

## Briefing Note

The National Assembly Commission 6 on Legislation and Justice

# Legal and Judicial Reform in Cambodia

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## Executive Summary

Since 2003, the Royal Government of Cambodia (RGC) has set out strategies and an action plan in order to bring about legal and judicial reform. Significant achievements including the establishment of various bodies, the creation of legal instruments and increased capacity building have taken place in order to strengthen the judiciary as well as to modernize the system. In spite of this, many challenges remain including:<sup>1</sup>

- Human resources:
  - There is a shortage of judges, prosecutors, court clerks, and administrative officials at the Ministry of Justice (MoJ) and municipal and provincial courts.
  - Shortage of qualified special judges in the Labor Court, Juvenile Court, Commercial Court, and Administrative Court.
  - Shortage of registration officials in the court registers (Model Court Project).
- Institutional capacity management:
  - Shortage of office buildings in the ministry and provincial courts and residences and offices for judges and prosecutors.
  - Shortage of buildings for dispute resolution mechanisms.
  - Limited budget for MoJ and municipal and provincial courts.
  - Shortage of lawyers for legal assistance.
  - Shortage of budget for processing criminal cases.
  - Limited transportation for field visits.

The RGC has committed to continue to bring about additional results in accordance with the legal and judicial reform strategies as laid out in 2003. The following are the policy suggestions to accelerate reform.

- Continue to increase resources, both infrastructure and budget, to municipal and provincial courts.
- Continue to increase the capacity and number of judges, prosecutors and judicial officers by recruiting young Cambodians through the judicial academy and providing increased training.
- Continue to strengthen judicial ethics and disciplinary actions against delinquent judges, prosecutors and relevant persons, and to fight corruption.
- Expand and strengthen the services and use of alternative dispute resolution (ADR). The efforts to establish “Maisons de la Justice” at the district/Khan level and “Commune Dispute Resolution Committee” at the commune/Sangkat level should be continued and expanded.
- Increase the number of appeal courts.
- Reduce the number of prisoners by applying an innovative sentencing regime and encouraging the use of ADR.

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<sup>1</sup> RGC, National Strategic Development Plan 2014-2018, pp. 9-12.

## I. Introduction

Legal and judicial reform remains high on the agenda of the Royal Government of Cambodia (RGC) in the 5<sup>th</sup> legislature. Since 2003, the RGC has attempted to improve its legal and justice system through various reform programs. The strategy for implementing this reform has since been adopted by the Council of Ministers of Cambodia.<sup>2</sup> The reform strategy revolves around human rights, rule of law and the principle of separation of power.<sup>3</sup> Also, the Plan of Action to Implement the Strategy was adopted by the Council of Ministers in 2005. The RGC has continued to prioritize its reform strategies for improving legal and judicial reform in Cambodia. The implementation of the reform strategy is currently ongoing. Such strategies and actions have, for instance, been laid out in the National Strategic Development Plan 2014-2018 and the Rectangular Strategies Phase III.

Cambodia's modern legal system has been greatly influenced by the French model, (i.e., the Civil Law system) since the country was a French colony from 1863 to 1953 and continued to be applied in Cambodia until 1975. From 1975 to 1979, the legal system was virtually destroyed by the Khmer Rouge regime, and most of the legal practitioners such as judges, prosecutors, and lawyers were killed. The search for survivors, who received legal training prior to 1975, found only seven survivors who were the pioneers in rebuilding the country's legal and judicial system literally from scratch.<sup>4</sup> In the transition period during the presence of UNTAC (United Nation Transitional Authority in Cambodia) from 1991 to 1993, some laws were enacted such as criminal law, judicial law, press law etc.<sup>5</sup> After the general election in 1993, Cambodia opened its border, liberalized its economy and received numerous official development assistance from foreign countries to support nation building. This, and the establishment of the Khmer Rouge tribunal have resulted in Cambodia's absorbing some Common Law practices into its legal and judicial system.<sup>6</sup> To this end, the legal system has been observed as a hybrid system influenced by both civil and common law elements.<sup>7</sup>

This briefing note will provide information on the updating of the legal and judicial system in Cambodia. It will also examine the issues and challenges facing capital/provincial courts with some suggested improvements.

