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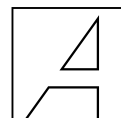
Introduction to **CAMBODIAN LAW**

Hor Peng, Kong Phallack, Jörg Menzel (Eds.)

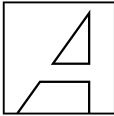
 Konrad
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THE KONRAD-ADENAUER-STIFTUNG

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House No. 4, Street 462, Khan Chamkar Mon, P.O. Box 944
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Tel: (855-23) 996 861/ 726 221, Fax: (855-23) 213 364

Office.Phnompenh@kas.de, www.kas.de/kambodscha

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

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CONTENTS

FOREWORD	1
PREFACE	3
1. OVERVIEW OF THE CAMBODIAN LEGAL AND JUDICIAL SYSTEM <i>KONG Phallack</i>	5
2. THE MODERN ERA OF CAMBODIAN CONSTITUTIONALISM <i>HOR Peng</i>	23
3. CAMBODIAN PRIVATE LAW: A SNAPSHOT <i>KORK Boren</i>	71
4. CIVIL CODE <i>KIYOHARA Hiroshi</i>	97
5. CAMBODIAN FAMILY LAW: DEVELOPMENT AND CHALLENGES AHEAD <i>SAR Senera</i>	135
6. OVERVIEW OF CONTEMPORARY CIVIL PROCEDURE OF CAMBODIA <i>KONG Phallack</i>	153
7. CAMBODIAN ALTERNATIVE DISPUTE RESOLUTION <i>Steven AUSTERMILLER</i>	181
8. THE BASICS OF SUBSTANTIAL CAMBODIAN CRIMINAL LAW <i>PHANN Vanrath</i>	197
9. THE CAMBODIAN CODE OF CRIMINAL PROCEDURE: SOME REMARKS <i>MEAS Bora</i>	227
10. ADMINISTRATIVE LAW AND DECENTRALIZATION <i>THENG Chan-Sangvar</i>	245
11. ECONOMIC LAW: INTELLECTUAL PROPERTY RIGHTS <i>PHIN Sovath</i>	265
12. CAMBODIAN LABOR AND EMPLOYMENT LAW <i>KONG Phallack</i>	285
13. INTRODUCTION TO THE LAND LAW OF CAMBODIA <i>HEL Chamroeun</i>	313
14. INTRODUCTION TO CAMBODIAN ENVIRONMENTAL LAW <i>CHHIN Nith, SOTH Sang-Bonn</i>	337
15. INTRODUCTION TO EDUCATIONAL LAW <i>HEM Bonarin</i>	355
16. WOMEN AND THE LAW IN CAMBODIA <i>Milana PLISCHUK</i>	381
17. RIGHTS OF INDIGENOUS PEOPLES IN CAMBODIA <i>SOTH Sang-Bonn</i>	397
18. EXTRADITION: INTERNATIONAL AND CAMBODIAN LAW <i>MEAS Bora</i>	417
19. THE ECCC IN THE CONTEXT OF CAMBODIAN LAW <i>Franziska ECKELMANS</i>	437
20. CAMBODIAN LAW: SOME COMPARATIVE AND INTERNATIONAL PERSPECTIVES <i>Jörg MENZEL</i>	477

FOREWORD

The current status of Cambodian law is a heritage of diverse historic legal and ideological concepts and multiple interventions. For centuries, Cambodia has followed a system of government and law which was influenced by Buddhist and Khmer traditions and rituals. This system changed when Cambodia was colonised by the French and the Civil Law System was introduced. Since independence from France, Cambodia's legal history has undergone many transformations. From 1954 to 1975, Cambodia's legal system was modelled after the French system. A comprehensive legal framework governing commercial, civil and family relationships regulated day-to-day life.

