incumbent upon State for harms caused by its agents it employs in the public service is not general nor absolute…it has its own rules which vary according to the needs of the service and the necessity of reconciling the rights of the State with private rights*".

8 German experts are involved in supporting the process of developing an administrative (procedure) code.

administrative cases. Such laws applied to this end range from the supreme law of the Kingdom of Cambodia, the 1993 Constitution, to rules normally applied to civil cases (Part 1 of this chapter). Within this current legal framework, there are a number of laws that currently function, and thus could be considered as general principles of state liability in Cambodia and can be utilized in administrative litigation actions (Part 2). Finally, within the current legal framework of court organization, this chapter will review some earlier projects that aimed at reforming the administrative process in Cambodia, as well as some reflection on its perspective in order to establish a contentious administrative law (Part 3).

I. Current Framework of Law of State Liability

The 1993 Constitution of the Kingdom of Cambodia provides equal rights for every Khmer citizen. Article 31 (section 2) states that "every Khmer citizen shall be equal before the law...". This provision must not be regarded in its narrow sense as equality of rights between Cambodian citizens as individuals before the law, but must be understood in its broader sense as equality between Khmer citizens and the state administration or its agents. Thus, the state as a legal entity, in which administrative agents provide the means of its functioning, is equal before law as are ordinary Khmer citizens. This is an important condition for the construction of the rule of law and the adherence to principles of democracy. In this regard, Article 39 of the 1993 Constitution recognizes the rights of Khmer citizens "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...". This article unequivocally recognizes, first, the rights of every citizen to file complaints against any violation of their rights and subsequently to claim compensation for any damages they suffered and, second, the existence of state liabilities to redress its wrongdoings or torts.

Within this constitutional and policy framework, the government is required to further develop an administrative (procedure) code as well as to regulate state liability. As this is an ongoing process, neither a general administrative code nor comprehensive regulations on state liability are currently available.

The only regulations on state liability or, particularly, the liability of public agents, can be found in the new civil law of the Kingdom of Cambodia, a code normally applied to relations between private individuals. Article 749 (section 1) of the Civil Code of the Kingdom of Cambodia prescribes that:

> *where a public official who exercises the public authority possessed by the national government or a governmental entity intentionally or negligently harms another in violation of the law in course of his public duties, the national government or governmental entity is liable for the payment of damages.*

The Article recognizes without any ambiguity state liability under tort law. However, it is silent regarding the procedure and court jurisdiction to adjudicate such matters.

The constitutional and civil code provisions cited above set out general grounds for the liability of the state and its administrative agents for their wrongdoings and recognize, as a consequence, the rights of citizens to claim damages suffered from unlawful or negligent state actions; however they fail to elaborate any procedure to follow or any principles that would be applied in holding the state to account for its actions. Despite this, within this vacuum of law, we try to detect principles of state liability from various sources of law within the current legal framework of Cambodia.

II. Principles of State Liability

Although a Cambodian administrative code or law on state liability is currently not available, general principles commonly applied under tort law could be applied in administrative litigation against state actions.[9] An administration is liable for its actions only when there is a **fault** committed and **prejudice** is consequently suffered by citizens; the **causal relationship between act and prejudice has to be proven by the plaintiff**.

These general principles are already found in the current Civil Code of Cambodia. Article 743 stipulates in the first paragraph that:

> *a person who intentionally or negligently infringes on the rights or benefits of another in violation of the law, is liable for the payment of damages for any harm occurring as a result.*

Thus, the notions of fault and damages are clearly recognized as elements for engaging civil liability. The third paragraph of the same article adds the third element of liability which is the link between fault and prejudice; according to the third paragraph:

> *except as otherwise provided in this Code or in other laws, the person seeking damages must prove the intent or negligence of the tortious actor, the causal relationship between the actions of the tortious actor and the harm that occurred, and the harm suffered by the injured party.*

Under administrative liability, unlike civil liability, the fault is always committed by an agent of an administration for the reason that the administration, as a legal public entity, could not commit any fault. There is thus an interest in distinguishing the **fault of an ad-**

9 When administrative complaints are filed with the current court, judges are obliged to adjudicate. If not, they will commit disciplinary fault that could engage responsibility in front the Supreme Council of Magistracy.

ministration from the **personal fault of an agent**. The current legal framework of Cambodia is not yet clear about this distinction. There is not yet any provision, written or otherwise, on this subject. From the experience of French administrative law, the personal fault of an agent has to be distinguished from the fault of an administration as a public person. This distinction is important for the application of the law and the court jurisdiction that deals with such matters.

With regards to this distinction, under French law the personal fault of an agent was firstly addressed in the 19th century by the decision of the *Tribunal des Conflits*,[10] dated 30 July 1873, "*Pelletier*". In this jurisprudence, the court adjudicated that the agent of the administration is liable for its actions, like other citizens, in front of the civil court if he has committed any "fault detachable from its institution" – in other words, without any link to the official work he pursues. From this concept, two categories of faults are generally recognized as personal faults of an agent. Firstly, a fault committed outside the institution[11] and secondly, the fault committed within the institution but pursuant of the agent's personal ends, without any link with administration interests.[12]

If the faults were considered as personal to the agent, the victims could pursue him in the civil court and, as a consequence, the civil code would be applied to him as it would to any other private individual: the agent would be personally liable for the faults committed. From another viewpoint, the administration could be engaged and liable with the fault committed by its agents even if the act committed could lead to criminal cases.[13] From this concept, the Cambodian judges could take these points into consideration when cases are presented in front of them. The future application of a civil or administrative code depends on the personal fault of an agent or the fault of the administration.

On the other hand, there is fault of the administration when the prejudice is non-personal and has its origin in the accomplishment of public service. Faults that could lead to administrative liability come in various forms. Firstly, it could be an omission or inaction of an administration to take measures in applying laws adopted by parliament. In that case, individuals could incur damages due to this abstention. An excessive slowness in enacting measures could also lead to a liability. The fault is therefore non-personal, that is, not committed by any agent. Second, the fault could derive from illegal acts of an administration, that is, acts breaching any rules or regulations in force such as the Constitution,

10 *Tribunal of conflicts*: the main jurisdiction to solve conflicts arising between administrative and civil courts.

11 For example, a firefighter lights an intentional fire

12 For example, a driver misuses a car belonging to the state for personal purposes; or the excess of behaviour leading to violence.

13 For example, a driver of a military car hits a passenger during his duties.

international conventions or laws,[14] or any refusal to provide information or the provision of inaccurate information, causing damages to individuals. Thirdly, it could be negligence.

Under the French law of administrative liability, the fault is mainly "shown by the fact that any illegality, in any administrative decision is considered in and by itself as a fault"[15] even if "it is purely formal or procedural".[16] However, illegality doesn't necessarily lead to liability. For example, procedural or formal illegality can be regulated later.[17]

The fault of an administration in its various aspects could lead to its liability when damages and causation could be proved by the victims. The prejudice or damage is not necessarily physical or pecuniary and not necessarily material: it could also take the form of a disturbance, psychological or moral damage, or mental pain. The damage can be already suffered, or yet to be suffered, but it must be certain.[18] For causation under the French contentious administrative procedure to be found, the fault has to be proven by the plaintiff, that is, by citizens who think they have suffered damages, with exceptions in some cases such as the case of a loss of chance (*la perte d'une chance*). In some circumstances, an administration can be partly exonerated from its liability when it is proven that it is the fault of plaintiff, or the act of a third person, or a situation of force majeure.

From the analysis above, the law of state liability in Cambodia exists. Cambodian judges, when receiving complaints from citizens who believe they suffered damages or considered themselves victims of administrative acts, have to find rules for adjudication as prescribed by the constitutional provisions cited above. Moreover, some provisions set out in the Civil Code, such as liabilities for breaches of contracts (Chapter 2, 3 and 4 in Book 4) or state liabilities for illegal acts of civil servants (Article 749), could serve as grounds for judges to make proper judgments.

The other issue of state liability is its liability in some special circumstances. The French administrative liability developed the notion of 'liability without fault' (*la responsabilité sans faute*). This concept could be of relevance to Cambodian judges and, from this concept, the evolution of a law of state liability in this area is possible in Cambodia.

The state liability without fault aims at protecting individuals in some cases where the damages exist but the fault is difficult to prove. Under French liability law, in some cases, fault is assumed and the administration is presumed to be liable for the damages. The theoretical ground of this concept is a 'risk theory'. In some cases, administrative activities, by their nature or their scope, create special risks even where they are con-

14 It is noteworthy that all illegal administrative decisions are not necessarily harmful to individuals. Thus, an illegal decision for non-respect of form or consultation procedure required by laws may not cause any harm to individual; in that condition,it could become legal if the author of the act regulated its situation by respecting the form or procedure required.

15 René Seerden and Frits Stroink (eds.), *op. cit*, p. 42.

16 Ibid.

17 An administrative act, illegal due to lack of consultation of the competent organ, can be regulated by asking for advice from that organ later.

18 René Seerden and Frits Stroink (eds.), *op. cit*, p. 43.

ducted lawfully, without any fault. However in such cases it would not be equitable to leave persons who by chance suffer damage from these activities without any compensation. For example, a case of damages suffered by state agents during the course of their normal work with dangerous materials;[19] or the classic example of an injury incurred by a bystander due to the use of firearms by the police. The second category is the liability of the state for damages suffered by persons assisting an administration; they are entitled to compensation where they suffered damage even if there has been no fault on the part of the latter.[20] The third category concerns damages caused by public works to people other than the users.[21] The fourth concerns damages caused by demonstrators.[22]

The other theoretical ground of state liability without fault is based on the concept of 'breach of equality'. It is the case, for example, of damages caused by public works or equipment,[23] or damages caused by statutes or international treaties.[24]

From those practices, Cambodian judges and lawyers could take these rules into consideration if complaints were filed with them. The administrative code could also set out those rules in order to assist the judges in their adjudicating function.

Another possible evolution of law of state liability relates to the recent development of local administrations in Cambodia. Laws on the organization and functioning of sub-national administrations (communes/*sangkat, srok/khan/krong* and provinces/the capital) recognize the legal personality of these entities. They are considered as legal public persons and enjoy administrative and financial autonomies. Therefore, damages caused by those sub-national administrations for their decisions or for their tort should lead to their own liability and should not be answered by state administration at the national level. So the liability of local administration should be recognized as one of the possible developments that must to be taken into consideration under the current law of administrative liability.

19 For example, state agents working in gunpowder manufacture.
20 An example: volunteer firefighters.
21 An example could be where a chemical product, spread on a road that is being repaired, pollutes a neighbouring agriculture property.
22 Damages inflicted by demonstrators to bystanders or to shops along the road of the demonstration have to be compensated by the state.
23 An example could be where rebuilding a road make access to a shop or a hotel impossible for a certain time.
24 C.E, Ass., 14 January 1938, *Société Anonyme des produits laitiers La Fleurette.*

III. The Competent Jurisdiction for Administrative Liability

The objects of complaints against any illegality or tort of an administration that could lead to administrative liability, or eventually to sub-national administration can generally be grouped into two categories: objective or subjective complaints. These can be general and abstract cases (the effects of court decisions are non-personal and affect only a general situation), or they may affect only a certain individual case. From this point of view, complaints for state liability in Cambodia could be divided into two categories: complaints for illegality and complaints for compensation. The first category of complaints, called objective complaints, aims at asking for the nullification of an administrative act or an administrative decision by assessing that it is in breach of any principal of legality. The decision made by judges in favour of the complaints causes the nullification of the act or decision and affects an entire situation or every individual. The second category, on the other hand, aims at asking for the nullification of a contract or at claiming damages caused by state acts.[25] This second category is generally called a subjective complaint as the decision of the judge in favour of the complainant affects only the case presented in front of him or her by the particular individual.

Complaints, whether in objective or subjective form, could be filed with the court. The combined reading of the present Constitution of Cambodia, especially its Articles 39[26] and 128[27], shows that complaints for liabilities of an administration are heard within ordinary courts, that is, according to the current Cambodian court system, provincial-municipal courts, the Appeal Court and the Supreme Court.

Although under current Cambodian administrative law, the separation of the court system has not yet been determined, historically there have been a number of developments of administrative courts in order to facilitate the handling of administrative litigation. Therefore, in the following section, we will firstly examine the history of administrative courts in Cambodia before, secondly, commencing an analysis of the current court system in adjudicating administrative litigation.

1. History of Competent Courts in Adjudicating Administrative Litigation

Stemming from the French concept of separation of functions between judiciary and administration, according to which administrative litigation would be resolved by a special

25 See below for the general principles of state liability.

26 Article 39: "*…the settlement of complaints and claims shall be the competence of the Courts*".

27 Article 128 (Section 3): "*The Judiciary power shall cover all lawsuits including administrative ones*".

court different from the normal civil court, the French protectorate introduced this concept within the court system of Cambodia.[28]

During the French protectorate, a *kram*[29] dated April 1933 created the *Sala Krom Viveat* (Litigation Court) within the court system of Cambodia. This Court was competent for adjudicating disputes relating to statutes involving civil servants, issues of taxation, contentious cases on elections of mayors and other complaints for compensation dealing with the discharge of civil servants' duties. Appeals against the *Sala Krom Viveat's* decision could be lodged with the Council of Ministers.[30] This creation was a sign of a separation of the jurisdictional function from the executive one, even though the level of separation was still weak. In practice, however, this court was not effective.

The *Sala Krom Viveat* was retained by a *kram* dated 9 January 1948. It was granted an extended jurisdiction to decide cases of legality of administrative decisions as well as cases for compensation. The same *kram* provided authority to a section of the Council of Kingdom[31] to hear appeals against decisions of the court of the first instance. At this point, administrative litigation in Cambodia was still in its first stages of emergence.

The second step of the emergence of administrative litigation was seen in 1953. A kram dated 26 October 1953 provided the creation of an Administrative Appeal Court to hear appeals against decisions of the court of the first instance.[32] The Appeal Court was also competent in dealing with conflicts of competence between civil and administrative courts.

The final stage in this process was completed in 1957 with the creation of a "*Conseil d'Etat*" (Council of State) as the highest court of administrative litigation, which hears administrative cases as the court of last resort. Following this, the Cambodian court system was not only separated from the administration, but also divided into the two jurisdictions like the French court system:[33] the common civil court, dealing with disputes between private citizens, and the administrative court, dealing with cases between civil servants and between state administrations and citizens.

---

28 See Clause-Gilles Gour, *Institutions Constitutionnelles et Politiques du Cambodge (Constitutional and political Institutions of Cambodia*), Dalloz, 1965, p 365 and Jean Imbert, *Les Institutions du Cambodge (The Institutions of Cambodia*), La documentation française (1 July 1969), 40 p. 15.

29 *Kram* is an administrative act, taken by the king for the promulgation of the law. It is commonly considered as law.

30 The Council of Ministers was an administrative organ rather than a real political organ under Cambodian government; it was under the control of French protectorate government.

31 Council of Kingdom is the second Chamber of Parliament of Cambodia, seated near the National Assembly. Created within the Constitution of the first Kingdom of Cambodia of 1947, it was maintained until the Khmer Republic of 1970 and then transformed into the Council of Republic and later to the Senate of the Khmer Republic. For further reading on the evolution, role and functions of the Council of Kingdom, Yan Vandeluxe, *Le bicamérisme au Cambodge* (the bicameralism in Cambodia), Ph.D thesis, publicly defended on 4 April 2012, Université Lumière Lyon 2 (France).

32 The president of the Administrative Appeal Court was also the president of civil court. Thus, "he had not enough time to accomplish his works in the administrative side", Say Bory, *Administrative litigation*, Royal University of Law and Economics, 2005.

33 For further reading of the organization of the French administrative court, see Jean-Bernard Auby, 'Administrative law in France', in René Seerden and Frits Stroink (eds.), *op. cit*, pp. 59–88.

In practice, however, the administrative court system was not effective and the *Conseil d'Etat* was not effectively created; the non-effectiveness of the latter blocked all cases coming from courts of first and second instances. For this reason, the Administrative Appeal Court and the *Sala Krom Viveat* became effectively dysfunctional in 1965 and 1968 respectively.

The number of cases heard by the administrative courts demonstrates the irregularity in their functioning. For example, in 1960, the number of decisions by *Sala Krom Viveat* peaked at 173, whereas the Appeal Court made 69 decisions in 1967.[34] The numbers of court decisions were highly variable over the years: *Sala Krom Viveat* recorded 29 in 1953, 20 in 1959 and none in 1964; the Appeal Court recorded 11 in 1954, 13 in 1961 and 28 in 1962.[35]

Say Bory cites the lack of human resources (specialized administrative judges) and lack of confidence in the administrative court system by Khmer citizens and civil servants as the major factors contributing to this failure.[36] In addition to that, Jean-Marie Crouzatier stressed the culture of 'submission of citizens to the administration' as a reason that was not favourable for the blossoming of administrative cases. Crouzatier noted that when confronting an administration, citizens preferred a dispute settlement by amicable means outside of court.[37] The complexity and slowness of the procedure also helps to explain this problem. Before going to court, citizens had to file administrative complaints to the administrative authority that authored the disputed decision, after this could they then file a complaint with the court. The exchange of arguments between litigants could last many months. Appeals could only be lodged to an appellant court that had not functioned since 1965. The primacy of an administration protected by the law of the Kingdom is a further factor that explains the reluctance of citizens to take legal action against the administration.[38]

As indicated, the separation of courts by their function under the system in France took time before being accepted and understood in the public psyche, and effectively utilized. The quick transposition of the dual court system into Cambodia revealed a gap in the Cambodian mindset. Therefore, it was no surprise when the system failed to operate as it does in France, as noted by Claude-Gilles Gour in his book: "the separation of powers represents only a façade of which the future is uncertain."[39]

34 Jean-Marie Crouzatier, 'Les aléas de la justice administrative au Cambodge', in *Les juridictions et la protection des libertés* (au Cambodge, en France en Thaïlande), pp. 141–149.
35 Jean-Marie Crouzatier, *op. cit.*, p. 142.
36 Say Bory, op. cit., p. 100.
37 Jean-Marie Crouzatier, *op. cit.*, p. 143.
38 Jean-Marie Crouzatier, *op. cit.*, p. 144.
39 "*…la séparation des pouvoirs ne représente qu'un plaquage externe dont l'avenir est incertain*", Claude-Gilles Gour, *op. cit.*, p. 365.

Despite of this failure, the subsequent political regime tried to retain the dual court system. The 1972 Constitution of the Khmer Republic presented the Conseil d'Etat as 'judge of last resort regarding the administrative cases' (Article 104 of the Constitution). However, this institution was not effective because the organic law for its establishment was never adopted due to the period's political instability.

Even under the dictatorial regime of Pol Pot, the Constitution of the Republic Democratic of Kampuchea still recognized the mechanism of control by citizens over state agencies or state agents. Its Article 39 provided that "citizens shall have the right to denounce any illegal acts committed by the state, social organizations and their personnel in the accomplishment of their functions as well as to request compensation."[40] The minister of control at the national level and the committee of control within each province were the ones in charge of conducting inquiries when complaints were made. Appeals could be made to the Council of Ministers. This mechanism existed only in theory as it had never been effected in practice.

The socialist regime of the Republic of Kampuchea adopted a one court system by allowing citizens to lodge a complaint with a civil court. The current Constitution of 1993 pursues the same system of court organization.

2. Current Legal Framework of Court Organization in Dealing with Administrative Cases

In the present law of administrative liability, as mentioned in Article 128 of the Constitution, all complaints against administrations (complaints for illegality or for compensation) are within the jurisdiction of the civil court, and are heard in the first instance by the provincial-municipal courts. Appeals can be lodged with the Court of Appeal, while the Supreme Court hears the case as a last resort. Administrative litigation is included within the civil court of Cambodia. Within this current constitutional and legal framework, many tentative measures have been taken to ensure that the administrative litigation was heard by a specialized court.

Jean-François Hertzen, a French expert in Cambodia's legal system, proposed reforms to Cambodia's current system of dealing with administrative litigation within its court system. He proposed four options:

- The creation of an administrative chamber within the provincial-municipal court, sitting nearby existing chambers. The administrative litigation would thus be incorporated in the civil court.
- The creation of an administrative court and an administrative appellate court, distinct from the civil court. Thus, administrative litigation would be heard by its own court and the Supreme Court would hear all civil and administrative complaints upon appeal.

40 Informal translation into English.

- The development of objects of the complaint. In this regard, the complaint for illegality may be filed directly with the Supreme Court and the complaints for compensation may follow the normal procedure.
- The complaint for illegality may be filed with the Appeal Court and then with the Supreme Court while compensation complaints should follow the standard procedure.

Another French expert, Mom Chanserey, a judge of the Administrative Appeal Court of France, proposed a similar project. Mom Chanserey proposed amendments to the existing law on the organization of Cambodia's Appeal Court by creating an administrative chamber within it. Within this new structure, complaints for compensations would be settled at the first instance by the provincial or municipal courts; appeals against the decisions of the first instance court may be filed with the Administrative Chamber of the Appeal Court. Complaints for illegality could be filed directly with the Administrative Chamber of the Appeal Court. The Supreme Court would retain jurisdiction to judge all cases, be they illegality or compensation complaints. Within this structure no amendment to the Constitution would be required.[41]

Nevertheless, the challenges that this new structure fails to address relate to the connectivity of complaints where an illegal decision may also cause damage to plaintiffs. Hence, a complaint in practice may ask not only for the annulment of a decision for illegality but also seek compensation for damages caused by it. In this regards, Chanserey has made some recommendations by suggesting rules for the Appeal Court to follow when settling complaints for illegality which also require a compensation to be awarded in cases where the complainant seeks both: the provincial and municipal courts would need to suspend their judgment if they have to adjudicate issues of illegality and submit to the Appeal Court to decide the issue first, before the latter designates the competent court to adjudicate the compensation.

From this rule, Mom Chanserey proposed three possible cases.

- First, if a complaint was filed with the provincial or municipal court asking for an annulment of an administrative decision (as first conclusion) and then for compensation (as second conclusion) on the grounds of illegality, the entire case would have to be transfered to the Appeal Court who would adjudicate both aspects of the case.
- Second, if a complaint was filed with the provincial or municipal courts asking for compensation from the state (as main conclusion) on the ground of illegality of an administrative decision, it would be the provincial or municipal courts that had jurisdiction to solve those issues.

41 Mom Chanserey, *Le Règlement du Contentieux administratif au Cambodge (The settlement of administrative complaints in Cambodia)*, Annales de la Faculté de Droit et des Sciences Economiques de Phnom Penh, 1996, pp. 11–26.

- Finally, civil servants in different provinces of Cambodia could make a complaint to the court within their province to deal with issues regarding the illegality of a decision of the nomination of other civil servants to specific posts. In this case, Mom Chanserey recommended that the Appeal Court, for reasons of 'good administration,[42] decide the legality of nomination first before the provincial court awarded any compensation.

The last proposal circulated relating to court organization was seen in the pending proposed draft law on the organization of the court in Cambodia. According to an unofficial document, interest in the Council of Jurists extending its competences to judicial review of administrative decisions seems strong. According to its current statute, the body created on 10 March 1994 has competences to initiate any amendment to existing laws through the prime minister which they think appropriate and assist ministries in developing draft laws or draft administrative regulations. The Council of Jurists could be asked for advice by the Council of Ministers on any draft laws or any international conventions before their adoption. This tentative extension of competences to judicial control of the administration would follow the model of France's *Conseil d'Etat*. The idea is not new, and its effective role was long ago noted by a French expert: "as we've seen, the Council of Jurists played already the consultative role and legal consultation like French *Conseil d'Etat*".[43]

IV. Conclusion

In future administrative litigation reforms as well as the upcoming Administrative Procedure Code, Cambodian judges will be obligated to hear all lawsuits against acts of state administrations for their illegality or tort that lead to their liability, in order to avoid denial of justice leading to disciplinary sanctions. Judges may use the existing law, such as some provisions in the Civil Code or Civil Procedure Code. Furthermore, prior to the adoption of an Administrative Code in Cambodia, some special laws regarding contentious administrative law are already in force.

Relating to public administration, we see the law on organization and functioning of the Council of Ministers, the law on sub-national administration; covering some specific areas, we can cite laws on contracts such as the law on public procurement, law on concession, the law on investment or the land law. This set of rules could be utilized by judges as a starting point to generate their jurisprudence, which could play an important role in creating a coherent law of state liability in the future.

42 Mom Chanserey, *Ibid*, p. 15.
43 Jean-Marie Crouzatier, *op. cit.*, p. 148.

SELECTED BIBLIOGRAPHY

- André Maurin, *Droit administratif (Administrative Law)*, Sirey, 4th edition, 257p.
- Clause-Gilles Gour, *Institutions Constitutionnelles et Politiques du Cambodge (Constitutional and political Institutions of Cambodia)*, Dalloz, 1965, 448p.
- Jean Imbert, *Les Institutions du Cambodge (The institutions of Cambodia)*, La documentation française (1 July 1969), 40 p.
- Jean-Marie Crouzatier, *Les aléas de la justice administrative au Cambodge*, in Les juridictions et la protection des libertés (au Cambodge, en France en Thailande), pp. 141–149.
- John M. Maguire, *State liability for Tort*, Harvard Law Review, Vol. 30, No 1, Nov. 1916, pp. 20–38
- Marie-Christine Rouault, *L'essentiel du Droit administratif général (Essential of general administrative law)*, Gualino, 5th edition, 2006, 124p.
- Mom Chanserey, *Le Règlement du Contentieux administratif au Cambodge (The settlement of administrative complaints in Cambodia)*, Annales de la Faculté de Droit et des Sciences Economiques de Phnom Penh, 1996, pp. 11–26.
- Pierre-Henry Chalvidan and Christine Houteer, *Droit Administratif (Administrative law)*, Nathan, 1996, 254p.
- René Seerden and Frits Stroink (eds.), *Administrative law of the European Union, Its members States and the United States, a comparative analysis*, Intersentia Uitgevers Antwerpen-Groningen, 2002.
- Say Bory, *General Administrative Law*, 3rd ed., 2002, Blossom Lotus.

ADMINISTRATIVE LAW AND DECENTRALIZATION

Dr. THENG Chan-Sangvar

CONTENTS

I. Overview 219
1. The Definition of Administrative Law 219
2. The Constitutional Grounds of Cambodian Administrative Law 220
II. The Organization of the Administration 221
1. The Central Administration 221
2. The Sub-National Administration 224
III. The Activities of the Administration 228
1. The Administrative Policing Powers 228
2. The Public Service 229
IV. Administrative Decisions 231
1. The Unilateral Decision 231
2. The Administrative Contract 233
V. Judicial Review 234
VI. Conclusion 236

ADMINISTRATIVE LAW AND DECENTRALIZATION

*Dr. THENG Chan-Sangvar**

I. Overview

1. The Definition of Administrative Law

In most countries, administrative law is about challenging official power. It is concerned with defining the powers of the state, as well as protecting or limiting the rights and liberties of citizens. It allows citizens to challenge whether a government or official agency has the legal authority to do what it has purported to do. Decision-making needs to be approached with a critical eye; but it has been hard to equip and encourage Cambodian people in this endeavour.

Administrative law is primarily an area of public law that regulates the relationship between the citizen and the state. Interpreting and applying administrative law, however, is about more than ensuring that an administrative body acts within the law. It involves understanding the way governments operate, the nature of the administrative power and process, the function of those who operate in a government, and the practices, procedures, manuals, guidelines and other internal policies or rules which may influence the way they behave. It also requires a keen sensitivity to various ways in which commercial, economic and political pressure impact on governments, administrators, tribunals and courts.

Over the past twenty years, administrative law has become, in many states, one of the most active, far-reaching areas of law, affecting the rights of individuals, the public as a whole, and businesses, vis-à-vis the government, the administrative bureaucracy and an array of official and semi-official agencies. Administrative law is at the cutting edge of the defence of democratic rights against the state. It can also play an important role in protecting basic rights and entitlements against the government.

* Dr. Theng Chan-Sangvar is a Professor of Law, Chief of Staff of the Office of the Minister for Rural Development, Kingdom of Cambodia.

2. The Constitutional Grounds of Cambodian Administrative Law

Although there is generally a consensus about which laws are regarded as public law and which as private law, this division is still not clear in Cambodia in terms of legal grounds. This is due to the fact that there is no clear division of the court system as there is in some countries such as Thailand, Germany or France where the civil judges and the administrative judges sit in different houses and apply different sets of law. The dual court system allows a clear distinction between public law and private law, since the civil courts apply the private law and the administrative courts apply the public law.

In Cambodian law schools, it is generally accepted that the study of law ought to be separated between private and public law or specialized into private law or public law. But the difference in terms of concepts and their applications are rarely taught. This is also due to the fact that, in general, the courts do not fully fulfil their mission in construing rules and bringing credible solutions to administrative conflicts. Looking at the provisions of the 1993 Constitution of the Kingdom of Cambodia (the "Constitution"), the administrative law constitutes a truly distinct branch of law.

Article 39 of the Constitution stipulates that "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". This provision provides the fundamental basis for rule of law in Cambodia in that it guarantees the submission of the state and administration to the law. It also provides a constitutional ground for judicial review.

Paragraph 3 of Article 128 new of the Constitution adds that "the Judiciary shall cover all lawsuits including administrative ones." This means that the Constitution recognizes that there are administrative lawsuits that are different to private lawsuits; it provides that the same courts have the competence to deal with both. The Cambodian courts, then, have to apply two separate sets of law, the private law and the administrative law, according to nature of the lawsuits presented before them. However, one crucial issue is still unresolved: the imprecision of the substance and content of that administrative law. The court has to play a very important role.

II. The Organization of the Administration

The Cambodian administration is divided into two main categories, the central administration and the sub-national administrations. The central administration is enhanced by the ministerial agencies and autonomous bodies and the sub-national administrations are the result of the implementation of the Royal Government of Cambodia's ("RGC") recent policy on decentralization.

1. The Central Administration

The central administration consists of two main sub-categories. The ministries and institutions represent the core agencies empowered to implement the government policy and to execute the legislation. The second sub-categories are legally created by the first one, but they are given certain autonomy and are supposed to fulfil certain tasks. They are called "public establishment".

The Ministries and Institutions

The ministries are created by law. Their number is not limited by any legislation. They are led by a minister and a member of the Cabinet, and are assisted by several state secretaries[1] and under-secretaries.[2] There is no legislation setting out any unique or specific structure for the organization of the ministries. Each of them operates according to the sub-decree governing its functioning and its organization. In general, a ministry shall have several general departments, or directorates which are divided into several departments. These departments are subdivided into several offices. Some ministries have a central unit called a secretariat general led by a secretary general. As Cambodia inherited a French style of government administration, each ministry has at its disposal a control unit in charge of inspection. According to the size of the ministry, this unit can be a general inspection having the rank of the general department and led by a general inspector or a simple inspection department chaired by an inspector.

Beside the ministries, there are two other kinds of government agencies which are not named "ministries" and are not led by ministers. They are inter-ministerial bodies and the regulatory institutions. I will refer to both of them as "institutions" for convenience.

1 The state secretaries are members of the Cabinet. They shall receive the same vote of confidence from the National Assembly as the ministers.

2 They are appointed by royal decree, but are not members of the Cabinet. They fulfill their functions for the same term as the government and shall leave if the government is dissolved by the National Assembly.

The Inter-ministerial Bodies

Inter-ministerial bodies are established at will by the government. They can be created by law,[3] a royal decree[4] or a simple sub-decree.[5] Their role is essentially to give advice to the government on specific issues. They are called "inter-ministerial bodies" because representatives from different ministries are sent to join the bodies. They are usually attached to a ministry and under the chairmanship of the minister of that ministry and can take the form of a council, a committee, an authority, or even a Task Force. They are mostly assisted by a secretariat or a general secretariat staffed by the civil servants from the attached ministry or sent from other agencies. There is normally no other supplementary salary provided to those staff. With very few exceptions, the inter-ministerial bodies have no proper budget for their functioning.

As a consultative body, decisions are made through a consensus, i.e. there is no vote. Normally, the secretariat drafts the decision and submits it to the inter-ministerial body, which convenes to discuss and decide whether to adopt the decision. In practice, the decision depends largely on the chairman of the body.

Most inter-ministerial bodies are established in the state reform sectors and most of the government reform programmes have been conducted by theses bodies. They conduct studies and research, and propose key ideas to reform policy. They are not empowered to issue regulations, which must normally be made by the attached ministry. Only some inter-ministerial bodies have been empowered to make decisions affecting the people.[6]

The Regulatory Institutions

Regulatory institutions are the most recent bodies created by Cambodian law. The purpose of their establishment is most probably to respond to the advent of the market economy and the liberalization of the public sectors. It is understood that to ensure fair competition in a sector among economic actors, private as well as public, an independent body should be created to guarantee smooth implementation of the law.

The role of a regulatory institution is usually to issue a licence to operators performing a specific economic activity. Since the operator can be a public or a state entity, a body independent from the government is the most suitable to do the job.[7] Once issued, the use of all licences is subject to control conducted by the regulatory bodies. Any violation of a licence can result in a sanction, administrative or criminal.

3 The National Committee for the Development of the Sub-National Democracy (NCDD).

4 The Tonle Sap National Committee.

5 The Inter-ministerial Commission for the Coordination, the Preparation and the Implementation of Development Projects along western and northern borders of the Kingdom of Cambodia.

6 The Council for Administrative Reform, for example, is entitled to hold, together with the Secretariat of Civil Service, the civil servant management system that affects the civil servants. The Council for the Development of Cambodia (CDC) is also empowered to make decisions upon request from the investors.

7 The very few regulatory bodies are the Authority of Electricity of Cambodia, the National Authority for the Eradication of the Mines and Unexploded Weapons, and the National Election Committee.

These bodies do not have their own legal personalities; they take actions and make decisions on behalf and under the responsibility of the state. Their functioning is organized so as to ensure their independence from the government. Members of regulatory institutions can be members of parliament, representatives from the private sector or civil servants, but once they are appointed to the body, they cannot be removed until the end of a term and they must not receive any instructions from government agencies. The members are usually specialized in relevant activities.

The Public Establishments

Public establishments are different from ministries and institutions because they enjoy a legal personality separate from the state. They are created by the government, but enjoy financial and administrative autonomy from the government. This autonomy does not mean independence; they are still attached to the ministry that initiated their creation. That ministry plays the role of the guardian of the public establishment.

The public establishments are placed under two types of control or guardianship: technical and financial. The technical guardianship is ensured by the attached ministry and the financial guardianship is handed to the Ministry of Economy and Finance. The two ministries can decide to audit, inspect or control as necessary. The public establishment shall communicate with the Council of Ministers, the guardian ministry and the Ministry of Economy and Finance through providing documents such as the meeting report of its board of directors, its development plan, its annual budget, as well as its annual management and financial account reports.

There are two kinds of public establishment: administrative public establishments and economic public establishments. Their difference lies in the fact that an economic public establishment is created in order to make profits, whereas administrative public establishments are non-profit. In addition to this fundamental difference, the status of administrative public establishments and of economic public establishments is set out in different legal texts.[8]

An administrative public establishment is organized as a normal public administration body. An economic public establishment operates as an ordinary business company. The common characteristic of the two categories of establishments is that they are managed by a board of directors appointed for a specific mandate. The board members are mostly civil servants sent by relevant ministries/institutions. There can also be representatives from the private sector or from the users' communities. The board of directors is the decision-making organ. It is assisted by an administration managed by an executive officer who is also a member of the board with full rights. This officer is sometimes called the

8 The royal decree dated 31 December 1997 deals with the administrative public establishment and the law dated 17 June 1996 sets the status of the economic public establishment.

director, the director general or even the rector. The staff of the public establishment can be civil servants or contractors.

2. The Sub-National Administration

The Constitution of 1993 does not specify the form of the Cambodian territorial administrations, but contents itself with stipulating that Cambodian territory is divided into provinces, districts and communes[9] and that the organization of these administrations is subject to organic laws.[10] The provinces, the districts and the communes have been the three traditional levels of administration in Cambodia for centuries.

Before 1993, Cambodia was an extremely centralized country. The first step of decentralization was realized at the commune level, the lowest level of administration, with the law on commune administration adopted in 2001.[11] At that time, the provincial and district levels were still centralized. In 2008, a new and drastic change was introduced at these two levels of administration by the Law on the administrative management of the provinces, the capital, the districts, the krongs and the khans.[12]

Today, all Cambodian territorial administrations are decentralized. These three levels of decentralized administrations are called officially and legally "the sub-national administrations". They are organized in such a unified form of administration at all levels.

All sub-national administrations enjoy legal personality and are autonomous by law from the state. This autonomy consists in the power of decision-making given to them and in the existence of the sub-national civil service as well as a local finance system.

The Local Administrative Organization

Sub-national administration is the result of the combination of policies of administrative de-concentration and the decentralization. Decentralization results in local elections which allow people to choose their representatives. In a de-concentration system, the country is divided into different administrative territories, and each of them is administered by officials appointed directly by the central government.

9 Article 145 new of the Constitution.

10 Article 146 new of the Constitution.

11 Law n° NS/RKM/0301/05 dated 19 March 2001.

12 As stipulated by the law n° NS/RKM/0508/017 dated 24 May 2008, Cambodia is divided into the Capital and provinces. The Capital is divided into khans and the provinces are divided into districts and krongs. Khans and krongs are divided into sangkats and districts are divided into districts (called sroks). In term of administrative organization, there is a major difference between sroks and khans and between the provinces and the Capital.

The Council

The council represents the people in a specific territory. The provincial and the district councillors are elected for five years by the commune councillors.[13] The number of the provincial and district councillors varies from seven to twenty one. The commune councillors are elected for five years directly by the people living in the commune.[14] Their number varies from five to eleven according to the size of the population of the commune.

