What Makes Australia's Judicial System First Grade? Why not in Cambodia?

By: Khiev Sokha, Student Judge Of Royal School For Judges and Prosecutors Of Cambodia
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INTRODUCTION

Through 8 weeks internship at the ACT Magistrates Court, I have learned a lot, asked a lot of questions and visited many places that work cooperatively with the court to enable the Australia Judicial System function such as the Supreme Court, Family Court, High Court, Australia Federal Police Station, Forensic Service Center, Parliament House, Belconnen Remand Center, Quamby Youth Detention Center, and some other entertaining places like Floriade, Tower, the Snow, and so on.

This would not be possible without the help, good hearted and kind support of the Chief Magistrate, Mr. R.J Cahill, and his Research Officer Melita Bozin, Magistrate Grant Lalor, all Magistrates and staff of the court. I also would like to thank Justice Terry Connolly of the ACT Supreme Court, Caroline Plunkett who is a research assistant to Chief Justice T. Higgins and Glyn Watson who is an associate to Chief Justice T Higgins of the ACT Supreme Court, and the people at the Commonwealth Director of Public Prosecution (DPP), Deputy Director Mr. Ian Bermingham, Prosecutor Jon White, Prosecutor Bruce Taggart, Mr. James Carter (Principal Legal Officer), Mr. Geoffrey Gray (Senior Assistant Director), Alan Oakey (Barrister, Senior Executive Service), and Dr. Chris Lennard (Director Operations Support, Chief Scientist) at the Forensic Service Center, and Sergeant Jason Kennedy at the Australian Federal Police (AFP) and Charlie Shore (the Manager of Quamby Youth Detention Center).

Unforgettably, I would like to express my deep gratitude to the Australia Government and the Center for Democratic Institutions for the assistance and support for my internship in Canberra, ACT Magistrate Court and in the Australia National University for its Corruption and Anti-Corruption Course. Meanwhile, I would like to extend my deep thanks to the Royal School for Judges and Prosecutors in always giving me support and opportunities to experience and absorb more knowledge.

From the internship I can see that the judicial system in Australia is of a very high standard. Suddenly a question comes to my thought why Cambodia cannot reach that point. Because of this, I try to think and observe why and what are the factors that can incur the Australia Judicial System to become a first grade system, so modern, and so reliable. And at the end, I would like to give my comments and recommendations on how to develop the Cambodia Judicial System.
Maybe some of my thoughts are not new things already known by my elder generation. But sometimes he or she may think they are not so important or they are impossible to do. However let this young girl, a future Cambodia Judge, try to think in a logical manner and develop the ideas, and share the experiences in order to contribute to the Development of the Cambodian Judicial System.

Nothing is impossible for human beings to do, and it is not too late to start doing things. I know that it is a hard mission to develop, the Cambodia Judicial System as well as Cambodia Country as a whole since each of the factors and sections is interrelated with each other, some time we can not concentrate too much on one thing. But it does not mean that it is impossible to do, only it is complicated and takes time. A very good sentence always is in my mind “Where there’s a will, there’s a way”. The main thing is “start now, start to be effective by doing the right things and to be efficient by making things right”. From the beginning it is always difficult, but do not be deterred, go on! be committed, steady and plan.

Through my study and observation, what makes Australia’s judicial system work, is not only the sophisticated Judicial System alone. What I can see from my internship is that the judicial system of Australia is of the highest quality because of two main factors, the external factor and the internal factor.

1. THE EXTERNAL FACTOR CONSISTS OF THE FOLLOWING:

1.1. THE ECONOMY

Australia

Australia has a very strong and prosperous economy which is rich in natural resources and is a major exporter of agricultural products (wheat, barley, sugarcane, fruit, cattle, sheep, poultry), minerals, metals, fossil fuels, and commodities (coal, gold, meat, wool, alumina, iron ore, wheat, machinery, and transportation equipment) that ensures the GDP and individual incomes are high. The average salary for a civil servant is more than $1000 per week, for the normal worker such as a cleaner can earn at least $10 per hour. With a strong economy, Australia can be assured that each sector of the economy remains strong and efficient.
Cambodia

What about the Cambodia Economy, the GDP is low at roughly around US$3.74 billion\(^1\) with the population of 13.5 million and what we export is mainly the garment sector to the US and the EU (particularly the UK and Germany) since Cambodia’s Garment Industry has benefited from the Garment Quotas allocation system imposed by the EU and US. The ending of garment quotas will end in 2005 because WTO member countries are likely to have a negative impact on the Cambodian Garment Industry. The individual income is also very low. The average salary for a civil servant is only $20 a month. A judge's basic salary is equal to $300 per month. With this low salary, a person cannot fulfill his or her duty effectively and cannot maintain the living standard making it hard to avoid corruption. Many people are under the poverty line. Many families cannot support their children to go to school, and sometimes some families sell their daughters to foreigners to get money to support their daily life.

With a weak economy and every section of the country and administrative structure as well as an ineffective judicial system, health, education, the police force and technology. Finally this leads to the crisis in society and to an increase in crimes because of poverty, impunity, unemployment, lack of education, domestic violence and mental illness. It is similar to having a weak immune system and therefore susceptible to disease.

How to improve the economy of Cambodia:
- Crack down on corruption
- Strengthen government administration and the public service
- Effective management of all related government stakeholders
- Improve tax collection and customs
- Improve heavy industry and technology (Computer monitoring system)
- Attract investments
- Adopt prioritized laws and regulations
- Improve education
- Improve the court system
- Improve the strategy of poverty reduction

\(^1\) According to the Statistic of 2002 from Mekong Capital.
1.2. THE CONSTITUTION

**Australia**

The Constitutional guarantee of judicial independence was embodied in Chapter III of the Australian Constitution, called "Judicature" giving power to exercise the judicial function to the high court and other federal courts or courts invested with a federal jurisdiction. This clear and absolute separation of power between the judicial power and the executive and legislative power gives more value and authority to the judge. Above all, through the Constitution, every one is equal before the law and entitled to justice. No matter who you are, you can be brought to court if you do something against the law. On the other hand Australia is a country, which adheres to the constitution. They absolutely abide by the Constitution which is difficult to amend unless there is a referendum.

**Cambodia**

If we look at the Constitution of Cambodia, Chapter 9 states the independence of Judiciary Power, and the separation of the 3 branches of power, Executive, Legislative and Judicial. In reality, we acknowledge that the factor that affects the judicial independence is not up to external factors alone but is also up to internal factors which relate to the judges capacity, ethic, and court case management. However, in Cambodia external factors considerably affect judicial independence making Judicial Power to be seen less and less independent and authoritative. This occurs through the appointment process, and removal of the judges, the court procedure in which complicated matters put to the Ministry of Justice, the court organization in which the jurisdiction and power of the judges in administrative matters is not clear, the personal security of the judge, the very low budget vested in the court, and lastly the judges low salary.

Chapter III states the Rights and Obligations of Khmer Citizens. The following are the main human rights, as stated in the Constitution:

- Respecting Human Rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights
- Respecting the Covenants and Conventions related to Human Rights, Woman and Children Rights
- Khmer Citizens shall be equal before the law

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2 This point will be explained in “2.2. Court Organization, Court Structure, and Case Management”
3 This point will be explained in “2.1. The Judicial Independence”
- Khmer Citizens shall have the right to chose any employment according to their ability and to the needs of the society
- Obtaining social security and other social benefits as determined by law
- The law shall protect the life, honor and dignity of the citizens
- The prosecution, arrest or detention of any person shall not be done except in accordance with the law.
- Coercion, physical, ill-treatment or any other mistreatment that impose additional punishment on a detainee or prisoner shall be prohibited
- Confessions obtained by physical or mental force shall not be admissible as evidence of guilt.

But how does Cambodia show that the spirit of the Constitution is respected in the sense that most Cambodians living standard is below the poverty line, some families have no rice to eat, and are kept in a continuing cycle of debt. Some people flee to work in a neighboring country this involves a significant security risk and exposure to violence and exploitation. There are many street children, and a lot of children who cannot go to school. Many people are unemployed, and those who are employed have low salaries. Sick people cannot afford proper treatment because they are poor. There is not guarantee that there is no violence by the arresting persons at the police station as there is no monitoring system or camera to watch these people. It is difficult to show that every body is equal before the law and that there is no corruption as there are no anti-corruption laws and the administrative law is not clear, the administrative court is not functioning, and the judge has less and less authority, and independence.

Chapter 15 of the Constitution states to amend the Constitution, the initiative to review or to amend the Constitution shall be the prerogative of the King, the Prime Minister, and the President of the Assembly at the suggestion of ¼ of all the assembly members. Revision or amendments shall be enacted by a Constitution Law passed by the assembly with a 2/3-majority vote. We can see that in Cambodia it is not a difficult process to amend the Constitution. Therefore it needs good political will to secure the precious spirit of the Constitution, otherwise the Constitution will be changed not because of the interest of the Cambodian People but because of the interest of a group of persons.