As a result of the Communist Party of Kampuchea's (CPK) policies during 1975 and 1979 the CPK abolished all institutions and laws existing under Cambodia's previous regimes and implemented a dictatorial legal system, which exercised absolute power. Intellectuals including legal professionals were targeted for elimination. After the Vietnamese intervention in 1979, Cambodians had to build their legal system from scratch; nearly all legal professionals had been killed by the Khmer Rouge. Over the next decade (1979-1989) the newly established legal system was influenced by the Vietnamese model.

The Paris Peace Agreement, negotiated after two years of supervisory control of the country by the United Nations Transitional Authority of Cambodia (UNTAC) over Cambodia led to the promulgation of a new Constitution in 1993 and the formation of a Constitutional Monarchy through elections, in which the concepts of political pluralism, human rights and the rule of law were introduced in Cambodia.

Since the promulgation of the Constitution much progress has been made and important steps have been taken in legal reform by the Royal Government of Cambodia to overcome systematic weaknesses within legal institutions. Still, more work lies ahead to promote the rule of law, such as ensuring a greater independence of the judiciary, and comprehensive implementation and enforcement of law in Cambodia.

The Konrad-Adenauer-Stiftung (KAS) has been active in Cambodia since 1994, offering advice and support to the Royal Government of Cambodia in developing the rule of law. Essential for development of the rule of law is a flourishing discussion on legal topics. Such debate has not been easy in Cambodia for many years due to its historical legacy and the legal vacuum that existed during and in the aftermath of the Khmer Rouge regime.

Through different publications, conferences and trainings, KAS contributes to the pluralistic formation of public opinions and aims at fostering public and academic debate on the status of the rule of law in Cambodia.

The publication "Introduction to Cambodian Law" is one result of KAS "Rule of Law" related activities. The book comprises 20 articles on recent trends and developments in selected legal sectors in Cambodia. It is the first book of its kind in Cambodia. It will serve as a significant tool for law students and legal experts and the interested public to gain knowledge on ongoing legal development trends and challenges in key areas of Cambodian Law.

Without the support and help of numerous Cambodian and International law scholars this project would not have been possible.

We also express our appreciation to the editors, who have all been cooperating with KAS in projects and events for many years: Professor Dr. Hor Peng (Rector, National University of Management, “NUM”), Professor Kong Phallack (Dean, Paññāsāstra University of Cambodia, “PUC”) and Dr. Jörg Menzel (Associate Professor, University of Bonn), who initiated this book when still working as a legal advisor to the Senate of the Kingdom of Cambodia. Many thanks finally go to all involved staff from the Konrad-Adenauer-Stiftung office in Cambodia for coordinating authors, editors and experts during the production period, to Raymond Leos and David Fagan for their extensive editing and proofreading assistance as well as to Christine Schmutzler for her inspirations on design and format.

We emphasize that all opinions expressed in this book are those of the authors and do not reflect the opinions of the Konrad-Adenauer-Stiftung.

We hope that this publication will contribute to a better understanding of recent developments in Cambodian law.

Phnom Penh, April 2012

Denis Schrey
Rabea Brauer

PREFACE

This book is about Cambodian Law. It is a collective effort by the Cambodian and foreign authors to give an overview of the main topics of law as well as some special fields, which might be interesting for the readers. From our knowledge this is currently the only introduction to Cambodian Law in the English language. There are also no up to date English language publications with respect to Private Law, Criminal Law or Public Law in Cambodia. We hope that this introduction will not only be helpful for foreign readers, but also for Cambodian readers who might study law in English language courses, or who are working in internationalized environments with foreign clients as private lawyers or foreign counterparts as legal staff in government or other institutions.

As it is impossible to provide comprehensive information on all areas of law in a single volume publication it is obvious that this book can only provide some basic information. All chapters have been originally written for this book, but as legal development in Cambodia is dynamic some information might be outdated by further developments soon after writing. Law is like a river, always flowing and changing and any attempt to describe it can only be temporary. Generally, as with any academic legal book worldwide, neither editors nor authors can guarantee the total accuracy of all information provided. We can only assure that we have tried to state the law as accurately as possible. As editors we have tried to ensure that important topics of Cambodian law are covered, but the authors are solely responsible for the content of their chapters.