Each council shall adopt internal regulations at its first session. The first candidate in the list presented by the winning political party shall be president of the council. The presidents of the provincial and the district councils enjoy only ceremonial duties. He/she chairs the council sessions according to the internal regulations, but has no specific regulatory power. The president of the commune council, called the commune chief, plays the role of the chief of the commune administration, since there is no board of governors at this level of decentralized administration. He or she shall not only preside over the commune council session, but also fulfil some duties as personally delegated by the central government.[15]

The council is a decision-making body of the sub-national administration. Decisions are made by a majority vote. Decisions may be made on issues such as the budget, the development plan, the organization of the administration, or the use and management of the assets. The council is accountable both to the population, in relation to the decisions it makes, and to the central government, in relation to the implementation of all laws and regulations adopted at the national level. The council shall control the governor's action. Where considered necessary, the council can require the governor to provide an explanation as to his or her actions in its meeting.

At the capital, the province and the district levels, the law creates three committees to assist the council in making and implementing its decisions. They are the Committee for Technical Coordination, the Committee for the Consultation on Women's and Children's Affairs and the Committee for Procurement.[16] The council is also authorized to create more committees to help fulfil its mission. The members of those committees are appointed by the council among the councillors, the members of the board of governors and staff of the council. The law only provides precision on the composition of the Committee for Technical Coordination.[17]

---

13 The election of the provincial and the district councils is set in the Law n° NS/RKM/0508/018, dated 24 May 2008.

14 The election of the commune council is determined by the Law n° NS/RKM/0301/04, dated 19 March 2001.

15 The commune chief is the civil record officer and charged by the government to ensure the implementation of law and regulation within the territory of the commune. In the commune, he is also the chief of the unified armed unit, which may comprise the police, the army and the military police.

16 Article 114 of the Law on the administration of the Capital, provinces, krongs, sroks, khans.

17 This committee is chaired by the governor and its members are all unit chiefs of the council, the Director of Finance and directors of all de-concentrated provincial departments of the ministries and institutions.

The Board of Governors

The board of governors represents the central government or the state. The board is composed of a governor and a number of deputy governors appointed by the central government.[18] The composition of a board varies from three to seven members, including the governor. All members are civil servants from the Ministry of Interior and they cannot be members of the council. The council can propose a revocation of the governor or the deputy governor to the central government. The governor and deputy governors have no term for their function.

The governor and deputy governors can be invited to attend all meetings of the council and shall have the right to speak, but not to vote. The board of governors gives advice, reports to the council and plays the role of executive of the council. The governor cannot make any decision within the responsibility of the council without the official consent of the latter.

The law gives the board of governors the right of proposal over a variety of matters concerning the local administration's life. This right of proposal seems to be exclusive to the board. It concerns, for example, the creation or dissolution of any administrative units, the organization of roles, duties and work conditions of the local staff, the nomination and promotion of staff, the three year investment rolling plan and the annual budget, the five-year development plan, and the council's annual activities report.[19]

The Means of the Sub-national Administration

The Administration and Staff

The council's staff and administrative units are a new creation of the Law on the administration of the capital, provinces, krongs, sroks, khans. The council can have a certain number of staff and administrative units as needed. This staff recruitment is decided by the council itself. A councillor cannot be a staff member of the council. These staff do not include the staff sent by the central government to work in the provincial or municipal departments, which are part of the de-concentration system. They enjoy a separate status to be determined by regulations from the central government.

The key person who directly manages the local staff is the administration director.[20] Strangely, this core person is not appointed by the council, but by the Minister of Interior. There is no regulation which determines whether the administration director is a member

18 The provincial governor is appointed with a royal decree. The provincial deputy governor and the district governor are appointed with sub-decree. The district deputy governor is appointed by Prakas (decision) of the minister of interior.

19 Articles 162 to 164 of the Law on the administration of the capital, provinces, krongs, sroks, khans.

20 This position has evolved undoubtedly from that of the Director of Cabinet of the province. Before the decentralization process, he was the core person in managing and coordinating the implementation of the governor.

of staff of the central government or the sub-national administration, even though the role and responsibilities of this administrator are huge. His or her work includes, for example, the daily implementation of the decisions of the council and board of governors, providing advice and proposals to the council, and receiving administrative delegations from the board of governors.[21] As the head of all administrative units belonging to the council, he also has to make sure that the Director of Finance regularly fulfils his work.[22]

The Local Finances

The new provisions of law and policy relating to local finances have not yet been fully implemented. The Law on the administration of the capital, provinces, krongs, sroks, khans devoted one entire section, from Article 241 to Article 253, to describe the financial system of the sub-national administration. However, because a number of the regulations that are required by law to implement this policy have not yet been enacted, the local finance policy has not yet been implemented. Presently, the sub-national administrations depend entirely on the state's budget.

In some respects, the law can be considered very ambitious. It provides for a system that is supposed to provide the sub-national administration with effective and sufficient financial tools to bring about their development projects. On the other hand, however, the law contents itself to impose on the National Committee for Decentralization and Deconcentration the duty to consult the Ministry of Economy and Finance and other institutions while gradually conceptualizing and implementing all procedural and substantial aspects of the legal provisions and policy relating to local finance.[23]

The law formally prohibits all sub-national administrations from taking out loans from any person or institution.[24] They also cannot issue any kind of bonds or negotiable instruments which lead to the creation of debt. The sources of local finance are limited to local taxation, rent fees and other non-fiscal income, or donation. But no complete set of laws and regulations on local finance has been enacted since the adoption of the Law on the administration of the capital, provinces, krongs, sroks, khans in 2008, or even the Law on the commune administration in 2001.

21 Articles 185 to 187 of the Law on the administration of the capital, provinces, krongs, sroks, khans.

22 The Director of Finance of the council is also a new position. He is appointed by the council upon the recommendation of the Minister of Interior and after the approval of the Minister of Economy and Finance (article 179 of the Law on the administration of the capital, provinces, krongs, sroks, khans).

23 Article 253 of the Law on the administration of the capital, provinces, krongs, sroks, khans.

24 Article 252 of the Law on the administration of the capital, provinces, krongs, sroks, khans and article 80 of the Law on the commune administration.

III. The Activities of the Administration

The majority of the work of the administration results from two main mandates or missions. The first of these consists of maintaining public order. It is called administrative policing. The second is to provide services to the general public.

1. The Administrative Policing Powers

Administrative policing consists of actions taken to prevent disturbances to public order. Public order can be defined as an absence of disorder in the realms of public security, tranquillity and sanitation. Once one of the three elements is affected, there is no public order. The mission of the administration is to ensure that there are no disturbances of public order. To do this, the administration is given decision-making powers that allow it to limit the rights of individuals. Activities of the administration which consist of making decisions in order to maintain public order are recognized as administrative policing.

Once there is a disturbance of public security, tranquillity or sanitation, the goal of administrative policing has failed. The focus will shift from preventive measures to responding with curative measures. This involves identifying the offender, and arresting and sending them to court if required. These powers are possessed by the judicial police under criminal law and procedure.

Administrative Policing Authority

Authorities are empowered with administrative policing powers at two levels: national and sub-national. At the national level, the prime minister enjoys general administrative policing power and ministers enjoy special administrative policing power. At the sub-national level, the governor (of the capital, the provinces and the districts) and the commune chiefs are vested with the general administrative policing power.

General administrative policing power refers to the decision-making power wielded by an official in the absence of specific legislation granting such powers to another authority. Officials possessing general administrative policing powers can make decisions whenever they deem it opportune or whenever the situation requires it.

If there is a law or regulation providing decision-making power to a specific authority to maintain public order in a particular field of activities, we talk about special administrative policing. The Minister of Environment is an official holding special administrative policing power in relation to the environment, since he is entitled to make decisions to

prevent any person from causing pollution.[25]Also, the Minister of Rural Development is in charge of building, renovating and maintaining rural roads. In this case, he can prohibit trucks that are overloaded from using these roads. In the same way, the Minister of Culture and Fine Arts is entitled to control the content of movies, songs and books. He can refuse to provide a licence allowing the commercialization of any content that may provoke disorder in Cambodian society.

The existence of special administrative policing powers does not constitute an obstacle to the exercise of general administrative policing powers by those with the authority to do so. For example, if those officials possessing special administrative powers fail to exercise these powers in response to a particular development, or are late in doing so, those possessing general administrative policing powers can make a decision.

The Exercise of Administrative Policing Power

Preventing disturbances to public order necessarily results in decisions that prevent people from doing anything that might lead to disorder. Those exercising administrative policing powers are therefore in a delicate position because their decisions may violate or infringe on people's rights.

The rights of citizens are described in the Constitution.[26] Other laws provide a detailed legal regime on how to exercise those rights. The administrative authorities have a duty to not only ensure that these rights are exercised lawfully, but also to ensure that they are exercised in a way that is not excessive and abusive, which could lead to disorder. In many cases, it is not simple to draw a line between the legitimate exercise of a right and the abuse of the right by taking excessive actions. There is so far no law, policy, or judicial precedent which provides exact guidance on how the authorities can reconcile their decision-making responsibilities and mission to maintain public order with the need to respect people's rights.

2. The Public Service

The administrative authority not only prescribes the limits of the rights and actions of citizens, but also provides services to the public in general. The scale of this mission depends very much on the political system adopted by the state. The Cambodian Constitution has set up a constitutional monarchy with a welfare state. It devotes two entire chapters not only to provide for the establishment and development of a market economy,[27] but

25 He is in charge of preventing, reducing and controlling the pollution to the air, to water, to the soil, and all pollutions caused by sound and vibration (law no 1296/36 dated 24 December 1996 on the protection of environment and the natural resource management). He is then in charge of controlling hard trash management in all territory (article 6 of the sub-decree no 36 ANK dated 27 April 1999 on management of hard trash.

26 Article 31 to article 50.

27 Chapter 5 from article 56 to article 64.

also to set out a series of responsibilities of the state in the fields of education, culture and social affairs.[28] The only way to fulfil this huge mission is for the administration to provide public services.

The French-inspired concept of public service was not well-known in Cambodia until the 5th of May 2006 when the Council of Ministers adopted a policy paper on public services, entitled "serving the people better". The paper defines a public service as "an activity done by a competent institution and an institution receiving competence aiming at serving the public interest." A competent institution refers to a state institution or the state's agent or authority at all levels. The institution receiving competence refers to a private sector or civil society organization that receives rights and duties from the state and enjoys them under the control of the state or its agency.

There is so far no official law or regulation to provide a legal distinction between different types of public services. The RGC's policy paper on public services does not provide any clear indication as to the difference in legal terms; it only tries to classify various activities of the administration into seven groups.[29] The only categorization we can make comes from the legal texts on the legal regime of the administrative public establishment[30] and of the economic public establishment.[31] According to these two texts, the activity of the administration, or its agents to which it delegates power, can be either administrative or economic. These activities are fulfilled by administrative public establishments and economic public establishments, respectively. Thus we can divide public services into activities that are either administrative or economic.

An administrative public service consists of activities related to the administration of various non-economic portfolios: social, health, cultural, scientific and technical affairs.[32] These public services are normally provided to the general public freely. The relationship between the provider and the beneficiary shall be governed by public law, that is, under the regulatory system. The government or its agency produces rules according to which the services are organised and provided. In case there is a complaint against the provider or the quality of the service, public law shall be applied and the administrative court competent.

28 Chapter 6 from article 65 to article 75.

29 They are 1) services related to the state's sovereignty, 2) services related to security, public order and social safety, 3) services related to justice and arbitration, 4) services related to the promotion of trade, SME, investment environment, and the participation of the private sector in developing and maintaining physical infrastructure, 5) services related to social, cultural and women's affairs, 6) services related to the development of physical infrastructure, and 7) services related to the state's income collection, expansion and cash flow.

30 Royal decree no 1297/91 dated 31 December 1997 on the legal status of the administrative public establishment.

31 Law no 0696/03 dated 17 June 1996 on the general status of the public enterprises.

32 Article 1 of the royal decree no 1297/91 dated 31 December 1997 on the legal status of the administrative public establishment.

An economic public service consists of producing goods and providing services to the market.[33] These activities are no different from private activities conducted in the economy. This implies that the provision of economic public services shall be governed under the private law. The economic public service is not only provided by the administration, but in the era of globalization, the government also regularly delegates responsibility to deliver services to the private sector.[34] To ensure fair competition, conflicts between the provider and the beneficiary shall be governed under private law, and thus these disputes fall within the jurisdiction of the ordinary court.

IV. Administrative Decisions

Most administrative decisions are made unilaterally; however, the administration can also conclude contracts.

1. The Unilateral Decision

There are five forms of regulatory acts that can be implemented by the Cambodian administration. The first four are issued by the central/national administration. The last is an act of the sub-national administration. These regulatory acts are explicitly provided for in law. They are examined in order of hierarchy below.

The royal decree is the top executive regulation. It is used either to implement a law, or to execute a sub-decree[35] or another royal decree when those acts specifically foresee such implementation. A royal decree is used to organize the functioning of a public institution, to create a new governmental body, or to appoint officials into a certain position or rank. It can also be used to offer distinction or honorific titles. A royal decree is an act of the government, even though it is signed by the King or the acting Head of State. The question logically arises as to when a royal decree can be used outside of those instances in which it is explicitly provided for and its use foreseen in law or regulations. In practice, the government makes a choice according to the degree of importance of the act to be undertaken. The procedure for its adoption is the same as that of a sub-decree, except that the draft of a royal decree is sent to the King for its signature.

A sub-decree is the most common government decision. It is signed by the Prime Minister or the acting Prime Minister and is used to implement a law and other regulatory acts. There is no official procedure as far as its adoption is concerned. In practice, the sub-

33 Article 26 of the law no 0696/03 dated 17 June 1996 on the general status of the public enterprises.

34 That should be one of the reasons of the development of the regulator established to control specific economic activities which are offered jointly by the administration and the private sector.

35 For example, a sub-decree creating a public university may foresee that the rector (the president of a university) shall be appointed by a royal decree.

decree can be adopted in four different procedures. First, it can be drafted by the Prime Minister's Cabinet who will immediately submit it to the Prime Minister for signature. In the second procedure, the draft is proposed to the government by an involved government agency, most commonly a ministry or, on rare occasions, an authority. The Office of the Council of Ministers convenes a consultation meeting of the Council of Jurists[36] and the Economic, Social, and Cultural Council[37] before submitting to the Prime Minister for signature. This meeting is known as the First Meeting. In the third procedure, the Office of the Council of Ministers convenes not only the First Meeting, but an inter-ministerial meeting is also organized to discuss the draft before submitting to the Prime Minister for signature.[38] The fourth procedure is the most commonly used to adopt the sub-decree. It consists not only of all steps of the third procedure, but also a Cabinet meeting before the Prime Minister signs the sub-decree.[39]

A decision of the government is an act usually issued to implement a royal decree or a sub-decree. It is used for a temporary purpose, for example to create a commission to deal with some particular issue. The decision does not constitute a permanent regulation. Its force will disappear when its goal is achieved. Any ministry or institution can propose a draft decision to the government for its adoption. It is signed by the Prime Minister.[40]

A ministerial regulation, known as a "*prakas*" (literally a declaration), is the top regulatory act issued by a government agency that has regulatory power. It is signed by the minister and must be in strict compliance with the royal decree and the sub-decree.

The local administration also issues regulatory decisions. They are called "*deka*". It is normally proposed by the chief of commune and the district/province governor and adopted by the relevant council. There can be a *deka* that is solely adopted by the chief of the commune or the district/province governor when they fulfil their duties as representative or agent of the state.

---

36 The Council of Jurists is a consultative body attached to the Office of the Council of Ministers. It is competent to provide advices to the government on legal issues. It does not have any regulatory power.

37 More commonly known as ECOSOCC, the Economic, Social, Cultural Council is another consultative body attached to the Office of the Prime Minister. It provides advice to the government on economic, social and cultural issues and does not have any regulatory power.

38 The inter-ministerial meeting is attended by representatives invited from different ministries and institutions of the government. It is co-chaired by the Secretary General of the government and a representative of the Minister in charge of the Office of the Council of Minister, usually a Secretary of State. In the meeting, representatives from relevant ministries and institution can provide comments and propose amendments to the draft. In case there is a strong contradiction between two or more different ministries, the Minister in charge of the Office of the Council of Ministers organize ad hoc meeting which is usually attended by the relevant ministers in person before submitting the draft to the Cabinet's meeting or to the Prime Minister.

39 The Cabinet's Meeting is chaired by the Prime Minister and attended by all the government's members. The government's advisers, the royal army chief of staff and the national police commissary general and the governor of Phnom Penh are also usually invited to attend this meeting.

40 Even though it is not foreseen in any law or government's regulation, the ministry or institution adopt also "decisions", and the same denomination is used as that of the government's decision.

2. The Administrative Contract

The Cambodian administration concludes administrative contracts. These contracts are not governed under the civil code, but under specific laws and regulations. These contracts are unique because unlike civil contracts they are not based on the principle of equality. The administration enjoys some special privileges, usually specified explicitly in the contract.

The most informal administrative contract is the *public procurement*. It is concluded between the administration and a private provider. The provider is contracted to supply merchandise, services, construction work or consultancy services to the administration.[41] The sub-decree on public procurement does not provide any legal definition of the contract, but provides a myriad of procedural rules in order to ensure the transparency, the regularity and the uniformity of the signing of the contract.

A *concession* is a contract through which the administration makes recourse to the services of the private sector, usually investors. There are at least three types of concession. The first type is created by the Land Law of 2001 under the denomination of *land concession*.[42] The Land Law creates two subcategories of land concession: *social land concessions* and *economic land concessions*. A social land concession is a contract between the administration and an individual representing a poor family to whom the state offers a piece of land for the family's housing and cultivation.[43] The state shall give the land title definitively to the family if the latter fulfils the terms of the contract.[44] An economic land concession is a contract between the administration and a commercial enterprise to which the state rents a piece of land for the development of any agro-industrial plantation in order to create employment for the local population.[45]

The second type of concession is the result of the Law on Forestry under the name of the *forest concession*.[46] The contract allows a private company to exploit wood from a particular forest area and, in return, fulfil some obligations imposed by the forest administration.

---

41 Sub-decree n° 105 dated 18 October 2006 on the public procurement, Official Gazette 2006, n° 77, p. 6996

42 Articles 48 and 49 of the Land Law dated 30 August 2001, Official Gazette 2001, n° 32, p. 2303. The land concession is the result of the fact that the Cambodian State owns most Cambodian land and it is crucial to give out some for social and economic proposes.

43 It is regulated by the sub-decree n° 19 dated 19 March 2003 on the social land concession , Official Gazette 2003, n° 11, p. 1162.

44 The most common obligation of the family is to settle their life on the actual land for the at least consecutive 5 years and for the period of at least 6 months per year.

45 The economic land concession is regulated by the sub-decree no 146 dated 27 December 2005 on the economic land concession, Official Gazette 2005, n° 48, p. 7799, modified by the sub-decree no 131 dated 15 August 2008.

46 Article 13 of the law n° 0802/016 dated 31 August 2002 on forestry, Official Gazette 2002, n° 34, p. 2537.

The third type of concession is the result of the Law on Concession.[47] The concession in this law refers to a contract between the administration and a commercial enterprise which is authorized to develop, on behalf of the administration, some infrastructure on state land for the use of the general public. If the law provides ten different forms of concession, the Build-Operate-Transfer (B.O.T.) concession appears to be the most commonly used contract.[48]

Recently, there is a development of a new type of contract between the government and developers. With this contract, the government rents an island to a private company so they can develop the island into a tourism site for a long period of time. This contract seems to fall outside the scope of the concessions we have examined so far since it is neither an economic land concession nor a B.O.T. It is rather a long lease with obligations imposed on the private company to have a development programme, which must be approved by the RGC.

V. Judicial Review

All the concepts examined above suggest that Cambodia has at its disposal a myriad of rules regulating relations between public authorities and between public authorities and private individuals, guaranteeing the rights of citizens as enshrined in law. Unfortunately, this is not the reality. From the beginning of the reconstruction of Cambodian law in 1993, a vast majority of rules have been adopted to essentially organize the administrative institutions and to give them powers to enact regulations upon the people. However, there are only a very few rules that help to protect the people against administrative abuse.

The goal of the current RGC is to improve public services so that the public can get the maximum benefit from the administrative activities of the government,[49] the purpose being to contribute to reducing the poverty of the population. Strangely, however, the RGC does not concentrate too much on how to maintain good discipline by the public authorities and ensure that they are punished if they illegally cause damage to private individuals. This is in fact what lawyers call "*to ensure the rule of law*". The most efficient way to ensure adherence to the rule of law is to have tribunals that can pronounce sanctions against any state agency that commits a mistake. However, to have a court system that works properly, there must be a set of procedural rules according to which complaints can be filed in an open and smooth manner.

47 Law n° 1007/027 dated 19 October 2007 on the concession.

48 Article 6 of the Law on the concession.

49 In 2006, the Royal Government of Cambodia adopted a policy paper on public service in order "to serve better the people" by classifying administrative activities into several groups and identifying various mechanisms through which the public authorities could offer their best services to the population.

Under the Cambodia-French Treaty of 1863, the French protectorate conducted a series of legal reforms.[50] With this reform, the French administration created a dual judicial system with a set of judicial courts and a set of administrative courts. After Cambodia gained independence, the dual court system was maintained for a while, before being abolished in 1968. This dual court system reappeared in 1993 in a different form.

After gaining independence, Cambodia kept the existing court system left by the French authority. Only some minor changes were made. The administrative courts deal "*with any conflict related with the rights and obligations of the civil servant; with the administrative decision which obliges the debtor of the public person having Cambodian nationality; and with the prejudice caused by the administrative activities*" [51]. In Phnom Penh, Kromviveat is the administrative court of first instance consisting of a judge as the president and two administrative officials as assistants. A royal attorney plays the role of the public prosecutor.

In 1933, an appeal against the administrative courts' decision was lodged to the Council of Ministers (the government). In 1948, this function was transferred to a special section of the Council of the Kingdom, equivalent to the Senate. In 1953 the administrative Court of Appeal was created. The president of this court was nominated by royal decree thanks to his/her knowledge and experience in administrative law. There were four other judges in the court. Two were judges from the Supreme Court (*Salavinichhay*) and two judges were appointed by the Council of Ministers from amongst senior administrative officials. This administrative Court of Appeal also played the role of the conflict tribunal, deciding on competence between the judicial courts and the administrative courts.

The Constitution set up a new administrative court system. Article 128 new provides that the judicial power "*covers not only the private conflicts, but also the administrative litigations, to the Supreme Court and to all kind of courts of all levels*." According to this provision, private as well as administrative litigation will be conducted in the "ordinary courts", that is, the provincial/municipal courts, the Appeal Court, and the Supreme Court. There is thus no dual court system as Cambodia used in the past.

The provision in the Constitution providing for a single court system to deal with both private and administrative lawsuits was a result of circumstances and necessity after the peace negotiations of 1991. The court system in Cambodia has not been fully able to respond to the needs of Cambodia's quickly evolving society. Providing for administrative litigation to be conducted before the provincial/municipal court has seriously reduced the efficiency of administrative justice and the process of judicial review. There are two main reasons for this lack of efficiency.

50 It was the occasion for the French administration to introduce the civil law tradition into the Cambodian legal system and to completely abolish the slavery.

51 See Royal Act No 399NS of 09 January 1948 and Royal Act No 825NS of 26 October 1953.

Firstly, it is because of the loss of the people's confidence in the courts and the loss of the identity of administrative litigation because of the fact that the Constitution provides for such lawsuits to be heard by the ordinary courts. When the people have no confidence in the courts, they will not believe that the courts could help them with sanctioning the administration. They try to find other alternative ways. Secondly, the ordinary courts use the "*common*" law, i.e. the private law, in dealing with litigation. The administrative court, which deals with administrative actions, shall use the administrative procedure, or at least a special law which is composed from principals different from the private law. If we stick strictly to the Constitution, all judges in Cambodian courts ought to have specialized in both private and public law. The author believes that it would be very difficult for judges to have done so.

Article 39 of the Constitution stipulates that "*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*". This article provides the fundamental rule of law which is the submission of the administration to the law. It also provides a constitutional ground for judicial review. Unfortunately, there is no law to provide clear rules on this process.

VI. Conclusion

Commitments to improve the legal and judicial system have been expressed since the adoption of the new constitution, but still today the general assessment is that the system is widely dysfunctional. Some researchers have for the time being qualified the current constitution as "*a head without a body*". The problem is not simply a matter of "incompetence" and cannot therefore be solved by training and waiting for better educated personnel. The combination of incompetence, corruption and political interference makes it difficult to achieve effective reform. Some steps have been taken to address problems, for instance, with a significant increase in the official salaries of judges and the establishment of a *Royal School for Judges and Prosecutors*.

Several other ideas have also been discussed. One of the most promising, that can be realized without amending the Constitution, is to strengthen the administrative tribunal within the sole existing court system by creating chambers specialized in administrative law at all levels of the judiciary. The *Royal School for Judges and Prosecutors* should also include units in its curriculum relating to administrative law. The judges shall be specialized in either private law or public law. But the success of the administrative tribunals can be achieved only by producing qualified judges and prosecutors. There must be enough procedural rules governing legal actions taken against the public authorities. This can be

achieved through the adoption of a code of administrative procedures. Once these rules are enacted, a publicity campaign should be conducted to encourage people to use courts to respond to abuses of their rights by public authorities.

Change in the overall legal culture obviously needs time;[52] however, for the time being the lack of independent academic research and debate remains one of the main obstacles in this process. At universities, law is starting to interest Cambodian students, and Cambodian law faculties are starting to become places of research, even though for the time being there is still no law library of quality, no legal journal or any alternative forum for academic discussion, and there are hardly any quality textbooks for the purpose of learning.

52 In Cambodia, there is still a belief that "*the eggs must not knock against the rock*". Encouraging an "ordinary individual" to sue his/her leader is against the nature of the middle-class Cambodians.

PART 3
COMPARATIVE PERSPECTIVES

ASPECTS OF ADMINISTRATIVE LAW IN FRANCE

Jean-Luc GREGORCZYK

CONTENTS

Abstract 243
I. Introduction 243
II. Codification and Administrative Law in France 245
1. The Milestones of Codification after the French Revolution 246
2. The Restart of Codification in the 1980s as a Response to the Normative Inflation 247
3. Technical Aspects of Codification in France: The Relationship between Law and Regulation and the Question of Codification 'on the Basis of Established Law' 249
4. Codification in the Field of Administrative Law: History of an Unfinished Masterpiece 252
III. The French Conseil d'Etat and its Recent Evolutions 254
1. The Recommendation Role of the *Conseil d'Etat* 254
2. The Litigation Role of the *Conseil d'Etat* 255
3. The Organization of the *Conseil d'Etat* and its latest Reforms under the Influence of European Law 256
IV. Recent Developments of French Administrative Law through Case Law 259
1. 'Administration Liability': Towards the End of a Particularity 259
2. The Principle of Legal Certainty and its latest Application by the Administrative Judge 261
3. Administrative Law and the Application of Competition Law 263

ASPECTS OF ADMINISTRATIVE LAW IN FRANCE

*Jean-Luc GREGORCZYK**

Abstract

This article tends to present a critical reflection on the foundations of French administrative law: why is it based on jurisprudence while France is a country of Roman law tradition where the norms are most of the time written by parliament? How does the administrative judge use this special role to organize the relationship between the state and citizens? How does the organisation of the French legal system offer a guarantee of the independence of the administrative judge?

To support this reflection, the article highlights how these principles are put into question by some of the latest evolutions of administrative law. Among these evolutions, the article focuses on three points:

- The debate around the establishment of a code of administration
- The debate around the reorganization of the *Conseil d'Etat* under the pressure of European jurisdictions
- A selected focus on the *Conseil d'Etat's* case laws concerning public liability, competition law and the principle of legal certainty.

I. Introduction

Probably because of the history of the French presence in Cambodia, many people trying to introduce a comprehensive legal system in the administrative sphere in Cambodia seem to be turning their eyes towards France, among other countries, as if this country were in this field a model to follow or to transpose.

Obviously, the purpose of this chapter is not to judge if France should be considered as a model in the administrative law field. For the author, it is still almost impossible to have a useful analysis on the ways to transpose as a whole the French system abroad, especially to Cambodia.

---

* Jean-Luc Gregorczyk is a civil servant who has worked for more than ten years for the French National Assembly. As legal advisor, his role is to provide the deputies – mainly the *rapporteurs* – with advice on draft bills.

The purpose of this chapter is more modestly to highlight, by choosing significant examples, the fact that French administrative law is, in many aspects, a **public monument**, the result of two centuries of history rooted in the French Revolution, shaped during the liberal 19th century and stabilized during the 20th century, a period that included two world wars, the advent of the welfare state and growing European integration.

For many people eager to find in the French system interesting principles, it surely remains very important to understand **in which general frame these principles are integrated** and of which evolving history they are a sometimes curious result.

This 'public monument' is based on three different pillars:

- As a country of **Latin law heritage**, France has always been very prone to see its legal *corpus* written 'in the marble of the texts'[1], be it the laws or the regulations.
- In a very centralised and integrated country, despite recent policies, the French legal system **gives the state**, and its administration considered as the acting arm of the state, **many prerogatives** to be able to rule the country.
- As a country with a strong revolutionary history, France has for a long time foreseen the need for barriers to limit the government's ability to monopolize power. This objective has taken the form of an **independent administrative judiciary system** specializing in control of the government's actions.

As the result of these three principles, the French administrative law system is characterized by the **prominent role of the administrative judge**, and especially of the *Conseil d'Etat*, the supreme court of the administrative jurisdiction.

This administrative judge permanently oscillates between the **protection of citizen's rights and the care of the administration's margin of action**. This oscillation is possible because French administrative law remains in a large part **the masterpiece of the administrative judge himself**, who is shaping its own legal solutions one step after the other through case law.

As paradoxical as it may seem, the French administrative law system, which is at the core of our State's design, is therefore closer to an Anglo-Saxon legal system than to French private or criminal law.

But of course, this situation has been evolving very fast for about two or three decades under the pressure of many factors:

- With the advent of European integration, many case law solutions preserving the margin of action of the state have been put into question in the name of human rights and equal relations between citizens and the state.
- The principles of administrative law tend to be more and more ruled by positive norms like laws or regulations. The private garden of the administrative judge is more and more threatened by parliament.

1 This expression is still used very often in the National Assembly when a deputy considers it important to fix a principle in law.

In order to give a practical illustration to these profound evolutions, **three relevant topics have been selected**:

- The first one concerns the building of an administrative code, which was the occasion of a confrontation between the Roman law tradition of the country and the case law principle of its administrative law.
- The second one concerns the recent evolutions of the organisation of the *Conseil d'Etat*. These evolutions, triggered by European jurisdictions, were imposed to clarify the judge's impartiality towards the administration.
- The third one is gathering fundamental case law of the *Conseil d'Etat* over the last two decades in selected areas of administrative law, in order to highlight the advantages of an evolving law made possible by the particular position of the administrative judge.

II. Codification and Administrative Law in France

Many of the legal and political debates surrounding codification in France since the 1980s, particularly in the field of administrative law, may be interesting for Cambodia, a country progressing towards the shaping of a comprehensive administrative law.

Codification is a very ancient tradition in France, due the Roman law heritage of the country. As early as 1579, King Henri III decided to issue a complete compilation of the royal ordinances; this work was entrusted to Barnabé Brisson, president of the Parliament of Paris and state advisor. He finished his work in 1587, gathering several thousand legal provisions under the title Code of Henri III. This very first significant code, **compiling existing laws without changing them**, became obsolete and was then abandoned after approximately 50 years.
The next step towards a better codification was taken under the impulse of Colbert, the well-known state secretary of King Louis XIV, who decided to compile the different laws in separate books dedicated to civil and criminal procedure (1667 and 1670), waters and forests (1669), commerce (1673), and the navy (1681). The difference from Henri III's code was that **Colbert's codification significantly changed and reorganised the existing provisions**.

This historical overview tends to highlight the fact that codification has been seen in France, for a very long time, as a means to improve state stability as well as to give a more certain framework for business.

1. The Milestones of Codification after the French Revolution

In this perspective, the very important codification work undertaken under the regime of Napoleon I, between 1799 and 1814 after the turmoil of the French Revolution, tried to reach the same objectives. M. Jean Portalis, the prominent jurist who was in charge of this codification, and notably of the first Civil Code, underlined that "legal order intends to cement political order".[2]

Therefore, the Civil Code was seen by many specialists as the **endpoint of the integration of the French nation after the Revolution**, the setting up of a united legal *corpus* after centuries of monarchy where, despite the advent of the absolute monarchy with Louis XIV (1643–1715), the laws had been different from one province to another.

In ten years, five very important codes were set, many articles of which still apply:

- the Civil Code (1804)
- the Criminal Code (1810)
- the Civil Procedure Code (1806)
- the Criminal Procedure Code (1808)
- the Code of Commerce (1807).

The purpose of this codification was not to put together all the existing norms, nor to try to foresee all the possible situations, as M. Portalis underlines brilliantly in his presentation of the Civil Code in 1804:

> *The purpose of the bills is to fix, through large views, the general maxims of law, to establish the fertile principles and not to come into the details that can emerge in every matter. It comes to the magistrate, impregnated by the general spirit of the laws, to drive its implementation.*

This assertion of the lawyer can more or less be seen as a prediction, given that the principles set up in the Civil Code were, throughout the 19th and 20th centuries, first interpreted, then completed and lastly overtaken by the intervention of the judge.

From 1880 to 1945, a series of big decisions taken by the civil Supreme Court – the *Cour de cassation* – tended to create many basic principles of civil law, like for example the principle of liability for the action of things (1896), the theory of unjust enrichment (1892) or the abuse of rights (1915).

2 This quotation comes from his speech before the National Assembly.

For this reason, the Civil Code as well as the other Codes from the Napoléonic period were seen, during the 20th century, as the "gathering of general common and residual principles".[3]

These historical considerations drive to the conclusion that **the setting up of a code is a way to fix the state of law at a given moment, but this setting up poses a danger:** the norms put together in the code are more difficult to adapt to the evolutions of society. Any code runs the risk of becoming outdated if the legislator doesn't take care of its updating.[4]

2. The Restart of Codification in the 1980s as a Response to the Normative Inflation

Codification as a Good Response to the Accessibility of the Norms

Curiously, codification was strongly revived in France during the 1980s as a response to the increasing number of laws voted. Since the beginning of the 1980s, there have been in France as many laws voted each year as during the whole period 1800–1850, and this acceleration is becoming a problem for citizens who are supposed to know the laws, according to the ancient adage: 'Nobody is supposed to ignore the laws'.

When these laws are changing very fast, when they become more and more complicated, when they are changing sometimes even before coming into effect, **the citizen is technically unable to follow these evolutions**.

This point of view will be confirmed later by the Constitutional Council itself, stating that "the equality of the law expressed by Article 6 of the Declaration of Human Rights and the guarantee of the rights implied by its Article 16 cannot be effective if the citizens do not have access to a sufficient knowledge of the norms applying to them".[5]

Therefore, codification became a **government priority at the end of the 1980s**. The decree 97-894 of 12 September 1989 created the Superior Commission on Codification and Simplification of the Laws, under the direct supervision of the prime minister. The vice-president of this commission, who also leads the *Conseil d'Etat*, manages its works in practice.

Between 1989 and 1995, 4 new codes were adopted:

- the Code of Intellectual Property (1992)
- the Code of Consumption (1993)
- the Code of Financial Jurisdictions (1994)
- the Code of Rural Affairs (1991-1993).

3 P. Remy, *La recodification civile*, 1997.

4 Portalis, *Discours préliminaire du projet de code civil* (1801): "Un code, quelque complet qu'il puisse paraitre, n'est pas plutôt achevé, que mille questions inattendues viennent s'offrir aux magistrats. Car les lois une fois rédigées demeurent telles qu'elles ont été écrites. Les hommes, au contraire, ne se reposent jamais; ils agissent toujours: et ce mouvement, qui ne s'arrête pas, et dont les effets sont diversement modifiés par les circonstances, produit, à chaque instant, quelque combinaison nouvelle, quelque nouveau fait, quelque résultat nouveau».

5 Decision CC 99-421 DC, 16 December 1999.

Besides these new codes, the Criminal Code was totally reshaped and consolidated.

This policy was accelerated through a circular of 30 October 1996 that provided, in an appendix, a comprehensive list of 42 codes to be created or reshaped over the years 1996–2000. However, between 1996 and 1999 only two codes were published, one being the voluminous Code of Territorial Collectivities.

In order to accelerate the process, the Government passed a law on 16 December 1999 providing **the executive power to adopt by ordinance the legislative part of 9 new codes.**[6] **These were published in 2000 and 2001.**

The Constitutional Council, seized by parliament to review the conformity of this procedure with the Constitution, confirmed that **codification must be accelerated to improve "legal accessibility and comprehensibility", which is acknowledged by this decision as a constitutional objective**.

Another law in 2003 then empowered the government to build by ordinance some five more codes (Historical Estate, Research, Tourism, Defense and Handicrafts) and to reshape five other existing codes.