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<sup>2</sup> The Danish Institute for Human Rights (DIHR), "Implementation of Legal and Judiciary Reform in Cambodia," The Evaluation of DIHR Partnership Programme with General Secretariat of Council of Legal and Judicial Reform (CLJR), 2012, p. 8.

<sup>3</sup> Ibid.

<sup>4</sup> Tom Fawthrop and Helen Jarvis, trans., *Getting away with Genocide?, Elusive Justice and the Khmer Rouge Tribunal*, (Sydney: UNSW Press, 2005), pp. 48-49.

<sup>5</sup> Destination Justice, accessed 14 February 2016, <http://www.chbab.net/chbab-net-in-english/about-the-cambodian-legal-system-en>.

<sup>6</sup> Ibid.

<sup>7</sup> Peng, Hor; Phallack, Kong & Menzel, Jorg. 2012. *Introduction to Cambodian Law*. Published by Konrad-Adenauer-Stiftung. p. 8

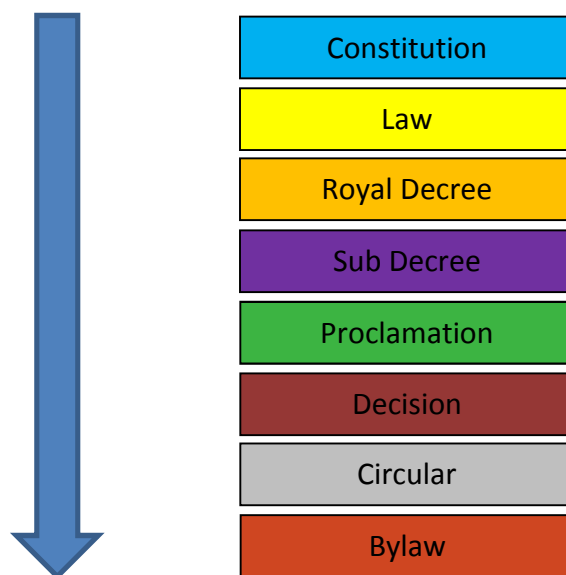
## II. The Current Legal and Judicial System in Cambodia

### 2.1. Legal System

#### 2.1.1 Source of Cambodian Law

The sources of Cambodian law can be categorized into either primary or secondary.<sup>8</sup> Primary sources refer to all legal instruments adopted or issued by the state competent authority, whereas secondary sources refer to “*customs, traditions, consciences, equity, judicial decisions, arbitral awards and doctrines.*”<sup>9</sup> In civil cases, if there are gaps in the law related to the case the court can still proceed to hear the case and deliver a judgment based on tradition, customs, consciences and equity.

Sources and Hierarchy of Law in Cambodia



Source: Peng, Hor; Phallack, Kong & Menzel, Jorg, *Introduction to Cambodian Law*. Published by Konrad-Adenauer-Stiftung, 2012

International law is also considered as a source of law in Cambodia according to the decision of Constitutional Council in 2007. However, according to Article 26 of the Constitution, all the international treaties and conventions shall be signed and ratified by the King after approval from parliament.<sup>10</sup> There is no clear indication in terms of hierarchy of international law. However, since

<sup>8</sup> Ibid.

<sup>9</sup> Ibid. P.8-9

<sup>10</sup> Constitution of the Kingdom of Cambodia, Art. 26.

it has to be approved by parliament and ratified by the King, it could be considered like domestic law.<sup>11</sup>

### 2.1.2 Law Making Process

Draft law can be initiated by the National Assembly, Senate, or Government. It can then be submitted to the National Assembly's expert commission to be reviewed. After discussion, the expert commission will report on the draft to all members of the National Assembly and submit it for adoption. The draft law will then be sent to the Senate for review and comment. At this stage, the bill can be sent back and forth, if necessary. The Senate generally has one month – in case of urgency, 5 days – to do the review. The National Assembly has the discretion either to accept or reject comments by the Senate. Once reviewed, commented and discussed by both chambers, the National Assembly can adopt the draft law and forward it to the King for promulgation before it enters into effect (within 10 days in Phnom Penh and 20 days nationwide). Certain laws, when indicated as urgent, shall be in force immediately after promulgation. In certain cases, the Constitutional Council may examine their constitutionality.<sup>12</sup>