The editors thank the Konrad-Adenauer-Stiftung, its former country director Mrs. Rabea Brauer, its current country director Mr. Denis Schrey and all their staff for the strong and patient support of this project. We also wish to thank the English language editors Mr. David Fagan and Mr. Raymond Leos as well as Mrs. Christine Schmutzler for her valuable work on design and format. Furthermore, we thank the numerous authors, who despite other obligations spent their valuable time and energy to write their chapters. Finally, we hope that the readers of this book might find the information provided helpful and that it will encourage further academic discussion of Cambodian law inside and outside the country.

Phnom Penh, April 2012

HOR Peng
KONG Phallack
Joerg MENZEL

OVERVIEW OF THE CAMBODIAN LEGAL AND JUDICIAL SYSTEM

and Recent Efforts at Legal and Judicial Reform

KONG Phallack

CONTENTS

I. Abstract.....	7
II. Cambodian Legal and Judicial System.....	7
1. Overview of the Cambodian Legal System	7
2. Sources of Law in Cambodia	8
The Constitution	9
Laws (Chbab).....	9
Royal Decrees (Preah Reach Kret)	9
Sub-Decrees (Anu-Kret)	9
Proclamations (Prakas)	9
Decision (Sech Kdei Samrach)	10
Circular (Sarachor)	10
Bylaw (Deika)	10
International law	10
3. Overview of Cambodian Judicial System	11
4. Overview of Cambodian alternative dispute resolution system.....	12
Negotiation	13
Conciliation	13
Arbitration	14
5. The Cambodian Legal Profession	15
III. Recent effort at legal and judicial reform.....	17
1. Methodologies for the formulation of legal and judicial reform strategies ...	17
2. The Values Document	18
3. Vision statement for the legal and judicial sector.....	19
4. Interventions for legal and judicial reform.....	19
5. The Legal and Judicial Reform Strategy.....	20
6. Development of the Plan of Action for Reform	20
7. Implementation of the legal and judicial reform strategy	21

OVERVIEW OF THE CAMBODIAN LEGAL AND JUDICIAL SYSTEM

and Recent Efforts at Legal and Judicial Reform

*KONG Phallack**

I. Abstract

This paper is intended as an overview of Cambodian law and the legal system as well as the Royal Government of Cambodia's efforts at legal and judicial reform.

II. Cambodian Legal and Judicial System

1. Overview of the Cambodian Legal System

Like most countries in the region and the world, the Cambodian legal system has evolved from unwritten customary law to statutory law. Scholars have classified Cambodian legal development into two phases, namely ancient law and modern law.¹ The former refers to the unwritten customary law from the Funan Period to the Angkor Period,² whereas the latter refers to the codification of Cambodian laws from 1336 to the present.³

Before French colonization (1863), Cambodia was governed by customary rules⁴ based on consensus. From 1863 to 1953, the Cambodian legal and judicial systems were based almost entirely on the French system. This system had a strong impact not merely on the law and legal education system but also on Cambodian lawyers, prosecutors, judges and bureaucrats until 1975. From April 1975 to December 1978, the dictatorial proletariat regime of the Khmer Rouge eradicated the entire legal system, existing laws, the judiciary,

* Dr. KONG Phallack is Dean and Professor of Law of the Faculty of Law and Public Affairs, Paññāsāstra University of Cambodia (PUC); Managing Director and Attorney at Law of KhmerLex Legal Solutions, a locally established law firm; Chief arbitrator of the Arbitration Council. He has handled 380 cases among 900 cases registered at the Arbitration Council. Dr. KONG Phallack has been selected to serve as a chairman of the Board of Director of the Arbitration Council Foundation; a member of Arbitration Panel of Kuala Lumpur Regional Centre for Arbitration (KLRCA), and a member of Inter Pacific Bar Association (IPBA).