Codification is not Sufficient to Stabilize the Existing Norms

Today, more than **60 different codes are in force and can be downloaded on the official website *Legifrance***. If this codification has indisputably made the French legal framework more accessible, some points of this work remain open to improvement:

- Some of these codes can easily be considered of **minor importance** like, for example, the Code of Navy Labour, the Code of Cinema or the Code of Military Justice. Many specialists have denounced over the recent period the fact that the legislator has gone too far in this work of compilation.
- The **stabilization of the laws that codification was supposed to bring is not respected**. For example, only one year after its adoption, the Code of Territorial Collectivities was subjected to a large modification concerning more than a hundred of its articles, and the Code of Labour evolved so rapidly that new numbering had to be adopted, creating a great confusion for professionals.
- **Many very important norms are still not codified**, for example European guidelines, the case law of supreme jurisdictions or the rulings of the more and more numerous independent agencies in France. For an unknown reason, some legal monuments have remained excluded from this work of codification, like for example the law of 1901 on the liberty of association or the law of 1905 on the separation between state and church, still in application and subjected to a lot of political debates recently.
- Technically speaking, **codification makes the work of a legislator much more difficult**. Each article of a draft bill does not express a clear idea nowadays, but changes a sentence,

6 Social Action and Families, Commerce, Education, Environment, Administrative justice, Financial, Road, Public Health.

a word, or sometimes just a figure in a codified article. For this reason, a member of parliament eager to understand the meaning of one article of a draft bill cannot get this directly from the text alone – **he or she must spend several hours to make clear the cross-references** between the draft bill and the different codes. This codification implies, as a practical consequence, the necessity to have at the disposal of parliament **many qualified and independent legal experts able to explain the consequences of each provision**.

3. Technical Aspects of Codification In France: the Relationship between Law and Regulation and the Question of Codification 'on the Basis of Established Law'[7]

Law and Regulation in the Process of Codification

The technique of codification greatly evolved after 1945. **Three different stages can be distinguished following the procedure and the normative vehicle of codification.**[8]

The first stage is the **administrative codification**, launched by a decree of 10 May 1948. This codification is performed only through a regulation procedure, more precisely by **decree taken after a review of the *Conseil d'Etat*** (which is at the highest point of the regulations hierarchy) even if this codification concerns laws voted by parliament.

This procedure is interesting because the shaping of a new code can be very fast, but it is also dangerous in so far as the existing laws may not have been repealed;[9] the juxtaposition of two norms could create difficulties and confusion. In order to overcome this difficulty, an **intervention of the legislator after 1958 was required to give the code the force of the law** and to repeal explicitly the prior legislative provisions. Around 40 codes were adopted using this procedure up to 1982.

The second stage can be considered as a **legislative codification**, despite the fact that it was organised by the decree of 12 September 1989. The new code is prepared by the Superior Commission of Codification, gathering the norms of legislative and regulation level (with a connection of the article's numbers between the two parts of the code). The legislative part of the code is then adopted by parliament in order to give the codification process a better democratic basis.

The problem with this procedure comes from the difficulty of getting a slot in the agenda of the chambers, which is always hard, particularly for a draft bill which is seen as more technical than political. In this period, the Superior Commission of Codification has often prepared codes that have become obsolete before going to be reviewed by parliament.

7 In French, '*codification à droit constant*'.

8 For these three stages, see for example, Fabrice Melleray, *Codification, loi et réglement*, Cahiers du Conseil constitutionnel, n°19, January 2006.

9 Indeed, it was not possible to repeal a law with a regulation.

In reaction to this problem, the government decided **to use the accreditation to rule by ordinance following Article 38 of the Constitution**. This procedure, empowering the government to write laws in a certain slot of time (generally 6 months) and in a very well defined area before the text is validated before the chambers, has been deeply criticized by parliament in so far as it was seen as a removal of its power. But the decision of the Constitutional Council of 1999 has given this procedure its legitimacy.

If this procedure is faster and provides a wider margin of appreciation to the Superior Commission of Codification, its remains very technical and rather difficult to use. The main problem comes from the articulation between the legislative and the regulation part of one code.

In principle, Articles 34, 37 and 41 of the Constitution tend to define a clear separation between the field of laws and the field of regulations: the laws fix general principles while regulations tend to give more precision to these principles or are ruling on more technical aspects.

If a law is made in the field of regulation, the Constitutional Council can proceed to a declassification of the norm. If a regulation is proposed in the field of the laws, it can be seized by the government or the president of one of the chambers in order to withdraw the provision.

But in reality, many laws are made in the field of regulation, and vice-versa. As a consequence, when the Commission of Codification is trying to shape the new code, it often has a tricky job to separate the provisions that have to be considered as regulation from those of the legislative field.

This work is often very subtle and also political; given that the codification is operated by ordinance, nothing in the Constitution imposes on the Codification Commission a requirement to seek the opinion of the Constitutional Council when translating provisions from the field of law to the field of regulation or vice versa.

In this work of codification, mistakes made by the commission are not rare;[10] for example, the offense of usury was accidentally removed when voting the Code of Commerce. And many mistakes of cross-references must often be corrected after the adoption of a new code. Last but not least, the separation between two codes is often very difficult to operate. One solution adopted was to establish a 'leading code', to be changed by the legislator, and these changes were automatically reported in the 'following codes'. But this technique, almost impossible to implement in practice, has been abandoned.

10 See for example, the report made by M. Etienne Blanc, deputy, on the draft bill 710 empowering the government to proceed to codification, 23 March 2003, p. 21

The Myth of Codification 'on the Basis of Established Law'

During the 19th and the beginning of the 20th century, codification was seen as a means to gather scattered provisions in one book, but also to make them more coherent. Thus, it was real work for a legislator.

After the 1980s, when the work of codification became greater, the principle has been progressively adopted that codification had to be performed 'à droit constant', which means without changing any provisions of the existing laws.

This principle has even been itself written in the marble of law. Indeed, Article 3 of the law 2000-321 (12 April 2000) on the rights of citizens in their relations with administrations states clearly that:

> *the legislative codification gathers and classifies in thematic codes the whole of the existing laws at the moment of the adoption of these codes. This codification is made on the basis of the existing law, subject to the necessary modifications in order to improve the written coherence of the texts thereby gathered, to ensure the respect of the hierarchy of the norms and to harmonize the state of the law.*

This second sentence is systematically repeated, after 2000, in every article empowering the Government to shape a new code by ordinance.

In practice however, the codification 'à droit constant', be it with minor modifications, is almost impossible. The elaboration of cross-references and the influence of European and international law that has to be taken into account by the Codification Commission requires the rewriting of a large number of articles.

The best example is probably the elaboration of a new Code of Labour in 1994. The organisation of the content was criticized by the trade unions, for example because the articles concerning apprenticeship were attached to a part concerning vocational training and not labour relations.

As a consequence, parliament and its administration must be ready to review technically, but also politically, one whole code when the ordinance creating it has to be ratified by the chambers.

4. Codification in the Field of Administrative Law: History of an Unfinished Masterpiece

This general movement of codification did not concern administrative law during the 19th and the beginning of the 20th century.

As mentioned above, **administrative law has always been considered in France as a separate part of the law**, where the role of the judge in organizing the relationship between administration and citizens was of prominent importance. In this respect, codification has been seen for a long time as **a threat to the independence of the administrative judge.**

However in the 1980s and 90s, this specificity tended to be more and more criticized under the influence of the Anglo-saxon legal system; **the administrative judge, in France, was seen as the defender of the prerogatives of administration**, be it for example in the field of public liability or expropriation. The question of codification of part of the administrative law became suddenly less a taboo.

In the framework of the restart of codification in the 1980s, **the creation of several codes in the field of administrative law, and further of public law, was scheduled** in the appendix of the circular of 1996 setting up a work programme over the years 1996–2000:

Political institutions:
Code of the Constitutional Public Institutions
Code of Electoral Procedures
Justice:
Code of the Magistracy
Code of the Judicial Organisation
Code of the Administrative Jurisdiction
Administration:
Code of Administration
Code of Civil Service
Code of Public Adjudication
Code of Public Properties

As we can see, **the creation of a Code of Administration was not, from the beginning, designed to gather all parts of administrative law**. The organization of the administrative jurisdiction was supposed to be the object of another code, as well as the norms ruling the private or business actions of the administration (adjudication or management of the public properties).

In fact, the Code of Administration was designed to gather the provisions related to administrative procedure. In practice, the Codification Commission began to work in this direction in 1998, but surprisingly, this code is not among those mentioned by the

bill empowering the government to create 9 new codes in 1999, nor in the similar bill of 2003, despite the fact that the work of the Codification Commission seemed to be ready as early as 2000.

In its public report of 2011, **the Codification Commission acknowledged that the perimeter of this Code was very difficult to find**, and should have been from the beginning focused on several laws ruling directly the non-contentious relations between the administration and citizens: the period to answer to a citizen, motivation of the regulations, implicit decisions, communication of personal or general decision, and so on.

As a professor of law underlines it perfectly in a very clear article, "there is a deep paradox between the acceleration of the codification over the last 15 years and the fact that the code of administration remains beside this work".[11]

This article mentioned **several difficulties linked to the branch of law to be codified:**[12] the history of administrative law in France makes it the unique branch of law shaped directly by the judge. This idea of a non-codified law is so deeply rooted in the French tradition, and particularly in the *Conseil d'Etat*, that the setting up of a Code of Administration has never found a means to preserve the case law character of the French administrative law.[13]

Behind this failure probably stands the idea, supported by the very influential members of the *Conseil d'Etat* – they are often members of the minister's cabinets – that **a written law is less flexible, but also that a written law offers to parliament the possibility to correct the natural inequality between the state and the citizen promoted by the administrative judge**. This Code of Administration would probably shift a little the power in the administrative field from the *Conseil d'Etat* to parliament.

As mentioned at the beginning, the rationale of administrative law is, in France probably more than in any other country in Europe, **to preserve the possibility of the public power to perform policies without being too much restrained in this task by legal actions.**

Finally, it is important to mention that, despite this failure to officially issue an administrative code, the private publisher DALLOZ, specialising in the editing of commented codes, decided to publish what it called unofficially a '*code administratif*'. Surprisingly, this 'code' gathers different texts organized in 26 different topics such as energy, administrative procedure, defence, expropriation, civil servants, public property, public service and so on. The publisher decided to adopt its own approach to this problem, without any visible link with the debates mentioned above.[14]

---

11 Mme Pascale Gonod, *La codification de la procédure administrative*, Actualité juridique du droit administratif, 2006 p. 489

12 Ibid, "Or, au-delà de difficultés liées à l'opération de codification, la singularité de la matière n'est sans doute pas indifférente à la manifestation de résistances à la codification de la procédure administrative".

13 Ibid, "In other words, codification appears like a threat to the place granted, for historical reasons, to the case law in the formation of the French administrative law".

14 The content of this code can be reviewed on the website: http://pvsamplersla5.dalloz-bibliotheque.fr/fr/pvpage2.asp?puc=5445&nu=40&selfsize=1

III. The French *Conseil d'Etat* and its Recent Evolutions

The French *Conseil d'Etat* is a prominent public institution whose existence is, in many aspects, at the heart of the particularities of our administrative law. Created in 1799 by Napoléon I, it was entrusted with a double mission that still applies today:

- to review the writing of important legal texts
- to solve litigation between citizens and the administration.

This double mission is a direct heritage of the Council of the King created in the early 13th century, and Napoleon I strongly insisted on keeping, in the *Conseil d'Etat* created in 1799, the titles of '*maître des requetes*' (between one and ten years of service) and '*conseiller d'Etat*' (after ten years of service) used since 1578 in order to preserve a certain continuity.

1. The Recommendation Role of the *Conseil d'Etat*

Today, the *Conseil d'Etat's* activities are still articulated around these two fields. The recommendation role is composed of several tasks organised by the Constitution or the law:

- **It is necessarily consulted on every draft bill** initiated by the government. These consultations are theoretically only for the benefit of the government, who can decide whether or not to divulge details. This expert advice is not binding on the government, despite it often being respectfully used in parliamentary debates. In 2013, for example, the *Conseil d'Etat* gave a consultation on the draft bill opening marriage to couples of the same sex. Some paragraphs of this consultation stressed, from a technical and juridical point of view, the difficulties engendered by the draft bill concerning filiation. The government decided to keep this consultation for its own use, but as the members of the *Conseil d'Etat* are magistrates protected by a very strong statute and a very high vision of their independence, this information was progressively delivered in the newspapers and used in the public debate;
- **It is also necessarily consulted on the projects of ordinances**. Furthermore, in the framework of the latest wide constitutional reform of 2008, the presidents of both the National Assembly and the Senate insisted on including in the Constitution that the *Conseil d'Etat* could also be consulted on draft bills initiated by the chambers, on the demand of the president of one of these chambers, and also on important amendments proposed by parliament;

- The *Conseil d'Etat* is necessarily consulted on the legal provisions voted in the field of regulations, which the government can change by decree (Article 37 of the Constitution); it is also consulted **on the most important decrees if a legal provision states so.**[15] This consultation is not binding for the government but in case of subsequent contestation of the legality of the decree, the administrative judge will obviously be very prone to cancel the decree. In most cases, the government then follows the recommendation of the council.

This recommendation role has always been very important for the council: in its activity report of 2013, the council says it reviewed 1,104 texts in 2012, 151 of which were draft bills and 940 draft decrees. The average time of work is 24 days but in many cases, notably concerning draft bills of high political importance, the council has to issue its recommendation in a few days. In these cases, the expert work has to be done mostly during the reviewing of the draft bill in parliament.

2. The Litigation Role of the *Conseil d'Etat*

Besides the role of recommendation, the council takes on a more and more important role in **ruling on contentious matters between citizens and the administration.**

This role has increased so significantly for two or three decades – despite the creation, in the provinces, of administrative courts (first degree) and appeal courts (second degree) respectively in 1953 and 1987 – that many specialists now consider that it is its main role. In 2012, the council has made statements on more than 9000 matters, while this number reached only 4000 to 5000 during the 1990s.

Furthermore, in the framework of the constitutional reform of 2008, the **Council received the prominent role of filtering the new procedure of 'constitutional questioning' that can be used by every party to a trial**. This questioning consists in contesting the conformity of a legal provision to the Constitution, on which the Constitutional Council didn't express its point of view in so far as it hasn't been seized by members of parliament to do so.

Between 1 March 2010[16] and 2013, a very important stock of existing legal provisions, sometimes voted for decades, has thus been exhumed and carried before the administrative judge. In order to avoid a congestion of the Constitutional Council, it was decided in 2008 that the supreme jurisdictions for both the private field (*Cour de cassation*) and administrative field (*Conseil d'Etat*) would be in charge of assessing if a serious question about the constitutionality of a legal provision could justify that this question should be transmitted to the Constitutional Council. The model for this procedure is the preliminary

15 Most of the articles of a bill say that the technical aspects of this article are set by 'decree in Conseil d'Etat', which means reviewed after preparation by the competent ministry.

16 The procedure could be applied only after the vote of an organic law.

question ruling the relations between national courts and European courts concerning the interpretation of European law.

During the past 4 years, some very important aspects of French law have in this way been revisited by the *Conseil d'Etat* and the Constitutional Council, sometimes cancelling important provision concerning, for example, the procedure of custody and the necessary presence of a lawyer during this procedure.

According to the latest activity report of the administrative jurisdiction, 2,459 of these questions were raised before the administrative judge between 1 March 2010 and the end of 2012, 655 of which were ruled on by the *Conseil d'Etat*.

3. The Organization of the *Conseil d'Etat* and its latest Reforms under the Influence of European Law

The *Conseil d'Etat* is composed of 300 members, two thirds of whom are working for this institution – the others are often transferred to the minister's cabinets or working temporarily in the private or semi-private sector like, for example, public companies.

Following its two functions, the Council is organized in several sections:

- The most important section is in charge of litigation surrounding the acts of different administrations ('*section du contentieux*'). This section is split into ten subsections specialising in separate areas of administrative law; most of the staff of the council work in these subsections;
- Five sections are in charge of the recommendation role (finance, social matters, public works, administration[17] and interior[18]) reviewing laws before being tabled by parliament, ordinances and important decrees.

One of the most ancient traditions of the Council is that **there was no practical separation between the sections from an internal point of view**.

Originally, the state councillors benefited from a double nomination in the litigation subsections and in the recommendation sections – each member was at the same time in charge of a recommendation and litigation role. As a practical consequence, a state councillor could be at the same time the person in charge of reviewing a decree, and, two or three months later, the public rapporteur on the litigation concerning the same decree.

After 1953 and the creation of the administrative courts, this rule has been progressively changed: a state councillor could switch from a recommendation to the litigation section, without being *at the same time* in the two sections. But in 1963, the government decided to restore this rule of double nomination.

17 This section has to review the texts related to the organization of the administration or the rules applying to civil servants.

18 This section reviews the texts related to constitutional principles, to public liberties and to the organisation of public bodies.

For decades, this intertwining was seen as the normal consequence of these two roles of the *Conseil d'Etat*, and even justified by the members of the Council by the fact that this institution was member of the executive power more than of the judicial power[19].

This intertwining is probably very difficult to understand for someone used to the Anglo-Saxon state and judicial power organization, and that is probably the reason why this particularity has been **progressively questioned by the European authorities, mainly the European Court of Human rights (ECHR) in its application of Article 6** of the European Convention on Human Rights proclaiming the right to a fair trial.

These questions were mainly focused on the role of the *public rapporteur* – the former 'government commissioner'[20] – in the proceedings. This public rapporteur, a member of the *Conseil d'Etat*, is in charge of defending the interests of the State in all the proceedings performed by the litigation section of this Council. Therefore, it benefited historically from different prerogatives in these proceedings, notably the possibility of reviewing the draft case ruling before its examination by the Council.

In different decisions from the ECHR, this jurisdiction managed to create a better framework for the *public rapporteur:*

- In the case **Kress vs France**[21] (7 June 2001), the ECHR gave an answer to two different questions raised by the defense.

The first one concerned the question of the non-transmission of the conclusions of the *public rapporteur* to the parties of the trial: the ECHR stated that this non-transmission could not be considered as a breach of the principle of a contradictory procedure, one of the consequence of a fair trial of Article 6 of the Convention, in so far as the parties could ask, during the proceedings, for the orientation of the *public rapporteur* and reply to his argumentations by a paper submitted at the stage of the deliberation of the Council.

On the other hand, the ECHR decided that the 'participation' of this public rapporteur, be it only with a deliberative voice, at the stage of this deliberation was a breach of this same Article 6; as the public rapporteur was the last person to express their point of view in the deliberation, the magistrate could be influenced in their decisions;

- In the case **Martinie vs France**[22] (12 April 2006), the ECHR gave some important precision to the previous case: concerning the 'participation' of the public rapporteur, the Court points out that the 'presence' itself of this rapporteur has to be considered as a breach of Article 6 of the Convention.

19 Le role du Conseil d'Etat, 1966, "The State council remained an element of the executive power and the development of its litigation role, if this did contribute to its autonomy, didn't really reconsider this affiliation to the executive power"(…) "History made of the council a judge, but this judge has never been a judicial power and, from a structural point of view, it has remained a part of the executive power, paradoxically in charge of judging this executive power".

20 The name was changed in 2009.

21 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-64069

22 http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-73195#{%22itemid%22:[%22001-73195%22]}

In order to take these decisions into account, a decree (1 August 2006[23]) now requires that the **conclusions of the public rapporteur have to be transmitted to the parties**, who can answer orally to these conclusions at the beginning of the deliberation. The presence of the public rapporteur during the deliberation is now prohibited, but only in the administrative courts and appeal courts. In the *Conseil d'Etat*, **he or she can assist in the deliberation but without taking part in the discussions , unless one of the parties asks the contrary.**

In order to anticipate any other decision at the European level, the *Conseil d'Etat* was behind the edition of two decrees:

- The first one[24] (6 March 2008) separates more clearly the recommendation and the litigation role. It recognizes officially that a councillor who took part in the formulation of a recommendation on a draft regulation cannot sit in a litigation section reviewing the legality of this same regulation. This decree also writes in the marble the fact that the councillor from the recommendation sections cannot sit at the same time in the litigation section. Last, during the deliberation of the litigation section, the president of the recommendation section that has reviewed the regulation cannot sit, even if he was not present when the recommendation sect ion took its decision;
- The second one[25] (7 January 2009) changes the name of 'government commissioner' to 'public rapporteur'.

This policy of anticipation of the *Conseil d'Etat* did not stop the ECHR from focusing on the relationship between the *public rapporteur* (defending the state's interest) and the *rapporteur* (preparing the decision for the section's deliberation).

However, this preoccupation did not drive the ECHR to strengthen the framework of the *public rapporteur:* in the case **Francois-Marc Antoine vs France**[26], the ECHR confirmed that there was no breach of Article 6 of the Convention ensuing from the lack of transmission to the defense of both the paper and the draft decision prepared by the *rapporteur*, whereas it was communicated to the *public rapporteur*. For the Court, the defense received all the documents of the parties, so that the paper and the draft decision of the r*apporteur* didn't enclose any further useful information for a better organization of the defense.

The debate between the two jurisdictions on the internal organization of the *Conseil d'Etat* seems to have found a more or less stable solution after a decade of great confrontation. At the same time, the ECHR has pushed forward its investigation by questioning the French Supreme Administrative Court on the ways it makes effective a conviction of the country on the basis of Article 6 of the Convention.

23 http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=2F2D77D530DA3B8946CE48BFD1E156B1.tpdjo05v_1?cidTexte=JORFTEXT000000817686&categorieLien=id

24 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018217481

25 http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020046644&dateTexte=&categorieLien=id

26 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-121742#{%22itemid%22:[%22001-121742%22]}

In the case **Chevrol**, France had been convicted on the basis of Article 6 of the Convention[27] because the *Conseil d'Etat* had linked in 1999[28] the respect of a fair trial to the application of an international convention. After this conviction, Mrs Chevrol decided to lodge a new appeal in order to gain a new examination of her case by the *Conseil d'Etat*, but the Council decided in 2004 that "there was no specification in the Convention stating that a conviction of a contracting party requires the reopening of a procedure".[29]

However, the ECHR recently gave a series of decisions opening the door to a new procedure before the administrative jurisdiction. The Court has once more highlighted "the importance, in the system of the Convention, of an effective application of the Court's decisions" (**ECHR, 11 October 2011, Emre vs Switzerland**) and more recently that "the authority linked to the Court's decisions requires that the convicted country gives the amount scheduled as compensation, but also that it takes personal measures and, if necessary, general measures required to stop the violation of the Convention" (**ECHR, 4 October 2012, M. Gilbert B**).

For the European Court, the compensation must tend to place the claimant in an equivalent position as the one he or she could have been in without any violation of the Convention, including the reopening of the procedure; however this solution has always been put aside by the *Conseil d'Etat* at the moment. But it is highly likely that the debate between the two jurisdictions is not closed.

IV. Recent Developments of French Administrative Law through Case Law

The purpose of this chapter is not to provide a general overview of all the evolutions of French administrative law, but to focus on several relevant points to illustrate its evolution and important recent jurisprudence. These points have also been selected for the interest they can present from the Cambodian point of view.

1. 'Administration Liability'[30]: towards the End of a Particularity

The administration's liability was recognized for the very first time in 1873 (case Blanco) by the Conflict Court ('*Tribunal des conflits*')[31] stressing in the same decision the general principle of a public liability and the necessity of proper public jurisdiction to shape its form.

27 ECHR, Chevrol vs France, 13 February 2003
28 CE, Ass, 9 April 1999, Chevrol
29 CE, 11 February 2004, Chevrol.
30 French public law speaks of the liability of the administration rather than of the state.
31 This Court has to state on the conflict of competence between the administrative and civil jurisdiction.

But of course this recognition has not been general from the beginning: more than one century of decisions from the *Conseil d'Etat* have been necessary to make the administration a person subject to trial like the others.

The administration's liability has been progressively engaged for **police activities** (CE 1905 Tomaso Grecco), **law making** (CE 1938 Lafleurette), **provisional custody** (1970), **justice** (1978), and last **functioning of public hospitals** (CE 10 April 1992, Epoux V).

However, according to the *Conseil d'Etat* itself,[32] the public responsibility has, over the two last decades, evolved more towards a socialization of certain imminent risks than an ongoing extension of the administration's liability. The state is, in many cases, the only person to be convicted in order to obtain compensation and, maybe more, to have an acknowledgment of the prejudice.

This role of socialization of certain risks has always been important in the case law of the *Conseil d'Etat*: by 1895 it had shaped the notion of **liability without any fault of the administration**, and then included in this notion **damages caused by public works**, dangerous activities like demonstrations, and more recently, the use of **dangerous products** that has motivated the recognition of the administration's liability, without any fault, for the transfusion of blood infected by HIV (CE 26 May 1995, Consorts Nguyen, Jouan and Pavan).

Besides this notion of liability without any fault, the *Conseil d'Etat* has also built and extended **the notion of liability linked to a fault of the administration**.

Traditionally, the *Conseil d'Etat* made a distinction between serious faults and simple faults: a serious fault was required in most of the areas of public actions to be able to acknowledge a liability of the administration. But this requirement has been progressively abandoned, so that a simple fault is now sufficient in most circumstances:

- In 1992, the serious fault was abandoned for medical and surgery acts (CE 1992 Epoux V).
- In 1995, the same evolution concerned **the controls operated by certain inspections**, notably labour inspection.
- In 1998, it concerned the **technical controls operated on ships.**
- In 1998, the evolution concerned **rescue services** (CE 1997 M. Ameon).
- In 2008, it concerned the **management of prison services** (CE 2008 Zaouiya).

The most important evolution of the administration's liability came from the **medical aspects of public action**. Originally, the liability was engaged for a serious fault concerning medical acts (CE 1971 CHU de Reims), but a **simple fault was sufficient for non-medical acts performed in a public hospital**.

32 Conseil d'Etat, Public report 2005, *Liability and socialization of the risks*, 2005.

In 1992, the *Conseil d'Etat* generalized the principle of a simple fault, and created in 1993 a **new regime of liability without any fault for medical matters**, in cases where a medical act has created a prejudice that was highly improbable and where the damages are very serious.

2. The Principle of Legal Certainty and its latest Application by the Administrative Judge

The principle of legal certainty is a concept stemming from German law which has received international recognition through the case law of European jurisdictions (ECJ 1962 *Bosch* and ECHR 1979 *Marchx vs Belgium*).

In French law, **the legal certainty was elevated by the Constitutional Council to the rank of 'constitutional objective' in 1999**, in the framework of the policy of codification mentioned above. This means that this principle is not clearly written in the Constitution but proceeds from some of its provisions.

For the Constitutional Council, the principle of legal certainty has two related – but separate – meanings:

- The '**predictability of the norms**'[33], which means the possibility to have easy access to them, the capacity of each citizen to understand them,[34] and the right of the citizen not to see them change too often or retrospectively.
- The '**legitimate expectations**'[35] of the litigants whose personal situation must not be called into question too deeply by the cancellation of a norm.[36]

In the field of administrative law, the *Conseil d'Etat* has been for two **decades stressing the dangers of a general degradation of the predictability of the norms, mainly in the public report for 1991 and again in 2005**.

For the institution, this degradation comes from the proliferation of the norms (at the international level but also at the national level from parliament and the territorial collectivities). It also stresses the degradation of the quality of the norms with the advent of soft laws at the international level but also non-normative provisions voted by parliament.

Besides these efforts to highlight a real political and legal problem in France, the ***Conseil d'Etat* has been paradoxically much less prone to recognize the necessity of the principle of legal certainty in its second branch** – the legitimate expectation of the citizens.

Indeed, French administrative law remains built on several principles preserving, on the first hand, the capacity of the administration to act properly, and on the second hand, the possibility of the administrative judge cancelling a regulation without the possibility, for the private applicant, of receiving damages for this cancellation.

33 In French, '*la prévisiblité des normes*'.
34 In 2010, the Constitutional Council cancelled a draft bill because it considered it too complicated.
35 In French, '*le principe de confiance légitime*'.
36 For these definitions, see Conseil d'Etat 2006, *Sécurité juridique et complexité du droit*.

For this reason, historical case laws of the Council have stated that:

- The public authorities can withdraw a regulation, for the future (abrogation) or retroactively (withdrawal) at any time if this regulation does not create positive rights for the applicant;
- A regulation enters into forced as soon as it is published, even if there is an appeal against this regulation;
- The cancellation of a regulation doesn't create a right of compensation for the applicants.

However, some aspects of this principle of legal certainty have been set up by the Council, mainly in order to frame the regulation power more than to alleviate the effects of its own cancellations:

- **Public authorities cannot repeal a regulation, after a certain delay, if this regulation has created some positive rights for the applicant** (CE 1922 Dame Cachet);
- Contrary to the laws, **regulations cannot be retroactive** (CE 1948 Société du Journal l'Aurore);
- When a regulation is cancelled by the administrative judge, the **individual decisions taken on the basis of this regulation are not necessarily cancelled if they created positive rights for the applicants (**CE 1954 Caussidery).

In many recent cases, the Conseil d'Etat refused to acknowledge the principle of 'legitimate expectation' (CE 1996 OPHLM, CE 2011 Entreprise Freymuth).

However, the Council has developed very innovative case law on many other points related the principle of legal certainty:

- In 2001, it stated that an illegal regulation creating positive rights can be withdrawn only within four months after its publication even if the delay of appeal (of two months) had not started because the administration didn't give any publicity to this regulation (CE 2001 Tournon). Before this case law, an illegal regulation could only be withdrawn within the delay of appeal (two months) starting from the moment of its publication.
- In 2004, the Council significantly changed its position on **the effects of a cancellation of regulations by the administrative judge**. Since 1925, a cancellation of a regulation by the judge meant that this regulation was supposed to have never existed (CE 1925 Rodière): thus the cancellation was retroactive and the applicant didn't have any right for compensation. But in 2004, it granted the administrative judge the possibility **to postpone the effects of a contentious cancellation when this cancellation** has "excessive effects on the personal situation of the applicant" (CE 2004 Association AC! and others);
- In 2006, a very famous case law **at last introduced the principle of legal certainty as a general principle of administrative law**. As for the Constitutional Council, this means that this principle is not written in our norms but that it is ensuing from the architecture of public law (CE 2006 Société KPMG). In this case, the Council stated that, in the situation where a regulation is creating a new legal framework, the **administration has the obligation to edict transitory measures in order to preserve the interests of the applicant**;

- Lastly, in 2007, it decided to go further in the contentious area by deciding that a **new case law solution is not necessarily applied retroactively or to other current litigations in cases where this application would undermine excessively the legal situation of the applicant**, particularly in the framework of a contractual relationship.

As we can see, the *Conseil d'Etat* still refuses to recognize a general principle of 'legitimate expectation', but most of its latest case law tends to give to this principle a real legal reach in practice.

3. Administrative Law and the Application of Competition Law

For decades, the administrative judge has been said, particularly by the European bodies and the civil judge, to be a stranger to all questions related to competition law.

As a matter of fact, this is not entirely true given that it established several solutions preserving private property and the liberty of commerce and industry that were actually milestones of the French Revolution – the first bills taken in this area were published in 1791 in order to give more freedom to the guilds.

Later on, the Council decided that a **municipality cannot create a free public service, even concerning health, if this service is proposed by private persons** (CE 1901 Casanova).

Over the last two decades and under pressure from European competition law, whose authority is now higher than internal laws and even constitutional provisions, the *Conseil d'Etat* has been obliged to go much further in its appropriation of competition laws.

In 1993, the Council cancelled the acquisition of the majority of a company's share by a public body – in this case a radio – because this acquisition would be contrary to the European provisions on concentrations (CE 1993 NRJ).

In 1998, it agreed to **evaluate the regularity of a public delegation regarding competition law** (CE 1998 Tete).

In this area, the most important solution was adopted in 1997, when the Council agreed to **control the legality of the administration's regulation in the light of competition law**, even when the administration is using its prerogatives of public power, for example while preserving public order (CE 1997 Million et Marais), managing the public domain (CE 1999 Société Hertz) or in the framework of police activities (CE 2000 Société L et P).

In conclusion, it is still possible to consider that French administrative law is the story of an inequality between the private applicants – be it an isolated citizen or a big company – and the public power that must have a certain margin of action to rule a country properly. But over the last two or three decades, this branch of French law, which was often seen from abroad as a curiosity, has registered some fundamental evolutions proving the capacity of the administrative judge to assimilate, sometimes after a certain period of resistance, new tendencies of society.

In this work of adaptation, the *Conseil d'Etat* has undoubtedly played an important role, by promoting new orientations and new analyses. In this respect, the two roles of this institution, close from the jurisdictions but also from the power and the politics, were and still are certainly an asset, in so far as it is not afraid to play a real political role in the public arena by changing progressively the principles and the foundations of French administrative law.

STRUCTURE AND DEVELOPMENT OF ADMINISTRATIVE LAW IN JAPAN

Hiroshi KIYOHARA

CONTENTS

I. Introduction 267
II. Historical Development of Japanese Administrative Law and Administrative Litigation 267
1. The Era of the *Meiji* Constitution (1889–1946) 268
2. The Present Japanese System 269
III. Structure of Administrative Law in Japan 272
1. Administrative Law Reform in 2000 272
2. Current Major Administrative Laws 275
IV. Proposals for Cambodia's Administrative Law System 279
1. Administrative Litigation 279
2. Administrative Procedure Law 280

STRUCTURE AND DEVELOPMENT OF ADMINISTRATIVE LAW IN JAPAN

Hiroshi KIYOHARA *

I. Introduction

I understand that Cambodia is in the process of building a comprehensive administrative law system. As you will find in my chapter, Japan has experienced major judicial reforms including administrative law reforms since the late nineteenth century. Japan has incorporated the advanced legal systems of other countries and has customized and adapted those laws to the cultural and societal factors present within the existing system. These Japanese experiences contain useful and valuable knowledge that can contribute to the 'rule of law' promotion process, which Cambodia is currently undertaking. This chapter aims to contribute to Cambodia's near-future success in building a comprehensive administrative law system by presenting and analysing the structure and development of administrative law in Japan.

II. Historical Development of Japanese Administrative Law and Administrative Litigation

In order to understand today's structure of Japanese administrative law and administrative litigation, it is necessary to take a brief look at the historical development of the Japanese judicial system, especially its administrative litigation system.

* Hiroshi Kiyohara is a Japanese and U.S. lawyer, and a legal advisor to the Ministry of Justice of the Kingdom of Cambodia. He is also a lecturer at the Royal Academy for Judicial Professions and the Royal University of Law and Economy in the Kingdom of Cambodia.

1. The Era of the *Meiji* Constitution (1889–1946)

Court System under the *Meiji* Constitution

The present Japanese judicial system can be traced back to the reforms of the mid-nineteenth century when Japan opened itself to Western (European) countries. In 1872, a decree called the Statute on Judicial Matters was issued. This decree was the first legislative act concerning the court system, and was strongly influenced by French law. By the early 1880s, civil and criminal cases started being brought in the district courts as the courts of first instance. Appeals could be brought to the courts of appeal, and finally to the Supreme Tribunal.

In 1889, however, the ***Meiji* Constitution** was promulgated. This Constitution was the fundamental law of the Empire of Japan from 1890 until the end of World War II. The adoption of the *Meiji* Constitution necessitated judicial reforms, and some German advisers[1] played a major role in redesigning the court system because the *Meiji* Constitution itself was primarily based on the German model. The Law on Court Organization, which replaced the Statute on Judicial Matters, was enacted in 1890. Under this law, ward courts were introduced. Thus, the district courts were the courts of first instance in civil and criminal cases, while ward courts were given jurisdiction for less significant (for example, small claims) cases. Appeals could be brought to the courts of appeal, and finally to the Supreme Tribunal.

Under the Meiji Constitution, the independence of the court was guaranteed to a certain extent. Judges could not be removed unless sentenced for committing a crime, or dismissed by way of disciplinary proceedings.[2] However, the courts had to render judgment in the name of the Emperor.[3] The Ministry of Justice was in charge of the overall administration of the courts and even had the power to appoint judges.

1 One of the German advisers was Isaac Albert Mosse (1846–1925). He was a German judge and legal scholar. In 1882, at the request of the German government, Mosse met with future Prime Minister of Japan Ito Hirofumi and his group of government officials and scholars, who were touring Europe to research various forms of Western style governments, and gave a series of lectures on constitutional and administrative law. Mosse was credited with convincing Ito Hirofumi that the Prussian-style monarchical constitution was the best suited for Japan. In 1886, Mosse was invited to Japan as a foreign advisor to the Japanese government to assist Ito Hirofumi and his colleagues in drafting the *Meiji* Constitution. Afterwards, he worked on other important legal drafts, especially devoting himself to establishing the draft laws and systems for local government. He lived in Japan from 1886 to 1890.

2 Article 58, Paragraph 2 of the *Meiji* Constitution provided that "No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment."

3 Article 57, Paragraph 1 of the *Meiji* Constitution provided that "Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor."

Court of Administrative Litigation

The jurisdiction of the courts was limited to civil and criminal cases under the *Meiji* Constitution. Administrative cases were handled by one institution, called the **Court of Administrative Litigation**. Although its name contained the word 'court', it was actually not a judicial court (that is, court of law). It was rather a part of the administration. Article 61 of the *Meiji* Constitution provided that:

> *No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by Court of Law.*

The Court of Administrative Litigation was located in Tokyo. This court was empowered to review only a limited category of cases. Not all administrative dispositions, but only those enumerated in statutory law, could be reviewed by the Court of Administrative Litigation. Those enumerated categories of cases were:

1. Cases concerning tax imposition
2. Cases concerning disciplinary punishment for non-payment of tax
3. Cases concerning business licence approval or disapproval
4. Cases concerning water usage or land usage
5. Cases concerning land delimitation.

The Court of Administrative Litigation could render a judgment to revoke an administrative disposition, but could not order any compensation of damages caused by the administrative disposition. The judgement could not be appealed. Thus, the Court of Administrative Litigation was the court of first instance of administrative cases, and at the same time was the final court.