### 2.1.3 Constitutional Council

The Constitutional Council is an independent institution that guarantees the constitutionality of the law, and also has the authority to interpret the laws adopted by Parliament. The council has nine members with a nine -year term. Among them, three are appointed by the King, three appointed by the National Assembly and three by the Supreme Council of the Magistracy. One third of the members are replaced every three years.<sup>13</sup> The council has the authority to solve disputes related to the election of members of the National Assembly and the election of senators.<sup>14</sup>

## 2.2 Judicial System

According to the constitution, the three main powers – legislative, executive and judiciary – are separate and independent of one another. The King guarantees the independence of the judiciary and the Supreme Council of Magistracy shall assist the King to ensure the independence of the judiciary.<sup>15</sup> As far as the court system is concerned, it is a three-tier system which includes capital/provincial court and military court (first tier), appeal court (second tier) and Supreme Court (third tier).<sup>16</sup> The capital/provincial and appeal courts review both facts and law in their deliberation, whereas the Supreme Court with a bench of five judges reviews only the law. In cases where a bench of nine judges is required to sit on the Supreme Court, they will review both facts

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<sup>11</sup> Destination Justice, accessed 14 February 2016, <http://www.chbab.net/chbab-net-in-english/about-the-cambodian-legal-system-en>.

<sup>12</sup> Constitution of the Kingdom of Cambodia, Art. 91 New, 92, 93 New, 113 New and 136 New

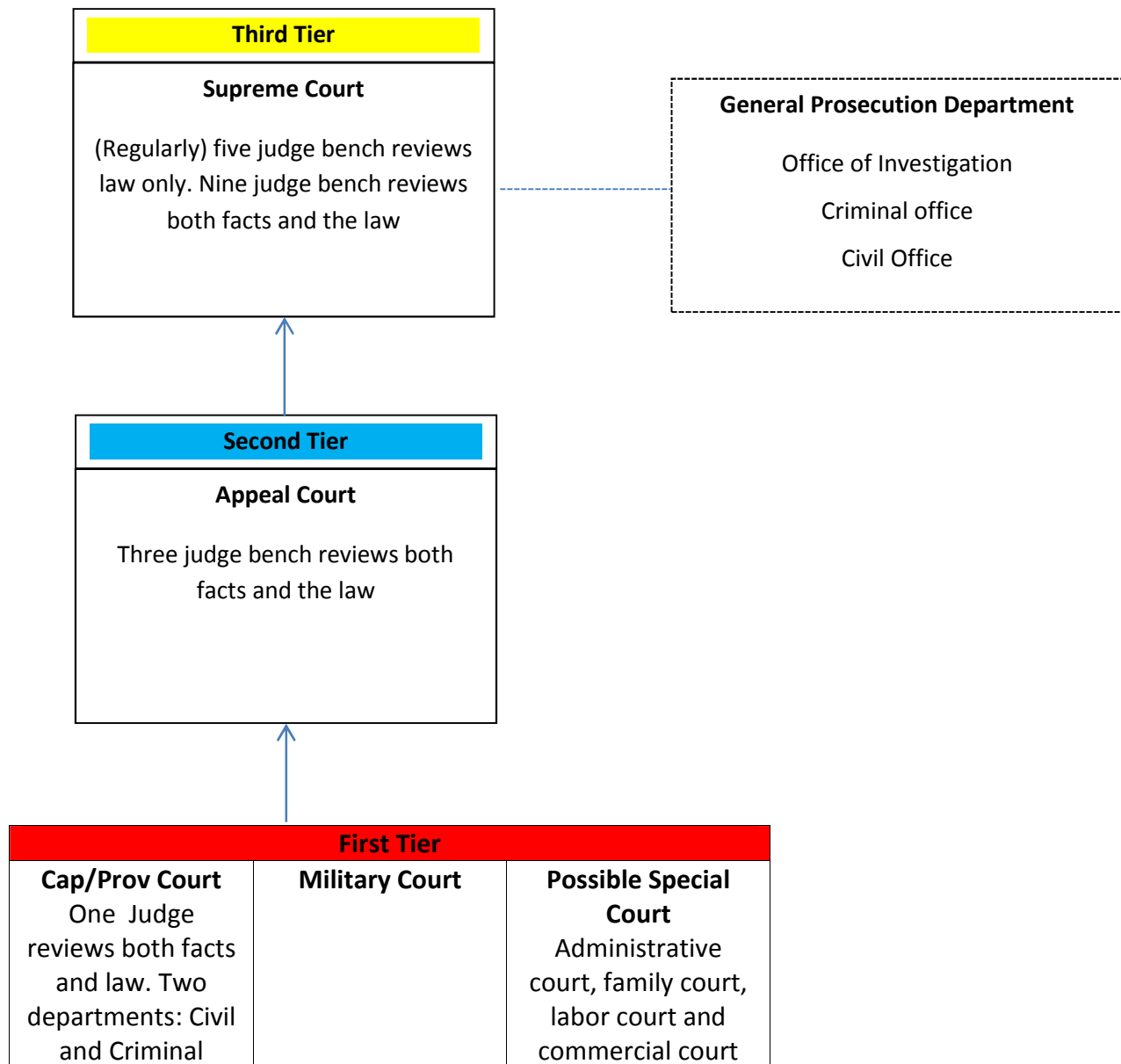
<sup>13</sup> Constitution of the Kingdom of Cambodia, Arts. 136-137.