1 Royal University of Law and Economics and Cooperation and Cultural Activities of French Embassy, Introduction Au Droit Cambodgien, p.7

2 *Id.*, pp.8-15

3 *Id.*, pp.16-25

4 KONG Phallack, Hok Sophea, Tep Navy, Oeurn Borarorth, The ASEAN Legal Systems, Faculty of Law and Economics, Phnom Penh, 1998, p.12

and government institutions. Judges, lawyers and other legal professionals were the target of execution. Vietnamese troops⁵ invaded Cambodia and started their occupation on January 7th, 1979. At that time the country faced a severe shortage of lawyers and laws. Michael Vickery⁶ described this situation as a complete legal vacuum. The legal system that emerged during these years was heavily influenced by the Vietnamese system. Major legislation promulgated during this period included Cambodia's presently applicable contract law. During the period of the United Nations Transitional Authority in Cambodia (UNTAC) from 1991 to 1993, a number of laws – including a criminal law, a judicial law, and a press law – were enacted.⁷ The current legal system is a hybrid legal system, which is an amalgamation of Cambodian customs, the French based legal system (an influence from French colonization), and the common law system, which is an influence arising from foreign aid assistance to legal and judicial reform in Cambodia. However, there must be a deep research to understand the entire legal structure, to understand elements of common law and civil law in the Cambodian legal system.⁸

2. Sources of Law in Cambodia

This section examines the sources of law in Cambodia. The word “sources” in this context means the origins of legal rules, including relevant Cambodian authorities and other sources of law recognized by the laws in force. The word “law” in the Cambodian context can mean both domestic law and international law according to a 2007 decision of the Constitutional Council.⁹ In accordance with Cambodian laws and regulations, as well as the current practice, sources of law in Cambodia can be classified as either primary sources, which means all legal instruments of the competent authorities of the State,¹⁰ or secondary sources, which means customs, traditions, conscience and equity, judicial deci-

5 Vietnam occupied Cambodia from 1979 to 1989

6 Michael Vickery, *Kampuchea: Politics, Economics and Society*, London, 1986. There were only ten law graduates including 5 judges remained in the country (Proclamation on January 10, 1979).

7 Under 1991 Paris Peace Agreement, UNTAC started its mission in Cambodia in order to help organize the general election and form a legitimate government. In cooperation with the Supreme National Council (SNC), a policy making body represents Cambodian four factions at home and abroad.

8 Development partners provide assistance to legal and judicial reform in Cambodia are AUSAID, ADB, CANADA, DANIDA, EU, Finland, FRANCE, ILO, JICA, GTZ, Netherland, OHCHR, SIDA, UNDP, UK, USAID, World Bank, (See Council for Legal and Judicial Reform, <http://www.cljr.gov.kh/>)

9 The Constitutional Council, CASE N°131/003/2007 Of June 26, 2007, Decision N° 092/003/2007 CC.D Of July 10, 2007

10 Constitution, article 91 (New) (1993 as amended in 1999), and Law on the Organization and Functioning of the Council of Ministers, Art 13, Art 28, Art.29 (1994), The Law on The Administration and Management of Commune/Sangkat, Art 48 (2001), and Law on Administrative Management of the Capital, Provinces, Municipalities, Districts, and Khans, Art 32 and Art 53- Art 61 (2008). Article 91 (new) of the constitution states: The members of the Senate, the members of the National Assembly, and the Prime Minister have the right to initiate legislation. The deputies shall have the right to propose any amendments to the laws, but the proposals shall be unacceptable if they aim at reducing public income or increasing the burden on the people.

sions, arbitral awards, and doctrines. In civil cases, when the law is not explicit, or when there is a gap in the law (for example where there are no provisions of law governing the circumstances in the case), the adjudicating court can proceed with the hearing and determine the case based on customs, traditions, conscience and equity.¹¹ Cambodian court judgments, other than those by the new hybrid court, the Extraordinary Chambers in the Courts of Cambodia,¹² do not often refer to precedents. However precedents for arbitral awards are well developed by the Arbitration Council, a quasi-judicial body that has jurisdiction over collective labor disputes.¹³ Cambodian legal doctrines can often be traced to well-known publications by scholars of Cambodian law.