2. The Present Japanese System

Court System under the Current Constitution

After World War II a large-scale law reform took place, aimed at democratizing the judicial system. In 1946, the new Constitution (**the current Constitution**) was adopted under the strong influence by the United States.[4] Like the American legal system, the independence of the judiciary is explicitly guaranteed by the Constitution, and the judicial courts

4 World War II ended with the acceptance of the Potsdam Declaration in 1945. Japan was placed under the control of the supreme commander of the allied powers (SCAP). The occupation took the form of indirect military rule – the Japanese government was allowed to function under supervision by the SCAP. The occupational forces were overwhelmingly American, and the post-war reforms were therefore carried out under a strong American influence.

are given broader jurisdiction, including jurisdiction over administrative cases. Article 76, Paragraph 1 of the Constitution provides that:

> *The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.*

Following Paragraph 1 of Article 76, the **Court Act** was enacted in 1947. This law replaced the former Law on Court Organization, and is the basic legislation governing the present judicial system in Japan. Under the Court Act, there are five kinds of courts: the Supreme Court, appellate courts, district courts, summary courts, and family courts.[5]

On the other hand, Article 76, Paragraph 2 of the Constitution provides that:

> *No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.*

Paragraph 2 of Article 76 prohibits the establishment of extraordinary tribunals. It follows that neither a military tribunal nor a special tribunal for the imperial family can be established outside the system of ordinary courts. However, this provision is understood not to prohibit the establishment of courts specialized in certain fields, such as tax or administrative courts within the ordinary court system.

It is a characteristic of the Japanese court system that although Japan originally modelled its judicial system after European legal systems, it did not introduce specialized courts of the German or French type. The exception is, as mentioned above, the Court of Administrative Litigation. However, this pre-war administrative court was abandoned by the adoption of the 1946 Constitution. Thus, administrative cases are currently handled by ordinary courts. While Germany has labour courts, finance courts, social courts, and administrative courts, in Japan the only court specialized in specific matters at present is the family court.

Administrative Litigation by Ordinary Courts

As described above, administrative cases are currently handled by ordinary courts under the 1946 Constitution. Furthermore, it should be noted that the scope of judicial power is much broader than in the pre-war period, due to the addition of the power of constitutional review and the introduction of full judicial review. Article 81 of the Constitution provides that:

> *The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.*

Article 81 explicitly provides the Supreme Court a right to determine the constitutionality of any administrative decision. Despite the silence of the Constitution on the power of constitutional review by the lower courts, it is acknowledged that they also have

5 Article 2, Paragraph 1 of the Court Act provides that "Lower courts shall mean Appellate Courts, District Courts, Family Courts, and Summary Courts."

such power. In fact, in a number of cases the lower courts have found certain laws or administrative acts to be unconstitutional.

The Court Act provides that judicial courts shall have jurisdiction over all kinds of legal dispute (Article 3, Paragraph 1).[6] This means that all administrative cases can fall within the jurisdiction of the ordinary courts almost without exception. This is a big change from the pre-war administrative court that had jurisdiction over only five types of administrative cases enumerated in statutory law. Currently the Japanese courts accept more than 2000 administrative cases a year.

Because administrative cases have been handled by ordinary courts, not by an administrative court since 1947, Japan has developed administrative law and judicial review of administrative actions, basically using civil procedure in ordinary courts. In 1948, the **Special Law on Administrative Litigation** was enacted and it provided special rules to the Code of Civil Procedure. This law was replaced in 1962 by a new comprehensive law on administrative litigation called the **Administrative Case Litigation Act**. This new Act provides for some types of public-law based administrative litigation, like actions for revocation of an administrative disposition, mandamus actions, actions for injunctive orders, and so on. However, the Code of Civil Procedure still applies to administrative litigation so long as it does not conflict with the character of administrative litigation (Article 7 of Administrative Case Litigation Act).[7]

Control over Administrative Procedure

With respect to controls over the decision-making process of administrative agencies, a new law on administrative procedure was enacted in 1993. This law is called the **Administrative Procedure Act**,[8] which provides, for example, requirements of a hearing and notice in administrative procedure. The Constitution, which has a close affinity to the US Constitution, contains a provision of due process of law. Article 31 of the Constitution provides that:

> *No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.*[9]

---

6 Article 3, Paragraph 1 of the Court Act provides that "Courts shall, except as specifically provided for in the Constitution of Japan, decide all legal disputes, and have such other powers as are specifically provided for by law."

7 Article 7 of the Administrative Case Litigation Act provides that "Any matters concerning administrative case litigation which are not provided for in this Act shall be governed by the provisions on civil actions."

8 Article 1, Paragraph 1 of the Administrative Procedure Act provides that "The purpose of this Act is, by providing for common rules concerning procedures for dispositions, administrative guidance and notifications, and procedure for establishing "Administrative Orders, etc", to seek to advance a guarantee of fairness and progress towards transparency (here meaning, that there be clarity in the public understanding of the contents and processes of administrative determinations.) in administrative operations, and thereby to promote the protection of the rights and interests of citizens."

9 Article 31 of the Japanese Constitution evidently has its origins in the Fifth and Fourteenth Amendments of the US Constitution.

Although Article 31 does not explicitly require the procedure to be 'due,' the Supreme Court found that the procedure restricting fundamental rights should be fair.[10] For example, notice and hearing are required for limiting fundamental rights on the basis of Article 31. Also, the Supreme Court ruled that Article 31 primarily covered criminal procedure, but does not necessarily exclude other procedures.[11] Thus, the due process provision is extended to administrative procedure, too. Following these developments of case law, the Administrative Procedure Act was enacted and this Act contains requirements of a hearing and notice in administrative procedure.

III. Structure of Administrative Law in Japan

1. Administrative Law Reform in 2000

New Enactments or Amendments of Administrative Laws

As explained above, there were the two major administrative laws in Japan: the Administrative Case Litigation Act enacted in 1962, and the Administrative Procedure Act enacted in 1993. However, from 1999 through 2005, Japan experienced administrative law reform, and several major statutes in administrative law were enacted or amended as follows:

1. **Act on Access to Information Held by Administrative Organs** was enacted in 1999. This Act was designed to provide the right to disclosure of information held by the national government.[12]
2. **Act on the Protection of Personal Information** was enacted in 2003. This Act was designed to clarify the responsibilities of the State and local governments in order to protect personal information.[13]

10 Judgement of the Supreme Court, 28 November 1962 (Keishu 16-11-1593)

11 Judgment of the Supreme Court, 22 November 1972 (Keishu 26-9-544)

12 Article 1 of the Act on Access to Information Held by Administrative Organs provides that "The purpose of this Act is, in accordance with the principle of sovereignty of the people, and by providing for the right to request the disclosure of administrative documents, etc., to endeavor towards greater disclosure of information held by administrative organs thereby ensuring to achieve accountability of the Government to the citizens for its various activities, and to contribute to the promotion of a fair and democratic administration that is subject to the citizens' appropriate understanding and criticism."

13 Article 1 of the Act on the Protection of Personal Information provides that "The purpose of this Act is to protect the rights and interests of individuals while taking consideration of the usefulness of personal information, in view of a remarkable increase in the utilization of personal information due to development of the advanced information and communications society, by clarifying the responsibilities of the State and local governments, etc. with laying down basic principle, establishment of a basic policy by the Government and the matters to serve as a basis for other measures on the protection of personal information, and by prescribing the duties to be observed by entities handling personal information, etc., regarding the proper handling of personal information.

3. **Act on the Protection of Personal Information Held by Administrative Organs** was enacted in 2003. This Act was designed to protect the rights and interests of individuals in personal information held by administrative agencies.[14]
4. The **Administrative Case Litigation Act** was largely amended in 2004. This amendment was designed to make legal challenge to governmental activities easier.
5. The **Administrative Procedure** Act was amended in 2005. This amendment was designed to incorporate a 'notice and comment' rulemaking procedure.[15]
6. The **Whistleblower Protection Act** was enacted in 2004. This Act was designed to protect whistleblowers and to clarify the responsibility of administrative bodies to take proper measures for the protection of whistleblowers.[16]
7. The **Local Government Law** and related laws were largely amended in 1999.

Four Fundamental Principles in Administrative Law Reform

The purpose of the recent administrative law reform outlined above was to promote the **'rule of law'**[17] to society. More precisely, the reform was to enhance the four fundamental principles:

1. **Fair** procedures and **transparency**
2. **Accountability** of open government
3. More protection of individual rights through **administrative litigations**
4. **Decentralization** by transferring authority from national to local government.

14 Article 1 of the Act on the Protection of Personal Information Held by Administrative Organs provides that "The purpose of this Act is to protect the rights and interests of individuals while achieving proper and smooth administrative management, in view of a remarkable increase in the use of personal information in administrative organs, by providing for the basic matters concerning the handling of personal information in such organs."

15 The notice-and-comment rulemaking procedure requires a rulemaking agency to post the proposed rule in the government register and on a website and to allow any person to submit written comments on that rule. An agency will decide on the final rule after examining all opinions submitted and post the final rule in the government register and on the website, along with a summary of opinions, and a statement as to why the agency took or did not take these comments into account.

16 Article 1 of the Whistleblower Protection Act provides that "The Purpose of this Act is to protect Whistleblowers to provide for nullity, etc. of dismissal of Whistleblowers on the grounds of Whistleblowing and the measures that the business operator and Administrative Organ shall take concerning Whistleblowing, and to promote compliance with the laws and regulations concerning the protection of life, body, property, and other interests of citizen, and thereby to contribute to the stabilization of the general welfare of the life of the citizens and to the sound development of socioeconomy."

17 The rule of law is a fundamental principle underlying the present Constitution of Japan. The Constitution, which was enacted in 1946, is regarded as the Supreme Law of the nation. It provides that no law, ordinance, imperial edict, or other act of the government against the Constitution is to have legal effect (Article 97). Fundamental rights guaranteed by the Constitution are regarded as inviolable even by law of legislation. In order to safeguard the supremacy of the Constitution, the courts are now empowered to review the constitutionality and legality of laws and ordinances as well as administrative decisions.

When we take a closer look at each enactment or amendment of the administrative statutes, we can find how these four fundamental principles worked in the administrative law reform.

1. Fair procedures and transparency clearly play an important role in the Administrative Procedure Act. The purpose of this Act is to protect individual rights and interests by promoting fairness and transparency. 'Transparency' here is defined as clarity in the public understanding of the contents and processes of administrative determinations (Article 1). Under the principle of fair procedures and transparency, governmental agencies are bound to provide more opportunities for notice-and-hearing, to create standard and transparent application or disposition procedures, and to perform Administrative Guidance[18] in accordance with legal boundaries.
2. The Act on Access to Information Held by Administrative Organs was an important statute for enhancing government accountability.
3. The Act on the Protection of Personal Information and the Act on the Protection of Personal Information Held by Administrative Organs partly aim for harmonization with privacy rules in the European Union and the United States as well as securing the constitutional human right of privacy protection.
4. The 2004 amendment of the Administrative Case Litigation Act was designed to facilitate enhanced opportunities for private parties to obtain judicial review and to control governmental actions. Recent data concerning administrative cases in Japan showed two distinguishing characteristics of Japan's use of courts:
   (1) Although gradually increasing, the number of administrative cases filed challenging government has been around 2000[19], a relatively small number compared with other highly developed countries.
   (2) The rate of administrative cases in which the plaintiffs (private entities like corporations or individuals) prevail in challenging government is very low, a bit more than 10 per cent.
   These two facts can be related to each other. The small number of administrative cases results from the low rate of plaintiff success. Many important cases challenging gov-

18 Administrative Guidance from government agencies and local authorities plays a significant role in Japan. Administrative Guidance is not a source of law, but an informal instruction of administrative agencies, usually addressed to private entities (corporations and individuals) and designed to influence and steer their behaviour in order to achieve a specific policy goal. Article 2 of the Administrative Procedure Act defines Administrative Guidance as follows: "Administrative Guidance: guidance, recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or affairs under its jurisdiction, certain action or inaction on the part of specified persons in order to realize administrative aims, where such acts are not Dispositions."

19 The total numbers of administrative cases filed with the courts of first instance in Japan were as follows:

In 2001	1484	In 2006	2081
In 2002	1654	In 2007	2211
In 2003	1856	In 2008	2170
In 2004	1844	In 2009	2029
In 2005	1863	In 2010	2195

ernment actions have been said to have been lost in courts due to threshold questions such as lack of standing. On the other hand, Article 32 of the Constitution provides that "No person shall be denied the right of access to the courts." If government actions were not subject to judicial review, it would be in conflict with the concept of rule of law by placing some government actions beyond the law. This was one reason that the Administrative Case Litigation Act was amended, and this amendment was expected to enhance judicial intervention against government actions.

5. The 2005 amended Administrative Procedure Act established the notice-and-comment rulemaking procedure, which was expected to enhance the transparency of rulemaking procedure and to impose more accountability of open government.
6. The 1999 amended Local Government Law redistributed the roles of national and local governments and provided more power to local government through decentralization.

2. Current Major Administrative Laws

In this section, I would like to provide a brief summary of two laws: the **Administrative Case Litigation Act**, and the **Administrative Procedure Act**.

Administrative Case Litigation Act

The Administrative Case Litigation Act is a Japanese statute first enacted in 1962 that governs administrative cases involving the government. As noted above, this law was largely amended in 2004.

The main types of administrative cases provided for in the Administrative Case Litigation Act are as follows:

1. **Actions for revocation** of acts of administrative agencies constituting the exercise of public authority[20]
2. **Actions for declaration of illegality** of inaction of administrative agencies[21]

---

20 Article 3, Paragraph 2 of the Administrative Case Litigation Act provides that "The term "action for the revocation of the original administrative disposition" as used in this Act means an action seeking the revocation of an original administrative disposition and any other act constituting the exercise of public authority by an administrative agency (excluding an administrative disposition on appeal, decision or any other act prescribed in the following paragraph)." Then, Article 3, Paragraph 3 of the Administrative Case Litigation Act provides that "The term "action for the revocation of an administrative disposition on appeal" as used in this Act means an action for the revocation of an administrative disposition on appeal, decision or any other act by an administrative agency in response to a request for an administrative review, objection and any other appeal."

21 Article 3, Paragraph 5 of the Administrative Case Litigation Act provides that "The term "action for the declaration of illegality of inaction" as used in this Act means an action seeking the declaration of illegality of an administrative agency's failure to make an original administrative disposition or an administrative disposition on appeal which it should make within a reasonable period of time in response to an application filed under laws and regulations."

3. **Actions for compelling** administrative agencies to render administrative dispositions ("mandamus actions")[22]
4. **Actions for prohibition** of administrative dispositions ("actions for injunctive orders")[23]
5. **Special kinds of actions** aimed at the application of laws and regulations for the protection of general public interests rather than for the relief of individual rights and interests[24] (for example, actions for the declaration of nullity of an illegal election).

Proceedings of all of these types of actions are conducted according to the Administrative Case Litigation Act. For matters not covered in this Act, the relevant provisions of the Code of Civil Procedure are applied mutatis mutandis.

The total number of administrative cases filed with the courts of first instance in 2010 was 2,195.

Administrative Procedure Act

As described above, the Administrative Procedure Act provides a new statutory framework for fair procedure and transparency, introducing more 'rule of law' principle into the administrative process. The legislative purpose of the Administrative Procedure Act is to protect citizens' interests through fair procedure and transparency. Article 1, Paragraph 1 of the Administrative Procedure Act provides that:

> *The purpose of this Act is, by providing for common rules concerning procedures for dispositions, administrative guidance and notifications, and procedure for establishing "Administrative Orders, etc", to seek to advance a guarantee of fairness and progress towards transparency (here meaning, that there be clarity in the public understanding of the contents and processes of administrative determinations) in administrative operations, and thereby to promote the protection of the rights and interests of citizens.*

22 Article 3, Paragraph 6 of the Administrative Case Litigation Act provides that "The term "mandamus action" as used in this Act means an action seeking an order to the effect that an administrative agency should make an original administrative disposition or an administrative disposition on appeal in the following cases: (i) where the administrative agency has not made a certain original administrative disposition which it should make (excluding the case set forth in the following item); (ii) where an application or request for administrative review has been filed or made under laws and regulations to request that the administrative agency make a certain original administrative disposition or administrative disposition on appeal, but the administrative agency has not made the original administrative disposition or administrative disposition on appeal which it should make."

23 Article 3, Paragraph 7 of the Administrative Case Litigation Act provides that "The term "action for an injunctive order" as used in this Act means an action seeking an order, in cases where an administrative agency is about to make a certain original administrative disposition or administrative disposition on appeal which it should not make, to the effect that the administrative agency should not make the original administrative disposition or administrative disposition on appeal."

24 The Administrative Case Litigation Act provides one of these special kinds of actions as "citizen action." Article 5 provides that "The term "citizen action" as used in this Act means an action seeking correction of an act conducted by an agency of the State or of a public entity which does not conform to laws, regulations, and rules, which is filed by a person based on his/her status as a voter or any other status that is irrelevant to his/her legal interest."

With regard to fairness, transparency and accountability, the licence and permission application procedure is most important. The Administrative Procedure Act made basic rules of application procedures. There are four major rules:

Rule 1: Administrative agencies shall establish standards for the review process for applications. Administrative agencies shall also make the review standards available to the public (Article 5)[25]

Rule 2: Administrative agencies shall make efforts to establish a standard time period for review (Article 6)[26]

Rule 3: Administrative agencies shall commence their review of the application without delay, and the disposition must either be to accept the application, to request correction of the application, or to deny the application when there is a severe defect in the application (Article 7)[27]

Rule 4: Administrative agencies shall, in cases where they render a disposition refusing the application, show the grounds for the rejection (Article 8)[28].

25 Article 5 of the Administrative Procedure Act provides that "(1) Administrative agencies shall establish review standards. (2) Administrative agencies, in establishing review standards, shall make them as concrete as possible in light of the nature of the particular permission, etc. in question. (3) Except in cases of extraordinary administrative inconvenience, administrative agencies shall make review standards available to the public by means of posting them at the office which is, pursuant to laws and regulations, in charge of receiving the subject Applications or by some other appropriate method."

26 Article 6 of the Administrative Procedure Act provides that "Administrative agencies shall endeavor to establish standard periods of time to be typically needed between an Application's arrival at their offices and the rendering of a Disposition regarding that Application (provided that where laws and regulations designate for receipt of Applications an organ which is not the competent administrative agency to decide upon such Applications, then also the competent agency shall endeavor to establish standard periods of time to be typically needed between the Application's arrival at the office of the organ designated to receive the Application and its subsequent arrival at the administrative offices of the competent agency); and upon establishing such standard periods of time, shall make them available to the public by means of posting them at the office which is designated to receive the subject Applications or by some other appropriate method."

27 Article 7 of the Administrative Procedure Act provides that "Upon the arrival of an Application at the offices of an administrative agency, the agency shall commence its review of the Application without delay, and unless an Application conforms to requirements that the entries of the written application be completed, that the written application be attached by necessary documents, that the Application be filed within a specified period of time, or to other pro forma requirements provided by laws and regulations, the agency shall promptly either request the persons who filed the Application (hereinafter referred to as "applicants") to amend the Application, specifying considerable period of time to make such amendment, or refuse the permission, etc. sought by the Application."

28 Article 8 of the Administrative Procedure Act provides that "(1) Administrative agencies shall, in cases where they render Dispositions refusing the permission, etc. sought by Applications, concurrently show the grounds for the subject Disposition. However, where either the requirements provided by laws and regulations for the permission, etc. or the review standards that have been made available to the public are clearly specified in terms of quantitative indices or other objective indices, and where the fact that an Application does not conform to these requirements or standards can easily be seen from the contents of the written application or from its attached documents, it would be sufficient to show the grounds for the refusal only upon request of the applications. (2) When Dispositions prescribed in the main clause of the preceding paragraph are rendered in writing, then the grounds set forth in the preceding paragraph shall also be shown in writing."

Rule 1 and **Rule 4** are provided to promote transparency and accountability, and to bring more opportunities for judicial review. **Rule 2** and **Rule 3** are provided to promote fairness of the licence and permission application procedure.

In addition, in the case of adverse dispositions[29], such as a disposition revoking a licence or permission previously granted, the Administrative Procedure Act provides three major rules on procedure:

Rule 1: Administrative agencies shall make efforts to establish disposition standards (that is, internal rules for disposition decision-making), and to make such standards available to the public (Article 12)[30].

Rule 2: Administrative agencies shall establish procedures for hearing statements of opinion of persons (Article 13)[31]. This is what is called 'the right to be heard'.

Rule 3: Administrative agencies, in cases where they render adverse dispositions, shall show the ground for the adverse disposition (Article 14)[32].

29 Article 2 of the Administrative Procedure Act provides the definition of 'adverse disposition'. Adverse disposition is defined as "disposition in which administrative agencies, acting pursuant to laws and regulations, designate specified persons as subject parties to the Disposition and directly impose duties upon them or limit their rights."

30 Article 12 of the Administrative Procedure Act provides that "(1) Administrative agencies shall endeavor to establish disposition standards, and to make such standards available to the public. (2) Administrative agencies, in establishing disposition standards, shall make them as concrete as possible in light of the nature of the particular Adverse Disposition in question."

31 Article 13, Paragraph 1 of the Administrative Procedure Act provides that "Administrative agencies shall, with regard to rendering Adverse Dispositions and pursuant to terms of the following items, establish procedures for hearing statements of opinion of persons who will become the subject parties of such Adverse Dispositions, in accordance with the categories specified respectively in those items and generally in the manner set forth in this Chapter. (i) Hearings: when any of the following applies: (a) when rendering Adverse Dispositions that will rescind some permission, etc.; (b) in addition to the circumstances provided for in (a) of this item, when rendering any other Adverse Dispositions which will directly deprive the subject parties of some conferred qualification or status; (c) when rendering Adverse Dispositions that are rendered to juridical persons and order the dismissal of the officers of the subject juridical persons, that order the dismissal of the persons engaged in the affairs of the subject parties, or that order the expulsion of persons who are members of the subject parties; or (d) other than cases as described in (a) through (c) of this item, when cases occur which administrative agencies recognize as appropriate. (ii) Grant of opportunity for explanation: when none of the circumstances described in (a) through (d) of the preceding items applies."

32 Article 14 of the Administrative Procedure Act provides that "(1) Administrative agencies, in cases where they render Adverse Dispositions, shall concurrently show the ground for the Adverse Disposition to the subject parties. However, this shall not apply when there are pressing needs for rendering Adverse Dispositions without showing their grounds. (2) In the case referred to in the proviso of the preceding paragraph, but excepting cases where the locations of the subject parties have become unknown and other cases where circumstances make it difficult to show the grounds after the rendering of the Disposition, administrative agencies shall show the grounds for the Disposition concerned within the considerable period of time after its rendering. (3) When Adverse Dispositions are rendered in writing, the grounds set forth in the preceding two paragraphs shall also be shown in writing."

Rule 1 and **Rule 3** are supposed to perform the same functions as the equivalent provisions of application procedure. As to **Rule 2**, the Administrative Procedure Act provides two kinds of hearing prior to adverse actions:

1. Notice and oral hearing (called 'Hearings')
2. Notice and written hearing (called 'Grant of Opportunity for Explanation').

Oral hearings have more procedural protection prior to severe adverse actions such as licence revocation than do written ones, which are utilized prior to less severe adverse actions such as licence suspension. It should be noted that an oral hearing is not a trial-type hearing. It is a kind of fact-finding procedure, in which the hearing examiner presides to produce a record and summary report. Based on this record and summary report, an administrative agency makes a decision such as a decision on licence revocation.

IV. Proposals for Cambodia's Administrative Law System

1. Administrative Litigation

Article 128 of the Constitution of the Kingdom of Cambodia provides that:

> *The Judicial power is an independent power.*
>
> *The Judicial power is the guarantor of impartiality and the protector of the citizens' rights and liberties.*
>
> *The Judicial power covers all litigations, including administrative litigation.*
>
> *This power is entrusted to the Supreme Court and to the Jurisdictions of the various categories and at all the degrees.*

There is no doubt that the Cambodian Supreme Court and lower courts have broad and independent judicial power over administrative litigation in order to protect citizens' rights and liberties. This situation is almost the same as the current Japanese Constitution enacted in 1946. At that time, Japan decided to abolish the pre-war administrative court and to give ordinary courts broader jurisdiction, including jurisdiction over administrative cases. If Cambodia follows this Japanese example, Cambodia would not need to establish administrative courts, and ordinary courts could handle administrative cases, basically using civil procedure. Cambodia has the Code of Civil Procedure enacted in 2006. In fact, ordinary courts already have a power to decide on the illegality of government actions under the Code of Civil Procedure and the Civil Code enacted in 2007. Article 749, Paragraph 1 of the Civil Code provides that:

> *Where a public official who exercises the public authority possessed by the national government or a governmental entity intentionally or negligently harms another in violation of law in the course of his public duties, the national government or governmental entity is liable for the payment of damages.*

When a government officer conducts an illegal act during his or her duties, a person who suffers damages can file a suit against the government for compensation for the damages. This type of lawsuit is categorized into civil cases, but it needs to scrutinize the legality of government action, which is a distinguishing characteristic of administrative cases. Of course, it is very hard to say that ordinary courts can render a judgement not only demanding the government to compensate for damages, but also revoking the illegal administrative actions. In order for ordinary courts to revoke the administrative actions, a special law on administrative litigation is necessary. That is why Japan has the Administrative Case Litigation Act first enacted in 1962 which governs administrative cases involving the government. Cambodia can refer to this Japanese Act, and customize and adapt this law to the cultural and societal factors present within the existing Cambodian system.[33] When Cambodia drafts a special law on administrative litigation, I would like to propose that the following types of administrative cases should be included:

1. **Actions for revocation** of acts of administrative agencies constituting the exercise of public authority
2. **Actions for declaration of illegality** of inaction of administrative agencies
3. **Actions for compelling** administrative agencies to render administrative dispositions ('mandamus actions')
4. **Actions for prohibition** of administrative dispositions ("actions for injunctive orders").

These four types of administrative cases are also found in the Administrative Case Litigation Act of Japan. **Types (3) and (4)** were newly introduced in the 2004 amendment of the Act. In order to protect citizens' rights and liberties, it should not be enough that the courts are only allowed to revoke the administrative actions. It is definitely necessary that the courts are also allowed to order the administrative agencies to conduct a certain administrative action, or to prohibit the administrative agencies from conducting a certain administrative action.

2. Administrative Procedure Law

The Constitution of the Kingdom of Cambodia does not contain an explicit provision concerning the **due process of law**. However, needless to say, many OECD or WTO member countries, including Japan, currently share common values to promote fairness and transparency of government activities. I understand that Cambodia has been trying to establish a legal system whose rules are harmonized with those of other WTO member countries to share their common values. Thus, **"fairness and transparency of government activities"** can be the key words for Cambodia's administrative law system in line with international standards.

33 In Vietnam, on 24 November 2010, the Law on Administrative Litigation was enacted with 265 articles in 18 chapters. The Japanese government provided technical assistance to this Vietnamese law.

To guarantee fairness and transparency of government activities, it is necessary to establish control over the decision-making process of administrative agencies by law. That is why Japan enacted the Administrative Procedure Act in 1993. I would like to propose that Cambodia also needs to enact a law on administrative procedure similar to the Japanese Act.

Especially in the process of licence and permission application, the following two rules are essential to promote fairness, transparency and accountability, and to bring more opportunities for judicial review:

Rule 1: Administrative agencies shall establish **standards** of the review process for applications. Administrative agencies shall also make the review standards **available to the public**. (This rule is stipulated in Article 5 of the Japanese Administrative Procedure Act.)

Rule 2: Administrative agencies shall, in cases where they render a disposition refusing the application, **show the grounds for the rejection**. (This rule is stipulated in Article 8 of the Japanese Administrative Procedure Act.)

In addition, in the case of adverse dispositions, such as a disposition revoking a licence or permission previously granted, the following rule is indispensable to promote fairness and transparency, and to guarantee the right to be heard:

Rule 3: Administrative agencies shall establish **procedures for hearing** statements of opinion of persons. (This rule is stipulated in Article 13 of the Japanese Administrative Procedure Act.)

If Cambodia follows this Japanese example, it is important for the drafters of a law on administrative procedure to take **Rules 1, 2 and 3** into careful consideration. I am personally sure that fairness and transparency in government activities will bring great advantages to Cambodian citizens, and promote social stability and economic growth in Cambodia.

DEVELOPMENT OF ADMINISTRATIVE LAW IN ESTONIA – LESSONS FOR CAMBODIA?

Tanel KERIKMÄE, Katrin NYMAN-METCALF

CONTENTS

I. Abstract 285
II. The Position of Administrative Law in Estonia 286
III. Initial Phases of Development 286
IV. Post-Independence Reforms 290
V. Principles for the Protection of and Ensuring the Fundamental Rights and Freedoms of Persons 291
VI. Relevant Case Law 295
VII. Some Features of the Estonian Administrative System 296
VIII. Concluding Remarks: Lessons for Cambodia? 298
SELECTED BIBLIOGRAPHY 300

DEVELOPMENT OF ADMINISTRATIVE LAW IN ESTONIA – LESSONS FOR CAMBODIA?

Tanel KERIKMÄE, Katrin NYMAN-METCALF *

I. Abstract

Administrative law can be defined and determined in very different ways. This chapter reveals developments and experiences in the Estonian Republic, a small but rather efficient country adapting itself to membership of the European Union. The authors give an overview of legal acts concerned with the field of study – administrative law –, reflect on the historical development of regulating administrative relations, and highlight relevant case law. The specific features of the Estonian legal system are analysed with the emphasis of the principles that are the pillars of law. One significant modern feature of the Estonian administrative system is the great reliance on e-governance. As Estonia joined the European Union, it had to find a compromise between Estonia's historical legal traditions, the examples of other countries in its region (such as Germany and Austria) and European Union suggestions and requirements. The chapter describes reforms and finds that administrative law systems can never be static, but should be the subject of debate in society.

* Tanel Kerikmäe and Katrin Nyman-Metcalf are both professors at Tallinn Law School, Tallinn University of Technology, Estonia. They have been involved in research projects related to European integration and also 'importing European values' into various countries and jurisdictions such as post-Soviet countries, Asian countries, Balkan countries and so on. The authors wish to thank their assistant Sandra Särav for her excellent work

II. The Position of Administrative Law in Estonia

Administrative law is part of substantive law in Estonia as it is a combination of numerous legal norms; its purpose is to define and circumscribe the limits of state institutions.[1] Though there is no definition to it, an Estonian administrative law professor, Kalle Merusk, defines it in his book on the topic as:

> *a branch of public law, the norms of which regulate the formation and the functioning of the organs operating the public administration and the relations evolved thereat, with the purpose of ensuring the realization of public interests.*[2]

Such treatment of administrative law refers to its formal obligation to execute the administrative function in the country. In its legal treatment, the political function of the administrative law can be emphasized as well, at the core of which can be found the protection of individuals and/or society in general, from the possible abuse of public power.[3] Though the latter treatment of administrative law is applicable today, the legal development of the system has been long and halting.

Estonian administrative law, in accordance with that of most European states, consists of a general and a special part. The general part includes the Administrative Procedure Act, the State Liability Act, the Substitutive Enforcement and Penalty Payment Act, and the Administrative Co-operation Act, as well as the Code of Administrative Court Procedure.

To determine the borders of administrative law, the definition of an administrative act has a crucial role. The Administrative Procedure Act defines an administrative act as follows:

(1) An administrative act is an order, resolution, precept, directive or other legal act which is issued by an administrative authority upon performance of administrative functions in order to regulate individual cases in public law relationships and which is directed at the creation, alteration or extinguishment of the rights and obligation of persons.

(2) A general order is an administrative act which is directed at persons determined on the basis of general characteristics or at changing the public law status of things.

III. Initial Phases of Development

It might be said that the development of administrative law in Estonia started with the first independence of the country in 1918 and has been, when given the chance, gradually developing ever since. There are certain stages that need to be paid respect to, in

1 Merusk, K & Koolmeister, I. Haldusõigus. Õpik. 1995. p. 24.
2 Merusk, K & Koolmeister, I. Haldusõigus. Õpik. 1995. p. 28. (Translation by the authors)
3 Merusk, Koolmeister, p. 28.

order to understand the progress. Perhaps the most influential stage was after the regaining of independence (at the end of Soviet occupation) in 1991 and through the reform of the Estonian legal system in general. It is by and large accepted that administrative law is a set of legal provisions and a branch of law falling under public law, as opposed to private law. Due to the fact that the Soviet legal system applicable in Estonia after its first Republic did not distinguish between private law and public law, one can refer to unified modern Estonian administrative law only after the country started to develop its own legal system with a clear distinction between the two areas of law.[4]

However, the legal system prior to the Soviet occupation in 1940 cannot be completely disregarded. The first Administrative Proceedings Act was adopted in 1936 and it is still considered to be important from two aspects: firstly, it played a crucial role in the development of Estonian administrative law terminology; and secondly, since it was quite well developed for its time, certain aspects of it remain topical in the present day – the principles regarding protection of parties in proceedings as well as procedural principles remain present in today's legislation.[5] Even though the new Constitution, drafted in 1992, provided a framework for the building of a new and independent Estonian legal system, there was an important decision made that influenced following reforms significantly. This was the decision on consistency in the drafting of legislation by *Riigikogu* (the parliament of Estonia) on 1 December 1992, according to which the acts in force during the first Republic before occupation, and not the Soviet principles, had to be taken into account in the preparation of new draft acts.[6] However, as the surrounding legal systems had developed despite the Soviet stagnation, the Maastricht Treaty had been signed and the European Union (EU) established, Estonia needed to look ahead rather than decades back.

Kalle Merusk, one of the drafters of the new administrative codes, considers the reform of the legal system during the first half of the 1990s to be characterised by "orientational and conceptual confusion in administrative law."[7] During the reform, the sources suggested for the development of public law were multiple. For one thing, at the European Council's meeting in Madrid in 1995, it was stressed that the prospective candidate countries needed to alter their administrative structures for the purpose of future harmonious integration.[8] As Estonia was very focused on joining the European Union, amongst other legislative pieces taken as examples, many EU directives were simply translated into legal acts, irrespective of whether the system was actually ready for such new developments. This unsystematic approach was also reflected in the fact that each ministry drafted the acts for its area of administration in accordance with existing knowledge and time limits.[9]

4 Merusk, K., Koolmeister, I. Haldusõigus. Õpik. Tallinn, 1995, p. 23.
5 Merusk, Administrative law reform, p. 56.
6 Decision of the Riigikogu of 1 December 1992 on the consistency of legislative drafting. RT 1992, 52, 651 (in Estonian).
7 Merusk, p. 53.
8 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf p. 9
9 K. Merusk. Riigihalduse õiguslik regulatsioon – Juridica, 1998, no 4, pp 170–172.

Moreover, different groups of legislative drafters drew their ideas from different countries with different legal systems, such as Germany, England or even the Scandinavian countries, which caused the systematic structure of administrative law to suffer considerably.[10] For instance, in a study by the Ministry of Justice, a group of legal experts suggested that Estonia could have modelled its public law on the German and Austrian legal systems due to the similarities in the countries' legal culture. Nevertheless, it was soon seen that mechanical copying of legal acts should be avoided. Merusk has emphasized that legislative acts, efficient from a practical point of view in one country, may not be effectual in another due to historic and economic as well as traditional and cultural differences in each country. Additional problems arose from the fact that often, while efforts were made to be compatible with all systems that had proved to be successful, protection of the rights of individuals in administrative proceedings was not included in the regulations.[11]

Despite the confusing times, the Commission concluded in its 1997 *Opinion on Estonia's Application for EU Membership* that Estonia had made considerable progress in transposing and implementing the Community acquis. Nevertheless, it was also emphasized that it was essential for the country to strengthen its administrative structure if Estonia wanted to apply and enforce the acquis effectively.[12] As a response, the Ministry of Justice thought that it would be efficient to transpose certain amended acts from Germany into the Estonian system. The 1992 decision on consistency was receptive to the German legal system as well. Hence, Estonians ordered translations of German laws and organized twinning projects with the Germans in order to prepare themselves for the adoption of a system whose effectiveness had been proven.[13]

Even so, in 1998 a conference that gathered legal and administrative experts as well as judicial officials proclaimed itself opposed to such an initiative, claiming that the idea of developing a country's legal system by copying another country's legal frameworks was not justified.[14] It was argued that legal reforms must take into account the country's own context since each country has unique and specific features through which the country identifies itself.[15] Adoption of the German administrative system would have made little sense for administrative law development purposes, taking into account the historical background and the differences in the development phases of two countries at the time, even though the *Bürgerliches Gezetsbuch* (BGB) was heavily relied upon when developing the Estonian civil law system. Indeed, later in 1998 the Minister of Justice of Estonia agreed that the development of administrative law should be determined by the Constitution, and even though in the case of private law, there can be considered a higher degree

10 Merusk, Administrative law reform. p. 53.
11 Merusk, p. 53.
12 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf p. 45
13 Madise p. 39.
14 Merusk, p. 53.
15 R. Narits. Eesti õiguskord ja väärusjurisprudents (Estonian legal order and jurisprudence of the value). Juridica 1998/1, p. 3 (in Estonian)

of unification, public law, including administrative law, should be developed taking into account peculiarities of each country and reflecting the actual situation of a country.[16]

During the reform of the Estonian legal system, it was necessary to decide in what way the national system would start to grow – should it be a field with legal norms designed to be understood mainly by lawyers, or should the norms be comprehensible to the addressees as well?[17] The general idea was to develop a legal order appropriate to a democratic state based on the rule of law.[18] Thus, at the end of the 1990s, Estonia decided to base its administrative law reform on the Estonian context, while accepting the theoretical support of other countries, including Germany.[19] It was decided that the purpose of the administrative law reform should rely on the principles arising from the Estonian Constitution that would pay respect to the actual situation of the country, instead of solely focusing on the practice of other states.