How to achieve the spirit of the Constitution:

- The need of political will
- Improve Democracy and respect for human rights
- Improve the role of NGOs
-Improve checks and balances of the legislative and executive body
-Educate the public
-Review and eliminate the factors that cause non-independency of the Court

1.3. DEMOCRACY

Australia

Australia is a democratic country. The people have full freedom of expression. The people know about their rights very well. But why does democracy help the court system to work so well? Because the basis of democracy is human rights with equal and fair justice for all people. Every person is equal and receives the same benefit and protection from the law. Moreover when you know about your rights, you will not allow someone to abuse you easily and that makes the judicial officers and others that uphold the law accountable and responsible for what they do. Also in a democratic society people have freedom to choose what they believe in. And by choosing a democratic way of life many people benefit from this system because it is fair and provides clear, open, free, accountable, and efficient structures. With a strong management system plus many people are tertiary educated, capable, and responsible, which helps to keep the system strong and firm and to advance very quickly.

Cambodia

Since the Rule of Law, Human Rights, Access to Justice, Equal and Fair Justice, and Freedom of Expression are not fully guaranteed in Cambodia. We cannot say that Cambodia is achieving the standard of a “Democratic Country”.

How to improve Democracy in Cambodia:
- Educate the Public in terms of democracy, human rights, good ethics, accountability and patriotism
- Improve the Checks and Balances between Legislative and Executive Bodies
- Improve the role of the Media
- Improve NGOs role in Society
- Educate people about Human Rights and the Court Processes
- Build a Culture of Transparency and Accountability
1.4. MODERN TECHNOLOGY

Australia

When I arrived in Australia, I realized that Australia has very modern technology. Every place is equipped and controlled by computers. Information is compiled into a database with a strong management system. This has the effect of speeding up the work of an institution and keeping accurate records.

The ACT Magistrates Court buildings were constructed using advanced technology, and costing approximately $24 million dollars. With a stainless steel coat of arms situated at the top of the concrete pillar located at the entrance to the Magistrates Court foyer. The 4 pillars located in the atrium on the Knowles Place side of the building and the pillars are made out of corrugated iron that includes inscriptions in blue fluorescent lighting. At night the fluorescent lighting provides illumination to the atrium.

There is a great security presence in the building, integrated teleconferencing units, hearing aid induction loop for deaf people, and in every courtroom there is a window for court monitors to view the courtroom. All matters are recorded, using a digital recording system and monitored by an officer either directly through one-way glass or remotely using close-circuit TV. The court can utilize a videoconference link to the Belconnen Remand Center. Moreover there are Remote Witness Close Circuit TV rooms used to enable witness to give evidence without being in the courtroom.

During a trial or hearing, the witness does not need to come in person, they can ask questions and answer and make declarations by telephone. This can make the process more convenient and quicker.

The day I visited the forensic center at the Australia Federal Police (AFP) station I was shown very sophisticated and modern technology for testing different kinds of evidence ranging from fingerprint, blood, teeth, hair, explosive materials, bullets and guns, documents, car, DNA and so on. Also at the AFP station, they have a specified area to interview people who are giving evidence or statements as well as an area for people in custody, which is monitored by computers and recorded by machines to make sure that the police do the right thing. There is no violence towards the arrested persons by the police officers or any other representative of the legal system and the safety of the arrested person is ensured and protected by the law. If this protection is abused by police officers or any other legal representative they can be charged.
I also visited the University of Canberra Court of the Future. This is a simulated court that has the most up to date and modern technology. It consists of the following

1. Smart Board
2. Integrated video conferencing
3. Digital audio and video
4. FTR recording system
5. Law Master Case Management system
6. Touch Screen Control
7. Plasma Screens

This court is for the benefit of law students but has also been used by the ACT Magistrates Court. In this courtroom, they can have an international tribunal where the judge or the witness from a different location can be part of the process, as seen on the screen there is a special high tech computer to interpret from one language to another language what is said by the witness or judge.

**Cambodia**

Cambodian courts consist only of 2 or 3 courtrooms and the courtroom itself is small, has no computer or Internet access. A limited number of courtrooms and judges can cause caseloads to build up because we cannot conduct many hearings a day. And one judge handles many matters. The building of the court is very old and un-repaired. There is no computer monitoring system and the information or case is not put into a database. When a case result is known we cannot even find a proper criminal record in helping to decide the sentence. And there is always the problem of unclear and inaccurate recording of the trial when an appeal is made to the higher court, because any record is made by the court clerk at the time of the trial and when the trial finishes, the court clerk asks the parties to sign the record. The issue is the court clerk cannot remember every thing and inevitably mistakes will happen.

It would be better if the courtroom had sound recording like the ACT Magistrates Court in order to keep accurate records. And it is even far better if we can have all the information of a case from the beginning to end in a database. In Australia, if you want to know about a case, it is accessible and easy to retrieve by case name or that of the accused or plaintiff. Then you have the advantage of the history of the case and the accused at the court. It would be more convenient if the witness in Cambodia could be asked and then answer questions by telephone without being present in the courtroom.
The forensic service in Cambodia is also limited. Forensics can only fingerprint, and examine letters or documents, bullets and guns. With something as complicated as DNA, car, or explosive material, blood, teeth, hair and so on, we have to send the evidence abroad for testing. Therefore the ability to investigate and crack down on crime in Cambodia is not strong. It is not enough or some time it is useless for criminal cases where we only have criminal law, and the judge, but we do not have a very sophisticated and effective forensic service. This can cause impunity because we cannot prove a person guilty beyond reasonable doubt.

How to improve modern technology:

- Training and seek more funds from donors
- Improve access to the Internet

1.5. ACCESS TO JUSTICE

Australia

Australia considers its Constitution and democracy the root of the legal system and also a source of law, which assists people in obtaining fair and equal access to justice. Modern technology also plays an important role in this as well.

Cambodia

In Cambodia where the spirit of the Constitution and Democracy are not really upheld, with an un-prosperous economy, un-modern technology, little police responsibility, no strong anti corruption system and law, not enough judges and courtrooms, not enough law, not many well-educated people, consequently access to justice cannot be assured.

How to guarantee the access to justice:

- Improve the level of respect for the Constitution, democracy, and human rights
- Educate the public about the court, human rights, the roles of parliament and the executive
- Improve the anti corruption system
- Improve technology
- Build up accountability of judges, police, and other related institutions
1.6. NO CIVIL WAR IN AUSTRALIA

Australia

With the commencement of the British Act on 1 January 1901, the Commonwealth came into being and the six colonies became the six States of Australia. Since then Australia has never had a major civil war, which means that the democratic way of life and economy in Australia has always been strong and stable.

Cambodia

Cambodia experienced a very long dark age with a period of economic, social and cultural stagnation since the abandonment of Angkor around the mid 15th century. It was then established as a protectorate under the French in 1863. To the mid 19th century we were still in a very difficult situation where we had to struggle against Thailand and Vietnam. It was even worse during the 1970-1979 Khmer Rouge Regime - remembered as year “0” for us. These factors resulted in slow progress for Cambodia because of a lack of human resources and infrastructure. The Khmer Rouge Regime really changed the good things in Cambodia and the Cambodian people. And it is taking time for us to restore our country.

How to avoid and prevent Civil War in Cambodia:

- Build up the culture of friendship and cooperation among Cambodian People

- Build up the Spirit of Patriotism and the thinking of Common Interest, and the Culture of Accountability toward Cambodian People through education and by leaders showing good examples.

- At school, teach about good ethic, show and analyze good films related to ethic, sacrifice, respected persons, the causes and consequences of wars.

- Take the benefit from Buddhist Religion
- Study the history and make the Cambodian people understand the cause of civil war in Cambodia, its effect and consequences and how to avoid and prevent it.

- Help Cambodian people to know that it is the time to put hand in hand to build and make peace and development in Cambodia for future generations.

- Be equitable among the people and get rid of corruption

1.7. VERY GOOD SYSTEM AGAINST CORRUPTION

Australia

In Australia the System Against Corruption was taken into account seriously and effectively through:

- The Administration of Government
- Judicial System
- The Anti corruption system and law

There is a law on Corruption defined in the ICAC Act. Independent Commission Against Corruption (ICAC) is an independent commission dealing with corruption issues in New South Wales, Australia’s largest state. Its role is to receive complaints related to corruption issues, investigate the cases of corruption and conduct corruption prevention activities such as providing corruption prevention advices, and recommendations, conduct training and education, and respond to requests for speakers. However, recently ICAC has moved forward from a change of investigation to corruption resistance. Therefore part of the main work of ICAC now is to understand how corruption related issues and risks differ among organizations and undertake a major research project.