Cambodian legal scholars identify the following legal rules deriving from competent authorities in Cambodia as primary sources of law:

The Constitution

The Constitution is the supreme law of the Kingdom of Cambodia. All laws and decisions made by state institutions must be in strict conformity with the Constitution.¹⁴

Laws (*Chbab*)

A law is adopted by the National Assembly and the Senate, and promulgated by the King or the acting Head of State.¹⁵

Royal Decrees (*Preah Reach Kret*)

A Royal decree is an executive regulation proposed by the Council of Ministers and signed by the King or the acting Head of State.¹⁶

Sub-Decrees (*Anu-Kret*)

A sub-decree is an executive regulation usually prepared by relevant ministries, adopted by the Council of Ministers and signed by the Prime Minister.¹⁷

Proclamations (*Prakas*)

A proclamation is an executive regulation made at the ministerial level. It is prepared by the relevant ministries and signed by the relevant minister(s).¹⁸

11 Law on Court Organization, Art 4 (1993)

12 See details about ECCC at <http://www.eccc.gov.kh>

13 Arbitration Council, <http://www.arbitrationcouncil.org>

14 Constitution, Art 150–new (1993 as amended in 1999)

15 Constitution, Art 28–new (1993 as amended in 1994 and 1999)

16 Constitution, Art 28–new (1993 as amended in 1994 and 1999)

17 Law on the Organization and Functioning of the Council of Ministers, Art 13 (1994)

18 Law on the Organization and Functioning of the Council of Ministers, Art 28 and Art 29 (1994)

Decision (*Sech Kdei Samrach*)

A decision is an executive regulation made by the Prime Minister, and relevant ministers.¹⁹ Decisions are referred to in Article 150 of the Constitution. However, the term “decision” is not defined by law. In practice, there are different types of decisions: a decision made by the Constitutional Council, a decision made by the Prime Minister, a decision made by relevant ministers and so on. A decision of the Constitutional Council is considered final and binding. It has supremacy within the legal system, meaning that all laws and regulations must strictly conform with a decision of the Constitutional Council.

Circular (*Sarachor*)

A circular is an administrative instruction which is used to clarify the works and affairs of government ministries. It is signed by the Prime Minister and relevant ministers.²⁰

Bylaw (*Deika*)

A bylaw is a legal rule approved by Councils at sub-national level. The term “Council at sub-national level” in this text means the Capital Council, Provincial Councils, Municipal Councils, Districts Councils, Khans Councils, Sangkat Councils and Commune Councils. These Councils have legislative power to issue bylaws (*deikas*).²¹

International law

According to a 2007 decision of the Constitutional Council²² international law is considered a source of Cambodian law. All international treaties and conventions can become Cambodian law after a vote of approval by the National Assembly and the Senate and signature and ratification from the King.²³ Based on this text, one can argue that Cambodia adopts a dualist approach²⁴ because all international treaties and conventions require approval from the Cambodian Parliament. However, Article 31 of the Constitution states the Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.²⁵ Based on this text,

19 Law on the Organization and Functioning of the Council of Ministers, Art 13 (1994), See also Sub-decrees on Organizations and Functioning of Ministries.