<sup>14</sup> Constitution of the Kingdom of Cambodia, Art. 136.

<sup>15</sup> Constitution of the Kingdom of Cambodia, Art. 132.

<sup>16</sup> Law on Judicial Organization (2014)

and law in their deliberation. Article 8 of the Law on Judicial Organization provides that the courts at all levels are attached to a prosecution office.



Source: The Khmer Institute of Democracy

### 2.2.1 Supervising and Assisting Bodies of the Court System

The Supreme Council of Magistracy has the authority to appoint, change and dismiss all judges and prosecutors at the request of the Minister of Justice. The body also has authority to take



disciplinary actions against delinquent judges and prosecutors at all levels of courts.<sup>17</sup> The constitution requires it to further ensure the independence of the court.

On the other hand, the MoJ has a role to monitor penitentiaries and to ensure that draft legislation conforms to the existing laws. Furthermore, it is also required to maintain criminal records.<sup>18</sup>

### 2.3 Legal and Justice Reform Efforts

Between 2003-2005, two main documents were developed by the RGC for legal and judicial reforms including the Legal and Judicial Reform Strategy and the Plan of Action for the implementation of the strategy.<sup>19</sup> Seven strategic objectives were outlined in the reform strategy which include 1.) improving individual rights and freedoms 2.) modernizing the legislative framework 3.) increasing access to information related to law and the judiciary 4.) improving the legal process and related services 5.) enhancing judicial services 6.) diversifying the alternative dispute resolution process 7.) and strengthening the mandate and performance of legal and judicial institutions.<sup>20</sup> To achieve these objectives, the Plan of Action to implement the strategy was also developed with 97 priority actions. In the National Strategic Development Plan 2014-2018, the RGC remains committed to continue the implementation of the seven strategic objectives for legal and justice reform.

The Rectangular Strategy Phase III has identified a number of accomplishments in legal and judicial reform efforts including<sup>21</sup>:

- Modernization of the legal framework and in particular, the enactment of the new criminal code, the civil code, the code for civil procedures etc.
- Enhancement of law awareness and law enforcement through legal education, and dissemination of laws and training to relevant officials and law enforcement officers.
- Improvement in strengthening both professional capacity and accountability of judges and prosecutors.
- Gradual increase of budget allocation to the judicial system.
- Expansion of out-of-court settlement mechanisms including the creation of the Center for Legal Services and the National Commercial Arbitration Center (NAC).