This is the extract from the ICAC Act - Section 8 - which provides a definition of corruption, public officials and public authorities in the ICAC Act.

Section 8 - General nature of corrupt conduct

(1) Corrupt conduct is:
a. any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

b. any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

c. any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

d. any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

a. official misconduct (including breach of trust, office fraud, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition)

b. bribery

c. blackmail

d. obtaining or offering secret commissions

e. fraud

f. theft

g. perverting the course of justice

h. embezzlement,

i. election bribery

j. election funding offences
k. election fraud
l. treating
m. tax evasion,

n. revenue evasion

o. currency violations

p. illegal drug dealings

q. illegal gambling

r. obtaining financial benefit by vice engaged in by others

s. bankruptcy and company violations

t. harbouring criminals

u. forgery

v. treason or other offences against the Sovereign

w. homicide or violence

x. matters of the same or a similar nature to any listed above

y. any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.
(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

a. matters arising in the State or matters arising under the law of the State, or

b. matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.

Cambodia

While in Cambodia the administration of government is still weak, and the judicial system is not strong enough. Further we do not have a very good system and law against corruption. This makes the whole structure of Cambodia so fragile.

And what Cambodia should think about on this stage is to:

- Make all the Cambodian people understand what is corruption, what are its effects? Why we have to combat and prevent corruption. And what are the causes of corruption?

- Adopt a law on corruption

  - Define what is corruption and decide on penalties
  - Have a transparency and accountability policy (declaring assets and explanation of the activity)
  - Create an independent commission to be in charge of anti-corruption issues
  - Define the missions, composition and mandate of the commission
- Draw the line between the commission and the police activity
- International cooperation

1.8. STRONG RESPONSIBILITY OF THE POLICE

Australia

The federal police of Australia have a very great responsibility to prevent and crack down on crime. All the police officers are very disciplined, and knowledgeable in terms of law and technology. Police stations have cameras to watch every corner of the city. This can help the mission of the police to be more effective and efficient.

Cambodia

The responsibility of the police in Cambodia cannot be strong because of low salary, poor education both in general knowledge and technology, and good ethic, no modern and sophisticated technology equipped for the police and the police station, and the issues of internal management. This can make the mission of the police to serve the country and the people, to enforce order and security in the society and to crack down the crimes cannot be done effectively and efficiently.

How to improve the responsibility of the Police:

- Improve ethics and respect for a code of conduct
- Make police understand how the importance and values of their mission and profession
- Provide compensation and consideration to good and honorable police
- Increase salaries
- Improve technology, computer monitoring program and forensic service
- Review internal management practices

1.9. CULTURE OF TRANSPARENCY AND ACCOUNTABILITY

Australia

A culture of transparency and accountability is part of the Australian people. Consequently, there is a clear separation of power in order to check and balance each other, a strong judicial system, and a very strict law on anti-corruption. More importantly there is a large responsibility and independency of the States and Commonwealth's Prosecutor from the Court and the Executive.
Even the construction of buildings indicates a level transparency and accessibility of Courts and associated buildings many are often open often with glass windows making it easy to view while work is being done, this indicates an open system.

The culture also can give rise to the fast development of the country especially when senior persons are accountable, transparent, and patriotic.

**Cambodia**

The culture of transparency and accountability in Cambodia is seen to be a key factor to building the country and a main thing to start with. After the Pol Pot regime, most of people are concerned with their own gains without thinking of the side effects and the future for younger generations. Because without a culture of transparency and accountability, corruption becomes the way of life in Cambodia at the present time and leaves the country with an undeveloped economy and susceptible to civil war.

How to build the Culture of Transparency and Accountability in Cambodia:

- Improve checks and balances of legislative bodies including the executive

- In every primary school, high school and university provide many good books related to ethics, self construction, accountably, ways and benefits of making friends, being open minded and the method of giving reasoning and explanation.

- Public office doors should be opened while working

2. **THE INTERNAL FACTORS CONSISTS OF THE FOLLOWING**

2.1. **THE JUDICIAL INDEPENDENCE**

**Australia**

In Australia you can see the judge’s independence through:
(The absolute separation of power by the constitution, the method of appointment and removal of judges assuring the security of tenure, criteria to be a judge, good salary, and good budget vested in the court.)

2.1.1. The Absolute Separation of Power by The Constitution

The constitution states very clearly “the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.”

Therefore, the executive power cannot interfere in the judicial power by any means. However the constitution alone cannot fully guarantee the independency of judicial power, a judge needs other things and must try to strengthen his or her own independency by proving themselves capable, reliable, disciplined, strong and respectful.

2.1.2. The Method of Appointment and Removal Can Assure the Security of Tenure

A judge is appointed by the Governor General in Council for a term until seventy years of age (65 years of age for a magistrate) and cannot be removed except by the Governor-General in Council, on an address from both houses of the Parliament in the same session, praying for such removal on the ground of proved misbehavior or incapacity. Meaning, that unless a judge is mentally ill or has misbehave, being corrupt or committed a crime, only then can a judge be removed. Otherwise a judge cannot be removed from his office. And the removal can only be made by the Governor-General with the consent of the two houses of parliaments. However this rarely occurs.

A Judicial Commission is responsible for complaints made against judicial officers. A complaint against a judicial officer about the matters that concern or may concern the ability of behavior of a judicial officer can be made by a member of the public or alternatively referred to the Commission by the Attorney-General.

However the function of the Commission is to investigate a compliant, not to discipline a judicial officer. The role to discipline a judge is given to the Governor-General related to incapacity, and to the review of the court of appeal in the matter of criminal conduct or corruption.
The Judicial Commission, after receiving a written compliant accompanied by a statutory declaration verifying the particulars of the compliant and classifying it as a serious compliant, then refer the complaint to the Conduct Division for examination and the Conduct Division may hold a hearing in public. If the complaint is found to be substantiated, the Commission reports to the Governor-General setting out Conduct Division’s conclusions, including its findings of fact and opinion that the complaint could justify parliamentary consideration of the removal of the judicial officer from office. Then the Attorney-General lays the report before both Houses of Parliament and the Parliament considers whether the conduct justifies the removal of the judicial officer from the office or not. If yes, the judicial officer will be removed from the office by the Governor-General on the grounds of proven misbehavior or incapacity.

Through this process we can see that a judge, unless he or she has misbehaved or is incapable, can be assured a secure tenure.

2.1.3. Criteria to be a Judge

In Australia, they use the word Magistrate for the lowest court, and Judge for the higher court.

To be a judge in Australia, at first, you have to be a barrister for at least 5 years except in New South Wales and Western Australia the minimum time of admission is not required. And to become a barrister, you have to complete a bachelor degree of law, and then spend another 12 months on the job training with any barrister. While, it is different from being a solicitor where you have to obtain a bachelor degree of law and spend another 12 months in legal workshop.

Moving from being a barrister to be a judge can assure that a judge has both sound knowledge and enough experience of court procedure and legal theory. A barrister is the one who defends a case before the court instead of a solicitor who only does a preparation and documentary work at the first stage with the client before going to court. But it is notably that in ACT a solicitor can also appear in court.

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4 However, traditionally a magistrate was promoted to the position after many years as a clerk. There are still some currently serving magistrates who were appointed under the former public service qualification.
5 A barrister is under the control of the Bar Association. And a solicitor is under the control of the Law Society.
6 The relationship between the solicitor and the barrister is that: a client pays a solicitor, and a solicitor chooses and pays for a barrister to defend a case before a court.
Also from being a barrister to a judge, it means that he or she already earns a good salary and wants now only is to gain respect in his career.

For Cambodia, in the past a judge was appointed automatically as long as they have degree or is a former teacher, former judge or court clerk. But at the present, judges have to go through the examination process. If they pass the exam, they have to study for 8 months at the Royal School for Judges and Prosecutors, and they have to take the internship in various courts for another 11 months. After that they have to take a final exam. When these processes are completed successfully they will be appointed as judges.

2.1.4. Good Salary

The Constitution of Australia states that a judge shall receive remuneration as the Parliament may fix but the remuneration shall not be diminished during their continuance in office.

Actually, a salary for a judge is $250,000 per year with a right of pension and half of the salary. Meaning a judge can earn around $300 per hour. And a salary for a magistrate is around 70% of a judge's salary which is equal to around $190,000 a year with different entitlements to the pension. With this good amount of salary, it can make a judge concentrate on the work and produce a good result of judgments.

While in Cambodia the salary of a judge is $300 per month which is hard to maintain the family properly including the expense for supporting children to get a higher education, other ceremony participation and general living costs such as electricity and gasoline. If a judge has a big family, this salary would be come even more challenging so that a judge has to seek other resources that can cause a chance of corruption and inefficiency in job implementation.