20 Law on the Organization and Functioning of the Council of Ministers, Art 13 (1994)

21 The Law on The Administration and Management of Commune/Sangkat, Art 48 (2001), and Law on Administrative Management of the Capital, Provinces, Municipalities, Districts, and Khans, Art 32 and Art 53–Art 61 (2008)

22 The Constitutional Council, CASE N°131/003/2007 Of June 26, 2007, Decision N° 092/003/2007 CC.D Of July 10, 2007

23 Constitution, art 26–new (1993)

24 Rebecca M.M. Wallace, M.A., LL.B., Ph.D. International Law, London. Sweet & Maxwell.200, p.36. According to the book, if a state is dualistic, international law will only become part of its municipal law if it has been expressly adopted as such by a way of legislative act.

25 Constitution, art 31 (1993)

it seems that Cambodia adopts a monist approach²⁶ because the Constitution recognizes all these international instruments.

3. Overview of Cambodian Judicial System

At present, the Cambodian judiciary consists of the Supreme Court, the Appellate Court,²⁷ the Provincial/Municipal Courts and the Military Court²⁸ as well as the hybrid court which is known as the Extraordinary Chambers in the Courts of Cambodia.²⁹

The Appellate Court reviews both *Ang Het* (matters of fact) and *Ang Chbab* (matters of law).³⁰ The Supreme Court hears only *Ang Chbab* (matters of law)³¹ except in the case of a joint trial of the second grievance complaint the Supreme Court may render a final decision on both law and facts.³² The Military Court³³ has jurisdiction only over military offenses. Military offenses are those involving military personnel, whether enlisted or conscripted, and which concern discipline within the armed forces or harm to military property.³⁴ All ordinary offenses committed by military personnel are tried in ordinary courts (provincial/municipal courts).³⁵ The Commercial Court³⁶ and Labor Court³⁷ have not yet been established.

26 Rebecca M.M. Wallace, M.A., LL.B., Ph.D. *International Law*, London. Sweet & Maxwell, 200, p.36. According to the book, if a state is monistic, if it accepts international law automatically as part of its municipal law and does not demand an express act of legislature.

27 Law on the Organization and Activities of the Tribunal of the State of Cambodia (LOAT), art.3, § 1, (1993): LOAT states the Appellate court and Supreme Court which are higher courts, they are located in Phnom Penh

28 LOAT, art.2, § 1. LOAT states the Provincial/Municipal Courts, and Military Court are inferior courts

29 Law on the Establishment of the Extra Ordinary Chambers within the Court of Cambodia (2004)

30 Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period was known as UNTAC Criminal Code, art.4, § 5 (1992): UNTAC Criminal Code states the Appellate Courts judge both law and fact

31 LOAT, art.14, § 1; see also UNTAC Criminal Code, art.5, § a

32 LOAT, art.14, § 2; see also UNTAC Criminal Code, art.5, § c

33 KOY Neam, *Introduction to The Cambodian Judicial Process*, the Asia Foundation, 1998, p.17. The Military Court located in Phnom Penh is administratively, financially and logistically under the Ministry of National Defense. All activities carried out by the court such as statistics of investigations and trial activities must be reported to this Ministry

34 UNTAC Criminal Code, art. 11; see also LOAT, art.9, § 2

35 LOAT, art.9, § 3; see also UNTAC Criminal code, art.11. The Military Court consists of Department of Prosecution, Department of a Chief Clerk, Department of Investigation, Department of Trial Judges, and a Secretariat (administrative office). All its staff are military personnel such as a President, three Vice Presidents, member judges who are appointed by the Ministry of National Defense, and military defenders are appointed by the President of the Court after finishing training at the Ministry of Justice. The President and Vice Presidents of the Military Court as well as representatives of the military prosecutors are appointed by the Ministry of National Defense

36 Law on the Commercial Regulations and the Commercial Register, art.55, (1995). This law states during the period in which the Kingdom of Cambodia has no Commercial Court, the ordinary courts of the Kingdom of Cambodia shall be competent in all commercial matters

37 CLL, art.389. CLL states that pending the creation of the Labor Courts for the time being disputes related to the application of this law shall be referred to common courts.