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<sup>17</sup> Law on Organization and Functioning of Supreme Council of Magistracy. (2014)

<sup>18</sup> Law on Establishment of MoJ (1996) and Anukret on Organization and Function of MoJ (2000).

<sup>19</sup> Peng, Hor; Phallack, Kong & Menzel, Jorg. 2012. *Introduction to Cambodian Law*. Published by Konrad-Adenauer-Stiftung. p. 17.

<sup>20</sup> Ibid., p.20.

<sup>21</sup> RGC, Rectangular Strategy Phase III, p. 14

In addition to the enactment of laws, other components of the reform strategy have been achieved. These include: including human rights education in the school curriculum; the establishment of a training center for lawyers; the Council of Ethics' capacity strengthening of the Bar Association; staff capacity development for the School of Magistrates and Judiciary; and the establishment of a monitoring system on justice performance.<sup>22</sup> In addition, the RGC has recently pushed the long-awaited three fundamental laws on the judiciary as committed in the National Strategic Development Plan 2014-2018.<sup>23</sup> They include: the Law on the Organization and Functioning of the Organization of Courts: the Statute on Judges and Prosecutors and the Law on the Organization and the Functioning of the Supreme Council of Magistrates.<sup>24</sup>

In addition, the RGC has also put efforts into upgrading the infrastructure of the justice system. Between 2009 and 2013, the RGC set up two provincial courts (Pailin and Oddar Meanchey) and constructed seven buildings and repaired three buildings for courts in the provinces.<sup>25</sup> On another front, the MoJ set up a Model Court mechanism to manage court registers in some areas such as managing statistics, collecting information and providing information in association with litigation) in an attempt to make sure that all courts share the same standards.<sup>26</sup> As a result, twenty seven court registers (civil and criminal books) were created. Training on the court register was also provided to judges, prosecutors, court clerks and justice officers at both the provincial and municipal courts.

However, these changes in the legal and judicial sector are not widely seen because institutional and legal reform can take place without too much public awareness.<sup>27</sup> This requires the RGC of Cambodia to enhance an awareness program to inform the public about its efforts and commitment to improve the legal and justice system in Cambodia.<sup>28</sup>

### **III. Challenges and Policy Suggestions**

Although great achievements have been made in improving the legal and judicial system in Cambodia, challenges and issues remain. Some of these are set out below.

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<sup>22</sup> The Danish Institute for Human Rights (DIHR), "Implementation of Legal and Judiciary Reform in Cambodia," The Evaluation of DIHR Partnership Programme with General Secretariat of Council of Legal and Judicial Reform (CLJR), 2012, pp. 12-13.

<sup>23</sup> RGC, National Strategic Development Plan 2014-2018, p. 108.

<sup>24</sup> The Phnom Penh Post, accessed 13 February 2016, <http://www.phnompenhpost.com/national/cpp-passes-judicial-laws-senate>.

<sup>25</sup> RGC, National Strategic Development Plan 2014-2018, pp. 9-12.

<sup>26</sup> RGC, National Strategic Development Plan 2014-2018, pp. 9-12.

<sup>27</sup> Peng, Hor; Phallack, Kong & Menzel, Jorg. 2012. *Introduction to Cambodian Law*. Published by Konrad-Adenauer-Stiftung. P. 21.

<sup>28</sup> Ibid.

### 3.1. Challenges in Legal and Justice Reform

The National Strategic Development Plan 2014-2018 identified the following challenges in the implementation of legal and justice reform strategies. They were categorized into the following two groups<sup>29</sup>:

- Human resources
  - Shortage of judges, prosecutors, court clerks, and administrative officials at the MoJ and municipal and provincial courts.
  - Shortage of qualified special judges in the Labor Court, Juvenile Court, Commercial Court, and Administrative Court.
  - Shortage of registration officials in the court registers (Model Court Project).
- Institutional capacity management:
  - Shortage of office buildings in the ministry and provincial courts and residences and offices for judges and prosecutors.
  - Shortage of buildings for dispute resolution mechanisms.
  - Limited budget for MoJ and municipal and provincial courts.
  - Shortage of lawyers for legal assistance.
  - Shortage of budget for processing criminal cases.
  - Limited transportation for field visits.