2.1.5. Good Budget Invested in the Court

We can see that there is a good amount of money invested in the court system as the result of the modern and high technology of the court construction, the human resource of the court, and the computer monitoring system of the court work. With this, it makes the court system of Australia, one of the most advanced in the world. Adversely the courts in Cambodia are facing shortages in financial resources since the budget line for the courts falls under the Ministry of Justice and the Ministry of Justice itself receives only 0.3 percent of total
national budget\textsuperscript{7} Such a low budget leaves the court of Cambodia weak and unsophisticated.

\textit{Cambodia}

\textit{What About The Judicial Independence Of Judges In Cambodia.}

First I think we start with how can a judge show his or her independence?

Even though the constitution and the international instruments ensure the independence of the judges, it remains the independence of judges must be seen by the public a separation of power through the way of nomination and the disciplinary sanction to the judge and the proud of an individual judge by proving to be knowledgeable (criteria to be a judge), reliable (adhere to the code of conduct\textsuperscript{8}), no corruption (good salary), reasonable and impartial judgment, as well as the good management in the court system itself (numbers of judges, how the judge works, judges and prosecutors, independent and enough budgets vested in the court).

\textbullet \textit{The Guarantee of Cambodian Judicial Independence in The Constitution}

The guarantee of the Judicial Independence in the constitution was embodied in Chapter 9 “the Judiciary”. Article 109 states “The Judicial Power shall be an independent power. Article 110 states “Only a judge shall have the power to adjudicate” Article 111 “Judicial power shall not be granted to the legislative or executive branches”.

But how to achieve the spirit of the constitution is another question that we have to think about.

\textbullet \textit{The Method Of Appointment And Removal Of Judges}

\textsuperscript{7} According to the Statistic in the year 2000 in Legal and Judicial Reform Strategy for Cambodia prepared and presented by Sok Siphana, Secretary of State for Ministry of Commerce and Member of Steering Committee for Legal and Judicial Reform

\textsuperscript{8} Until now Cambodia has no Code of Conduct for Judges and Prosecutors. We are now in the process of drafting the code.
In Cambodia, the Supreme Council of Magistracy plays an important role in nominating or disciplining a judge.

The Composition of the Supreme Council of Magistracy is:

1. The King, President
2. The Minister of Ministry of Justice, Member
3. The President of the Supreme Court, Member
4. The Prosecutor-General of the Supreme Court, Member
5. The President of the Appellate Court, Member
6. The Prosecutor of the Appellate Court, Member
7. Three Judges, elected by judges, Member
8. Three Judges, also elected by judges, Alternate Members. They replace an absent of full member (elected judge)

The Supreme Council of Magistracy decides and proposes to the king the appointment, transfer, leave of absence, delineation of duties, and dismissal of judges and prosecutors”.

When related to the appointment, transfer, leave of absence, delineation of duties, and dismissal of judges and prosecutors, it is the role of the Ministry of Justice to draft and submit a Royal Decree to the King.

While in the matter of disciplinary there is no role of Minister of Justice. It is the role of the Council of Discipline, which is composed of members of the Supreme Council itself, presided over by the President and the Prosecutor of General of the Supreme Court. But if the Disciplinary Action against Supreme Court judges or Prosecutors-General of the Supreme Court, the meeting to give the discipline is chaired by the King or his representative. The meetings can be participated by others. But the word “other” is not specified by the Law on Functioning of the Supreme Council of Magistracy. The decisions of the Council of Discipline are final and binding.

Through this process we can see that even though the minister of justice, who is the one in the executive branch, is the member of the Supreme Council of Magistracy but he is not taking part in disciplinary action, which can give rise to the transfer or dismissal of a judge and even at the last paragraph of article 2 of the law on the functioning of the Supreme Council of Magistracy itself added the clause that "in case of incompatibility, the minister of justice shall be replaced by a leader of the Ministry of Justice". However it would show 100%
of independence and transparent if without the presence of the minister in the Supreme Council of Magistracy.

Another thing is that the one who decides and give the disciplinary action to a judge is done by the superior judge as noted in the description above no other person takes part in the decision. This can affect the individual independence of a judge while fulfilling the duty in the court. And another problem is the decision of the Council of Discipline is confidential, final and binding. So if a judge, who thinks that the Disciplinary Action is not right, he cannot appeal to anywhere. Interestingly, since the Code of Conduct for Judges and Prosecutors does not currently exist, therefore we do not now what are the standards or reasoning for the decisions of the Council to be based on. Also there is no one or institution to monitor the above council. These above mentioned factors could be dangerous and should be taken into account.

● **Criteria To Be A Judge in the Past and at the Present Time**

As noted the Khmer Rouge regime brought Cambodia bad luck, they destroyed everything, the infrastructure, and human resources. They killed nearly all educated people. After the Khmer Rough regime we faced the issues of lack of capable human resources. To be a judge in Cambodia, we can view the following Steps:

- After the Khmer Rough regime: a judge is appointed automatically from the surviving educated people especially teachers and those who had been working in the court in the past.

- Later on, in August 1994: there are an additional 44 training judges chosen by way of taking exam\(^9\) organized by the Ministry of Justice with 6 months internship in the courts, various ministries, national assembly and national bank. Finally they have to take another final exam. They become judges in 1997 by the appointment of the Supreme Council of Magistracy.

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\(^9\) Criteria to be eligible for the exam:

1. Have a diploma of secondary legal study and 6 years prior experience in legal institution.
2. Be a civil servant with a high school degree.
3. Have completed legal studies at the border camps.
4. Those who had law degrees from foreign countries were automatically admitted to training.
At the present: recently in year the 2003 the Royal School for Judges and Prosecutors was established in order to train professional judges and prosecutors. Now to be a judge, a person has to go through the School. The criteria to be eligible for the exam is a proven a bachelor degree and to be less than 35 years of ages. There are 55 students in which 6 are females in the first generation (8 months for theory learning at school, 11 months for practical internship in various courts, plus another final exam.)

For the judges who were appointed right after the Khmer Rough regime and the ones who were appointed in 1997, the cases related to commercial matters (especially the matter related to company and copy right law) can be the problem for them because in the training they were taught only criminal and civil law (Contract and Family Law). Some judges also have limited ability to deal with cases in relation to land law. In practice a judge has to settle every kind of case which can not produce a good judgment in every case because a judge has no specialization in a specific field. Another thing is the ability to integrate into the international arena because of the limitation of the knowledge of globalization, the international languages and the international laws.

For the youngest generation in the year 2003, besides the focus of theory studies that have to be equipped with, another concern is to strengthen their ethics. Because they are fresh and they are the hope of the Cambodian Society. The people have a very high expectation toward them. It is not enough to know how to work as a judge, but also to know how to become a good judge. The judicial development mainly depends on them. Even though some of them are young, but age is not the problem, the problem is ability and accountability. What they have to do is to build a professional culture and the feeling of being one chain. If one link is broken, the chain also brakes. They have to understand this deeply in order to contribute to the Judicial Development in Cambodia.

To contribute to build up the Judicial System starts from building a very good individual judge. It is not different from building a good society starting from building a very good family because family is a cell of a society.

And how to teach about the Code of Conduct is not to remember all of them but to understand why they should behave as the Code of Conduct states, what will be the effects if they don't follow the Code of Conduct, understand the issues that can cause a break to the judicial independence and integrity, and the importance of the judicial function in a society, the expectation from the public toward a judge, why the standard of being a judge is different from other normal
persons, and how to show a judge reliability, accountability, and respect to the public. To understand these, it makes judges feel more responsible and it can help judges to create a professional culture.

What should be done to improve the judicial independence of Cambodia?:

-Respecting the Constitution (guarantee the separation of power)
-Participation of the Executive
-Reform the Supreme Council of Magistracy (In terms of Composition, mandate, the basis and processes of giving disciplinary action, participation from the public, open decision for appeal, and think of who guards the guard)
-Improve the process of selecting judges
-Seek more funds for courts
-Strengthen the code of conduct for judges and prosecutors by adopting the code of conduct and efficiently convey the code of conduct to judges and prosecutors
-Reform court organization and case management
-Improve the reliability of the court by:
  -Keep building the capacity of judges and the respect for the code of the conduct
  -Increasing the number of judges
  -Increasing the salary level for judges
  -Specialized courts
  -Improve cooperation of involved institutions (police, forensic service)
  -International co-operation (extradition policy, international law and human rights)
  -Reform case management
  -Improve the court proceeding by reviewing the procedure of the court.