In addition to these courts, there is a Constitutional Council (CC),³⁸ which has a duty to safeguard respect for the Constitution, interpret the Constitution and laws adopted by the National Assembly (and reviewed completely by the Senate), and has the right to receive and decide on disputes concerning the election of members of the National Assembly and election of members of the Senate.³⁹ There is also a Supreme Council of Magistracy, which is a judicial organ ensuring the smooth functioning and the independence of the judiciary in Cambodia.⁴⁰ It has a duty to decide and make proposals to the King on the appointment, transfer, leave of absence, delineation of duties, promotion and dismissal of judges and prosecutors at all courts⁴¹ and takes disciplinary action against delinquent judges.⁴² Despite having different responsibilities, Cambodian judges and public prosecutors are both categorized as *Chaokrom* (magistrates).⁴³ *Chaokrom* in its general sense is a title in the Cambodian judicial system that refers not only to judges who sit at trial but also to those who hold the position of public prosecutors. A judge involved in a trial or investigation is called *Chaokrom Angkuy* (sitting judge). A judge holding a position in the prosecutor department (*Ayakar*) is called *Chaokrom Chhor* (standing judge).⁴⁴

4. Overview of Cambodian alternative dispute resolution system

The resolution of conflict outside the judicial system, which is known as alternative dispute resolution (ADR), is not new in Cambodia. Cambodian people have long been solv-

38 See Constitutional Council of Cambodia at <http://www.ccc.gov.kh>

39 Cambodia. Const. art.136; art.137, § 1; art.141. The Constitution states CC consists of nine members with a nine-year mandate. 3 members appointed by the King; 3 members by the National Assembly and 3 others appointed by SCM. After promulgation of any law, the king, the President of the Senate, the President of the National Assembly, the Prime Minister, 1/4 of members of the Senate, 1/10 of members of the National Assembly or the courts may request CC to review the constitutionality of that law. Khmer citizens shall have the right to appeal against the constitutionality of any law through their representative or President of National Assembly or member of the Senate or President of the Senate

40 Cambodia. Const. art.132; LOFSCM, art.1, art.2. LOFSCM states SCM consist of (i) The King as Chairman; (ii) The Minister of Justice as member; (iii) The President of the Supreme Court as member; (iv) The General Prosecutor to the Supreme Court as member; (v) The President of the Appellate Court as member; (vi) The General Prosecutor to the Appellate Court as member; (vii) Three judges elected by judges as members and three alternate judges are elected to replace an absent elected judge. In the event there is incompatibility of function of the Minister of Justice he shall be replaced by a senior official from the MOJ

41 Cambodia. Const. art 134; LOFSCM, art.11

42 Cambodia. Const. art. 133:

43 UNTAC Criminal Code, art. 2 This code states judges and prosecutors both are magistrates. Only judges may adjudicate. Prosecutors are responsible for penal actions, which only they may initiate. They file indictments in court and in all other for a provided for in this text. The Attorney General pleads before the Supreme Court in the interest of the law, reviews the legality of indictments by provincial prosecutors, and organize and supervises their work

44 KOY Neam, *supra note* 33, at 24

ing their disputes outside the court.⁴⁵ William R. Wiebe, Esq. stated that ADR has a long tradition in Cambodia.⁴⁶ Reconciliation is not only part of current procedure,⁴⁷ but it also existed in the old judicial system before 1970.⁴⁸

In principle, and according to current practice, dispute resolution outside court litigation in Cambodia is conducted based on the following methods:

Negotiation

Negotiation is the most common form of ADR in Cambodia and is used by parties to resolve disputes directly through compromise, without the assistance of a third party. Negotiation is allowed under Cambodian law, for example, under Article 20 of the above-mentioned Cambodian Investment Law provides for the use of negotiation when investment disputes happen.