Professor Narits' ideas on how Estonia indisputably belonged to the cultural system of continental Europe also firmly concluded that in order for the law to be effective, one of the preconditions was familiarity with everyday life, so as to base the solutions on practical circumstances.[20] The idea was that the reform of the legal system, including the development of administrative law, should be by agreement in society, based on purposes and values at a certain moment in time, in the context of a specific case, by combining actual life and justice. Such a practical approach would provide the most just solutions, satisfying both the individual as well as society in general.[21] Then again, everything put on paper without the possibility of testing its effects first, is simply a matter of theory and thus the reform expanded over a long period of time, testing every possible approach for its suitability for Estonia's specific societal situation. Towards the end of the reform, one of the indications of considerable success of the Estonian reforms was found in the Commission's regular report: "[o]verall, Estonia has continued to make good progress in both adopting and implementing the acquis. As regards the capacity to implement and effectively enforce the acquis, Estonia has most of the necessary institutions in place;" however, it was also emphasized that, "[t]hese institutions need to be further strengthened and continued efforts are required in specific sectors to further develop administrative capacity."[22]

16 P. Varul. Eesti õigussüsteemi taastamine (Restoration of the Estonian legal system). Juridica 1999/1, p. 3 (in Estonian).
17 Madise, Ülle. Eesti haldusõiguse reformi kandvatest ideedest. Juridica I/2003. P 38.
18 Merusk. p. 52
19 Merusk, p. 53.
20 R. Narits, Eesti õiguskord ja väärtusjurisprudents. – Juridica, 1998, no 1, pp 2–6.
21 Madise, p. 40
22 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf p. 46

IV. Post-Independence Reforms

After the reform, it was concluded that the most important indication of the quality of a law is its fulfilment: if it is followed voluntarily, its application by the public authorities can be regarded as successful and the purpose of the law fulfilled.[23] In the Commission report of 2002, it is stated that since the 1997 opinion, Estonia had continued to make steady progress in the transposition of EC legislation as well as developing an administrative capacity – Estonia's administrative capacity, the previously problematic aspect of our administrative law development, was considered to be reasonably advanced.[24] The Seville European Council also stressed the importance for the candidate countries, such as Estonia, to continue to make progress with the implementation and effective application of the acquis, and added that the possible member states needed to take all necessary measures to bring their administrative and judicial capacity up to the required level.[25] The report confirmed that, during the reforms, Estonia was lacking administrative capacity – in many cases, the legislative acts were not compatible. Thus, the Commission and Estonia developed an action plan to jointly identify the next steps required for Estonia to achieve an adequate level of administrative and judicial capacity by the time of accession, and ensure that Estonia would be provided with case-specific assistance in areas essential for the functioning of an enlarged Union.[26]

Therefore, the decade after the reestablishment of independence was characterised by reforms of the legal system, bearing in mind the principles established during the first Republic as well as taking into account the Community acquis to become part of the bigger European system. The reforms of the Estonian legal system were thorough, gradual and deliberate. It took as long as ten years after the introduction of the Constitution of the Republic of Estonia before the reform of the administrative system could be regarded as finalized. Next to the development of private and penal law, the Riigikogu passed essential legislative acts relating to the general part of administrative law. Amongst those were the Administrative Procedure Act (in force 2002),[27] State Liability Act (2001),[28] Substitutive Enforcement and Penalty Payment Act (2001),[29] and Administrative Co-operation Act (2003),[30] as well as the drafting of a new Code of Administrative Court Procedure,[31] which, next to ensuring lawful administration, rendered important the protection of the rights and freedoms of individuals.[32]

23 Madise, p. 41
24 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf p. 50
25 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf
26 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf p. 12
27 http://www.legaltext.ee/text/en/X40071K4.htm
28 http://www.legaltext.ee/text/en/X40075K3.htm
29 http://www.legaltext.ee/text/en/X40074K2.htm
30 http://www.legaltext.ee/text/en/X70028K3.htm
31 http://www.legaltext.ee/text/en/2012X18K3.htm
32 Merusk. Law Reform in Estonia: Legal Policy choices and Their Implementation. p. 52.

The Administrative Co-operation Act[33] sets out the conditions and procedure for granting authority to natural and legal persons to perform public administration duties of the state and local government. The Act also provides the legal basis and specifies the procedure for different administrative authorities to provide each other with professional assistance. The Act permits various kinds of public or private law bodies or individuals to perform public functions (Article 3) based on law or a decision or act adopted based on law. Delegations can be made in different ways and to different bodies, but always need a basis in law.

Merusk underlines that the courts, and particularly the Administrative Law Chamber of the Supreme Court, played a very significant role in bringing clarity to the sometimes confusing (early) administrative legislation and in general contributed to the development of democratic principles of good administration.[34]

Another important influence was that of the EU. In some respects Estonia took a rather passive role vis-à-vis the EU and accepted EU law without much deliberation, on the presumption that this is compatible with Estonian Constitutional principles. In the academic debate this passive acceptance has lately been somewhat criticised.[35] The criticism is not that the substance of the law inspired by the EU is not good, but rather that the way it is adopted does not allow for much deliberation.

V. Principles for the Protection of and Ensuring the Fundamental Rights and Freedoms of Persons

An important positive element in the development of Estonian administrative law was considered to be the strengthening of the administrative capacity of the legal chancellor's office. It was held that Estonia should maintain the "momentum of the integration process."[36] Indeed, the reform was clearly shaped by the principles of the Constitution of Estonia, ensuring the fundamental rights of persons by granting guarantees to make sure the system was not abusive of power. The current Administrative Procedure Act refers to "protection of rights of persons by creation of a uniform procedure which allows participation of persons and judicial control," as the purpose of the act.[37] There is an important section for the rationale of developing administrative law in Chapter II of our Constitution;

33 RT I 2003, 20, 117

34 Merusk (2004) p. 53.

35 T. Kerikmäe; K. Nyman-Metcalf 'Karsruhe v. Lisbon: An Overture to Constitutional Dialogue from an Estonian Perspective' in European Journal of Law Reform Volume 12, 2010, issue 3–4 pp. 373–387 at pp. 384–385. Also and more extensively T. Kerikmäe 'Estonia as an EU Member State: Lack of Pro-Active Constitutional Dialogue' in K. Topidi and A. H. E. Morawa Constitutional Evolution in Central and Eastern Europe pp. 11–41 and pp. 27–32.

36 http://ec.europa.eu/enlargement/archives/pdf/key_documents/2002/ee_en.pdf p. 20

37 http://www.legaltext.ee/text/en/X40071K4.htm

namely section 14, which holds that in addition to legislative, executive and judicial powers, the objective of guarantee of rights and freedoms is also a task for local governments.[38] It is not only the obligation to avoid interfering with the fundamental guarantees and rights of individuals, but it is also the obligation to provide the guarantee of such rights; according to section 3 of the Administrative Procedure Act, "the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law." This means that, among other things, it is the task of the state to provide access to fair administrative proceedings so as to ensure the protection of the rights of the individual.

Today, the legal chancellor is effective in his work, taking into consideration complaints of those who find that administrative actions violate their fundamental rights. In April 2013, for instance, the chancellor of justice held that it was a violation of the Constitution when a rural municipality decided to deprive a minor of state support since he had not paid to the municipality for certain school supplies. Instead of informing the minor about the proceedings, state support was taken away. The chancellor of justice held that it is one of the fundamental principles of good administration to inform a person about proceedings regarding him or her. Since by this date, the Administrative Law Act has been applicable for more than 10 years, the chancellor suggested the rural municipality examine the level of knowledge of its officials and, if necessary, provide adequate training. He held that it is the task of the administrative body to ensure fair and expedient proceedings for an individual. Administrative acts cannot be too formalistic, but rather should be humane and just. According to the chancellor, administrative proceedings need to be purposeful as well as transparent and one of the fundamentals of administrative proceedings is to keep the parties informed of the course of the proceedings.[39]

As an indication on where in the administrative structure the chancellor belongs, it is interesting to see that in textbooks on constitutional law[40], the text on the chancellor is placed under the heading of Independent Advisory or Controlling Non-political Organs.[41] The chancellor on his webpage states as follows: "The institution of the Chancellor of Justice is established by the Constitution and the Chancellor only observes the Constitution and his conscience".[42] At the same time, the dispute over the question of the relationship between Estonian law and its Constitution has been topical. In principle, the hierarchy of legal norms agreed upon by the legal scholars indicates that the judicial or quasi-judicial decisions should prioritise international law and EU law:

38 http://www.president.ee/en/republic-of-estonia/the-constitution/
39 http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_ettepanek_rikkumise_korvaldamiseks_koduse_mudilase_toetus_rae_vald.pdf
40 R. Narits, K, Merusk Eesti Konstitutsiooniõigusest (Tallinn 1998)
41 Ernits (2011) p. 328.
42 http://oiguskantsler.ee/en/estonian-model-of-the-institution-of-the-chancellor-of-justice

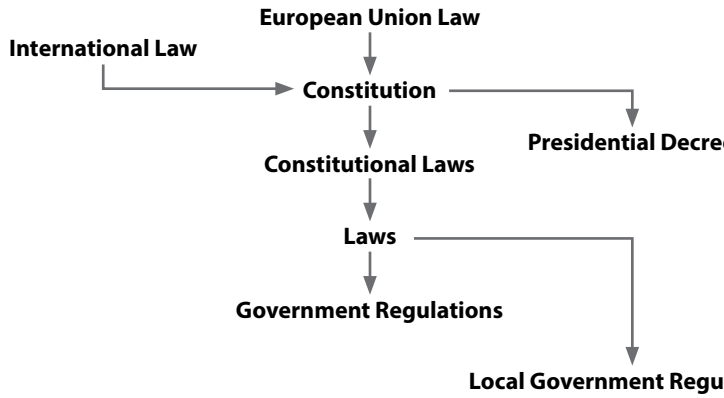


Figure 1 The hierarchy and relationships between elements of the Estonian legal system

Additionally, regarding the general part of administrative law, the adoption of the Substitutive Enforcement and Penalty Payment Act was important for the purpose of addressing the issue the Commission had pointed out – it had a strong influence on the increase of administrative capacities and the efficiency of the administration since, prior to its adoption, there was no general law regarding the application of administrative enforcement.[43] Section 3(3) of the Act holds that for the purpose of ensuring performance of an obligation, "the mildest coercive measure and minimum degree of coercion expected to be the most effective are applied," whereas the administrative authorities "shall choose a coercive measure which forces a person to perform the obligation imposed on the person by a precept while causing minimum harm to the person."

Amongst the principles underlying the practice of administrative law in Estonia is the principle of a right to good administration, which was interpreted from section 14 of the Constitution of Estonia by analysing the principles applicable in European legal systems (Article 41 of the Charter of Fundamental Rights of the European Union[44]).[45] Administrative procedures, according to section 5(2) of the Administrative Procedure Act must be purposeful, efficient, straightforward, conducted without undue delay, avoiding superfluous costs and inconvenience to persons. There are two main equally important goals to the act:

- the guarantee of appropriate and lawful activity in the course of administrative procedures
- the guarantee and respect for individuals' rights in administrative decisions.[46]

43 Merusk, p. 60.
44 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF
45 http://www.nc.ee/?id=11&tekst=RK/3-4-1-1-03
46 Merusk, p. 57.

Certain other sections of the Act are considered to be the main principles as regards fair legal justice. These are:

- the principle of lawfulness
- the principle of proportionality
- the right to be heard (section 40 of the Administrative Procedure Act)
- the right to examine documents (section 37 of the Administrative Procedure Act)
- the right to receive explanations (section 36 of the Administrative Procedure Act)
- the right to maintain business and personal data (section 7(3) of the Administrative Procedure Act)
- the right to representation (section 13 of the Administrative Procedure Act)
- the right to appeal (section 71 of the Administrative Procedure Act).

Access to public information is a main feature of good administration. The Public Information Act[47] from 2000 regulates access to information in Estonia, a right that is based on Article 44 of the Constitution. The Act plays an important part in supporting the Estonian e-government system, which is a special feature of the Estonian administration. According to Articles 11 and 12 of the Public Information Act, each agency has to have a document register that is a digital database maintained by a state or local government agency or a legal person in public law in order to register documents received by the agency and prepared in the agency and to ensure access thereto. Earlier, from 1999 to 2000 there was a special law on databases to deal with the first phases of the creation of integrated electronic databases. Such specialised legislation was seen as needed for the transition to electronic and unified databases, but as the development progressed, the need for separate legislation reduced. The other important area of law immediately linked to e-government is data protection. In Estonia, data protection is regulated by the Personal Data Protection Act 2007 that came into force on 1 January 2008.[48]

Access to justice has been one of the core principles, and beside direct access by individuals, the legal chancellor and also president having right to veto – not approve – law proposed by parliament, has played a significant role in our system.

47 RT I 2000, 92, 597.
48 RT I 2007, 24, 127.

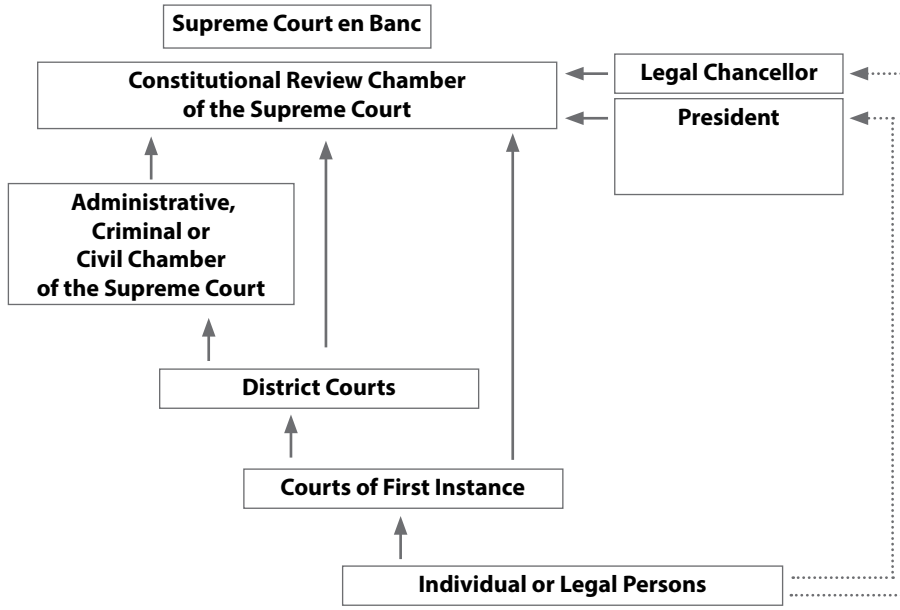


Figure 2 Relationships of some key actors in the Estonian judicial system
Source: Rait Marute "Põhiseadus ja selle Jerelvalve" Juura, 1997, p. 163

VI. Relevant Case Law

As mentioned above, the Supreme Court and especially its Constitutional Chamber have helped to develop principles of good administration by showing what certain notions mean in practice. This includes notions such as legal clarity and legal certainty and separation of powers as fundamental principles on which the state is founded. There must be a separation of powers as well as a clear determination of the competence of organs of legislative and administrative bodies. The fulfilment of the functions of any state organs must be in accordance with principles of the Constitution as well as generally recognised principles of law. Any uncertainty about competence or actions outside of the competence jeopardizes legal security and risks violating constitutional principles: "The ambiguity of competence, as well as exceeding the limits of competence, hampers general legal certainty and give rise to the danger that the constitutional state-building principles and everyone's rights and freedoms may be prejudiced."[49] The Court also refers to the case law of the European Court of Human Rights and its interpretation of legality (Malone v. United Kingdom 1984).[50]

49 3-4-1-3-96 (1996) para. 1. See Ernits (2011) p. 9.
50 Ibid.

The Constitutional Review Chamber in 2009 found that legal clarity is a fundamental element of the rule of law state: "Legal clarity, i.e. the certainty about the content of valid law, constitutes one of the foundations of a state based on the rule of law"[51] Human dignity was expressly recognised in 2011[52] and democracy as a basic principle was explicitly mentioned in 2010.[53] The social state has also been recognized, with the right to state assistance in the case of need being a "fundamental social right, proceeding from the principles of a state based on social justice and human dignity referred to in section 10 of the Constitution. Both are constitutional principles"[54] in line with the nature of the state as a state built upon the social state and human dignity.[55]

Earlier cases such as one from 2001[56] have highlighted the importance of constitutional rights to a fair and effective process (Article 14 of the Constitution), and another in 2003[57] explained how in administrative procedure the rights and freedoms of individuals should be protected and the rights of different individuals balanced.[58] The Supreme Court is not the only source of case law of interest in understanding the main principles of the Estonian administrative system. A case from the Tallinn Administrative Court in 2010 on the principle of legitimate expectations came to the conclusion that the local government was obliged to keep allowing compensation for study loan interest, even if the law had changed the system in 2009. As the change in law was regarded as having retroactive effect it was against the principle of legitimate expectations, which can be seen as a principle of good administration.[59]

VII. Some Features of the Estonian Administrative System

As has been shown, the Estonian administrative system is influenced by EU law as well as by the law of other European states, especially Germany. At the same time, even if Estonia is a small country and open to international influences, the administrative system also contains some unique features that have not been influenced by any European or other international model. This is true about the system for electing the president of the Republic (either by parliament according to special rules or, if they do not agree, by a special electoral college)[60] as well as the role of the chancellor of justice[61]. Even if such

51 3-4-1-17-08 (2009) para. 26.
52 3-3-1-11-11(2011) para. 10.
53 3-4-1-33-09 (2010) para. 52.
54 3-4-1-7-03 (2003) para. 14.
55 Ernits (2011) p 8.
56 3-4-1-4-01 (2001) para. 11–14.
57 3-4-1-4-03 (2003) para. 16 and 21.
58 Merusk (2004) pp 54–55.
59 Inimõigused Eestis. Eesti Inimõiguste Keskuse Aastaaruanne 2010 (Tallinn) p. 109.
60 N. Parrest 'Vabariigi Presidendi valimiste kord' pp 620–636 in Juridica IX-2009 p. 635.
61 M. Ernits Põhiõigused, demokraatia, õigusriik (Tartu Ülikooli Kirjastus, Tartu, 2011) pp. 320–321.

organs exist in other countries, the Estonian system differs from those. Such special features exist despite the fact that Estonia, like most of the post-Communist European states, had a lot of international advisors as well as returning diaspora assuming important positions and despite Estonia being one of the countries in the world that is a member of the largest number of international organisations.[62]

Administrative law systems can never be static, but are the subject to debate in society. In Estonia there is a constant discussion on the presidential election system. The re-election of the current President Mr. Toomas Henrik Ilves in 2011 was the first time since re-independence that there was sufficient majority in parliament to elect the president there, without resorting to the electoral college[63], which is seen by many to be unrepresentative of the population.[64]

One significant modern feature of the Estonian administrative system is the great reliance on e-governance. This has meant some changes to laws and a few new legal acts (for example, on e-signatures), but even more than changing the legal system, it has affected the actual provision of public services and the way citizens communicate with authorities. In fact, it is better for various reasons not to make many separate laws on e-governance, as electronic solutions should be seen as an integral part of the entire administrative system. Consequently, Estonia has chosen to introduce e-government mainly through amendments to various laws rather than through special laws on e-governance. If there is a special law (or several) on e-governance, this risks overemphasizing the technical aspects rather than the substantive legal issues. One special law that is necessary for e-governance is a law on electronic (digital) signatures, which explains what such signatures look like and ensures that the digital signature has the same value in all legal relationships as a regular signature. In Estonia this was done by the Digital Signature Act (from 2000, last amended in 2010).[65] Laws on access to information and on data protection, mentioned above, are also important for an e-governance system to function effectively.

62 On organisation membership, see e.g. http://www.state.gov/r/pa/ei/bgn/5377.htm

63 Detail on the web-site of the Estonian National Electoral Committee, http://vvk.ee/arhiiv/vabariigi-presidendi-valimised/vabariigi-presidendi-valimised-2011-aastal/. The first President of the Republic Election Act was adopted in July 1992 only a few days after the entry into force of the Constitution and was of a transitional nature for the first elections. The second amended law was adopted in 1996 (RT I 1996, 30, 595) shortly before the next presidential elections. This Law has only been amended to a very small extent since its entry into force in April 1996 (Parrest (2009) p. 620). Parrest finds that it has stood the test of time rather well, but nevertheless has suffered from some unclear areas and gaps since its inception. Ibid. p. 622.

64 Detail on the website of the Estonian National Electoral Committee, http://vvk.ee/arhiiv/vabariigi-presidendi-valimised/vabariigi-presidendi-valimised-2011-aastal/. See also the comments in footnote 64.

65 RT I 2000, 26, 50.

VIII. Concluding Remarks: Lessons for Cambodia?

All in all, the result of reforms based on the idea of finding solutions derived from a country's direct and primary needs have been the adoption of certain administrative law acts. These include the Administrative Procedure Act, State Liability Act, Substitutive Enforcement and Penalty Payment Act, Administrative Co-operation Act as well as the Code of Administrative Court Procedure that, with certain non-substantive redactions, are still applicable today. Access to justice is provided with the previously mentioned principles of administrative law through the two administrative courts in the first instance as well as the right of recourse to the Ombudsman. Current Estonian state liability principles refer to the claim for compensation for damage by the state as the right to both a claim for monetary compensation for damage, and a request for the elimination of unlawful consequences. Thus, it might be concluded that the essential principles of administrative law in Estonia, especially as concerns the post-reform period, are efficiency, speed and simplicity of administration – these principles combined show that a value is placed on both the protection of persons' rights and good administration.[66]

It is not an easy task to suggest concrete proposals for the Cambodian legal system and its developing administrative law. We still believe that the crucial questions are: what is the main purpose for the reforms, and what are the principles behind them? The Estonian system may give inspiration for being quite rational but still open to regional and international experience. Building up the administrative legal system should not be state-oriented but rather answer the questions (derived from the questionnaire of the European Union to its member states):

1. How is the right to have one's affairs handled impartially and fairly regulated?
2. How is the right to have one's affairs handled within a reasonable time regulated?
3. How is the right to be heard before any individual measure is taken that would affect the citizen adversely, regulated?
4. How is the right of access to documents regulated?
5. How are the principles of lawfulness, non-discrimination and proportionality expressed or regulated?
6. How is the obligation to state reasons in writing for all decisions regulated?

We would also suggest, from Estonian experience:

- Define the status of administrative acts in the light of norm hierarchy. Avoid an ultra-positivist approach, and instead have well defined principles behind the legal reforms.

66 Merusk, p. 62.

- Avoid copying another's country legal system, but rather find a balance with the legal culture of Cambodia and carefully discuss and analyse possible standard solutions from other jurisdictions and international practice.
- The institutions taking care of administrative responsibilities should comprise a whole system. The issues of centralisation and de-centralisation of certain administrative powers should be analysed.
- The Estonian e-governance system has been taken up by several jurisdictions. In the long-term, it is cost-effective and may be a good fit for a country like Cambodia.

SELECTED BIBLIOGRAPHY

– Andresen, Ene. 'The Claim for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law', *Juridica International* (2005)
– Ernits, Madis *Põhiõigused, demokraatia, õigusriik*, Tartu Ülikooli Kirjastus, Tartu, (2011)
– Kerikmäe, Tanel 'Estonia as an EU Member State: Lack of Pro-Active Constitutional Dialogue' in K. Topidi and A. H. E. Morawa *Constitutional Evolution in Central and Eastern Europe*, Ashgate (2010)
– Kerikmäe, Tanel; K. Nyman-Metcalf, Katrin 'Karsruhe v. Lisbon: An Overture to Constitutional Dialogue from an Estonian Perspective' in *European Journal of Law Reform* Volume 12, (2010)
– Madise, Ülle. 'Eesti haldusõiguse reformi kandvatest ideedest'. *Juridica International* (2003)
– Merusk, Kalle. 'Law Reform in Estonia: Legal Policy choices and Their Implementation.' *Juridica International* (2004)
– Merusk, Kalle, Koolmeister, Indrek. Haldusõigus. Juura (1995).
– Merusk.K, 'Riigihalduse õiguslik regulatsioon' *Juridica International* (1998, no 4)
– Narits, Raul, Merusk, Kalle , *Eesti Konstitutsiooniõigusest*, Tallinn (1998)
– Narits, Raul, 'Eesti õiguskord ja väärusjurisprudents' ('Estonian legal order and jurisprudence of the value'). – *Juridica International* (1998)
– Parrest, Nele, Vabariigi Presidendi valimiste kord *Juridica* IX-(2009)
– Varul, Paul, 'Eesti õigussüsteemi taastamine' ('Restoration of the Estonian legal system'). *Juridica International* (1999)
– *Inimõigused Eestis. Eesti Inimõiguste Keskuse Aastaaruanne 2010* (Tallinn)

ADMINISTRATIVE LAW IN EAST AND SOUTHEAST ASIA

Jochen HOERTH

CONTENTS

Abstract 303
I. Sources of Administrative Law 304
II. Rule of Law Principles at Administrative Law 305
1. Parliamentary Authorisation of Executive Powers 306
2. No Contravention of Prevailing Law 307
3. Legal Certainty, Transparency and Predictability of Governmental Action 308
4. Reasonableness vs. Proportionality 310
III. Procedural Rules and Principles 312
1. Principle of Investigation ex officio 312
2. A Fair Hearing 312
3. Providing Reasons 315
4. Types and the Scope of Discretionary Powers 316
IV. Extra-judicial Control of Administrative Action: Complaints, Internal Appeals and Review by Tribunals 318
1. Civil Law Practice 320
2. Common Law Practice 322
3. Grounds of Review 324
4. Formal Requirements 324
5. Suspension and Enforcement of Administrative Decisions 324
V. Judicial Control of Administrative Action 326
VI. Conclusion 329

ADMINISTRATIVE LAW IN EAST AND SOUTHEAST ASIA*

*Jochen HOERTH***

Abstract

Every day a large number of administrative actions[1] take place at all levels of public life, dealing with the rights and interests of individuals of each and every society in Asia. These may be proceedings directly between state authorities and citizens, e.g. proceedings regarding the granting or revocation of licences, as well as administrative actions that affect peoples' lives and their freedom of choice. A wide array of legal principles and procedural rules to guide the behaviour of officials is necessary, in order to protect the individual from arbitrary and unjust state action, and to make sure people are treated fairly and equally, according to their personal situation and the circumstances of their case.

This chapter describes and compares the basic principles and procedural standards underlying various systems of administrative law, focussing on the theoretical background of administrative decision-making and its review within the executive branch of government. It is an introduction to the book's topic and gives an overview of the legal structures governing administrative actions in eight countries in East and Southeast Asia. The eight countries researched for this paper include four common law jurisdictions – Hong Kong, Malaysia, the Philippines and Singapore – and four civil law jurisdictions – Indonesia, Japan, the Republic of China and Thailand.

* This article was published first in the year 2008 in a compilation of articles on "Administrative Law and Practice from South to East Asia" by Konrad Adenauer Stiftung with Clauspeter Hill & Jochen Hoerth as editors. The author as well as Konrad Adenauer Stiftung kindly authorized the re-print as the article is still relevant as a comparative framework for the articles included in this publication.

** Jochen Hoerth studied law at the University of Heidelberg, Germany. Between 2007 and 2009 he worked for the Konrad Adenauer Stiftung's Rule of Law Program Asia in Singapore where his focus lay on the research on Asian administrative law. He wrote up a doctoral thesis analysing the independence of the Malaysian judiciary. Currently, he practises law at a law firm in Berlin, Germany.

1 By 'administrative actions' is meant any interaction between citizen(s) and administrative agencies of the state at all levels, but not court proceedings.

This chapter does not assess the practical side of administrative law, i.e. whether the legal principles and procedures are being properly followed, issues such as the efficiency of administrative decision-making, or the effectiveness of legal protection of people's rights and interests through, and in the course of, administrative actions. Nor does it examine in detail the issue of control of administrative action by means of judicial review, which is only touched upon at the end of this chapter.

I. Sources of Administrative Law

To begin it is appropriate to take a brief look at the sources of East and Southeast Asian administrative law. The legal systems prevailing in the region vary considerably. On one hand there are countries like Malaysia, Singapore and the Hong Kong Special Administrative Region of the People's Republic of China, that are greatly influenced by English common law. On the other hand, states such as Indonesia, Thailand, Japan and the Republic of China (commonly known as Taiwan) are part of the civil law tradition, their legal foundations and basic legal philosophies being based on continental European legal orders such as Germany or France.

There are also fused systems, for instance the system in the Philippines, influenced by both its Spanish colonial and American post-war periods so that civil and common law principles are merged with one another.

As a consequence, the sources of administrative law vary correspondingly. Whilst a series of laws and regulations in civil law countries set general principles, procedures or rules of conduct, e.g. the Administrative Procedure Act of Thailand (1996), the Administrative Appeal Act of Taiwan (2000), the Law on Administrative Courts of Indonesia (1986)[2], the main source of administrative law in common law systems is the court judgements that create precedents, which over decades and even centuries became a body of "law" just as statutory law is in civil law countries. However, in common law systems there is also statutory law, which has to be observed by the executive. Legislatures in common law countries are generally anxious to establish at least some procedural requirements when conferring powers on administrative authorities. Many statutes in common law systems lay down procedures that officials have to follow. However, if the lawmakers in a common law country do not legislate or the relevant legislation contains gaps, then decision-makers generally fall back on the judge-made common law.

Despite the significant differences between common law and civil law there are some similarities because all states included in this research have written constitutions that include several principles of administrative law. As an example, the Constitution of Malaysia whose Article 135 (2) provides that no civil servant shall be punished "without being

2 Official specification: Law No.5 of 1986 on the Administrative Court.

given a reasonable opportunity of being heard" – a principle at the very heart of administrative law, using the common law terminology, part of the incontrovertible principles of natural justice that have to be upheld in all administrative actions affecting citizens' rights and interests. In this context it is notable that England, as the original source of common law, unlike the researched common law countries, which have adopted common law, does not have a written constitution.

Further important sources of administrative law are, in both common law and civil law systems, to be found in the area of law dealing with the legislative power of government departments and administrative agencies. In common law countries, the executive is by statute allowed to make subsidiary legislation, also referred to as delegated or subordinate legislation, in the form of rules, by-laws or regulations. Public authorities in civil law countries are vested with comparable powers as it is common practice for the legislatures in all modern states to confer power to make subsidiary legislation on those ministries and departments, that directly deal with the subject matter and are therefore best placed to make rules, bylaws and regulations that are grounded in reality.

Conventions and usage play a part: ministerial directions, administrative circulars, even speeches of ministers and the practices of appropriate committees will provide sources of administrative law. There is also customary law, which exists where a longstanding customary practice has acquired the force of law.

In summary, although one must not forget the differences between common and civil law, there are many similarities between them when it comes to sources of administrative law. This is also reflected in the basic legal principles governing the various proceedings between the state and individuals in everyday life, which are dealt with below.

II. Rule of Law Principles at Administrative Law

This chapter gives an overview of the legal principles every public officer has to adhere to if a state is to claim to be governed by the rule of law. These principles are not usually laid down in particular laws or judgments, but arise out of the context of contemporary jurisprudential discourse, the constitution, and the body of existing formally enacted laws dealing with the relationship between citizen and state. Due to the differing legal philosophies and legal terminology of each country there are no universal terms for the examined principles. In order to find some common ground on which to conduct this comparison, paradigmatic legal terms have been chosen.

1. Parliamentary Authorisation of Executive Powers

The first principle being analysed is termed 'parliamentary authorisation of executive powers'. This principle requires that decision-making or regulation-making power of the executive must be clearly authorised by statute. No action of the executive can impinge on the rights of the individual unless that action is authorised by a statute enacted by the legislature. The principle of parliamentary authorisation of executive powers signifies that the power of the executive branch is within the same limits as the power of the legislature. Thus, every official action is examined with reference to the power by statute.

The constitutions of Asian common law systems have incorporated this elementary rule in various provisions, e.g. Article 5 and Article 9 of the Federal Constitution of Malaysia and the Constitution of Singapore, respectively, which state that no person shall be deprived of his life or personal liberty, save in accordance with law. Article 30 of the Basic Law of Hong Kong guarantees freedom and privacy of communication "except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences". All Asian legal systems based on the common law claim to be governed by the rule of law. The doctrine of the rule of law has its origins in the English jurisprudence of the 19th and 20th century[3] and has since been an indisputable part of English legal philosophy. It has been transplanted into all countries that have adopted the common law as part of their legal systems.[4]

Although there are many different conceptions of the rule of law, common law scholars all over the world agree that the principle requiring parliamentary authorisation is one of the core elements of the concept of the rule of law. The Philippine Constitution explicitly invokes the rule of law in its preamble. In both Malaysia and Singapore, Article 4 of their respective constitutions render the constitution the supreme law of the country – a clear acceptance of the rule of law.

The first article of official English translation of the Indonesian constitution bases the Indonesian state on the concept of the rule of law. The Indonesian term negara hukum is derived from the Dutch or German term Rechtsstaat. In continental European legal theory the concept of Rechtsstaat encompasses among other principles, the principle of

3 Albert V. Dicey, An Introduction to the Study of the Law of the Constitution (1885), Macmillan, London, 10th ed., 1959.

4 Article 8 of the post-1997 Hong Kong Basic Law: 'The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained (...) subject to any amendment by the legislature of the 'Hong Kong Special Administrative Region'.

parliamentary authorisation of executive powers. It is considered a distinguishing feature of the doctrine of separation of powers and a system of checks and balances.[5]

Hence, it is not surprising that in civil law countries in Asia and all over the world, this principle is not only found in constitutions but is also enshrined in laws dealing with administrative procedures and administrative law in general. As an example, Article 2 para 4 of the Administrative Procedure Law of Japan (1993) states that administrative agencies can only impose duties upon parties or limit their rights if they are authorised to do so by statute. Section 29 of the Constitution of the Kingdom of Thailand (2007) is an example of this principle applied in Asian civil law countries. The wording of that section is a good definition of the principle of parliamentary authorisation of executive powers. It says that "the restriction of such rights and liberties, as recognised by the Constitution, shall not be imposed on a person except by virtue of [a] law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties". The last part of the wording shows a highly sophisticated legal understanding of the need for proportionality in the limitations of civil rights similar to that found in the German jurisprudence.[6]

The researched Asian common law and civil law countries have consciously incorporated the principle of parliamentary authorisation of executive powers into their legal systems and philosophies, and underlined the significance of this principle by placing it clearly and deliberately in their constitutions or laws.

2. No Contravention of Prevailing Law

Another important rule of law principle may be called 'no contravention of prevailing law'. As its name implies, this principle prohibits any action by the executive, be it purely administrative or legislative that violates provisions of higher-ranking laws or constitutional law. It is related to the principle of parliamentary authorisation of executive powers and in combination with that principle, ensures that public officials act lawfully or in accordance with law. The difference between these two principles can be summarised as follows. Parliamentary authorisation of executive powers means: officials can only act if a statute authorises them to act. The 'no contravention' principle says: officials cannot act in contravention of existing laws.

Civil law countries, which usually have a number of statutes governing administrative procedures and administrative law, are much more likely to explicitly apply the no contravention principle to their written administrative actions and orders than common law

5 This is one of the reasons why many scholars now regard the idea of the rule of law as equivalent to the German notion of Rechtsstaat or the French concept of État de Droit, at least from the perspective of a formal conception.

6 Section 29 states that the executive is never allowed to interfere with the "essential substances" of the individual's basic rights and liberties. This is equivalent to the German Wesensgehaltstheorie as stipulated in Article 19 para 2 of the German Basic Law.

countries do. Examples are found in Taiwanese and Indonesian laws. Article 125 of the Constitution of Taiwan says that rules and regulations by administrative agencies that are in conflict with national laws or with provincial rules and regulations shall be null and void.[7] Article 53 (2) of the Law on Administrative Courts of Indonesia limits the grounds for review of the actions of the executive to situations where executive power has been used for purposes other than that intended by law, where the officials have acted in their own interests rather than in the public interest and where the officials have acted in contravention of prevailing laws and regulations. All of the researched legal systems have a written constitution. They expressly or implicitly regard the constitution as the supreme law of the nation and some officially declare every action on part of the executive or the legislature, which contravenes the constitution, as void or unenforceable.[8]

3. Legal Certainty, Transparency and Predictability of Governmental Action

Legal certainty, transparency and predictability are further rule of law principles. They require all law to be clear, ascertainable and certain, and stem from the belief that citizens must always be able to understand the gist of the law when s/he deals with state authorities, be it in relation to a hypothetical issue or in relation to a practical matter. Thus, these values apply to all three branches of government and all fields of law. For the legislature, it means that every law has to be relatively general, certain, prospective and definable in terms of both statutory interpretation and the legal consequences. Put simply, a layperson must be able to understand what they can do and what they cannot do. The judiciary are also constrained by those values, as there is the need for their decisions to be understandable. When it comes to criminal law, the well-known nulla poena maxim, which prohibits the courts from retrospectively applying legislation, is important and can be found in every constitution of the researched Asian legal systems.

For the executive, transparency and predictability play a big role. Decision-making processes, however well-intentioned, must be transparent and predictable. Transparency is an essential ingredient in preventing corruption. In a speech in 2006, Lord Bingham of Cornhill postulated eight principles of the rule of law. The first of his principles states that the law must be accessible and as far as possible be intelligible, clear and predictable.[9] The second part of this statement emphasises how vital transparency and predictability

7 The constitution uses the term Hsien which is only used in Taiwan. Hsien are subdivisions of provinces, a kind of local administrative authority, and as such is part of the executive and subject to the centralized government.