More commitment and additional interventions are required to strengthen the rule of law as well as the legal and justice sector in the coming years. The RGC has expressed its commitment in addressing these challenges in order to bring about greater results in improving legal and justice reform. Such commitment can be found in strategies such as, the “Political Platform” of the Fifth Legislature of the National Assembly, the Rectangular Strategy Phase III, and the National Strategic Development Plan 2014-2018.

### 3.2. Policy Suggestions

The identified challenges will require commitment, innovation, time and resources to bring additional concrete changes to the legal and justice reform efforts.

- Resource and budget is seen as a huge challenge for reform of the judicial system in Cambodia and is perhaps one of the biggest challenges for the RGC to overcome. The RGC has already addressed part of this challenge by providing steady increases of budget allocation to the judicial system. Lack of court budgets as well as adequate salary, pension and benefits has made it difficult for judicial members to perform their mandates and make them vulnerable to bribe taking.<sup>30</sup>

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<sup>29</sup> RGC, National Strategic Development Plan 2014-2018, pp. 9-12.

<sup>30</sup> Ibid. P.35. *IBAHRI meeting with the Vice President of the Supreme Court, 22 April 2015.*

- There is a need to increase both the number and capacity of judges and prosecutors particularly in rural areas. There are only 264 judges in Cambodia amounting to 1.76 per 100,000 inhabitants.<sup>31</sup> Compared to France and Germany with 8.45 and 4.46 per 100,000 inhabitants respectively. In addition, judges are largely based in Phnom Penh.<sup>32</sup> The inadequate number of judges can result in procedural delays for hearing and concluding of the cases. Therefore, increasing the number of judges and judicial officers is important, especially in rural areas. The establishment of the Royal Academy for Judicial Profession and the Lawyer Training Center to recruit and train young Cambodians for the positions of judges, prosecutors and lawyers is an important step in the right direction.
  
- Limitation of data availability related to the justice sector can substantially affect justice reforms. When data is not available, it is hard to assess how effective and efficient the system is. Therefore, a database should be established to track court information such as the number of file cases, how many cases have been cleared and, on average, how long it takes for each case. To comprehensively establish this database, the RGC, and especially the MoJ can work with donor agencies and NGOs. Furthermore, to increase transparency, data should be publicly accessible.<sup>33</sup>
  
- Judicial corruption is an issue not only in Cambodia, but also, in other countries, especially in developing countries.<sup>34</sup> In the workshop on Judiciary Integrity in July 2012, the MoJ Minister of Cambodia emphasized that "*The loss of honesty in the judicial and prosecutorial profession has created a lack of public confidence in the court system.*"<sup>35</sup> Therefore, strengthening the professional ethics and discipline of judges is important and can be done through continuous training for judges and prosecutors.<sup>36</sup> Also, it can be improved through law enforcement related to judiciary members' professional ethics. The RGC has committed to tackle corruption which will improve the performance of the courts and judicial members.<sup>37</sup>

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid., p. 36.

<sup>33</sup> East-West Management Institute, "Legal Reform: Program on Rights and Justices in Cambodia II (2013-2018)," accessed 16 February 2016, <http://ewmi.org/sites/ewmi.org/files/files/programpdfs/EWMICambodiaPRAJII2009.pdf>.

<sup>34</sup> UNODC and Crime Prevention, "Strengthening Judicial Integrity Against Corruption," Global Programme Against Corruption Conference, 2001, p. 4.

<sup>35</sup> UNODC, accessed 16 February 2016, <https://www.unodc.org/southeastasiaandpacific/en/cambodia/2012/07/judicial-integrity/story.html>.

<sup>36</sup> International Bar Association, "Justice versus corruption Challenges to the independence of the judiciary in Cambodia," Report of the International Bar Association's Human Rights Institute, 2015.

<sup>37</sup> See, in particular, Rectangular Strategy Phase III, National Strategic Development Plan 2014-2018, and Political Platform of the Fifth Legislature of the National Assembly.