2.2. COURT ORGANIZATION, COURT STRUCTURE, AND CASE MANAGEMENT

(Court Structure and Jurisdiction, Various Court Sections, Human Resources In The Court, Number Of Judges, Specialized Courts)
Report On: Lesson Learned
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2.2.1. COURT STRUCTURE

High Court of Australia (1 Chief Justice and 6 other Justice)
(Two types of Jurisdiction: Original and Appellate)

Federal Court of Australia
(Full Court of the Federal Court of Australia)

Supreme Court (States)

District Court/County Court

Magistrate Court/ Local Court

ACT Supreme Court (4 resident Judges, some Visiting Judges and 6 Masters)
- Appeal Court
- Trial Court

ACT Magistrate Court (11 magistrates and 6 Tribunals)
- Coroner Court
- Children Court
- Court Rooms
- Tribunals/ Hearing Rooms
- Conference cells for family matters, domestic violence and small claims

Federal Court (a writ of mandamus/ an injunction sought against an officer of the Common Wealth, bankruptcy, corporation, industrial relations, taxation, trade practice, and election)

Family Court of Australia (dissolution and nullity of marriage, custody and welfare for the children, maintenance and the settlement of property between the parties)

Federal Magistrates' Court (Concurrent Jurisdiction with Federal Court with less complex matters. In family law the amount of money for property settlement is less than $700,000 or more with the consent of the parties, summary order, parenting order (residence of a child, contact, maintenance, and specific issues, and child support)

By: Khiev Sokha, Student Judge Of Royal School For Judges And Prosecutors Of Cambodia
During Internship In ACT Magistrate Court, Canberra
28 August-21 November 2004
The court structure is divided into the federal, the state and territory. The High Court of Australia is the final court of appeal whether decided in Federal, State or Territory. For the federal, it was structured into the Federal Magistrates Court, Federal Court, and Full court of the federal court of Australia which has jurisdiction under Australian federal law such as trade practices, administrative law, taxation matters, intellectual property, maritime matters, and corporation matters as covered by the corporation Act 2001.

There are 3 levels of court structures in each state that is Magistrate Court, District Court, and the Supreme Court (which consists of appeal courts and full courts). While there are only 2 levels at the ACT territory because of a smaller population compared to the states. The ACT court structure is Magistrate court and Supreme Court.

2.2.2. Court Jurisdiction

In criminal matters, a Magistrate has only the power to deal with a matter that is summary in nature – where the period of imprisonment provided in the statute setting out the offence is imprisonment for a period not exceeding one year or where the penalty provided is a fine only. A magistrate can also deal with some indictable matters where the defendant elects for him to so deal with it – where in the statute setting out the offence the period of imprisonment doesn’t exceed 10 years or 14 years for property offences. If the Magistrate deals with the offence summarily he can only impose a penalty of 2 years imprisonment for each offence. A sentence of imprisonment is not to be imposed in the ACT unless the court after considering all other sentences is satisfied that no other penalty is appropriate. If he considers that a term of imprisonment is appropriate he must state reasons for so deciding.

In civil matters, the jurisdiction of the Magistrate Court is determined by the amount of money, like the following:

- Small Claims: Less than $10,000 exclude the dispute in respect of residential tenancy (found in part XXII of the Civil Jurisdiction ACT in 1982)
- Civil Claim (above $10,000 to $50,000 (found in the Magistrate Court Civil Jurisdiction Act 1982)

By: Khiev Sokha, Student Judge Of Royal School For Judges And Prosecutors Of Cambodia
During Internship In ACT Magistrate Court, Canberra
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In civil claims, it was divided into 2 kinds:

- ordinary claim which is for an un-liquidated amount of money for example you have a motor accident case, in this case the damage can not be shown by the exact amount of money, so you need the court to asses this amount.

- special claim which is for the liquidated amount (e.g. you have a case where someone owes money, so you have to set a fixed amount how much has to be repaid).

The separation of the jurisdiction in criminal matters and civil matters between the Magistrate Court and Supreme Court is very useful in the sense that in criminal matters the jurisdiction is divided according to the seriousness of the offences. And in order to appeal to the High Court, a party has to get a special leave which means getting permission to appeal. Only one case in 10 can get leave to appeal. “Special Leave” is before one judge. If leave is granted, the hearing of the appeal is before three or five judges according to the matter.

The tests for “special leave” are:

- related to something sufficiently important
- different view of interpretation of law across the states
- providing guidance for other cases

The division of jurisdiction according to the seriousness of the offences and the test of granting special leave can help the case run very fast and produce a quick decision so that the parties don't need to wait for years for a final decision. Especially criminal cases always give rise to damages. Therefore, the other parties can get rapid compensation, reduce costs and losses.

Interestingly, there are many good points in Civil Proceeding which will be pointed out in the following:

1. The jurisdiction is divided according to the amount of money. This can help the movement of the case run quickly and reduce caseloads.
The parities can get a quick result so they can reduce cost and loss to their business.

2. The loser has to pay the legal cost\textsuperscript{10} to the winner. This is good because before the plaintiff decides to sue somebody, he or she has to make sure that he has a good cause, not just to bring trouble to someone or waste the court time.

3. If a party fails to submit within a particular time limit, the case can be dismissed or they have to pay the cost for the delay. And if a party fails to submit a defence, the other party can seek for default\textsuperscript{11} or interlocutory judgment from the court. The period for presenting the defence is usually in the Small Claims Court within 14 days, for Civil Claims it is 21 days. There is also a discovery from the 3\textsuperscript{rd} parties by way of Subpoena (it is the court order which requires to produce documents for court).

E.g. The report from National Health Insurance for Personal Injury Subpoena to the doctor.

This is good because in each trial each side knows the story, evidence, strength and weakness of the case. The process of combination the pleading, the statement of claim, which states the nature of claim, the amount of damages, and the discovery, is designed to encourage the settlement. And it is also good in the sense that the lawyer can give good advice for settlement.

4. there is a strict rule of evidence. For the evidence, which is not showed to the other side, whether supporting or damaging the claim, cannot be introduced when comes to the hearing.

\textsuperscript{10} It is in contrast to the American System in which the Jury Trial was used in civil cases, the judge does not make the order for the loser to pay legal costs. However the judgment sum can be very high in terms of the figure of compensation or impunitive damages).

\textsuperscript{11} Default Judgment was used in the case for the liquidated amount of the money. While Interlocutory Judgment was used in the case for the un-liquidated amount of the money.

By: Khiev Sokha, Student Judge Of Royal School For Judges And Prosecutors Of Cambodia
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When submitting new evidence after the discovery stage, late evidence which can be allowed is the expert report and other evidences in case the parties have good reasons. However, the trial will be adjourned every time of submitting late evidence. And the parties who produce the late evidence have to bear financial penalty for the adjournment.

5. Pre-Trial Conference works and small claims are done by registrar. When the parties are ready, the registrar or deputy registrar will organize a pre-trial conference to allocate a hearing date. And the registrar will ask the party whether all the experts have been served, about the medical report, and whether the witness or the expert will come in person at the trial or will be questioned through the telephone. If the parties say that the expert will come to the trial in person, the registrar will ask the reason why he needs to come in person. The delegations of the works can help to reduce the workloads from the magistrates and judges.

6. Question witness and expert through telephone: Because dealing by telephone can save a lot of money. Instead of spending money for the flight, and at the same time he can do other works like seeing other patients if he is a doctor. And the plaintiff needs to pay the fee for only half an hour for the expert time to answer questions through the telephone. And the registrar will ask also the prospect for settlement (discussion of dollar amounts) and push parties to a settlement and talk about the range of damages. If there is no settlement the registrar will list a hearing date. The conference between the registrar and the parties is confidential. The registrar keeps the file separately from a judge.

2.2.3. Case Proceeding

The following is the summary chart of the Criminal and Civil Proceedings in ACT Magistrate Court:

SUMMARY MATTER

By: Khiev Sokha, Student Judge Of Royal School For Judges And Prosecutors Of Cambodia
During Internship In ACT Magistrate Court, Canberra
28 August-21 November 2004
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*During Internship In ACT Magistrate Court, Canberra*  
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**THE SUMMARY CHART OF THE CIVIL PROCEEDING**

<table>
<thead>
<tr>
<th>Ordinary Claim</th>
<th>Special Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unliquidated Amount</td>
<td>Liquidated Amount</td>
</tr>
</tbody>
</table>

**No Defence**

- **21 days**
  - Interlocutory Judgment (By Deputy Registrar)
  - Court Assessment For Damages

**Defence**

- **21 days**
  - Pre-Trial Conference (By Deputy Registrar)
  - Settled
    - Consent Judgment (By Deputy Registrar)
    - Court
    - Judgment (Magistrate)
  - Not Settled
    - Court Assessment For Damages
    - Consent Judgment (By Deputy Registrar)
    - Court
    - Judgment (Magistrate)

**No Defence**

- **21 days**
  - Default Judgment (By Deputy Registrar)
  - Settled
    - Consent Judgment (By Deputy Registrar)
    - Court
    - Judgment (Magistrate)
  - Not Settled
    - Pre-Trial Conference (By Deputy Registrar)
2.2.4. Various Court Sections

There is a good management of a court system. To illustrate, in the ACT Magistrates Court, the court was divided into different sections such as Court Room, Tribunals/Hearing Rooms, Children's Court for persons under 18 years old, Coroners Court, and Conference Cell (for domestic violence, family matters and small claim matters). Why is this good? Because it can help to reduce time consuming processes, and can increase the work so it runs effectively and efficiently.