8 The preamble of the Constitution of Japan, Article 171 of the Constitution of Taiwan, section 6 of the Constitution of Thailand, Article 11 of the Basic Law of Hong Kong and Article 4 of the Constitution of Malaysia and of Singapore.

9 The speech was held on 16 Nov 2006 for the Sir David Williams Lecture at Cambridge University.

are, not only to the enactment of administrative law but also in its application. It is also a core element of the much discussed idea of good governance.

In many Asian civil law jurisdictions the laws require the authorities to act transparently. For example, the first section of the first Article of the Administrative Procedure Law of Japan seeks – almost as the guiding principle of the whole act - to advance "progress towards transparency" and even defines that phrase, as meaning there shall be "clarity in the public understanding of the contents and processes of administrative determinations".[10] Even more expressively, section 34 of the Administrative Procedure Act of Thailand states that "an administrative act may be made in written, verbal or other form (...) but it must be sufficiently clearly defined in content or meaning".

The Taiwanese administrative lawmakers summarised it as: "The substance of administrative acts shall be clear and definite".[11]

The intention of these examples is clear. Whenever the executive is dealing with citizens it is important that the citizen who will be affected by the official's decision knows the basis on which the official's decision will be made. In particular, it means the citizen must know the name and contact details of the official making the decision, the agency's decision must be issued in clear and intelligible language, it specifies the facts upon which the legal decision is made, the legal consequences of the decision and it is easily understood. At common law the need for transparency is expressed in terms of the rules of natural justice, which will be examined later in this chapter.[12]

The Australian Federal Court in Dixon vs. Commonwealth explained that giving a person whose rights are being affected by a determination of a public body, the opportunity of being heard, requires that s/he has been clearly and comprehensively informed of the nature and content of the material being considered by the officials.[13] Similarly, by putting the weight on comprehensibility, the Supreme Court of the Philippines has clarified that administrative decisions, however concisely written, must distinctly and clearly set forth the facts and law upon which they are based.[14]

The principle that law should not have retrospective effect also applies to administrative law but is only briefly touched upon here because it is more important in other fields of law. The second rule of the Statement of Principles of Good Administration released by the Malaysian Government can be summarised as follows. No decision shall have retrospective effect unless the decision is taken to relieve particular hardship resulting from an earlier decision.[15]

10 Chapter 1 – General Provisions, Article 1 – Purpose (of the Act).

11 See Article 5 of the Administrative Procedure Act.

12 See below Chapter 3.

13 See (1081) 3 ALR 289, 294-5.

14 See Naguiat vs. National Labor Relations Commission 269 SCRA 564.

15 See Appendix I, No. 3 of W.A. Ahmad/M. Hinguin, An Introduction to Administrative Law, 1995.

This general statement is qualified by the executive's power to revoke unlawful administrative acts within a certain amount of time even if they were of a beneficial nature.[16]

4. Reasonableness vs. Proportionality

When dealing with rule of law principles in administrative law one must not forget the requirement for reasonableness in the process of rendering a decision. Referring again to Lord Bingham's principles of the rule of law, ministers and public officers at all levels must exercise the powers conferred on them, reasonably and in good faith.[17] The relevance of this criterion is that it is the only basis upon which common law courts and civil law courts can review the merits of an administrative decision itself. They are otherwise limited to considering questions of legality.

When considering the reasonableness of decision-making one has to bear in mind that this principle is not understood and used uniformly in common law and civil law countries. In civil law countries reasonableness overlaps with the principle of proportionality or the proper weighing of the interests of involved parties as it is applied in continental European jurisprudence. Article 7 of the Administrative Procedure Act of the Republic of China, expands on the principle of proportionality by taking it to pieces as the German legal philosophy does.[18] Namely, it requires that the official making an administrative decision must seek to achieve the objectives of the administrative agency by choosing a course of action which does the least harm to the rights of the citizens involved, and that the harm to the citizen is not clearly out of balance with the anticipated benefits to the community.

In Indonesia the concept of reasonableness is not expressly mentioned in the Law on Administrative Courts but the Explanatory Note speaks of "proper weighing" of the relevant facts and the observation of certain unwritten "valid principles". These principles are recognized by the Supreme Court as general principles of good administration and explicitly include the principle of proportionality.[19] Section 46 of the Administrative Procedure Act of Thailand includes the requirement of reasonableness as it provides that the official examining an appeal may review the "administrative act (…) on the reasonableness of the decision".

At common law the term reasonableness is primarily associated with the use of discretionary powers. In order to be lawful, a discretionary power must be exercised reasonably. Lord Green's often quoted explanation of the concept of unreasonableness in Associated Provincial Picture Houses Ltd v Wednesbury Corporation[20], commonly referred

16 See section 49-53 of the Administrative Procedure Act of Thailand (1996).
17 Supra, footnote 9.
18 See the German Grundsatz der Verhältnismäßigkeit which can be interpreted as 'principle of proportionality'.
19 See the Special Guideline no. 52/Td.TUN/III/1992.
20 [1948] 1 KB 223, CA.

to as 'Wednesbury unreasonableness', suggests that there are two kinds of unreasonableness. The first involves cases where a public authority's decision is so devoid of any plausible justification that no sensible person could ever think it lay within the powers of the agency. The second is the need for decision-makers to direct themselves properly in law, meaning that the officer entrusted with the discretion must consider matters, which he is bound to consider and not consider irrelevant matters. Thus, common law jurists approach the question differently, putting unreasonable actions on a level with arbitrary or capricious conduct.[21]

Despite the varying approaches to the concept of reasonableness in jurisdictions following the two basic legal philosophies, there are points of similarity regarding the way decisions have to be made, not only due to the usage of the same name for the concept but also because both legal traditions require the officer to act reasonably and give balanced consideration in the process of making their decision. However, the principle of proportionality, as recognized in the jurisprudence of a number of European countries, is not unknown in Asian common law jurisdictions. For example, judicial decisions in Hong Kong and Malaysia[22] have referred to the English case R v Barnsley Council ex. P. Hook[23] where the revocation of a license as a punishment was held "out of proportion" to the licence's behaviour. In Singapore, the Supreme Court has clearly rejected the applicability of the said principle in Chee Siok Chin v Minister for Home Affairs[24]. However, these example cases are clear signs that the principle of proportionality has been making its way into Asian case law in recent years. This illustrates the way in which the common law is being fertilized by continental law and vice versa.

This examination of the principles listed above shows that the eight legal systems covered by this research have all integrated the principles comprehensively in their constitutions and statutes, on one hand, and in judge-made law on the other hand. They all share a common awareness of the need for furnishing their legal systems with basic principles the executive authority must observe in order to uphold the rule of law. But whether the single person conferred with administrative powers abides by the rules and principles in practice is a different matter and is not dealt with in this chapter.

21 Pang Chen Suan v Commissioner for Labour [2007] 4 SLR 557 (Singapore); Chong Chung Moi@ Christine Chong v The Government of the State of Sabah [2007] 5 MLJ 441 (Malaysia); Chu Hoi Dick v Secretary for Home Affairs [2007] 4 HKC 263 (Hong Kong).

22 Chu Ping Tak Tim v Commissioner of Police [2002] 3 HKC 663; Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 MLJ 289 (Malaysia).

23 [1976] 1 WLR 1052.

24 24 [2006] 1 SLR 582; [2005] SGHC 216.

III. Procedural Rules and Principles

Having considered some of the underlying principles of administrative law let us now turn to the more practical side, the procedural rules and principles governing administrative actions in the researched Asian jurisdictions. Such rules serve as procedural safeguards to ensure citizens are treated fairly and equally when dealing with state authorities in various circumstances. They also give every individual the ability to plan their life by helping to make the outcome of administrative actions reasonably foreseeable. Lastly, a clear set of procedural rules and principles encourage officials to act objectively and reduce the scope for them to act in an arbitrary manner or for motives other than those stipulated by law.

1. Principle of Investigation ex officio

The principle of investigation ex officio requires all public authorities to investigate the facts of the case on their own motion. In contrast to civil litigation, where the parties generally have to present the material facts and produce evidence to support their claim, the official is not bound by the participants' submissions and motions to receive evidence. The ex officio principle is derived from criminal law but is also of relevance to administrative actions.

Accordingly, the Malaysian Statement of Principles of Good Administration points out that it shall be the duty of an authority in making a decision to ascertain all facts, which are material to the decision.[25] Under Section 28 of the Administrative Procedure Act of Thailand, an official may examine all the appropriate facts without being restricted to the application or evidence of the participants. Similarly, Section 6 of the Administrative Procedure Act of Taiwan states that the public body shall conduct an enquiry into the evidence ex officio regardless of any allegation, which may have been made by the party, and allows the authority to choose any measures it thinks fit to investigate the facts and evidence.

These examples show that the principle of investigation ex officio is well anchored in the legal systems of the examined Asian common law and civil law states.

2. A Fair Hearing

The term 'fair hearing' has been chosen to represent important rights and procedural safeguards a person has during the period before a decision is made by an administrative authority, which would affect its rights adversely. It comprises the right to due notice, the right to be heard and the opportunity to present one's own case as well as the right to legal representation. The principle of fair hearing is possibly the most important

25 Appendix I, No. 3 of W.A. Ahmad/M. Hinguin, An Introduction to Administrative Law, 1995.

guideline in administrative actions, as it is in other fields of law. It is a general principle and as such can be found in the constitutions and statutes of the researched Asian legal systems in different ways.

Usually, fair hearing rules laid down in constitutions are relevant to criminal cases. For instance, the Japanese Constitution states that no person shall be arrested without being at once informed of the charges against them, and furthermore that the accused shall enjoy the right to a speedy and public trial, be permitted full opportunity to examine witnesses and at all times shall have the assistance of competent counsel.[26] More generally, Article 16 of the Constitution of Taiwan says that people shall have the right to present petitions, lodge complaints, or institute legal proceedings.

More detailed examples of the codification of the fair hearing principle are laid down in the acts dealing with administrative law. Section 30 of the Administrative Procedure Act of Thailand speaks of citizens having 'adequate opportunity to be informed of the facts, the right to object to an administrative order that may affect the interests of the participant and the right to produce their own evidence'. Section 23 of the same act grants a person the right to be accompanied by a lawyer or adviser when s/he has to appear before an official. Taiwanese lawmakers have inserted a chapter of 13 articles into the Administrative Procedure Act stipulating strict rules and codes of conduct for the hearing of administrative proceedings, with Article 61 entitling the party to present his or her opinion and produce evidence.[27] The duty of the administrative authority to notify the participant of his or her rights is part of the right to due notice. The notice should include an explanation of the legal remedies available, the time period within which remedies may be sought and the authority with which an application for relief must be filed. This important right is, for instance, codified in the Thai Administrative Procedure Act, together with the officer's duty to correct a person's application if it contains statements which are erroneous or difficult to understand, or that are clearly caused by the lack of knowledge or carelessness of the applicant.[28]

At common law the right to a fair hearing is discussed in connection with the well known principles of natural justice, which are 'required by nature' or so self-evident that they should be applied universally without needing to be enacted into law by a legislator. There are two fundamental rules derived from Roman law that constitute the principles of natural justice from which several sub-rules can be drawn: first, audi alteram partem (lat.: hear the other side) meaning the right to be heard and second, nemo iudex in re sua (lat.: no one shall judge his own cause) meaning the right to an impartial decision-maker. These rules play a leading part in court proceedings. But the question is how they affect administrative actions.

26 See Articles 34 and 37.
27 See section 10, Articles 54 to 66.
28 See section 27.

Since the House of Lord's landmark decision in Ridge v Baldwin[29] in 1964, the principles of natural justice have applied to virtually all administrative decisions rather than, as had previously been the case, applying only to decisions where the administrative body was exercising a quasi-judicial function.[30] Since then they have been applied to virtually all administrative decisions regardless of the nature of the body making the decision. Furthermore, the judiciary has extended the doctrine beyond the protection of legal rights, to the protection of privileges, in those circumstances where a person has a legitimate expectation. A legitimate expectation may arise from a promise that has been given in that regard, from the nature of past practice of the relevant authority or simply from the relationship between the parties.

Such a legitimate expectation was the subject of a notable Malaysian case, J.P. Berthelsen v Director General of Immigration, Malaysia[31], where the cancellation of an employment pass was quashed because the applicant had not been heard before his pass was cancelled and because he had a legitimate expectation of remaining in Malaysia until the end of the period for which the pass was initially granted. This shows that Asian common law countries afford their citizens a right to a fair hearing, which is at least comparable to those statutorily granted to citizens in civil law countries.

In addition, parliaments in common law countries impose certain procedural requirements, e.g. hearing procedures, by means of regulations or additional rules when powers are conferred on administrative authorities. Section 19 of the Road Traffic Ordinance (Cap 374) in Hong Kong, for instance, provides that "the Chairman of a Transport Tribunal may by notice in writing, summon any person to appear before the Tribunal to produce any document or to give evidence". Judge made common law is not applicable when procedural requirements are provided for in the relevant legislation and in some situations the rules of natural justice are expressly excluded by statutes. But this does not necessarily mean that the courts will not intervene, especially if the procedures applied are insufficient to achieve justice. It is clear that the principle of a fair hearing is deeply embedded in the legal practice of the examined continental law and common law jurisdictions, be it by way of codified laws or by-laws and regulations, or by unwritten principles of natural justice.

29 [1964] AC 40.

30 A definition of the term 'quasi-judicial' can only be made by distinguishing it from purely administrative decisions. The distinction is in the manner in which the opinion of the authority is reached. A decision is quasi-judicial if in reaching it the authority has to ascertain certain facts by means of evidence presented to the authority, namely, considering the representations and objections of the parties affected, before it is free to make a decision on the facts so ascertained. The decision is deemed purely administrative if in forming such opinion the authority is free to use whatever information it thinks fit and howsoever obtained (SP Sathe, Administrative Law, Butterworths 2006, p. 151).

31 31 See [1987] 1 MLJ 134.

3. Providing Reasons

In the Philippines there are seven cardinal rules governing judicial review of administrative actions and, since the landmark case of Ang Tibay v CIR[32], administrative decision-making involving hearings conducted by an administrative officer, which are designed to ensure that the due process requirements of the Philippine Constitution are complied with.[33] One of these seven rules requires that parties are informed of the reasons for the decisions made. The dictum in Ang Tibay's case further explains that "the performance of this duty is inseparable from the authority conferred upon it". This indicates that the individual citizen must be aware not only of the facts of the case, but also the reasons and legal basis of the administrative decision so that he can prepare his legal argument and has the opportunity to present his own case. The principle of providing a reasoned decision is a constituent part of all legal systems of the researched countries. An example is the wording of Article 96 of the Taiwanese Administrative Procedure, which in section 1 states that, an "administrative disposition shall be rendered in writing", and in section 2 instructs the official to "specify the subject matter, facts, reasons and the legal basis of the relevant decision".

However, in most Asian common law countries there is no statutory backing for the principles of natural justice, such as the Tribunals and Inquiries Act of 1992 of Great Britain, where general procedural rules for at least some standardized administrative actions, including provisions for reasoned decision-making, are laid down.

The author was confronted with this problem when he applied for an employment pass in the Republic of Singapore. The relevant legislation does not require the official to provide reasons for their decision and the author was denied an employment pass with these words: "Unfortunately, your application for the abovementioned employment pass was rejected. Sincerely yours, Ministry of Manpower". This shows that although governments generally advocate adherence to the rule of law in general and the principles of natural justice in particular, the ideal and reality often lose touch with each other in practice.

32 69 Phil. 635.
33 See Ang Tibay v CIR 69 Phil. 635.

4. Types and the Scope of Discretionary Powers

Administrative actions are either ministerial or discretionary. A ministerial action is one where the authority has a duty to do something in a particular way. Such actions, however, are exceptional. In most administrative actions the authority has discretionary power either to act or not to act, or to act in one way or another. Thus, there are two kinds of discretionary powers: one referring to the freedom to decide to take action or not, and the other signifying an official's right to choose between the means available to achieve the goal. Following the principle of parliamentary enactment mentioned above, an administrative agency can only exercise a discretionary power, which has been clearly conferred upon it. It has to act strictly within the legal limits set by the legislature. Discretionary powers laid down in statutes are identified by words or expressions such as 'may' or 'if he thinks fit'. Whenever a provision uses the word 'shall' it indicates the existence of a specific duty that has to be complied with by the authority addressed. Section 37 of the Administrative Procedure Act of Thailand even uses the word 'must'.

This distinction can be seen in laws and regulations of all the researched countries, whether general procedural laws or more specific laws. Since discretionary powers have to be exercised in accordance with the law, such discretion can never be absolute and without limitations. Monitoring the observation of such limitations and the legality of the exercise of the conferred powers is the basis of the courts' power of judicial review.

One of the most significant developments of the past and present century is the expansion of powers and authority of the administration. Over that, the centre of gravity of power has shifted from the legislature to the executive. The reasons for that include globalization and the increasingly international political orientation, but above all growth in the functions of the state and consequent growth in the number of laws enacted each year. Parliament has to spend its time on important matters such as foreign affairs, economic policy or development and cannot spare time for working out the details of the laws that it enacts. It also lacks expertise to deal with technical matters which laws might be concerned with. Thus, huge amounts of power have been vested in the executive, the authorities that are specialized in dealing with specific matters and in experts who are able to react to rapid changes in circumstances or sudden emergencies.

Accordingly, various types of administrative bodies have been established within countries and at different levels of public administration. And this does not only apply to the well developed economies of Japan or Singapore or the so called Asian Tigers such as Taiwan or Hong Kong, but also to countries like Thailand, Malaysia or Indonesia which find themselves the focus of interest from western investors and economies and therefore have to adopt legal standards that can only be met by the implementation of many laws and consequent delegation of power to the executive. This means that the legislature delegates wide powers to the administration to make administrative decisions, which has an impact on the procedures that are applied to make those decisions. In the Philip-

pines, for example, where general laws on administrative procedures are not codified, administrative bodies which are expressly granted quasi-judicial powers are also deemed to be vested with the implied power to prescribe rules for the conduct of proceedings.

Where the statute does not require any particular procedure, the competent agency may adopt any reasonable procedure to carry out its functions. This primarily applies in common law jurisdictions, where procedural rules are at best attached to the specific laws enacted by parliament, and no clear boundaries exist except the principles of natural justice. But the executive in the researched civil law countries is also granted broad authority. In Japan and Taiwan, for example, diverse forms of administrative guidance are exercised in a broad range of fields and constitute a significant part of public administration.

Administrative guidance can be described as guidance, recommendations or advice, given by an administrative body, which requires a specific person to perform or refrain from performing a certain act in order to achieve a certain administrative objective.[34] Both Japan and Taiwan have implemented this instrument in their Administrative Procedures Acts, giving a legal framework and requiring the exercising agencies to keep within their imposed limits. However, the relevant agency can interpret the procedures of the given guidance as it thinks fit, which indicates the flexibility and responsibility of the empowered administrative agency.

On the other hand, strengthening of the authority of the executive is made even clearer in the context of executive law-making, at common law generally referred to as delegated or subsidiary legislation. According to dicta in Kerajaan Malaysia v Wong Pot Heng[35], any subsidiary legislation is in effect a transfer of power from parliament to some other authority, usually to local authorities. Administrative bodies are given the right to promulgate rules, regulations, by-laws, statutes or ordinances that have the force of law although not the formal status of an Act of Parliament. Consequently, the administrative bodies have the power to set administrative procedures. Examples include statutes adopted by a university, laying down the rules governing examinations and the procedures to challenge the mark awarded in examinations. That shows the status administrative law now enjoys all over the world. It also shows how important it is to have sound legal standards and procedural safeguards, in order to uphold and strengthen individual rights and to ensure just and fair processes when the state and citizens interact.

34 See Guidelines for Administrative Guidance, Fair Trade Commission, Japan, 1994.
35 [1997] 1 MLJ 437.

IV. Extra-judicial Control of Administrative Action: Complaints, Internal Appeals and Review by Tribunals

Let us now take a look at another important field of administrative law, which is all too often neglected when the control of administrative action is analysed: extra-judicial review. In Southeast and East Asia, the parties involved in administrative processes have a right to challenge the actions or inaction of administrative authorities through an independent review mechanism outside the judicial system. There are a number of ways of challenging an administrative decision, action or inaction. Some public bodies offer internal complaints procedures. Elsewhere, people can lodge complaints to an Ombudsman or a Commissioner for Administrative Complaints.

In Hong Kong the Ombudsman Ordinance No. 67 established the office of Commissioner for Administrative Complaints, in 1988.[36]

The Commissioner can rule on complaints made on the grounds of injustice due to maladministration. However, the Commissioner's findings on such complaints usually have no binding legal effect.

For example, the powers of the Commissioner in Hong Kong, are quite limited. He may only investigate, recommend and publicise, but his recommendations are not binding and he has no power to overrule decisions by officials.[37]

A more promising remedy is an internal or departmental appeal, whereby the appellant requests the authority that issued the decision or refused to take action, to re-assess the merits of the case. At this point it is vital to distinguish between civil law and common law systems. As will be demonstrated later, the term appeal is understood differently in both systems and must be used with care and properly qualified when describing procedures in the two systems.

Most civil law jurisdictions have general laws governing administrative procedures, which create what I shall describe, as an 'internal or administrative appeal system'.[38] Internal appeals are generally available if and when the issued order or action taken by the official has certain formal characteristics prescribed in the laws on administrative procedures. And there lies the issue. When researching and writing on comparative law issues, one is compelled to refer to the translation of legal acts from a foreign language and terminology, into English. In these translations domestic legal terms and principles are often simply translated literally into English without considering whether the word used is already in use in the English language, i.e. common law terminology, without

36 Indonesia, Japan, Thailand and the Philippines also have Ombudsman systems. Malaysia plans to set up an Ombudsman office in the future.

37 Cf. Clark/McCoy, Hong Kong Administrative Law, Butterworths 1993, p. 89, et seq.

38 In Thailand, Chapter II, Part 5 of the Administrative Procedure Act deals with the "Appeal against an Administrative Act" which includes detailed provisions regarding different procedural steps and constitutes an appeal system. Taiwan has promulgated an Administrative Appeal Act comprising no fewer than 101 articles. Japan passed its Administrative Complaints Inquiries Act as early as 1962.

comprehending that the term means something different in the common law context. This is the reason why a common law trained jurist does not understand terms such as 'administrative act' or 'administrative appeal'.

When enacting laws, most of the Asian civil law jurisdictions took their cue from the continental European systems, especially from France and Germany, where such terms have a particular meaning.[39] They have tried to retain those legal principles by translating them literally into the domestic language and English.

However, there are few internal or departmental appeals in the common law world. In common law systems an internal or departmental appeal is only available when and where it is explicitly provided for by statute law. And the statute will clearly stipulate the circumstances under which the appeal is possible and which body will hear the appeal. Section 7 (2) of the Singaporean Employment of Foreign Manpower Act, for instance, states that "any person who is aggrieved by a decision of the Controller (...) may appeal to the Minister, whose decision shall be final".[40]

The concept of appeal needs to be distinguished from that of judicial review. Internal or departmental appeals allow the facts of a decision to be re-examined, whereas judicial review deals with the question of whether relevant authorities acted lawfully, meaning according to the powers conferred on them and within the legal boundaries set by parliament. In principle, judicial review is only allowed if alternative remedies are not available or have been exhausted. In this regard the common law and civil law approaches are the same.[41]

Another major point of difference lies in the creation and administration of tribunals for the extra-judicial settlement of disputes between the state and individuals, as well as among citizens themselves. Tribunals often have the trappings of a court of law although they cannot be equated with them in terms of personnel, procedures and the substance of the rulings. Tribunals are rarely found in civil law systems because there are often special administrative courts, separate from the ordinary courts. This will be expanded upon later in the section on administrative litigation. Let us now focus separately on the civil law and common law modi operandi regarding extra-judicial control of administrative action, as adopted in the researched Asian legal systems.

39 French Acte administratif or the German equivalent Verwaltungsakt which have nothing do with the English understanding of an Act, i.e. a legal code or a bill, passed by Parliament.

40 Chapter 91A as of January 1991.

41 According to Article 48 of the Indonesian Law on Administrative Courts and its Explanatory Note the complainant must first go through a system of alternative remedies at the administrative level before they have the right to resort to the Administrative Court.

1. Civil Law Practice

The various laws dealing with administrative procedures in Indonesia, Japan, Taiwan and Thailand, have been strongly influenced by continental Europe. Indonesian administrative remedies are partly a legacy of the Dutch colonial system, whereas Japan, Taiwan and Thailand have modelled their extra-judicial review systems on those of Germany and France. The extent to which they have borrowed from the continental systems varies from legal terms and principles – in the case of Thailand whole passages of the German Administrative Procedures Act have been taken – right through to the establishment of similar review methods and procedures.

Asian lawmakers have tended to 'cherry-pick' from Western legal systems and have melded continental law traditions with domestic practices and conventions, giving the law a new zest. As indicated above, all of the researched civil law countries have enacted general laws dealing with appeals, often referred to as administrative appeals, and thus have created a review mechanism within the executive branch of government. The exhaustion of these internal remedies is a prerequisite to bringing a case before the courts. They are not seen as a means of settling disputes but rather as a request for the issuing authority to re-examine its own decision on matters of fact and of law. And only if the official in charge or the next higher authority rejects the appeal, may the complainant resort to the courts. The internal appeal systems provide informal and therefore quick and cost-efficient relief in most cases, which reduces the pressure on the courts.

Since these internal administrative appeals are a general extra-judicial remedy and usually not provided for by special legislation, rules need to be in place to prescribe when and to whom, an aggrieved citizen may appeal. The starting point is the sort of decision or action the issuing authority has taken. In contrast to the common law systems, the types of powers conferred and the kinds of functions exercised while acting are of minor importance.

The administrative order or action needs to fulfil certain formal requirements in order to be appealable.

In Thailand, only 'administrative acts' are subject to an appeal.[42] According to section 5 of the Administrative Procedure Act, an administrative act means "the exercise of power under the law by an official to establish juristic relations between persons, i.e. the state and the individual, to (…) affect the individual's status of rights or duties, permanently or temporarily, such as giving an order or permission (…) but shall not include the issuance of a bye-law". So, if the issued order or executive action does not meet those re-

42 The official translation speaks of 'administrative acts'. Although in the common law world it is common to use 'act' to describe an action and 'Act' to describe a specific piece of legislation, a more suitable term would have been 'administrative order' to emphasise the formal character and the formal requirements connected with an administrative act as mentioned in the Administrative Procedure Act. Again, this interpretation comes from the literal translation of the French Acte administratif or the German Verwaltungsakt

quirements, there is no right of appeal. If it does, section 44 applies and stipulates that an appeal has to be submitted to the official who has issued the contested decision. If this official does not agree that the decision or action should be changed s/he shall immediately report his or her opinions and reasons to a higher official authorized to consider the appeal (particulars are specified in the Ministerial Regulation). If the higher authority does not rule in favour of the appellant, and if not otherwise statutorily provided for by specific laws, the appeal is deemed rejected and the appellant has to seek judicial review if s/he wants the decision to be quashed.

In Taiwan, both administrative actions and inaction can be appealed. Article 3 of the Administrative Appeal Act specifies the requirements that an 'administrative action' has to fulfil in order to be the subject-matter of an internal appeal. It needs to be an administrative decision or measure which practically and directly creates legal effects for the citizen and must be taken by a central or local government agency. The appeal cannot be in respect of a hypothetical issue. An appeal has to be filed with the issuing official unless stipulated otherwise.

The official then has to decide upon it and, if he does not agree that the decision or action should be changed, transfer the matter to the Administrative Appeal Review Committee, an 'in-house' appellate body that every major public authority has to create to process administrative appeals.[43] Article 2 read in conjunction with Article 82, empowers this committee to require the official in charge to make a certain administrative order or action that he or she has refused to make, despite a legal duty to do so. After having exhausted the remedies stipulated in the Administrative Appeal Act, the appellant may seek relief in the courts.

If a Japanese citizen believes its rights have been infringed by an administrative authority's decision he/she generally has to file an internal appeal with the same agency. This step is called a 'request for reinvestigation'. If he or she is not satisfied with the result of the reinvestigation the appellant may file a 'request for reconsideration' with the next higher authority. The relevant law is the Administrative Complaints Inquiries Act (ACIA). Only 'administrative dispositions' are reviewable. Administrative dispositions are administrative orders or actions that designate specified persons as parties and directly affect their rights and duties.[44] An official's refusal to act as obliged by law can also be contested in accordance with paras 2 (b) and 7 of the ACIA.

The Indonesian legal system does not have a general law, which deals with administrative appeals. However, the Law on Administrative Courts stipulates some rules in this regard. Article 48 provides that under certain circumstances, appeals must be addressed to either higher levels of the administration or to tribunals that have been especially established for this purpose, such as the Tax Tribunal.[45] The existing administrative appeal

43 43 See Articles 4, 5 and 58.
44 See para 4-6 of the ACIA.
45 Bedner, Administrative Courts in Indonesia, Kluwer Law 2001, p. 80.

system is not adequate although it could soon be much improved by the enactment of an independent law on administrative proceedings, which the government plans to introduce in the near future.

2. Common Law Practice

The Asian common law systems have little familiarity with extra-judicial review mechanisms or laws dealing with these mechanisms.[46] In common law systems, appeals to non-judicial bodies are, if provided at all, incorporated in the legislation that establishes public authorities and confers powers on them in specific fields. There is no comprehensive administrative appeal system or generally prescribed appeal procedures, which every authority has to adhere to. Not even England has such a system. If a specific law allows for an appeal, the appellant may file the appeal with the person or body to which the appeal lies. This process can generally be described as administrative adjudication and is usually carried out by tribunals. There is a difference between internal departmental adjudication within the administration and adjudication by separate tribunals.

The Malaysian Trade Unions Act 1959 (Act 262, Revised Edition 1981) is an illustration of the former. The Director-General of Trade Unions is obliged to refuse to register a trade union or withdraw an existing certificate of registration, if he is not satisfied that the trade union has complied with the provisions of the Act.

The applicant first appeals to the Director-General against refusal or withdrawal. If that appeal is unsuccessful, an appeal is made to the Minister. The Minister may then, after considering the grounds given by the Director-General and the submissions of the trade union, decide on the matter as he deems just and proper.[47]

In the Philippines, however, the Administrative Code of 1987 in Book VII outlines administrative procedures and in one provision (section 19), administrative appeals. This provision stipulates that unless otherwise provided for by law or executive order, an appeal from a final decision of one of the administrative agencies defined in section 2, may be taken to the department head. However, neither the whole code nor the section on appeals is comparable with the comprehensive system of administrative procedures and appeals of the researched civil law countries.[48] In general, administrative adjudication in the Philippines is handled as in other common law jurisdictions.

Administrative tribunals are yet another way for non-judicial dispute settlement. The status of administrative tribunals is ambiguous. They are not seen as part of the judiciary but neither are they part of the executive structure. A tribunal in the strictest sense per-

46 A rare exception is section 19 of the Administrative Code of the Philippines, which says that unless otherwise stipulated by law, an appeal on a final decision of an agency may be taken to the department head. However, the Code limits the number of agencies to which this provision applies.

47 Similar laws can be found in Hong Kong, Singapore and the Philippines in various contexts.

48 According to section 1 the provisions of Book VII are only applicable to a restricted number of agencies laid down in section 2

forms only judicial functions, as distinguished from administrative agencies, which may perform quasi-judicial functions along with administrative and legislative functions. According to the report of the 1957 Franks committee in England, "tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as a part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the department concerned".[49] That is why those administrative tribunals are best referred to without the adjective 'administrative'. One reason for creating tribunals is that resolving disputes by departmental adjudication is not seen as being independent of government policies or interests and therefore the official dealing with the dispute is regarded as, actually or unwittingly, biased. The main reason, however, is that the machinery of the courts are not equipped to settle every dispute arising out of the work of government. This is because there is a need for specialised knowledge if certain disputes are to be resolved fairly and economically, and the ordinary courts cannot deal with the mass of applications for review of departmental decisions.[50]

In the special fields of adjudication for which they are created, tribunals are simply more efficient than courts. In practice, these adjudicatory bodies need not necessarily be designated as tribunals. A good example is the Singaporean Income Tax Board of Review, which functions under the provisions of the Income Tax Act.[51] If a person disputes their assessment of income tax by a subordinate tax official, they may apply to the Comptroller of Income Tax to review and revise the assessment. If the objector is still dissatisfied after the Comptroller's review they may appeal to the Board of Review. This example shows that departmental adjudication and adjudication by tribunals are not incompatible.

Sometimes, appeals against a tribunal's decision lie to a higher tribunal or a court. In the case of the Singaporean Income Tax Act there may be an appeal to the High Court or there may be no appeal at all. Often there are provisions stating that the authority's decision 'shall be final' or 'not questioned before any court of law'. Such expressions obviously exclude rights of appeal but they cannot deprive the courts of their inherent power to review administrative action for excess of jurisdiction or errors of law. This will be discussed below in the discussion of judicial control of administrative action.

Finally, in common law systems it is difficult to challenge an official's inaction in certain circumstances where he or she has a duty to act. An order requiring the official to act can only be obtained by means of judicial review.

49 218, 1957, p. 9.
50 Bradley/Ewing, Constitutional and Administrative Law, Longman 2002, p.668.
51 Sections 78-84 of the Income Tax Act (Cap 134, Revised Edition 1994).

3. Grounds of Review

Administrative authorities in civil law countries may re-examine a decision, which a citizen with standing has objected to, on both legal and factual grounds. The reviewing official may revoke or amend the original decision in whole or in part, may include supplementary or incidental provisions, or make an entirely new decision. That means that he or she is not bound to the issuing body's position, but can take his or her own view. Section 46 of the Administrative Procedure Act of Thailand states that in considering the appeal the official may review the administrative act either on matters of fact or matters of law, or on the reasonableness of its decision. He or she may order the revocation or amendment of the administrative action in any manner, whether or not it increases or reduces the burden on the citizen, may exercise discretionary powers and impose any conditions, whatsoever. The common law practice is comparable. The official in charge may, in contrast to courts exercising judicial review, re-consider the merits of the case and the correctness of an administrative action. They are free to substitute their own decision for that of the relevant authority, amend the decision or apply further conditions.

4. Formal Requirements

Appellants have to adhere to certain procedural rules. These rules vary from country to country and authority to authority. Whereas in the researched civil law jurisdictions general procedural provisions apply, in common law countries parliaments usually provide for appeal procedures in the legislation, which sets up appellate bodies and the rights of appeal. Sometimes, however, detailed rules are not laid down and the relevant authority sets their own procedures, subject to the principles of natural justice and fair trial.

In all of the researched countries an appeal has to be submitted in writing. Although the timeframes for submitting an appeal vary from country to country, there is no general distinction between common law and continental law. The Malaysian Trade Union Act 1959 requires an appeal to be sent to the Minister within 30 days. In this case, the procedure for dealing with the appeal is left to the discretion of the Minister. In Thailand, the deadlines for both the submission (15 days; section 44) and the consideration of the appeal (30 days; section 45) are clearly prescribed in the Administrative Procedure Act.

5. Suspension and Enforcement of Administrative Decisions

Another very important question is whether the filing of an appeal automatically leads to a stay of the enforcement of an administrative order until a final decision is made on the appeal or the judicial review. This issue is crucial because the consequences, both legal and practical, can be devastating for the participants directly involved in the case,

as well as for those of third parties or the public if the administrative order can be executed – e.g. in the cases of demolition orders or eviction orders.

The researched Southeast and East Asian countries handle this topic with care. An appeal does not automatically stay the enforcement of a decision in any of the jurisdictions. A stay of enforcement can only be achieved by way of petition or application to the court or tribunal, and in a small number of cases to a departmental appellate body. In Japan, for example, the Administrative Case Litigation Law of 1962 provides that while any appeal is pending the effect of the challenged decision, its enforcement or the continuation of procedure related to the decision, are not automatically suspended. A stay of enforcement is only possible upon application to the courts, which may then order a stay of enforcement where they find it urgently necessary to avoid irreparable harm and if it does not seriously threaten public welfare. The opposing party has the right to immediately lodge an appeal against a staying order. Other legal orders speak of irreparable damage that is out of proportion, very urgent situations or the protection of important public interests.[52]

Thailand is exceptional, because not only the courts, but also an official who has the power to consider an appeal, may issue an order staying the enforcement of an administrative act.[53] In the researched common law countries it is the same. Usually, parliamentary legislation does not include provisions staying the enforcement of administrative decisions pending an appeal. Where there are provisions about staying enforcement, they are usually specific exceptions to a general rule that an appeal against the decision of a department or tribunal does not automatically stay its enforcement.[54] Thus, an aggrieved person must separately petition for an order staying enforcement, usually at tribunal or court level.

The grounds for granting a stay of execution in common law countries are similar to those outlined above for civil law countries.

This field of law is closely related to that of provisional relief by means of injunctions, which may be granted by the courts as part of a judicial review. This will touched upon later in this paper.

Looking back on what has been said about non-judicial control of administrative action, one point deserves to be emphasised. It is not the characteristics of a particular legal order that attract attention. It is the principal difference in the approach to the way administrative decisions are challenged within each of the two big legal traditions. The civil law philosophy generally first gives administrative agencies the opportunity to resolve the dispute internally, by allowing administrative appeals to be lodged with the administrative body, or the department head, which can then reconsider its own decision. This is an opportunity for the organisations to monitor and evaluate departmental decision making.