- The RGC's commitment to expanding the service and use of the alternative dispute resolution mechanism as well as the out-of-court settlement mechanism should be encouraged. The alternative dispute resolution mechanism will assist the provincial court to reduce the outstanding cases and make the process of dispute resolution through provincial court faster for the citizens.<sup>38</sup> . One of the project's components was the establishment of the dispute resolution system called "Maisons de la Justice" at the district level and "Commune Dispute Resolution Committee (CDRC)" at the commune level.<sup>39</sup> Both of these mechanisms have provided an alternative to the court process. By 2010, there were 20 Maisons and 56 CDRCs across the country. The evaluation of this component by independent consultants Laura McGrew and Virorth Doung was rated, despite some challenges, as a success and it was recommended that the mechanism be expanded. The RGC has since established an additional 31 new centers.<sup>40</sup>
  
- The number of appeal courts should be increased. There is only one appeals court in Cambodia and it is located in Phnom Penh. Therefore, access to the appeals court is limited for the poor who cannot afford to travel to the capital. In addition to this, there appears to be no law specifying grounds for appeals.<sup>41</sup> As such, the backlog of cases before the appeals court is also a concern.<sup>42</sup> The RGC has already discussed the option of establishing an additional number of appeal courts in provinces.<sup>43</sup> This effort will not only increase access to justice for the poor and people living in the provinces, but also reduce the backlog of cases before the current appeals court.
  
- Prisons in Cambodia are overcrowded.<sup>44</sup> This has caused problems not only in prison capacity, but also with various social problems such as health, sanitation and making bad acquaintances inside the prisons. In order to reduce the number of prisoners, the court could be creative in applying the sentencing regime. For instance, western countries apply community service and mediation mechanisms for, small and petty offences. This would

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<sup>38</sup> RGC, National Strategic Development Plan 2014-2018, p. 11.

<sup>39</sup> Laura McGrew and Virorth Doung, "Final Evaluation Report of Access to Justice Project in Cambodia," May 2010.

<sup>40</sup> National Strategic Development Plan 2014-2018, p. 11; See also, Laura McGrew and Virorth Doung, "Final Evaluation Report of Access to Justice Project in Cambodia," May 2010.

<sup>41</sup> Koy Neam, *Introduction to the Cambodian Judicial Process*, The Asia Foundation: 1998.

<sup>42</sup> Khuon Narim and Lauren Crothers, "Ministries Discuss New Appeals Courts, Judicial Reform," The Cambodia Daily, 22 January 2014, accessed 18 February 2016, <https://www.cambodiadaily.com/archives/ministries-discuss-new-appeal-courts-judicial-reform-50940/>.

<sup>43</sup> Khy Sovuthy, "Government to Establish New Appeal Court by 2018," The Cambodia Daily, 18 February 2016, accessed 18 February 2016, <https://www.cambodiadaily.com/news/government-to-establish-new-appeal-court-by-2018-108673/>.

<sup>44</sup> OHCHR, Prison Reform Support Programme in Cambodia, accessed 18 February 2016, <http://cambodia.ohchr.org/EN/PagesFiles/PrisonIndex.htm>.

help to alleviate overcrowding and allow the government to allocate budget funds to other programs.

## **Conclusion**

The legal and justice system have been steadily improved through legal and judicial reforms. After the development of the legal and justice strategy and the Plan of Action for the strategy, the RCG has, to date, accomplished significant achievements with the plan. However, issues and challenges remain and they require constant actions and additional policies to ensure a transparent legal and judicial system in Cambodia. These actions and policies may include: increasing the number of judges, systematically recording data related to the legal and justice system, increasing salary and benefits for judges, prosecutors and budget for courts and, improving the ethics of judges and prosecutors through continuous training and law enforcement. Efforts in promoting the use of alternative dispute resolution should be increased in order to avoid overloading provincial/municipal courts and thereby decreasing the backlog of cases currently awaiting trials. Alternative dispute resolution should also bring down the number of prisoners, who are overcrowding many of the prisons across the country. By bringing down the number of prisoners, the state can also save on its prison budget for other important purposes.

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