2.2.5. Human Resources in a Court

Besides the judges, judge associates and registrars, there are many more staff working in the court such as researchers, administrative staff to run the processes of the court in order to research and prepare the information for the court.

2.2.6. Number Of Judges

There are 10 magistrates in ACT Magistrates Courts and 6 tribunals. The population of Canberra is about 350,000. The rate of caseload is 63,500 cases in the year 2003-2004. We can see that there are still caseloads in ACT Magistrate court. The number of caseloads results from an increase in the variety of cases handled by the ACT Magistrates Court. This high number compared to Cambodia caseloads which is low because Cambodia Court only handles criminal cases and a limited variety of civil cases in which one court has around 2000 a year where there are 23 courts in Cambodia. (The exact number of caseloads will be provided later when the information collected while coming back to Cambodia).

The following are the names of magistrates:

The Names and Numbers of Magistrates:

1. Chief Magistrate Ron Cahill
2. Magistrate Michael Somes

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5. Magistrate Karen Fryar (F) 6. Magistrate Shane Medden
7. Magistrate Beth Campbell (F) 8. Magistrate Maria Doogan (F)
9. Mr Grant Lalor
10. Special Magistrate Phil Thompson

In the Supreme Court there are 4 resident judges and some visiting judges from the federal court in case of an increased case load. And there are about 6 masters to deal with civil case.

In the High Court there is a chief justice and six other justices.

2.2.7. Specialized Court (Criminal, Civil, Family, Commercial, Labor, Children, Administrative)

The ACT does not have a specialized court but there are other states. However the ACT Magistrates Court they try to divide cases into separate sections deciding separate matters for example: tribunal sections decides Administrative Appeal, Credit, Discrimination, Guardianship and Management of Property, Mental Health, Residential Tenancy. Whereas, the Magistrates decide Criminal and Civil Matters. Moreover they have Conference Cells for small claims, family matters and domestic violence. The ACT has a specialize family court which deals with dissolution and nullity of marriage, custody and welfare for the children, maintenance and the settlement of property between the parties, and the children court which deals with criminal and traffic charges and summonses against persons who are under the age of 18 years and applications involving children that have been subject to abuse or neglect. Sentencing for the young person can be imposed up to two years. And the way they treat children in the court is really different from adults, all proceedings are closed to the public. The rights of the children are upheld by the Children and Young Peoples Act. The court helps them reintegrate into society with the assistance of family services. The court proceedings are always conducted within the presence of their parents. They also have Coroner’s Court which deals with suspicious deaths, which may be the result of murder or any other cause of death e.g. suicide.

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In contrast to Cambodia in our court we do not have specialized chambers and a judge decides on the matters in front of him. It is not effective and efficient for one person to do everything instead of a specific and specialized one. With specialization, work can be done quickly in an effective and efficient way.

2.3. SENTENCING SYSTEM

Australia

Australia has a variety of sentencing systems, which is aiming toward giving serious penalties for serious crimes but also to rehabilitate and reintegrate people back into a society. Each offence has a penalty attached to it at law. The judge must not impose a penalty more than is provided. A penalty can be either a fine or imprisonment or both. However, there are other penalties that a judge can impose instead of imprisonment or a fine.

2.3.1. Imprisonment

A term of imprisonment is said to be a penalty to be imposed only where no other penalty is appropriate and the court is told what it has to consider when thinking of imposing a penalty – e.g. the age of the offender, whether he has any prior convictions, the effect of the crime on the victim, whether the offender was affected by a drug or alcohol at the time of offending, whether the offender has demonstrated remorse etc.

If the penalty provided is imprisonment the Court can sentence a fixed term – i.e. 12 months. But if it is a sentence longer than 12 months the Court must set a non parole\(^\text{12}\) period. If it is a fixed term the defendant serves that time and the sentence is finished. If it is for two years with a non parole period of 6 months

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\(^{12}\) Parole: a period during which a person is not in jail but is in the Community and is supervised by the Parole Board. The Composition of Parole Board are the people appointed by government, they could be professors or minister of religion. If the person commits any offence or fails to obey a direction of the Parole Board- attend drug rehabilitation-his parole is revoked and he is returned to prison to serve the rest or part of the rest of his gaol term.

A magistrate may say: You are sentenced to be imprisonment for a term of 3 years and a period of 12 months during which you are not eligible for parole.
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the prisoner serves six months and is then “on parole” for the next 18 months. He is subject to the supervision of the Parole Board for that period. If he offends again during that 18 months, the Parole Board can revoke his parole and he returns to prison to serve the remaining 18 months or such part of it as the Parole Board says. The Parole Board is not the Court but is an administrative body.

Other Penalties Instead of Imprisonment or Fine

2.3.2. Conditional release (no conviction)

Without proceeding to conviction after being satisfied that the offence has been proved the court may, having regard to the character, antecedents, age or health of the defendant or the trivial nature of the offence or the extent to which the offence was committed under extenuating circumstances, the court may dismiss the charge or discharge the defendant on his entering a recognizance to be of good behavior for a period of time not exceeding 3 years and will comply with any conditions that are imposed.

(Offence proved. Without proceeding to conviction the information is dismissed. Or the defendant is released on entering a recognizance self surety $200 (with one surety $200) to be of good behavior for a period of 12 months and to accept the supervision of the Director of Corrective Services and obey all reasonable directions of the Director).

Surety of $200 means that if the defendant is of good behavior for 12 months no further penalty is imposed but if he is convicted of another offence within 12 months or he doesn’t obey the directions of the Director he is brought back to the Court and dealt with for a “breach of recognizance” and his surety of $200 is forfeited to the Court (and his surety is also forfeited) and he can be re-sentenced for the offence. When he enters the recognizance the defendant promises that if he does not comply with the terms of the recognizance he will forfeit that amount of money. He does not have to pay that amount when he enters the recognizance, only if he “breaches” the recognizance.
2.3.3. **Conditional release following conviction without passing sentence**

Once the Court has convicted a person it may instead of passing a sentence release the defendant on his entering a recognizance as above with an additional condition – it *may* also impose a monetary penalty

(Offence proved. Conviction recorded. Without passing sentence the defendant is released on his entering a recognizance self in the sum of $200 to be of good behavior for a period of 12 months with the following conditions:

(a) he will be subject to the supervision of the Director of Corrective Services during the period and will obey all reasonable directions

(b) He will reside where directed by the Director

© He will undertake any courses or treatment as recommended for his drug/alcohol addiction

(d) he will pay a penalty of $500 to the Territory to be paid by fortnightly installments of $100 with the first such payment to be made on or before 22 October 2004 and thereafter fortnightly.)

2.3.4. **Conditional release following conviction after passing sentence.**

The Court passes a sentence of imprisonment after recording a conviction and may either suspend the whole or part of the sentence of imprisonment on the defendant entering a recognizance as above.

(Offence proved. Conviction recorded. Sentenced to be imprisoned for a period of 12 months to be released immediately (or after serving 6 months) on entering a recognizance.

If a person fails to comply with the conditions of the recognizance in 2 or 3 above the Magistrate may issue a summons directing the defendant to appear or may issue a warrant for his arrest. When he appears and the breach is proved the court may (in 2) impose such a penalty as it would have imposed or (in 3) order that he serve the suspended 6 months imprisonment or a part of it. The Court may take no action on the breach or may extend the period of the recognizance.

*By: Khiev Sokha, Student Judge Of Royal School For Judges And Prosecutors Of Cambodia*

*During Internship In ACT Magistrate Court, Canberra*

*28 August-21 November 2004*
2.3.5. Community Service Orders

If the defendant is convicted of an offence punishable by imprisonment instead of sentencing him to imprisonment the Court may direct him to perform unpaid work for a number of hours that is a multiple of 8 and not less than 24 hours and not more than 208 hours. The Court may also impose a fine as well as the community service order.

Such an order cannot be made unless the defendant consents to it being made and the court is satisfied that he is a suitable person to perform the work under the order and that suitable work will be supplied to him by the Corrections Office. The Court usually requests a pre-sentence report in which the author advises whether the defendant is or is not suitable for community work. If a person has a physical or mental incapacity he may not be suitable for any such work and so the order is not available.

If the defendant does not comply with the order by not attending as directed for work he will be brought back to the Court and he can be dealt with by resentencing.