52 Article 93 of the Administrative Appeal Act of Taiwan and Article 67 of the Law on Administrative Courts of Indonesia.

53 Section 44 in connection with section 56 of the Administrative Procedure Act.

54 Part V of the Medical Assistants (Registration) Act 1977 of Malaysia (Act 180).

These appeal systems are seen as a preliminary stage and a prerequisite to recourse to the Administrative Courts. Only when the appellant is not satisfied with the response at the administrative level does the dispute have to be resolved by the judiciary, except in rare situations such as Japan or Indonesia, where a handful of special tribunals have been set up.

At common law, appeals, be they in the field of public law or private law, are transferred up to the next higher authority – on the basis that disputes are best handled by an impartial body with expertise in the particular subject-matter. And here, tribunals or similar adjudicatory bodies come into play. They are found in various fields of law and serve as extra-judicial arbitrators that reduce the burden on the courts. Despite the advantages of tribunals, they appear to contravene the doctrine of separation of powers. Tribunals have the trappings of a court but are not. Nor are they really part of the administration. They are two branches of government, executive and judicial, blending into each other. This is demonstrated by the fact that often judges act as the chair of tribunals, which on one hand can be seen as desirable by raising legal certainty but on the other hand also leads to members of the judiciary fulfilling extra-judicial and administrative functions.

None of the examined mechanisms are perfect. However, they are fairly elaborate and well developed, which to some degree is due to the adoption of various ideas, laws and principles of long established western legal systems. The next question is whether the rules and principles are actually adhered to in day-to-day practice. The answer to that question is not to be found in this article but may be found in other chapters in this publication.

V. Judicial Control of Administrative Action

This section provides an overview of the grounds of review and the remedies that can be sought through the process of judicial review.

Judicial review in common law countries has to be distinguished from that in countries with a continental law background. In common law jurisdictions, judicial review is an established term describing a special procedure by which a court, usually a higher court, supervises the legal aspects of the exercise of public powers. This is not the same as the court's power to review appeals from inferior adjudicatory bodies such as tribunals.

An appeal allows the appellate body, e.g. ministers, tribunals, appellate courts or even the supreme court of the state, to decide the whole matter again, unless the particular statute limits the grounds of appeal, for instance to questions of law only. An appeal may therefore involve a thorough reconsideration of the whole decision, especially its merits, whereas judicial review is concerned only with ensuring that legal standards have been complied with when taking an administrative decision.

An appellate body can usually substitute its decision for that of an inferior body. In judicial review proceedings, the court cannot make the decision itself but has to send the

matter back to the authority, which made the decision, to reconsider it, after taking account of the court's ruling on the law. An applicant for judicial review first has to seek the leave of the court to apply for judicial review.[55] In common law jurisdictions the relevant court usually has a special chamber, which deals with judicial review matters.

Historically, the basis of judicial review has been the doctrine of ultra vires. Most public authorities are creatures of statutes and are vested with their powers by the statutes creating them. The role of the courts is to check that the administrative bodies keep within their allocated authority or jurisdiction. The grounds of review are illegality, irrationality and procedural impropriety. Illegality arises when public bodies go beyond or outside the powers conferred on them. This usually happens when the authority misuses discretionary powers, namely by refusing to use the power at all, by using it for the wrong purpose or by putting unlawful limits on the exercise of power – the so called fettering of a discretion. Irrationality occurs where a decision seems so unreasonable as to be perverse or irrational – the so called 'Wednesbury unreasonableness' discussed above.

Procedural impropriety deals with the formal process of reaching a decision and invokes the principles of natural justice. If an application for judicial review is successful, there are a number of remedies available. The important ones are the prerogative orders of certiorari (quashing order), prohibition (prohibiting order) and mandamus (mandatory order). Certiorai entitles the court to strike down the original decision and to direct the administrative body to make the decision again, this time lawfully. Prohibition forbids the public authority from doing something unlawful which it is about to do. And with the help of the remedy of mandamus the relevant body can be compelled to fulfil its duties in a specific situation.

Those orders can also be made in conjunction with each other.

In the civil law tradition there is no such distinction between appellate review and judicial review. Administrative appeals are reviewed non-judicially, usually within the department in which the decision was made. If a citizen is not satisfied with the decision reached after the internal or departmental appeal, he is able to resort to the courts. In Indonesia, Taiwan and Thailand, independent administrative courts have been established.

The Japanese court system is a compromise between continental law and common law, with the latter being adopted from the United States of America, and so jurisdiction over administrative matters is integrated into the ordinary court system. Due to its traditionally strong separation of powers, virtually the only available remedy in Japan is to annul an administrative act. The judiciary exerts a passive check on the executive but does not take action to interfere with it, e.g. by prohibition or mandatory orders. Accordingly, the courts review most decisions according to a standard that leaves the authority considerable flexibility.

55 Order 53 of the Rules of the High Court of Malaysia (1980). In the Philippines, the Supreme Court has jurisdiction according to Article VIII, section 5 of the 1987 Constitution.

Pursuant to section 30 of the Administrative Case Litigation Act, they examine whether the public body acted illegally, exceeded the scope of its discretion or abused its discretion. Most noteworthy is that the petitioner bears the burden of proof, as in civil law cases. It is he who must prove the illegality of the actions of the administrative body.

In Indonesia, Article 53 of the Law on Administrative Courts limits the grounds for review to contravention of laws and regulations, the use of administrative power for purposes other than that intended by law and improper weighing of all relevant matters (arbitrariness).

The Thai Administrative Courts are divided into two levels, namely the Supreme Administrative Court and the Administrative Courts of First Instance, which consist of the Central Administrative Court and the Regional Administrative Courts. According to section 9 (1) of the Act on the Establishment of Administrative Courts and Administrative Court Procedure, Thai Administrative Courts have the jurisdiction to try and adjudicate or make orders regarding cases where an unlawful act by an administrative agency is involved. They may quash a decision on the grounds that the authority has acted beyond the scope of its powers and duties, or in a way that is inconsistent with the law or specified procedures, or in a manner which discriminates unfairly, or places an excessive burden on the public, or improperly exercises discretionary powers. Furthermore, they can compel an agency to carry out the duties imposed on it by law, if the agency refuses to do so.

In Taiwan, cases against decisions on administrative appeals must be brought before the High Administrative Courts, which are established in the provinces, special municipalities and special districts of the Republic of China. Taiwan has a two tier system. The Supreme Administrative Court, being the court of last resort, hears appeals against judgments of the High Administrative Court. It has power to issue quashing and mandatory orders.

The availability of provisional relief is very important for the rule of law. This is well illustrated by a debate which has been going on in Malaysia since the late seventies and which has only been resolved in recent years. The question was whether a court was allowed to grant an injunction against activities of a Malaysian Government at the federal or state level. Pursuant to section 29 of the Government Proceedings Act 1956, an injunction cannot be issued against the Government in civil proceedings. In conjunction with section 54 (d) of the Specific Relief Act 1950, which states that an injunction cannot be granted to interfere with the public duties of any department of any government in Malaysia, it was held that no injunction could be issued against a wide range of governmental activities. This was a logical conclusion of interpreting the expression 'the Crown', in the English Crown Act 1974, as equivalent to the Government.[56] In English law the Crown carries numerous meanings. As noted in M v Home Office[57] injunctive relief, including

56 Wan Azlan/Ahmad Kamal, Administrative Law in Malaysia, Sweet & Maxwell 2006, p. 220.
57 [1994] 1 AC 377.

interim declarations, is available against Crown servants, and the English Crown Act only applies to civil proceedings.

In Malaysia, a series of cases since 1994, including Saonah Bedul v Pentadbir Tanah dan Daerah Melaka Tengah, Sabil Mulia Sdn Bhd v Director of Tengku Ampuari Rahmah Hospital or Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd,[58] have led to Malaysian courts granting interim and permanent injunctions against any servant of the government – including the Government of Malaysia.

In the researched Asian common law countries, provisional relief has to be sought by way of judicial review, as described above. The court has the power to issue prohibitory or mandatory injunctions. In the former case, the defendant will be restrained from committing an unlawful act, whereas in the latter case the public body will be compelled to perform a specific duty. Usually, a temporary or interim injunction is issued first and it remains in force and valid until, or unless, it is amended or revoked by the court. The court may also make the interim order permanent.

The jurisdiction of the Thai administrative courts covers not only cases concerning quashing and mandatory orders, but also provisional relief. Section 9 of the Law on Administrative Courts authorises the courts to issue prohibitory, as well as mandatory, injunctions. In Indonesia, Articles 98 and 99 of the Law on Administrative Courts provide for a type of provisional relief called a 'fast-track procedure'. It is only available where the protection of the interests of the plaintiff is urgent and this must be clear from the reasons provided in his or her petition. The fast-track procedure rules force the judge to decide the matter more quickly, but this can still take a month or longer. Thus, it cannot offer relief in very urgent cases, e.g. where demolition or eviction orders are at issue. Another problem is that the jurisprudence is not completely clear about the relationship between the fast-track procedure and a stay of execution and when and where each remedy applies.

VI. Conclusion

There is no doubt that in many Asian countries sophisticated administrative law systems have evolved over the last few decades. This progress is only partly due to colonial or more recent foreign influences, from Western or neighbouring nations. Countries like Japan, Malaysia or the Philippines have over many decades shaped their own administrative law and developed their own legal principles and case law. In addition, countries like Indonesia, Taiwan or Thailand have democratised their political systems, created agencies to oversee the administrative process, promoted good governance and established elaborate administrative court systems.

58 [1994] 3 MLJ 758; [2005] 2 AMR 502; [2008] 4 MLJ 641.

These achievements have altered the landscape of administrative law in the region and made it harder for authoritarian rulers to seize power and administer the state arbitrarily. However, there is still some way to go for most of the countries. With the exception of Japan, and to a certain extent Hong Kong and Taiwan, there are big problems with the efficiency and effectiveness of the systems and especially the protection of the rights and interests of individuals. On paper, the laws are in place and legal reforms have been carried out or are in progress. Human rights committees, anti-corruption agencies and judicial appointment commissions have been set up all over the region. Yet for a number of reasons, the administrative law systems are not functioning in practice as we might expect, given the laws in place and the institutions, which have been established.

Among the reasons for this state of affairs, three are important. Firstly, the officers in charge lack skills. They are often badly trained, have obtained their positions through nepotism and are paid poorly. This makes them highly susceptible to corruption, which crushes hopes of fair and equal proceedings. Secondly, many institutions are not given sufficient authority and they do not take effective measures to achieve the goals for which they have been brought into being. The judiciary in many parts of Asia is not as independent and vigorous as it should be in order to be an effective watchdog over the executive. Thirdly, the political influence on the administrative decision-making process weakens people's trust and belief that they are in the hands of a good and fair administration that protects their rights and interests, and handles their affairs dispassionately and with care. Nevertheless, it would be wrong to feel pessimistic about the future. All of the researched countries are on the right path – it is just a matter of time until they reach their destination, though this journey might be longer for some than for others.

ANNEX
TO PART 1

CONSTITUTIONS OF PORTUGAL AND SPAIN (EXTRACTS)

PORTUGUESE CONSTITUTION

Article 266: Fundamental principles

1. The Public Administration shall seek to pursue the public interest and shall respect all such citizens' rights and interests as are protected by law.
2. Administrative bodies and agents shall be subject to this Constitution, and in the performance of their functions shall act with respect for the principles of equality, proportionality, justice, impartiality and good faith.

Article 267: Structure of the Administration

1. The Public Administration shall be structured in such a way as to avoid bureaucratization, bring departments and services closer to local people and ensure that interested parties take part in its effective management, particularly via public associations, residents' organizations and other forms of democratic representation.
2. For the purpose of the previous paragraph and without prejudice to the necessary efficacy and unity of the Public Administration's work and the management, superintendence and oversight of the competent bodies, the law shall lay down adequate forms of administrative decentralization and devolution.
3. The law may create independent administrative bodies.
4. Public associations may only be formed in order to fulfill specific needs, may not perform the specific functions of trade unions and shall be organized internally on the basis of respect for their members' rights and the democratic formation of their bodies.
5. The processing of administrative activities shall be the object of a special law, which shall ensure that the resources to be used by departments and services are rationalized, and that citizens participate in the taking of decisions that concern them.
6. Private bodies that exercise public powers may be subject to administrative inspection as laid down by law.

Article 268: Citizens' rights and guarantees

1. Citizens shall possess the right to be informed by the Administration whenever they so request as to the progress of the processes in which they are directly interested, as well as to be made aware of such decisions as are taken in relation to them.

2. Without prejudice to the law governing matters of internal and external security, criminal investigation and personal privacy, citizens shall also possess the right of access to administrative files and records.
3. Administrative acts shall be subject to notification to the interested parties in the form laid down by law, and when they affect rights or interests that are protected by law, shall be based on express grounds that can be accessed by the parties.
4. Citizens shall be guaranteed effective judicial oversight of those of their rights and interests that are protected by law, particularly including the recognition of the said rights and interests, the impugnation of any administrative act that harms their rights and interests, regardless of its form, the issue of positive rulings requiring the practise of administrative acts that are due by law, and the issue of adequate injunctions.
5. Citizens shall also possess the right to challenge administrative rules which possess external force and which harm any of their rights or interests that are protected by law.
6. For the purposes of (1) and (2) above the law shall lay down a maximum time limit for responses by the Administration.

Article 269: Rules governing Public Administration staff

1. In the performance of their functions, Public Administration workers and other agents of the state and of other public bodies shall exclusively serve the public interest, as defined in accordance with the law by the Administration's competent governing bodies.
2. Public Administration workers and other agents of the state and of other public bodies shall not be prejudiced or benefited as a result of their exercise of any political rights provided for in this Constitution, particularly party political preferences.
3. Persons who are the object of disciplinary proceedings shall be guaranteed the right to be heard and to a defence.
4. Public positions and offices shall not be accumulated, save in such cases as are expressly permitted by law.
5. The law shall lay down the incompatibilities between the holding of public positions or offices and other activities.

Article 270: Restrictions on the exercise of rights

Strictly to the extent required by the specific demands of the functions in question, the law may impose restrictions on the exercise of the rights of expression, meeting, demonstration, association and collective petition and the right to stand for election by full-time military and militarized personnel on active service, and by members of the police forces and security services. In the case of the latter, even when their right to form trade unions is recognized, the law may preclude enjoyment of the right to strike.

Article 271: Liability of state staff and agents

1. The staff and agents of the state and of other public bodies shall be civilly and criminally liable and subject to disciplinary proceedings for their actions and omissions in the performance of their functions, and for any such performance that leads to a breach of those citizens' rights and interests that are protected by law. At no stage shall any suit or proceedings in this respect be dependent on authorization by higher authority.
2. Liability shall not accrue to any member of staff or agent who acts in the performance of his duties in compliance with orders or instructions issued by a legitimate hierarchical superior, on condition that he previously protested against the said orders or instructions or required them to be transmitted or confirmed in writing.
3. The duty of obedience shall cease whenever compliance with orders or instructions would imply the commission of any crime.
4. The law shall regulate the terms under which the state and other public entities shall be entitled to indemnification by their bodies, staff and agents.

Article 272: Police

1. The functions of police forces shall be to defend the democratic rule of law and to guarantee citizens' internal security and rights.
2. The measures to be used for policing purposes shall be those laid down by law and shall not be used more than is strictly necessary.
3. Crime prevention, including that of crimes against state security, shall only be undertaken in compliance with the general rules governing policing and with respect for citizens' rights, freedoms and guarantees.
4. The law shall lay down the rules governing police forces and each such force shall possess a sole organizational structure for the whole of Portuguese territory.

SPANISH CONSTITUTION

Section 103

(1) The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law.
(2) The organs of State Administration are set up, directed and coordinated in accordance with the law.
(3) The law shall lay down the status of civil servants, the entry into the civil service in accordance with the principles of merit and ability, the special features of the exercise of their right to union membership, the system of incompatibilities and the guarantees regarding impartiality in the discharge of their duties.

Section 104

(1) The Security Forces and Corps serving under the Government shall have the duty to protect the free exercise of rights and freedoms and to guarantee the safety of citizens.
(2) An organic act shall specify the duties, basic principles of action and statutes of the Security Forces and Corps.

Section 105

The law shall make provision for:
a) The hearing of citizens, directly, or through the organizations and associations recognized by the law, in the process of drawing up the administrative provisions which affect them.
b) The access of citizens to administrative files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of persons.
c) The procedures for the taking of administrative action, with due safeguards for the hearing of interested parties when appropriate.

Section 106

(1) The Courts shall check the power to issue regulations and ensure that the rule of law prevails in administrative action, and that the latter is subordinated to the ends which justify it.
(2) Private individuals shall, under the terms laid down by law, be entitled to compensation for any harm they may suffer in any of their property and rights, except in cases of force majeure, whenever such harm is the result of the operation of public services.

I. The General Administrative Code of Georgia (Extracts)

CHAPTER 1: GENERAL PROVISIONS

Article 1. The purpose of this Code

3. This Code defines the procedures for issuing and enforcing administrative acts, reviewing administrative complaints, and preparing, concluding, and implementing administrative contracts by an administrative agency.
4. The purpose of this Code is to ensure the protection of human rights and freedoms, public interests, and the rule of law by administrative agencies.

…

Article 4. Equality before law

1. Everyone shall be equal before law and an administrative agency.

2. The restriction of or interference with the enjoyment of lawful rights, freedoms, and interests of any party to an administrative proceeding and preferential treatment or discrimination of any party in violation of law shall be prohibited.
3. Wherever circumstances of different cases are identical, judgements in regard to the persons involved shall be identical, except if there is a lawful ground for rendering a different judgment.

Article 5. The exercise of authority pursuant to law

1. An administrative agency may not perform any action that is against law.
2. The issuance of an administrative decree by an administrative agency or any action that restricts constitutional rights or freedoms shall be based on Chapter 2 of the Constitution of Georgia or applicable law or regulation.
3. The administrative decree issued in abuse of power and the action performed by an administrative agency in abuse of power shall be nullified.
4. The official of an administrative agency shall be held liable under law for the failure to duly perform his duties and the abuse of power.

Article 6. The procedures for exercising discretionary power

1. If an administrative agency enjoys discretionary power to solve any matter, it shall exercise discretionary power in compliance with law.
2. The exercise of discretionary power by an administrative agency shall be appropriate to the purpose for which it was granted to the agency.

Article 7. The balance of public and private interests

1. While exercising discretionary power, an administrative agency may not issue any administrative decree, if the harm inflicted by the latter upon the lawful rights and interests of a person substantially exceeds the benefits of the decree.
2. The measures prescribed by the administrative decree that was issued within discretionary power may not result in unreasonable restriction of a person's lawful rights and interests.

Article 8. Impartial resolution of a case

1. An administrative agency shall exercise its authority impartially.
2. No public official shall participate in administrative proceeding, if he has any private interest or there is any other circumstance that may affect decision-making process.

Article 9. The right to legitimate trust

1. An administrative agency shall protect a person's right to legitimate trust.
2. The promise of an administrative agency or its official to perform any action shall co stitute the ground for legitimate trust.

3. Legitimate trust may not be invoked if it is based upon an illegal action committed by an interested party.
4. An illegal promise made by an administrative agency may not be invoked as the ground for legitimate trust.

Article 10. Openness

1. Everyone may gain access to official documents kept by an administrative agency, and obtain a copy thereof, unless such documents contain state, professional, commercial, or private secrets.
2. The procedures for gaining access to and obtaining copies of the public information kept by an administrative agency are prescribed by Chapter 3 of this Code.
3. An administrative agency shall ensure open and public hearing of any issue in cases prescribed by law.

Article 11. Confidentiality

1. No public official of any administrative agency may disclose or misuse secret or confidential information obtained during administrative proceeding. This prohibition may not be invoked as the ground for the dereliction of the responsibility stipulated by Article 10 of this Code.
2. The procedures for keeping official information confidential are prescribed by law.

Article 12. The right to apply to an administrative agency

1. A person may apply to an administrative agency to solve the matters that fall within the area of responsibility of the agency and directly affect the applicant's rights and legal interests.
2. Unless otherwise prescribed by law, an administrative agency shall review the application pertaining to the matter that falls within the area of its responsibility, and render an appropriate decision.

Article 13. The right to be heard

1. An administrative agency may review and solve a matter only if the interested party whose right or legal interest is restricted by the administrative decree has been enabled to present his opinion, except as provided by law.
2. The person specified in Paragraph 1 of this Article shall be notified of administrative proceeding and his participation in the case shall be ensured.

THE GENERAL ADMINISTRATIVE CODE OF GEORGIA (EXTRACTS)

CHAPTER 1: GENERAL PROVISIONS

Article 1. The purpose of this Code

3. This Code defines the procedures for issuing and enforcing administrative acts, reviewing administrative complaints, and preparing, concluding, and implementing administrative contracts by an administrative agency.
4. The purpose of this Code is to ensure the protection of human rights and freedoms, public interests, and the rule of law by administrative agencies.

Article 4. Equality before law

1. Everyone shall be equal before law and an administrative agency.
2. The restriction of or interference with the enjoyment of lawful rights, freedoms, and interests of any party to an administrative proceeding and preferential treatment or discrimination of any party in violation of law shall be prohibited.
3. Wherever circumstances of different cases are identical, judgements in regard to the persons involved shall be identical, except if there is a lawful ground for rendering a different judgment.

Article 5. The exercise of authority pursuant to law

1. An administrative agency may not perform any action that is against law.
2. The issuance of an administrative decree by an administrative agency or any action that restricts constitutional rights or freedoms shall be based on Chapter 2 of the Constitution of Georgia or applicable law or regulation.
3. The administrative decree issued in abuse of power and the action performed by an administrative agency in abuse of power shall be nullified.
4. The official of an administrative agency shall be held liable under law for the failure to duly perform his duties and the abuse of power.

Article 6. The procedures for exercising discretionary power

1. If an administrative agency enjoys discretionary power to solve any matter, it shall exercise discretionary power in compliance with law.
2. The exercise of discretionary power by an administrative agency shall be appropriate to the purpose for which it was granted to the agency.

Article 7. The balance of public and private interests

1. While exercising discretionary power, an administrative agency may not issue any administrative decree, if the harm inflicted by the latter upon the lawful rights and interests of a person substantially exceeds the benefits of the decree.
2. The measures prescribed by the administrative decree that was issued within discretionary power may not result in unreasonable restriction of a person's lawful rights and interests.

Article 8. Impartial resolution of a case

1. An administrative agency shall exercise its authority impartially.
2. No public official shall participate in administrative proceeding, if he has any private interest or there is any other circumstance that may affect decision-making process.

Article 9. The right to legitimate trust

1. An administrative agency shall protect a person's right to legitimate trust.
2. The promise of an administrative agency or its official to perform any action shall co stitute the ground for legitimate trust.
3. Legitimate trust may not be invoked if it is based upon an illegal action committed by an interested party.
4. An illegal promise made by an administrative agency may not be invoked as the ground for legitimate trust.

Article 10. Openness

1. Everyone may gain access to official documents kept by an administrative agency, and obtain a copy thereof, unless such documents contain state, professional, commercial, or private secrets.
2. The procedures for gaining access to and obtaining copies of the public information kept by an administrative agency are prescribed by Chapter 3 of this Code.
3. An administrative agency shall ensure open and public hearing of any issue in cases prescribed by law.

Article 11. Confidentiality

1. No public official of any administrative agency may disclose or misuse secret or confidential information obtained during administrative proceeding. This prohibition may not be invoked as the ground for the dereliction of the responsibility stipulated by Article 10 of this Code.
2. The procedures for keeping official information confidential are prescribed by law.

Article 12. The right to apply to an administrative agency

1. A person may apply to an administrative agency to solve the matters that fall within the area of responsibility of the agency and directly affect the applicant's rights and legal interests.
2. Unless otherwise prescribed by law, an administrative agency shall review the application pertaining to the matter that falls within the area of its responsibility, and render an appropriate decision.

Article 13. The right to be heard

1. An administrative agency may review and solve a matter only if the interested party whose right or legal interest is restricted by the administrative decree has been enabled to present his opinion, except as provided by law.
2. The person specified in Paragraph 1 of this Article shall be notified of administrative proceeding and his participation in the case shall be ensured.

THE DANISH PUBLIC ADMINISTRATION ACT (1985) (CHAPTERS 2–8)

CHAPTER 2
DISQUALIFICATION

Section 3

1. Any person working for the public administration shall be disqualified relative to a specific case if

- they have a particular personal or financial interest in the outcome of the case or if they have previously represented any person in the same case with such interests;
- their husband or wife, any person related by blood or marriage in the direct line of ascent or descent or in a collateral branch as close as a first cousin, or any other closely attached person, has a particular personal or financial interest in the outcome of the case or represents any person with such interests;
- they are involved in the management of or are otherwise closely associated with any company, partnership, association or other private legal entity with a particular interest in the outcome of the case;
- the case concerns a complaint about or exercise of the control or supervision of another public authority, and the person previously served with that authority and assisted in making the decision or in implementing the measures at issue in the case; or
- there are other grounds for questioning the person's impartiality.

2. No person shall be disqualified if the nature or strength of his interest, the nature of the case, or his tasks in connection with the handling of the case are such that the decision on the case is unlikely to be affected by extraneous considerations.

3. No person disqualified relative to any specific case shall be allowed to decide, to take part in deciding, or otherwise to assist in the consideration of the case in question.

Section 4

1. Section 3 shall not apply if it would be impossible or cause substantial difficulties or misgivings to arrange for another person to act in place of that person in considering the case.

2. Section 3 shall apply to members of a collegiate administrative authority even where a substitute cannot be called in. However, this provision shall not apply it members of the authority would not form a quorum or if the composition of the authority would be

called into question if the member could not attend its meetings, and if consideration of the case cannot be stayed without material damage to public or private interests.
3. Notwithstanding Section 3, any member of a collegiate administrative authority may take part in electing members for specific duties, even if his own name is put forward. Section 3 shall not apply to decision-making by local government councils on the remuneration etc. of their own members.

Section 5

After consulting with the Minister for Justice, the minister concerned may lay down more detailed rules by order on the scope of Sections 3 and 4 for specific sectors of the administration.

Section 6

1. Any person who is aware of circumstances relating to them as referred to in Section 3(1) shall immediately advise their hierarchical superior thereof, unless it is clear that the circumstances are immaterial. In the case of a member of a collegiate administrative authority, the authority shall be advised.
2. Disqualification shall be decided by the authority referred to in paragraph 1.
3. The person concerned must not himself take part in considering or deciding his own disqualification, but see Section 4(1) and (2). This shall not apply to areas subject to other provisions laid down by law.

CHAPTER 3
ADVICE AND REPRESENTATION ETC.

Section 7

1. An administrative authority shall advise and assist, to the extent required, any person consulting them on areas within their purview.
2. Any written enquiry that falls outside the purview of the administrative authority to whom it has been sent, shall as far as possible be forwarded to the proper authority.

Section 8

1. At any time during consideration of a case, any party thereto may to be assisted or represented by others. However, when it may affect the outcome of a case, the authority may demand that the party attend in person.
2. The first sentence of paragraph 1 shall not apply where it is considered appropriate that the party's interests in being assisted or represented give way to important considerations for public or private interests, or where otherwise specified by law.

CHAPTER 4
ACCESS TO FILES BY PARTIES TO A CASE

RIGHT OF ACCESS TO FILES

Section 9

1. Any party to a case in which a decision has been or will be made by an administrative authority may ask to see the case documents. A request for documents shall indicate the case to which the documents relate.
2. Provisions on secrecy applying to persons acting in public service or duty shall not limit the duty to grant access to files under this Chapter.
3. The provisions of this Chapter shall not apply in the case of infringements resulting in criminal prosecutions, but see Section 18.

Scope of access to files.

Section 10

1. Subject to the exceptions in Sections 12-15 of this Act, parties to a case may access
   1) all documents relating to the case in question, including duplicates of letters issued by the authority concerned, provided such letters must be assumed to have reached the addressee; and
   2) entries in journals, registers, and other lists concerning the documents of the case at issue.
2. However, any person applying for or having applied for employment or promotion in public service may ask to see only of the documents etc. relating to his own circumstances.

Stay of proceedings

Section 11

1. If, while a case is pending, a party applies for access to files and such application has to be granted under the provisions of this Act, proceedings in the case shall be stayed until the party concerned has been given an opportunity to acquaint himself with the documents.
2. However, paragraph 1 shall not apply if a stay of proceedings would mean that the case could not be decided within the statutory time limit or if it is considered appropriate that the party's interest in a stay of proceedings give way to important considerations for public or private interests in avoiding such a stay.

Documents subject to exemptions

Section 12

1. The right of access to files shall not apply to an authority's internal working documents. Internal working documents shall include
   1) any document prepared by an authority for its own use in considering a case;
   2) correspondence between units within the same authority, and

3) correspondence between a local council and its committees, departments and other administrative bodies, or between those bodies.

2. Notwithstanding paragraph 1, information on the facts of a case which may greatly affect the outcome of the case and is exclusively contained in internal working documents, shall be provided in accordance with this Chapter.

Section 13

1. Notwithstanding Section 12, the right of access to files shall include internal working documents in their final form if

1) the documents contain only the substance of the authority's final decision on the outcome of a case;

2) the documents contain only information that the authority had a duty to record pursuant to the Danish Access to Public Administrative Documents Act; or

3) the documents are self-contained instruments drawn up by an authority to provide proof or clarity concerning the actual facts of a case.

Section 14

1. The right of access to files shall not apply to:

1) records of meetings of the Council of State, minutes of meetings of ministers and documents prepared by an authority for use at such meetings.

2) documents exchanged in connection with one authority acting as a secretariat for another authority.

3) documents drawn up in connection with considering proposals for decisions to be taken by the European Community or to do with the interpretation of or compliance with EC rules.

4) correspondence between authorities and outside experts for use in court proceedings or in deliberations on possible legal proceedings.

2. Notwithstanding paragraph 1, information on the facts of a case which may greatly affect the outcome of the case and is exclusively contained in the documents mentioned in paragraph 1, shall be provided in accordance with this Chapter.

Information subject to exemptions

Section 15

1. The right of access to files may also be limited where it is considered appropriate that the party's interest in using a knowledge of documents in the case to protect his interests give way to important considerations for the interests of the party concerned or to other private or public interests, including

1) State security and the defence of the realm;

2) Danish foreign policy and Danish external economic interests, including relations with foreign powers and international institutions;

3) preventing and investigating any infringement of the law, prosecuting offenders, executing sentences and protecting the defendant, witnesses and others in criminal or disciplinary prosecutions.

4) carrying out public supervision, regulation and planning activities and measures planned under tax law; and

5) protecting public financial interests, including interests relating to public commercial activities.

2. Where paragraph 1 applies only to part of a document, the party requesting disclosure shall be allowed to see the remaining contents of the document.

Decisions on access to files

Section 16

1. Decisions on whether and in what form an application for access to files shall be granted shall be made by the authority responsible for deciding the case at issue.

2. The authority shall decide without delay whether the application should be granted. If an application has not been granted or rejected within ten days of its receipt by the authority concerned, the authority shall inform the applicant of the reasons for this and also of the date when a decision can be expected.

3. If it is important for a party's ability to protect his interests that he be handed a transcript or an office copy of any document in the case, his application for such transcript or office copy shall be granted. However, this shall not apply if the nature, number or form of documents make this unreasonable. The Minister for Justice shall lay down rules on the fees payable for transcripts and office copies.

4. Appeals against decisions on access to files shall be submitted to the appeals authority for the case to which the application for documents relates. Section 11 shall apply mutatis mutandis.

5. The minister concerned may lay down rules by order derogating from the provisions of paragraph 1 and the first sentence of paragraph 4.

Section 17

If the right to appeal against a decision in a case is limited in time and an application for access to files is submitted after the decision has been communicated to the party concerned but before the expiry of the time limit for appeal, the authority may decide that the time limit be suspended. The time limit for appeal shall then resume from the date when access to files is granted or denied, and be no less than fourteen days. Any other person notified in writing of the decision in the case and entitled to appeal shall also be notified of the expiry date of the extended time limit for appeal.

Access to files in criminal cases.

Section 18

1. When a criminal case has been decided, any party thereto may ask to see any document in the case provided that their request is reasonably founded on the need to protect the interests of the party concerned, and provided that it does not run counter to the need to prevent, investigate and prosecute any infringement of the law or protect defendants, witnesses or other persons. Sections 12-14 of this Act shall apply mutatis mutandis.
2. Paragraph 1 shall not apply to office copies of entries in court records concerning the criminal case or to documents in the case that have been produced in court. The same shall apply to office copies of entries in court records and to documents adduced in court relating to other criminal cases cited in the hearing of the case.
3. Decisions on whether and in what form an application for access to files may be granted under paragraph 1 shall be made by the authority which made the administrative decision in the criminal case. Appeals against such decisions shall be submitted to the relevant superior administrative authority. The Minister for Justice shall lay down rules on the fees payable for transcripts and office copies.

CHAPTER 5
HEARING THE PARTIES

Section 19

1. If a party to a case cannot be assumed to have notice that an authority is possessed of specific information on the facts of a case, no decision shall be made until the authority has notified that party of such information and has given him an opportunity to make a statement. However, this shall apply only if the information is unfavourable to the party concerned and essential to reaching a decision in the case. The authority may fix a time limit for the submission of a statement by the party concerned.
2. Paragraph1 shall not apply if
   1) the nature of the information and the case are such that it is considered unobjectionable or a decision to be made on the basis of the information available;
   2) a stay of proceedings would mean that the case could not be decided within the statutory time limit;
   3) it is considered appropriate that the party's interest in a stay of proceedings give way to important considerations for public or private interests in avoiding such a stay;
   4) the party concerned does not have a right to access files under Chapter 4 concerning the information in question;
   5) the decision would affect a wider, unspecified group of persons, enterprises etc., or if presenting the information to the party would cause other substantial difficulties; or

6) special provisions are laid down by law which give the party the right to acquaint himself with the grounds for the contemplated decision and to make a statement on the case before a decision is made.

3. After consulting with the Minister for Justice, the minister concerned may lay down rules by order to the effect that specific fields of responsibility to which points 1 and 5 of paragraph 2 would normally apply shall not be subject to paragraph 1.

Section 20

1. In cases where the authority may change its decision if requested to do so by a party, the authority may decide not to hear the party concerned if the nature of the case and considerations for the party concerned make it appropriate.

2. If a decision has been taken not to hear a party pursuant to paragraph 1, the decision shall enclose the information which would otherwise have been given to the party pursuant to Section 19. The party shall also be informed of his right to apply for the case to be re-considered. The authority may fix a time limit for submission of an application for re-consideration.

3. Where there is a time limit for submitting an appeal against a decision to another administrative authority and an application for the case to be re-considered is submitted in time, the appeal time limit shall be suspended. The time limit for appeal shall then resume from the date when the new decision is communicated to the party concerned, and be no less than fourteen days.

The right to issue a statement

Section 21

1. At any time in the proceedings, a party to a case may demand that a decision in the case be stayed until the party concerned has issued a statement on the case. The authority may fix a time limit for the submission of the statement.

2. Paragraph 1 shall not apply if

1) a stay of proceedings would mean that the case could not be decided within the statutory time limit;

2) it is considered appropriate that the party's interest in a stay of proceedings give way to important considerations for public or private interests in avoiding such a stay; or

3) any special statutory provision provides for the party to make a statement on the case before a decision is made.

CHAPTER 6
GROUNDS, ETC.

Section 22

A decision communicated in writing shall set out the grounds, except where the decision is in every particular in favour of the party concerned.

Section 23

1. Any person who has been notified of a decision orally may demand that written grounds for the decision be given, except where the decision is in every particular in favour of the person concerned. An application for written grounds shall be submitted to the authority concerned within fourteen days of the party being notified of the decision.
2. An application for written grounds submitted pursuant to paragraph 1 shall be answered as soon as possible. If the application is not answered within fourteen days of its receipt by the authority concerned, the authority shall inform the applicant of the reason for not answering and of the date when its answer can be expected.

Section 24

1. The grounds for a decision shall refer to the laws on which the decision is based. To the extent that the rules provide for the decision to rest on administrative discretion, the grounds shall also state the main considerations taken into account when such discretion was exercised.
2. If necessary, the grounds shall also briefly state which facts in the case were deemed to be of paramount importance in making the decision.
3. The grounds may be limited to the extent it is considered appropriate that the party's interest in being able to use his knowledge of them to protect his interests should give way to considerations for the interests of the party concerned or other private or public interests, cf. Section 15.

CHAPTER 7
ADVICE ON THE RIGHT TO APPEAL

Section 25

1. Written decisions which can be appealed against to another administrative authority shall be accompanied by written advice on the right to appeal indicating the appeals authority and the appeals procedure, including any time limit. This shall not apply if the decision is in every particular in favour of the party concerned.
2. After consulting with the Minister for Justice, the minister concerned may lay down rules by order to the effect that in specific fields of responsibility subject to special con-

ditions, advice on the right to appeal may be omitted or given in a way other than that described in paragraph 1.

Section 26

Any decision which can only be appealed against in court subject to a statutory time limit for the start of appeal proceedings shall be accompanied by information to that effect.

CHAPTER 8
OBLIGATION TO MAINTAIN SECRECY ETC.

Obligation to maintain secrecy.

Section 27

1. Any person working for the public administration has an obligation to maintain secrecy, cf. Section 152 and Sections 152c-152f of the Danish Criminal Code, whenever information is designated as confidential by law or other provision or whenever it is otherwise necessary to keep the information secret to protect important considerations for public or private interests, including in particular

1) the security of the State and the defence of the realm;

2) Danish foreign policy and Danish external economic interests, including relations with foreign powers and international institutions;

3) preventing, and investigating any infringement of the law, prosecuting offenders, executing sentences and protecting defendants, witnesses and others in criminal or disciplinary cases;

4) implementing public supervision, regulation and planning activities and measures planned under taxation law;

5) protecting public financial interests, including public commercial activities;

6) the interests of individual persons or private enterprises or societies in protecting information on their personal or internal, including financial, circumstances; and

7) the financial interests of individual persons or private enterprises or societies in protecting information on technical devices or processes or on business or operating procedures and policies.

2. Any person acting working for public administration may be ordered to maintain secrecy in respect of any particular piece of information only when secrecy is required to protect important considerations for particular public or private interests in accordance with paragraph 1.

3. An administrative authority may order a person outside the public administration to maintain secrecy in respect of any confidential information passed on by the authority to the person concerned when the authority was not obliged to do so.

4. Where rules on secrecy are laid down by virtue of Section 1(2), or secrecy is ordered by virtue of paragraph 3, Section 152 and Sections 152c-152f of the Danish Criminal Code shall apply mutatis mutandis to any infringement of such rules or orders.
The provision of information to other administrative authorities

Section 28

1. Information on an individual's strictly private circumstances, including information on race, religion, skin colour, political affiliation, union membership, sexual orientation, criminal record, health, major social problems, drug abuse, etc. shall not be provided to another administrative authority.
2. However, the information referred to in paragraph 1 may be provided if
   1) the person concerned has given their consent;
   2) the information must be provided by law or provisions laid down pursuant to a law;
   3) it thereby protects private or public interests which clearly override the interests for which secrecy was maintained, including the interests of the person to whom the information relates; or
   4) it is necessary for the consideration of the case at issue or required to enable an administrative authority to carry out its duties of supervision and control.
3. Other confidential information may be provided to another administrative authority outside the circumstances referred to in paragraph 2 only when the information can be assumed to be very important to the performance of that other authority's activities or for a decision to be made by the other authority.
4. Consent within the meaning of paragraph 1, point 1 shall be given in writing and state the type of information which may be provided, the person to whom the information may be provided, and for what purpose. A derogation may be granted from the requirement that consent be given in writing if the nature of the case or other circumstances make it appropriate.
5. Consent within the meaning of paragraph 2, point 1 shall lapse no later than one year after it has been given.
6. Local administrative bodies granted independent status by law shall be deemed to be independent administrative authorities in accordance with in paragraphs 1 and 3.

Section 29

1. In cases brought on application, information on the applicant's strictly private circumstances shall not be obtained from other branches of the public administration or from any other administrative authority.
2. Paragraph 1 shall not apply if
   1) the applicant has consented to information being obtained;
   2) laws or provisions laid down pursuant thereto provide otherwise; or
   3) consideration for the applicant or a third party clearly overrides the applicant's interest in the information not being obtained.

Section 30

Confidential information obtained exclusively for the purpose of compiling statistics or as part of a scientific research programme shall not be passed on to an administrative authority for other use.

Section 31

1. To the extent that an administrative authority is entitled to pass on information, it shall do so at the request of another administrative authority if the information is important to the performance of the other authority's activities or for a decision to be taken by the other authority.
2. However, paragraph 1 shall not apply if passing on the information would cause the first authority additional work out of all proportion to the second authority's interest in obtaining the information.

Section 32

Any person working for the public administration shall not use his position to obtain confidential information that has no relevance to the performance of his duties.

THE EUROPEAN CODE OF GOOD ADMINISTRATIVE BEHAVIOUR*

The European Ombudsman

Forword by the European Obudsman

Dear reader,

Since taking up the post of European Ombudsman on 1 April 2003, I have worked hard to promote good administration within the European Union s institutions and bodies. This work has a dual dimension. On the one hand, the Ombudsman acts as an external mechanism of control, investigating complaints about maladministration and recommending corrective action where necessary. On the other hand, the Ombudsman serves as a resource to the institutions, helping them to better their performance by directing attention to areas for improvement. The ultimate goal in both instances is to improve the service provided to European citizens.

The European Code of Good Administrative Behaviour is a vital tool for the Ombudsman in performing his dual role. The Ombudsman uses the Code in examining whether there is maladministration, thereby relying on its provisions for his control function. But equally the Code serves as a useful guide and a resource for civil servants, encouraging the highest standards of administration.

European citizens deserve nothing less. The right to good administration by EU institutions and bodies is a fundamental right, according to Article 41 of the EU Charter of Fundamental Rights. The Code tells citizens what this right means in practice and what, concretely, they can expect from the European administration. With the Charter making up Part II of the Treaty establishing a Constitution for Europe, we can be sure that this right will become increasingly meaningful in the coming years.

Citizens and officials have shown much interest in the Code since its adoption by the European Parliament in September 2001. Its impact has not been limited to the Union s institutions and bodies and I am pleased to note that the Code has been taken on board

* © European Communities, 2005
All rights reserved. Reproduction for educational and non-commercial purposes is permitted provided that the source is acknowledged.
Luxembourg: Office for Official Publications of the European Communities, 2005
ISBN 92-95022-24-6

by a number of Member States and candidate countries. As European Ombudsman, I feel it is my duty to further raise awareness of the rights and obligations contained therein. It is for this reason that we have chosen to publish a new version in all of the official EU languages, as well as in the languages of the candidate countries.

I hope that the Code will continue to serve as a useful working tool for public administrations and as a reference point for citizens all over Europe.

P. Nikiforos Diamandouros
Strasbourg, 5 January 2005

Introduction

On 6 September 2001, the European Parliament adopted a resolution approving a Code of Good Administrative Behaviour which European Union institutions and bodies, their administrations and their officials should respect in their relations with the public.

The idea of a Code was first proposed by Roy PERRY MEP in 1998. The European Ombudsman drafted the text, following an own-initiative inquiry and presented it to the European Parliament as a special report. The Parliament's resolution on the Code is based on the Ombudsman's proposal, with some changes introduced by Mr PERRY as rapporteur for the Committee on Petitions of the European Parliament.

The Code takes account of the principles of European administrative law contained in the case law of the Court of Justice and also draws inspiration from national laws.

The Status of the Code

The Charter of Fundamental Rights of the European Union was proclaimed at the Nice summit in December 2000 and has now become Part II of the Treaty establishing a Constitution for Europe.

The Charter includes as fundamental rights of Union citizenship the right to good administration (art. 41) and the right to complain to the European Ombudsman against maladministration by the Union's institutions and bodies (art. 43).

This Code is intended to explain in more detail what the Charter's right to good administration should mean in practice.

Right to good administration

(Article 41 of the Charter of Fundamental Rights[1]

1. Every person has the right to have his or her aff airs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

1 Article 41 of the Charter corresponds to Article II-101 of the Constitution.

2. This right includes:
- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her fi le, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The European Ombudsman investigates possible cases of maladministration in the activities of Union institutions and bodies, in accordance with Article 195 of the EC Treaty and the Statute of the Ombudsman[2]. The Ombudsman's definition of maladministration in his 1997 Annual Report is that

"maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it".

This definition has been approved by the European Parliament.

Ombudsman

(Article 43 of the Charter of Fundamental Rights[3])

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

At the same time as approving the Code, the European Parliament also adopted a resolution calling on the European Ombudsman to apply it in examining whether there is maladministration, so as to give effect to the citizens' right to good administration in Article 41 of the Charter. The Ombudsman therefore duly takes account of the rules and principles contained in the Code when examining cases of alleged maladministration.

A European administrative law

When it approved the Code, the European Parliament called on the European Commission to submit a proposal for a regulation containing the Code. The view was that a regula-

2 Decision of the European Parliament on the Regulations and General Conditions governing the performance of the Ombudsman's duties, OJ L 113/15, 4.5.1994.

3 Article 43 of the Charter corresponds to Article II-103 of the Constitution.

tion would emphasise the binding nature of the rules and principles contained therein and apply uniformly to all EU institutions and bodies, thereby promoting transparency and consistency.

This goal could now best be achieved on the basis of a proposal from the Commission for a European law on good administration. Article III-398 of the Constitution could provide the legal basis for such a law. It states that:

> *"In carrying out their missions, the Institutions, bodies and agencies of the Union shall have the support of an open, efficient and independent European administration.*
>
> *In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article III-427, European laws shall establish specific provisions to that end."*

The Ombudsman will continue to emphasise the added value of transforming the Code into a European law. This would help eliminate the confusion currently arising from the parallel existence of diff erent codes for most EU institutions and bodies, would ensure that the institutions and bodies apply the same basic principles in their relations with citizens and would underline, for both citizens and officials, the importance of such principles.

The European Code of Good Administrative Behaviour

The Code approved by the European Parliament contains the following substantive provisions:

Article 1 General provision

In their relations with the public, the Institutions and their officials shall respect the principles which are laid down in this Code of good administrative behaviour, hereafter referred to as "the Code".

Article 2 Personal scope of application

1. The Code shall apply to all officials and other servants to whom the Staff Regulations and the Conditions of employment of other servants apply, in their relations with the public. Hereafter the term official refers to both the officials and the other servants.
2. The Institutions and their administrations will take the necessary measures to ensure that the provisions set out in this Code also apply to other persons working for them, such as persons employed under private law contracts, experts on secondment from national civil services and trainees.
3. The public refers to natural and legal persons, whether they reside or have their registered office in a Member State or not.
4. For the purpose of this Code:
   (a) the term "Institution" shall mean a Community institution or body;
   (b) "Official" shall mean an official or other servant of the European Communities.

Article 3 Material scope of application

1. This Code contains the general principles of good administrative behaviour which apply to all relations of the Institutions and their administrations with the public, unless they are governed by specifi c provisions.
2. The principles set out in this Code do not apply to the relations between the Institution and its officials. Those relations are governed by the Staff Regulations.

Article 4 Lawfulness

The official shall act according to law and apply the rules and procedures laid down in Community legislation. The official shall in particular take care that decisions which affect the rights or interests of individuals have a basis in law and that their content complies with the law.

Article 5 Absence of discrimination

1. In dealing with requests from the public and in taking decisions, the official shall ensure that the principle of equality of treatment is respected. Members of the public who are in the same situation shall be treated in a similar manner.
2. If any difference in treatment is made, the official shall ensure that it is justified by the objective relevant features of the particular case.
3. The official shall in particular avoid any unjustifi ed discrimination between members of the public based on nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation.

Article 6 Proportionality

1. When taking decisions, the official shall ensure that the measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued.
2. When taking decisions, the official shall respect the fair balance between the interests of private persons and the general public interest.

Article 7 Absence of abuse of power

Powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest.

Article 8 Impartiality and independence

1. The official shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever.
2. The conduct of the official shall never be guided by personal, family or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a fi nancial interest.

Article 9 Objectivity

When taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration.

Article 10 Legitimate expectations, consistency and advice

1. The official shall be consistent in his own administrative behaviour as well as with the administrative action of the Institution. The official shall follow the Institution's normal administrative practices, unless there are legitimate grounds for departing from those practices in an individual case; these grounds shall be recorded in writing.
2. The official shall respect the legitimate and reasonable expectations that members of the public have in the light of how the Institution has acted in the past.
3. The official shall, where necessary, advise the public on how a matter which comes within his or her remit is to be pursued and how to proceed in dealing with the matter.

Article 11 Fairness

The official shall act impartially, fairly and reasonably.

Article 12 Courtesy

1. The official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked.
2. If the official is not responsible for the matter concerned, he shall direct the citizen to the appropriate official.
3. If an error occurs which negatively affects the rights or interests of a member of the public, the official shall apologise for it and endeavour to correct the negative effects resulting from his or her error in the most expedient way and inform the member of the public of any rights of appeal in accordance with Article 19 of the Code.

Article 13 Reply to letters in the language of the citizen

The official shall ensure that every citizen of the Union or any member of the public who writes to the Institution in one of the Treaty languages receives an answer in the same language. The same shall apply as far as possible to legal persons such as associations (NGOs) and companies.

Article 14 Acknowledgement of receipt and indication of the competent official

1. Every letter or complaint to the Institution shall receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period.
2. The reply or acknowledgement of receipt shall indicate the name and the telephone number of the official who is dealing with the matter, as well as the service to which he or she belongs.
3. No acknowledgement of receipt and no reply need be sent in cases where letters or complaints are abusive because of their excessive number or because of their repetitive or pointless character.

Article 15 Obligation to transfer to the competent service of the Institution

1. If a letter or a complaint to the Institution is addressed or transmitted to a Directorate General, Directorate or Unit which has no competence to deal with it, its services shall ensure that the file is transferred without delay to the competent service of the Institution.
2. The service which originally received the letter or complaint shall notify the author of this transfer and shall indicate the name and the telephone number of the official to whom the file has been passed.
3. The official shall alert the member of the public or organisation to any errors or omissions in documents and provide an opportunity to rectify them.

Article 16 Right to be heard and to make statements

1. In cases where the rights or interests of individuals are involved, the official shall ensure that, at every stage in the decision making procedure, the rights of defence are respected.
2. Every member of the public shall have the right, in cases where a decision affecting his rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken.

Article 17 Reasonable time-limit for taking decisions

1. The official shall ensure that a decision on every request or complaint to the Institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt. The same rule shall apply for answering letters from members of the public and for answers to administrative notes which the official has sent to his superiors requesting instructions regarding the decisions to be taken.
2. If a request or a complaint to the Institution cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author thereof as soon as possible. In that case, a definitive decision should be notified to the author in the shortest time.

Article 18 Duty to state the grounds of decisions

1. Every decision of the Institution which may adversely aff ect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.
2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.
3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning.

Article 19 Indication of the possibilities of appeal

1. A decision of the Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them.
2. Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 230 and 195 of the Treaty establishing the European Community.

Article 20 Notification of the decision

1. The official shall ensure that decisions which affect the rights or interests of individual persons are notified in writing, as soon as the decision has been taken, to the person or persons concerned.
2. The official shall abstain from communicating the decision to other sources until the person or persons concerned have been informed.

Article 21 Data protection

1. 1. The official who deals with personal data concerning a citizen shall respect the privacy and the integrity of the individual in accordance with the provisions of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[4].
2. The official shall in particular avoid processing personal data for non-legitimate purposes or the transmission of such data to non authorised persons.

Article 22 Requests for information

1. The official shall, when he has responsibility for the matter concerned, provide members of the public with the information that they request. When appropriate, the official shall give advice on how to initiate an administrative procedure within his fi eld of competence. The official shall take care that the information communicated is clear and understandable.
2. If an oral request for information is too complicated or too comprehensive to be dealt with, the official shall advise the person concerned to formulate his demand in writing.
3. If, because of its confidentiality, an official may not disclose the information requested, he or she shall, in accordance with Article 18 of this Code, indicate to the person concerned the reasons why he cannot communicate the information.
4. Further to requests for information on matters for which he has no responsibility, the official shall direct the requester to the competent person and indicate his name and telephone number. Further to requests for information concerning another Community institution or body, the official shall direct the requester to that institution or body.
5. Where appropriate, the official shall, depending on the subject of the request, direct the person seeking information to the service of the Institution responsible for providing information to the public.

Article 23 Requests for public access to documents

1. The official shall deal with requests for access to documents in accordance with the rules adopted by the Institution and in accordance with the general principles and limits laid down in Regulation (EC) No 1049/2001[5].
2. If the official cannot comply with an oral request for access to documents, the citizen shall be advised to formulate it in writing.

4 OJ L 8/1, 12.1.2001.

5 OJ L 145/43, 31.5.2001.

Article 24 Keeping of adequate records

The Institution's departments shall keep adequate records of their incoming and outgoing mail, of the documents they receive, and of the measures they take.

Article 25 Publicity for the Code

1. The Institution shall take effective measures to inform the public of the rights they enjoy under this Code. If possible, it shall make the text available in electronic form on its website.
2. The Commission shall, on behalf of all institutions, publish and distribute the Code to citizens in the form of a brochure.

Article 26 Right to complain to the European Ombudsman

Any failure of an Institution or official to comply with the principles set out in this Code may be the subject of a complaint to the European Ombudsman in accordance with Article 195 of the Treaty establishing the European Community and the Statute of the European Ombudsman[6].

Article 27 Review of operation

Each Institution shall review its implementation of the Code aft er two years of operation and shall inform the European Ombudsman of the results of its review.

6 Decision of the European Parliament on the Regulations and General Conditions governing the performance of the Ombudsman's duties, OJ L 113/15, 4.5.1994.

GLOSSARY WITH WORKING DEFINITIONS

Kai HAUERSTEIN

Working Definitions Underpinning Administrative Law

Terms used in administrative law depend on the context of the legal system, vary from author to author, and therefore can have different meanings. To reach a common understanding and to avoid misunderstandings, a clarification of terms is needed.

The following terms are called 'working definitions' and not 'terminology'; this section is not a dictionary. The latter would indicate an official adoption or even a common understanding among legal scholars or linguists beyond the borders of this publication. This is not the objective. However, users are free to use the following working definitions as a starting point for discussions for creating a broader understanding.

The working definitions are not substitutes for official definitions and/or translations in the current debate of administrative law in Cambodia.

The development of working definitions is considered to be open and ongoing, and as work in progress these definitions should be adapted over time.

Accountability and liability

The administrative principle of accountability includes that a government official shall be accountable for his or her action, be it on duty or in private and that there should be no impunity.

The administrative principle of liability includes that damages caused by an officials in the line of duty should be paid by the state.

Act

(also used as statute law/ordinance/legislation or law)

An act is a written regulation enacted by the legislature. Under the present Constitution of the Kingdom of Cambodia, the National Assembly is the only body empowered to enact laws. Laws adopted by the National Assembly and reviewed by the Senate are promulgated (brought into force) by the king through 'kram' (royal decree of promulgation).

Administration

The role of the administration, as part of the executive branch of government, is to implement/enforce public laws towards citizens. The administration acts through either direct or indirect agencies (administrative bodies) on different organizational and territorial levels.

- Direct administration means government implements the law through its own organization either through a ministry or its deconcentrated branches. For example the tourism law directly authorizes the Ministry of Tourism to manage matters related to the tourism sector (Article 9, Law on Tourism).
- Indirect administration means that the government transfers its implementation authority to an independent legal body. Independent legal bodies can be divided in (1) territorial or (2) functional administrative bodies. They carry out the implementation of a law (on behalf of the government). For example, the Law on Tourism delegates authority to sub-national administration to organize the sub-national tourism development plan (Article 9), or to issue tourism licences (Article 38).

Administration function

The function of administration can be structured into:

- **Intervening** administration, whose function is to ensure security and establish order in society (a policing function). The administration enforces laws to control/change behaviour that is potentially harmful to society. Characteristic are prohibitions, bans, restrictions, permits, licences and sanctions.
- **Service** administration. Since the end of the 19th century, the function of the administration has also included providing services such as infrastructure, welfare, education, and a social security system.

  The issuance of a licence, however, should not be considered a service in this sense. A licence is the result of restricting a specific activity. For example, government prohibits driving a car unless the driver gets a licence. The licence certifies that the driver is qualified to drive. The primary objective is not to provide a service, but to protect public health from unqualified drivers. Licences are therefore an integral part of the intervening administration and not the service administration.
- **Fiscal** administration, which has the function of generating revenues for state and to pay for public services. This area includes the levy of taxes and related charges.

Administrative body

Administrative body (also used as administrative agency/government institution) is any government agency or organization directly or indirectly charged with implementing laws and regulations.

Administrative code

An administrative code is understood as an open concept, which either compiles or codifies administrative law. For ease of discussion it is used for the codification of administrative principles and procedures, which provides a general legal framework (of rights and obligations) governing the relations between administration and citizens, in particular in the field of bureaucratic decision-making and the delivery of public services.

Administrative contract

In contrast to the administrative act, which is a unilateral decision, stands the administrative contract, which is a bilateral agreement regarding a public law issue. It is used instead of a purely civil law contract where the subject matter of the contract deals with the exercise of a public duty. For example, the administration concludes a contract with an applicant stipulating that a building permit will be issued under the condition that he provides parking space.

Administrative court

An administrative court is a specialized court that deals with disputes between public authorities and individuals arising from the exercise of public authority.

In most European countries administrative courts are separated from general courts. In the United States, administrative courts are tribunals within administrative agencies, and are distinct from judicial courts. Decisions of administrative courts can always be appealed to a judicial court. Other countries have specialized chambers within the general court system.

Administrative decision /Administrative act

An administrative decision means a legally binding decision in an individual case (unilateral). This decision can either be a sanction, for example the order to close a restaurant, or a service, for example to issue a tourism licence or to provide a grant/subsidy.

Specific sector laws foresee a decision-making process, which includes the collection of data, assessment, and the decision. For example, The Law on Tourism states in Article 39 that "Ministry of Tourism or the Sub-National Administration shall inform the applicant of its decision whether or not to grant requested license"; or The Law on Demonstration states in Article 3 that authorities can ban a demonstration, issuing a decision to do so within 48 hours and communicating this decision to the demonstration's organizers.

Administrative measures (types)

Administrative measures are instruments that the administration uses to:

- Prepare generally applicable rules such as policies, plans, and regulations (general measures); or

- Make individual decisions such as imposing sanctions, providing a service, or imposing a penalty (specific measures).

Administrative law

Administrative law deals with the actual operation of government. It provides the legal framework for (i) the organization of the legal framework itself and (ii) the interaction between government and citizen.

The legal framework governing the organization of the administration itself includes:

- civil service
- territorial organization (for example the law on decentralization)
- functional organization such as the organization of ministries, agencies and so on.

The legal framework governing the interaction between administration and citizen (and vice versa) includes

- general administrative law
- specific administrative sector law
- administrative law-making.

Administrative law (general)

General administrative law provides a general standard of how to apply administrative law. Government agencies must comply with this general framework as a minimum standard. This minimum standard often includes rules regarding:

- administrative principles
- standardized proceedings
- standardized instruments such as an administrative act
- standardized complaint mechanisms
- enforcement of administrative decisions
- state liability.

Administrative law (specific)

Specific administrative law deals with various aspects of public life such as maintaining law and order, protecting public goods such as the environment, managing development and the economy, and providing public services. Specific administrative law can complement general administrative law as long as the specific regulation does not conflict with the general regulation

Administrative Litigation Procedures Code

Rules governing administrative court (tribunal) procedures; also referred to as Administrative Court Act.

One way to seek legal protection against administrative action is to file a court action. The underlying litigation process is laid down in the Administrative Litigation Procedures Code. Depending on the legal and institutional framework of a country, citizens may have to first appeal the administrative decision at the next higher level before they can file a claim, or, they may be able to file a claim directly.

Administrative law system

A comprehensive administrative law system includes a number of building blocks such as:

- access to administrative law
- general administrative law
- specific administrative law
- administrative adjudication.

Administrative principles[1]

Administrative principles are general rules that apply in the field of administrative law. Nearly all developed legal systems have such a set of rules. Some of those rules are typically binding for all state action because they are embedded in the state's constitution. Apart from this, administrative law principles can be codified in an administrative code or administrative procedure code, or they can be developed by courts and tribunals or by influential legal scholars. In France the work of the Conseil d'Etat has been very influential, and in Germany many such principles were developed by the higher administrative courts from the latter third of the 19th century, and by scholars, long before they were codified. Such principles serve as guidelines for all legislation, decision-making and action in the administrative field.

Administrative principles often include, but are not limited to: (i) legality, (ii) proportionality, (iii) impartiality, neutrality, and fairness, (iii) good administrative procedure (due process), complaint and remedy, (iv) transparency, information, and confidentiality, clear organizational structure, effectiveness and efficiency.

Administrative procedure

Administrative procedure (proceeding) is the structured decision-making process within the administration. It deals with the process of how an administrative body arrives at a decision.

An ideal administrative process has a beginning, a middle and an end. It also adheres to standardized procedures, for example legality. The generic process includes three substeps (i) initiation, (ii) the core decision-making process, and (iii) the final decision. The main actors involved are the citizen and the government institution (and within govern-

1 The definition of administrative principles including elements are taken from Jörg Menzel's chapter on administrative principles. Detailed explanation are also to be found in the chapter.

ment institutions, government officials in departments). In more detail, the three sub-steps of administrative procedure are:

- Initiation: the decision making process is initiated either by the administrative authority itself or upon the application of a citizen. For example, the applicant fills out an application form. The law should state the timeframes in which the application should be checked and registered.
- Decision-making process: After the application has been received and registered, the application is transferred to the responsible person in the department or division of the responsible government agency. One or more government officials involved in the process check the requirements. The head of department approves or rejects the application, and should provide reasons for the decision.
- The final decision should include:
  – the result of the proceeding – for example, a positive decision to issue a licence
  – information about cost
  – information about appeal
  – information about sanctions and enforcement.

Administrative procedure code

An administrative procedure code is the codification and standardization of rules/principles governing the administrative decision-making process. The term administrative procedure code is used in different ways. In analogy to the terms criminal procedure code and civil procedure code it can be used as procedures governing the litigation process. It seems that the Action Plan for Legal and Judicial Reform of the Cambodian government has used the term in this way.

In other countries, for example Germany, the term administrative procedure code is used for rules governing the decision-making process. In Germany (and many other countries) the administrative procedure code therefore does not consider court procedure, but only the procedure within the administration itself.

Choice of action

Government can (within the limits of the law) act in the form of private law or public law. For example, if government operates a state owned enterprise it chooses the form of private law. In this case civil law governs the operation of the state owned enterprise. The classification whether government acts under private law or public law is important, for example in identifying the jurisdiction of the court (civil or administrative court).

Code

A code or codified law is characteristic for civil law countries and refers primarily to statutes, rules, or principles that have been collected and systemized to provide the legal framework of an important field of law. A prominent example would be the Napoleonic Code (1804), which comprises three components in the field of civil law: the law on persons, property law, and commercial law.

Complaint (objection, redress, administrative appeal)

Complaint is defined as a remedy of an individual against negative administrative measures such as (i) negative administrative behaviour (ii) negative administrative decision, (iii) administrative criminal actions such as corruption, (iv) illegal regulations or (iv) insufficient administrative public management/service provision.

In Cambodia, the term complaint seems to have a negative connotation as it is understood mainly as complaint against the abuse of power. However complaints are not only about the abuse of power, but also about having a different opinion regarding the interpretation of the law and/or correcting the negative effect of an administrative decision.

Complaint (formal/informal)

In Cambodia, formal complaints are understood as complaints handled by a court, and informal complaints are those handled by the administration. The differentiation is theoretical as in practice, courts are not handling administrative complaints.

Therefore, a more narrow definition of complaints could be considered reflecting the fact that some complaints have formal requirements and legal effects and others not. Against this background, a formal complaint (in a narrow sense) means that the complaint requires a specific certain form (written, time-bound) and has a legal effect resulting in a formal decision. Informal complaints have no formal requirements and have no legal effects resulting in a recommendation/notification.

Complaint (internal/external)

Internal means that the complaint is processed directly within the responsible sector ministry. External means that a third/complementary institution/person processes the complaint.

Criminal law

Part of public law, which provides the legal framework declaring what behaviour is criminal, setting out punishment for criminal behaviour, and setting out procedures by which crimes are investigated, prosecuted, adjudicated, and punished.

Damage

In a lawsuit, harm caused by administrative measures, as well as the money awarded to one party based on injury or loss caused by the administration.

Discretion

The right of government officials to act or not to act on the basis of judgement.

Most legal provisions are 'if-then' clauses. If certain conditions are met, then a specific legal consequence (rule) follows. In administrative law this means that if all legal requirements are met the government official has the authority to act. This competence includes two options (1) duty to act and (2) discretion to act.

Discretion to act

The freedom of choice – the official may decide whether or not to act, and if so, how to act. For example, the Law on Assembly states, "if the assembly was not notified, the police may dissolve an assembly". If the assembly takes place without notification, the police has the choice to dissolve or not dissolve the assembly. As discretion is wide open for abuse, it is strictly limited by administrative principles and open to judicial review.

Discretion can also have a negative connotation. Discretionary procedures (as opposed to rule-based legal procedures) are characteristic of authoritarian regimes. Discretionary procedures or a discretionary legal system refer (1) to unfettered discretion that the executive may exercise, or (2) to discretion, which is not effectively controlled by judicial review. These regimes are often described as 'rule by sub-decree' or 'rule by law' (instead of the rule of law). By contrast, rule-based procedures correspond to the notion of due process of law and the effective legal limitation of state power. [2]

Due process principles

Rules/principles applicable in administrative proceedings. Procedural principles can include (i) duty to accept and process application, (ii) right to hearing, information and access to files, and due exercise of description, (iii) duty to decide and give reasons.

Duty to act

An official must perform an act/decision as a result of applying a rule-based procedure. For example, the Law on Assembly states, "if the assembly was not notified, the police must dissolve an assembly". This provision defines a situation: an assembly is not notified. So if the assembly takes place nevertheless, the rule is to dissolve the assembly.

Effectiveness and efficiency

This is another administrative principle, which includes:

2 Chen, AHY, *Administrative Law and Governance in Asia*, p. 373

- administrative regulations shall be practically realistic
- administrative action shall be effective
- regulations shall only be made when necessary and helpful
- regulations shall avoid unnecessary costs.

Equality and absence of discrimination

The administrative principle of equality is another cornerstone of modern constitutionalism and human rights law around the world. In principle, it is widely accepted, but in practice, it is often violated in many countries. It includes the following aspects:

State action shall not distinguish on the grounds of race, colour, sex, language, religious belief, political tendency, national origin, social status, wealth or other status (Article 31 CC).

People who are in the same situation shall be treated in a similar manner. Differences can only be made when they are justified by objective relevant features of the particular case.

Good administrative procedure (also used as due process):

In any administrative procedure, the administration shall follow the law, consider proportionality of all action, and act neutrally and impartially (see principles above). With regards to the decision-making process itself, these additional principles need to be considered:

- Receipt of complaints and applications: the administration has to receive complaints and applications. An acknowledgement receipt shall be provided whenever possible and requested.
- Speedy but considerate decision-making: the administration shall decide on procedures in a speedy but considerate way.
- Transparent procedures and costs: the procedure of decision-making shall be transparent for everybody. Fees for licences and other decisions shall be fixed, general and made public.
- Hearing, advice and information: whenever possible, the administration shall hear the affected person(s) before a decision is made. The administration shall give advice on how the affected person can safeguard his/her rights and interests. It shall provide all necessary information.
- Courtesy: the official shall be shall be service-minded, correct, courteous and accessible in relations with the public.
- Representation: in administrative procedure, everyone shall have the right to be represented by a person of his/her trust or a lawyer.
- Due exercise of discretion: discretion shall be applied in a neutral and consistent way, considering the limits and the purpose of the discretion provided to the authority.
- Providing reasons: administrative decisions shall give reasons when stipulating obligations or negatively affecting the rights or interests of the addressed person or interested third parties.

- Information about remedies: a person who is directly affected by an administrative decision that stipulates an obligation or may affect their rights or interests shall without request be informed about any complaint mechanisms and remedies.
- Impartiality, independence, objectivity and fairness

The following are evident standards of modern state administration

- Every official shall act impartially, fairly and reasonably. The official shall stay away from any preferential treatment. His or her conduct shall in particular not be guided by personal, family or political interest.
- When making decisions, state institutions and officials shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration.
- An official shall not take part in a decision in which he or she, or any close member of the family or anybody else personally close, has a financial or other special interest.
- Every official shall fulfil his/her obligations with integrity and shall not bring the public service into disrepute through private activities.

Law

Law is a generic term that includes written and unwritten rules made and enforced by a state governing the operation of state or the behaviour/relationship of people. The main purpose of law is to maintain social order and resolve disputes.

As a generic term law has many meanings (too many to discuss in a glossary). The following list only provides the most common meanings:

- Law can also mean a set of rules and principles characteristic of a legal system (common law, civil law) or dealing with a specific area of a legal system, for example criminal law, administrative law, copyright law.
- Law (in the civil law tradition) is referred to as law adopted by the legislature, for example the Law on Corruption adopted by the National Assembly.

Law in day-to-day communication is used as law student or law faculty.

Law, international

Means the collection of treaties, customs, and multilateral agreements governing the interaction between nations or non-governmental organizations

Law, customary

Customary law addresses custom as a source of law within the civil law tradition.

Legality

The principle of legality reflects a common standard of constitutional states in Europe, Asia and around the world. It is a cornerstone of 'rule of law'. See also Article 4 ECGAB. Two principles can be distinguished:

- Priority of the Law (No. 1 and 2)
- Necessity of the Law (No. 2)

In the civil law tradition (which is the basis of Cambodian law), the law is mainly defined by laws adopted by parliament. Important decisions have to be dealt with by such laws, whereas technical details can be dealt with in government regulations (such as sub-decrees). The German Constitution, for example, has a clear provision stating that government regulations need a basis in parliament-made law. 'Delegated legislation' is also limited in many common law countries.

Penalties

Penalties can be imposed for the violation of obligations set out in specific sector law. Penalties are often delegated and stipulated in implementing regulation. For example, The Law on Tourism states in Article 66 that: "any violation of the obligations stipulated in Article 48 of this Law may be subject to provisional fine. Any act, which is subject to and amount of the provisional fine shall be specified in detail by Prakas of the Minister of Tourism."

Plans

A plan is a document that operationalizes a government policy. A plan often includes timeframes, goals, activities, and responsibilities. The Law on Tourism, for example, authorizes the national and sub-national administration to prepare national and sub-national development plans for tourism. (Articles 5–8). The plan can also come in another form, for example the spacial plan. The procedure of planning is relevant when realizing projects of territorial impact (spacial planning) or political impact (national development plan).

Policy

Policy is often referred to as general strategy to address a public issue. To implement a policy, a government prepares plans, reforms, specific strategies, laws and regulations.

Private law (also used as civil law)

Regulates the relationship between individuals. Civil law provides rules about contracts, property, employment, family relationships, commerce, and so on, to ensure the smooth functioning of markets and society. It also provides rules for dealing with breaches of private law, which mostly lead to financial compensation. To claim compensation a citizen has to file a lawsuit and ask the court for a decision that can be enforced.

Processes of administrative law

Every government must have implementation procedures to transmit decisions to those who are affected by them. The generic administrative process includes:

- a government agency adopts rules implementing and explaining a new law
- an individual applies for a benefit or licence or is subject to a sanction under the new law
- the agency denies the benefit/licence or imposes a sanction
- the individual asks the agency to reconsider, but is denied
- the individual files an action in court challenging the agency
- the court ruling reverses or upholds agency's decision.

Proportionality

The proportionality principle has two aspects: when taking decisions, the state shall ensure that (1) measures taken are proportional to the aim pursued, (2) a fair balance between the interests of private persons and general public interests is respected.

The proportionality test applies to legislation as well as executive and judicial action – a law shall not stipulate non-proportional restrictions, sanctions or other limitations of freedom, for example: no outrageous punishment in cases of minor offences, no excessive licensing requirements if not necessary for specific reasons; no criminal sanction if an administrative solution is sufficient. The application of the law shall always consider the principle. In particular, the use of discretion always has to reflect proportionality.

Public law

Public law is the body of law that governs the conduct of the state and the relationship between the state and citizens. Public law in relation to citizens is characterized by a hierarchical relationship and the use of power as opposed to private law, where the relationship is characterized as equal.

Public law comprises (1) criminal law, (2) administrative law, which includes all public sector laws such as social law and tax law, (3) constitutional law, (4) state organization law, and (5) judicature/procedure law.

Regulation

Regulation is the body of law enacted by executive power. Regulations reflect the rule-making/legislative authority of the government/administration. See also the sub-definition of administrative law above. Most statues authorize the administration to draft regulations and often regulate technical details.

In Cambodia, the national-level administration issues (i) royal decrees, (2) sub-decrees, (3) decisions, (4) ministerial proclamations, and (5) circulars:

- royal decrees organize the functioning of a public institution, create a new governmental body, or appoint officials

- sub-decree is the most common government decision, implementing laws or other regulations. Sub-decrees can be issued by (i) the Prime Minister's Cabinet, (ii) a ministry, (iii) the Office of the Council of Ministers, and need different signatures depending on the process
- decisions implement either a royal decree or a sub-decree, but expire when the purpose is achieved
- prakas implement a royal decree or a sub-decree setting up the organization of a ministry
- circulars provide clarification of legal issues, instructions, or administrative requirements.

Sub-national administration issues regulations called 'deka'.

State

Max Weber defines 'state' as a compulsory political organization with (1) centralized government that maintains (2) monopoly of legitimate force within (3) a certain territory.

In a democracy the government of a state is separated among the legislature, executive, and judiciary:

- Legislature refers to the National Assembly and its various committees and the Senate. The legislature has the power to make statutes (acts).
- Executive refers to the Royal Government of Cambodia, which includes the prime minister, the Council of Ministers, and ministries which extends to the bureaucracy on both national and sub-national levels. The executive has the power to determine polices and to implement laws. It also has the (delegated) power to make law (regulations) to implement laws.
- Judiciary refers to all courts and judges. The judiciary has the power to resolve disputes by interpreting and applying the law.

In practice, most countries do not strictly separate the three powers, but allow overlapping. For example, the executive has delegated legislative authority to implement laws. In common law countries the judiciary has the authority to interpret law and thus has a law-making function.

Transparency and confidentiality

These are two principles which on first glance might seem to be contradictory. However, transparency and confidentiality are both necessary administrative principles and both have their basis in public interest as well as basic rights.

- The administration shall be as transparent as possible with respect to its general activities and all regulations in place. Regulations (sub-decrees, prakas and so on) shall be made publicly available. Access to information shall be provided according to special legislation.
- No official may disclose or misuse secret or confidential information obtained in his or her position.



ISBN: 978-99950-982-4-7

www.kas.de/kambodscha