2.3.6. Periodic Detention

Where the Court convicts a defendant and would but for the availability of a periodic detention order have sentenced him to a term of imprisonment of not less than 3 months and not more than 24 months it may instead of sentencing him to imprisonment order him to complete a number of detention periods at a detention center. A detention period is from 7pm on a Friday night until 4.30pm on Sunday. The number of detention periods is calculated at the rate of 1 period for each week of imprisonment the person would otherwise have been sentenced to. If there is more than one sentence imposed the Court can order detention periods on each charge and order them to be served concurrently or cumulatively but if it orders them to be served cumulatively it cannot order more than 104 periods in total.

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13 Cumulatively = Added to
Concurrently = At the same time

There are five offences. You are sentenced to 2 years on each of the offences.
1. 2 years
Before imposing periodic detention the Court must order a pre-sentence report which sets out whether the defendant consents to the making of such an order instead of imprisonment and if there is an appropriate place available to serve the order and that it is appropriate for the defendant to attend periodic detention.

During this detention the defendant can be directed to work at, for example, a hospital or some other institution or undertake such study courses as may be of benefit to him. There is alcohol and drug testing and a person is not permitted to remain if he is taking drugs or alcohol.

If the order is not complied with the Court can re-sentence the defendant.

2.3.7. **Fine**

The Court can impose a fine where it is provided for under the Act. Such a fine must not be a “crushing” penalty. The means of the defendant to pay a fine must be taken into account. The defendant is usually allowed a certain time to pay the fine – e.g. if it is a small fine for a wealthy man he might be allowed 7 days to pay it. If a poor man was fined the same amount he might be allowed two months to pay it. A fine can be ordered to be paid byinstallments – e.g. to be paid by fortnightly installments of $100. In the ACT the non-payment of a fine means that a person’s license to drive a motor vehicle is removed or some other administrative penalty is imposed. Property can be seized and sold to pay the fine.

2.4. **WATCH HOUSE, REMAND CENTER, JAIL, HOME DETENTION**

Since the Jail is not in the ACT but in New South Wales, I was only able to visit the Watch House at the police station, Belconnen Remand Center, and Quamby Youth Detention Center. Though I was told that the jail is even far better than the Remand Center while I already feel that the Remand Center and the Watch House is in the high standard already in terms of the sanitation, the management, education and other services.

2. 2 years concurrent on 1
3. 2 years cumulative on 2
4. 2 years concurrent on 3
5. 2 years cumulative on 4
Totally 6 years with non-parole period 3 years. So you serve in prison only for 3 years.

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One room has only one detainee, and the room is very clean with all basic needs like the toilet, shower, television, books, and so on. The detainees have enough time for exercise, family visiting, and the time for education. At the Quamby detention center, which is only for young persons under 18 and less, they can even earn money while they are remanded with the discipline and the rehabilitation system through education. The day I visited Quamby Detention Center I didn't feel like it was a Remand Center but I felt like it was a beautiful village.

There is another method for detention, which is called "Home Detention". Home Detention allows a person who has been convicted of an offence(s) or has received a full time custodial sentence of no more than 18 months to serve the sentence at any approved place of residence.

Home detention is not available if the conviction or sentence involves:

- Assault (of a serious nature)
- Armed robbery
- Drug trafficking or sale and supply
- A domestic violence offence against a person with whom they intend to reside or have a relationship, and
- Any offence involving a firearm, etc.

A person is also not eligible if their conviction sentence or offence history involves:

- Murder or manslaughter
- A sexual offence or stalking
- If in the past five years, they have been the respondent of a final protection order obtained by a potential co-resident or the applicant has been the perpetrator of a domestic violence offence against a co-resident within the past 10 years.
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Home Detainees are subject to intensive supervision by trained staff. Additionally, electronic monitoring equipment is a tool used to ensure that the Home Detainee complies with the conditions of their order. The Home Detainee will be installed with electronic monitoring equipment called "a transmitter" by a Correction Officer that must be worn for the duration of the Order fitted to the Home Detainee's ankle or wrist. A Home Monitoring Unit is also connected at the approved residence and may be connected at an educational facility or worksite. The Unit receives continuous signals from the transmitter attached to the Home Detainee. If the Home Detainee is not present at the designated location, when they are supposed to be, the monitoring unit will send a message to a central computer, which will convey a message to a Correction Officer.

A home detainee can maintain family relationships while at the same time attend work, educational, rehabilitation, training or vocational programs. A Home Detainee can be directed to undertake appropriated rehabilitative programs such as:

- Cognitive skills training
- Alcohol and drug counseling and/or treatment
- Financial Counseling or
- Counseling and treatment to address their psychological or physical health needs, etc.

If the home detainee breaks any of the Home Detention Conditions, breach action will be initiated. The Court may then revoke the Order. If the order is revoked, the person cannot apply for Home Detention again for the offence(s) for which the Order was initially granted.

2.5. ENOUGH LAW

In Australia there are 3 sources of law:

- Common Law
- Legislation passed by parliament
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-Precedent

The law in Australia is developed more and more according to the new situations and the evolution of crimes in order to keep society in order and peace.

The Law is made according to the types of offences (e.g. the offence against others or property) not according to the types of seriousness of the offence as it was made in Cambodia (e.g. Felony or Misdemeanor)

2.6. JURY SYSTEM

The juror is the person who decides on the fact in criminal cases. There are 12 jurors in a criminal case. The jury trial only exists at the Supreme Court. However, the accused can choose to have a jury trial or not at the Supreme Court.

Each person who is registered on the roll of electors for the ACT is liable to serve on a jury unless he is exempted under the Juries Act or is disqualified.

Disqualified persons are persons who have been convicted of an offence anywhere that was punishable by imprisonment for a period of 12 months or more, is unable to read and speak English, is blind, deaf or dumb, is incapable because of some mental or physical disability of serving as a juror or is of unsound mind.

Persons are exempt if they are within classes of persons set out in the Juries Act as being exempt. There are a number of classes and include doctors, magistrates and judges and their staff, the staff of the Supreme and Magistrates Courts, ministers of religion, pharmacists, dentists, school teachers, firemen, anyone over 60 years of age, police, politicians, barristers or solicitors etc. A person who is exempt from serving on a jury can serve if he does not claim the exemption.

A judge tells the sheriff that a jury panel is required. The sheriff then selects by computer from the roll of electors a number of people to go on a jury list – about 100. The sheriff then makes this list available to the police who then check their
records to see if any of those selected are disqualified – i.e. do they have a prior conviction punishable by imprisonment for 12 months or more?

The sheriff then serves a summons on those left on the jury list and that summons tells them the date they have to attend the Supreme Court for jury selection. The sheriff prepares a list of those who have been served with a summons. That list has the names of the people and their occupation. A card is then prepared for each person with his name and his occupation on it. The sheriff then hands to the Registrar of the Court the list of the prospective jurors and the cards with their names and occupations.

On the morning of the trial the matter is called and the prosecutor presents the indictment and the accused pleads not guilty to the charge or charges on it. The judge then orders that a jury be empanelled. The cards with the names and occupations of the potential jurors are placed in a ballot box and the Registrar of the Court draws them out one at a time and reads aloud the name of the person and the occupation of that person.

The defence counsel then has the right to challenge the person selected before he enters the jury box. This is called a peremptory challenge. The accused has the right to make 8 such challenges and he doesn’t have to give any reason for making them. If there is more than one accused they each get the right to make eight peremptory challenges.

The prosecutor may “stand aside” the person selected before he enters the jury box and may stand aside any number of people without giving any reason for doing so. He may also challenge the person selected and has the same number of challenges as the accused. The difference between standing aside someone and challenging them is that if all the names on the list have been used and there are still not 12 members selected for the jury all those who have been stood aside are able to go back into the ballot box and the process commences again. Anyone who is challenged is automatically not able to be considered for selection again at that trial.

If the accused and the prosecution have each used their eight peremptory challenges and they wish to challenge further selected people they must “challenge for cause” – i.e. they must state why they are challenging such a
person and the judge will decide whether their reason is sufficient for rejecting that person as a juror.

A prosecutor may stand aside people for many reasons – he may wish to get a balanced jury, a mixture of male and female jurors of varying ages and occupations. The defence counsel might tell him that one of the people on the panel lives next door to the accused or the accused’s co-worker is on the panel. If he is selected the prosecutor might think that out of fairness he should stand aside that person rather than have the accused use one of his peremptory challenges. As counsel doesn't have to say why they challenge a person or stand him aside their reasons for doing so are not usually known.

The number of jurors in a criminal trial in the ACT is usually 12 but a Judge has the power to rule that a greater number, not exceeding 16 be picked. This is usually done in trials that are going to be long and costly. Normally if a juror becomes sick during a trial or dies or for some other reason cannot continue as a juror he or she may be excused by the Judge. If the number of jurors left is less than 10 the trial has to stop and there is a retrial. This would not be of much use to the community either from a cost point of view or court time wise and so in long expensive trials the judge will have more than 12 jurors selected. Where he says that there should be 13 or 14 jurors there are 9 peremptory challenges allowed to each side. 10 challenges where there are 15 jurors and 11 where there are 16.

When all 12 jurors have been selected, or a greater number where it is ordered, they take an oath or affirmation to give a verdict according to the evidence. The jury is not permitted to discuss the case with anyone and their verdict must be unanimous. If they are unable to decide or if their verdict is not unanimous there is a retrial. No one is permitted to ask a juror what happened in the jury room and a person is not permitted to tell anyone what happened in the jury room.

**Summary of Jury Selection**

1. Sheriff selects by computer from electoral role e.g. 100 names
2. Issue 100 Jury Summons
3. Serve Summons on 100 people
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4. People apply for exemption
   - If you are older than 70 years
   - If you have earring problem or other exemptions as set out in the Act.
     E.g teachers, emergency services, lawyers, firemen, ambulance drivers.

5. Sheriff can exempt some.
6. Day of trial at court.
   70 Jurors on Panel

   (i). Some can apply for exemption
   E.g. (a) Know the accused
        (b) Know a witness
        © Runs a small business
   (ii) Nam are selected

Prosecution and the defence counsel are given a list of the Jury Panel, which only has the Jurors’ number from 1-70, and his name and occupation e.g. 2nd Bill Smith engineer

7. Selection

   Number in a box – same number as People on Panel- 1-70
   Registrar of the Supreme Court selects a card at random or secretly, number of name read out and Person stand-up.

Why the jury system is good:

1. Leaves judges free from deciding on facts and to gain more respect and less criticism from public, meaning that the duty of the judges is to apply the law and declare sentences therefore the judges seldom can incur censure.
2. The jurors are chosen randomly
3. The people are well educated
4. High possibility of security
5. Low chance of corruption

The trial by jury will not probably work in Cambodia because of:

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- Low education
- No Security
- Corruption

2.7. INDEPENDENCE OF PROSECUTOR FROM THE COURT

Australia

The independence of the prosecutors from the court and political arena was given by the Act of Director of Public Prosecution in 1983. Even though some decisions of DPP have to be asked to the Attorney-General pursuant to section 8 of the Act relate to a particular case since he is a First Law officer responsible for the Commonwealth criminal justice system and accountable to Parliament for decisions made in prosecution process. Still the guidelines or directions which may be given by the Attorney-General may only be issued after consultation with the Director of DPP and must be published in the Gazette and tabled in each House of Parliament.

The prosecutor office is separated from the court and a prosecutor represents the police at the court. It was seen that the system is fair, open, responsible, and efficient in the sense that the prosecutor brings a case to trial only those against whom there is an adequate and properly prepared case and who it is in the public interest should be prosecuted with the explanation in public to justify their policy and functions.

Cambodia

While in Cambodia the prosecution office is in the court. This more or less can affect the function of prosecutor through the relationship between the prosecutor and judges and the influence of superior power of the president of the court to prosecutor. A prosecutor seems to be under the power of court president and under a hierarchy control by the prosecutor general, and ministry of justice. It even makes a prosecutor have less power and independence in prosecuting someone since in a complex matter, a prosecutor has to ask the ministry of justice first before making a prosecution and most cases that the prosecutor fails to prosecute because being afraid of the power of the executive body and his personal security.
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2.8. ADVERSARIAL SYSTEM v. INQUISITORIAL SYSTEM

Australia

In Australia, the adversarial system is chosen as a system of law. The court only decides what the parties asked them to decide. The judge does not ask questions but just listens to the arguments and sees the evidence provided by prosecutor or barrister; this is different from the inquisitorial system where the judge tends to investigate the truth of the case. In the inquisitorial system the judge asks questions in order to find more evidence if he thinks that there is not enough evidence to find the person guilty or not guilty.

Advantages and disadvantages of adversarial and inquisitorial system

Because in a criminal case, the rule of beyond reasonable doubt is compulsory and respected, the accused do not need to find the evidence to prove his innocent. The burden of proof is vested in prosecutor. If his evidence is not strong enough, the prosecutor will lose the case. The prosecutor and barrister are the active persons in the case. This ensures that human rights are completely respected. In flagrant offences, the police can decide to let the offender free or come to the prosecutor to go on with the prosecution. If the offender is prosecuted, he will be taken to the court and the court will decide to release on bail or put in custody.

In non-flagrant offences, the police submit a brief to the prosecutor and the prosecutor considers preparing the charge or not. If there is a prosecution, the prosecutor represents the police before the court.

In Civil Case, the judge does not see the file in advance, he just comes to the courtroom and listens to the parties arguing and presenting the evidence and then decide the case. This can assure that the judge is neutral and impartial since he does not have the prejudgment.

However, with an adversarial system the judge does not have much power compared to the inquisitorial system. The judge cannot investigate to find more evidence, ask questions, call witness or arrest a person. The prosecutor even has less power than the judge because the offender and the witnesses reserve the right not to talk or cooperate. Therefore it is hard to achieve
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guilty verdicts. On the other hand, since the burden of proof is vested heavily on the prosecutor, the strict rule on law of evidence, and the accused or witness doesn't need to cooperate with the prosecutor therefore the system needs very strong forensic evidence.

Another point is that the judge in an adversarial system does not concern himself so much about the truth, he acts like a referee and allows the parties to interplay in the cross examination of witnesses. This can cause imbalance when the parties are not equal (the rich against the poor).

Cambodia  

Inquisitorial System

The inquisitorial system is used in the process, meaning that the judge has a lot of power to ask questions, orders to find more evidence and can have a person arrested. In Cambodia, we have a prosecutor, an investigating judge, and a trial judge. A prosecutor can prosecute a case and the prosecutor can pass the case to the investigating judge. Since the prosecution can be done with some evidence not "beyond reasonable doubt" therefore the right of the accused cannot be assured, and it can cause the corruption in the process.

When the case comes to the investigation, the judge investigates in order to find the truth or the investigating judge can dismiss the case if he finds that there is not enough evidence to charge the person. In doing so the investigating judge can order the accused or witness to come to court to be asked question, request the police to have further investigation to find more evidence. If the accused failed to appear before the investigating judge, there will be an order to take the accused to the court or to be arrested. If the accused appeared before the investigating judge, the investigating judge conducts an investigation by asking questions and decides if the person will be temporarily detained or released on bail. At this stage, sometimes the accused can be temporarily detained without justified reasoned. Meanwhile, the witness also has an obligation to cooperate with the judge.
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In the system you can see that the judge has a lot of powers to call witnesses to ask questions, order the police to find more evidence, and keep the accused in custody. But without the separation of power, the executive can use the judicial power to prosecute or remand someone in custody due to political reasons.

How to get benefit from an Inquisitorial System:

- Have a clear separation of power
- Improve the ability and responsibility of the police
- Strengthen the independence of prosecutor
- Respect the code of conduct for judges and prosecutors
- Improve respect for human rights

CONCLUSION AND RECOMMENDATIONS

In order to decrease the amount of crime, high penalties alone are not enough since the crime can be related to many other things like social issues, economic issues, political will, and technology. Likewise in order to improve a judicial system, the court alone is not enough we need other participation to make the judicial system work. From this lesson learned, I can say that in order to improve the judicial system in Cambodia we should improve the following factors:

- The whole economy of the country and job opportunities
- The participation of the political will of the executive, related ministries, police officers, and Cambodian citizens as a whole
- Build up the culture of accountability and transparency
- Build up human resources by putting more funds into the courts and through the legal training of the judiciary and practitioners
- Funding more financial resource for courts
- Judiciary and prosecutors' independence by respecting the constitution, no interference from the executive and legislative body, increase judges’ salary.
- The prosecutor should be given more powers but at the same time he has to be independent from the court and executive because the prosecutor plays an important role in initiating the prosecution in order to maintain public order and social security. Further, he is the
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one who can balance and monitor the power of the court and the 
executive by way of appeal and starting the criminal complaint 
process.
- The effectiveness of the Supreme Council of Magistracy 
- Building, logistic and facilities of the courts 
- Technology equipped in the court system especially database and 
computer monitoring system 
- The technology in police stations, the salary and ability of the police 
- The responsibility and ethics of judge, and prosecutors 
- Laws and regulations 
- Court procedures and court management 
- Jurisdiction in settling the case according to the amount of the money 
or seriousness of the case 
- Court organizations 
- Specialized Courts or a Court but specialized chambers (Criminal, 
Family, Commercial, Children, Coroner Court…) 
- System against corruption 
- Study and research on criminology and the cause of crimes in 
Cambodia 
- The building and purpose of remand center and jails with technology, 
sanitation, correctional services, education on good ethics for life, 
vocational training and job opportunities for the purpose of 
reintegration into society 
- Sentencing system 
- Health care system and center for persons who are mentally ill 
- Education young persons and adults in terms of good ethic, 
accountability, and patriotism.