Conciliation

Conciliation or mediation is part of the Cambodian culture and traditional legal system. Conciliation is traditionally conducted by a third party, namely a monk, an *Achar* (knowledgeable expert), a prominent person the parties trust, or the King,⁴⁹ and formally it is conducted by a public officer appointed by the government and the judge. In practice, the settlement of disputes through conciliation is conducted as part of daily life and

45 Carmen Maria Lopez Vasquez, Pre-Trial Dispute Resolution Process, 20 March, 1996, The Cambodian Development Research Institute (CDRI), p.9

46 William R. Wiebe, Esq, *supra note* 29, at 2.

47 KOY Neam, *supra note* 33, at 47. There is a disagreement on reconciliation whether it is a part of current procedure or not. According to KOY Neam judges at the provincial court said it is mandatory for the court proceeding whereas the Appellate Court's judges said it is not a necessary part of the court procedures.

48 Siphana Sok, J.D, Denora Sarin, J.D, *supra note* 27, at 65; KONG Phallack, Hok Sophea, Tep Navy, Oeum Borarorth, *supra note* 79, at 42; KOY Neam, *supra note* 31, at 48. Reconciliation has existed in Cambodia long time ago. Cambodian Civil Procedure Code, art. 35, (1963) provides that reconciliation is allowed if the dispute does not involve or affect the public order, customs or civil status.

49 The Conciliation conducted by the King is called *Preab Reach Savnakar* (The Royal Hearing). *The Preab Reach Savnakar* was applied before 1970. It is an extra-judicial forum or method of reconciliation by the king where citizens can submit their civil disputes to him for settlement. The Royal Hearing was revived in 1994 and was conducted every ten days. From early April 1994 to the end of May 1994 there were 133 cases lodged for the Royal Hearing, but only 40 cases had been heard. Due to the King's illness or for other unexplained reasons this method has been suspended. In the Royal Hearing method the king cannot make any decision. The Commission for Receiving Complaints for the Royal Hearing (CRCRH) is set up to receive complaints from various sources: (i) A complaint lodged directly with CRCRH by one or more parties whose dispute was settled by local authorities; (ii) A complaint forwarded by the National Assembly Commission or members; (iii) A complaint not processed by the court; (iv) A case already settled by the court; (v) A case finally settled by the court but for which authorities failed to execute the judgment. After receiving a case CRCRH sends investigators to the place where the dispute arose or settled to collect information. The investigation report must be forwarded to the King's advisors for screening. During the Royal Hearing session the King hears a complete report read by a high ranking official, then he gives his opinion on the dispute to the parties how to get along together without causing prejudice to either of the parties or to authorities concerned for consideration. His opinion is not binding.

people never think of disputes as “criminal” or “civil” cases. If a dispute is not severe enough to significantly harm their interests, people often prefer compromise to bringing cases to the authorities or the courts. According to the Cambodian legal framework, conciliation is permitted, and it is provided for in various laws, including the Law on Family and Marriage (family disputes),⁵⁰ the Labor Law (labor disputes),⁵¹ the Land Law and Regulations (land disputes),⁵² and the Code of Civil Procedure (civil cases).⁵³

Arbitration

Arbitration has been recently developed in Cambodia, in particular labor arbitration.⁵⁴ Cambodian labor arbitration is a tripartite system and the award is usually non-binding. A binding award can happen only when parties agree for the decision to be binding prior to the arbitration or when there is no opposition to the arbitral award after eight days.⁵⁵ Commercial arbitration is not yet taking place, though the Law on Commercial Arbitration was promulgated in 2006. At the time of writing, the National Arbitration Center had not yet been established, but the first controversial batch of trainees to be future commercial arbitrators were selected, obtained training and are pending for the examination to be arbitrators. In relation to the enforcement of arbitral awards, the Cambodian Code of Civil Procedure provides enforcement of both domestic and foreign arbitral awards. Cambodia has been a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1960, but it is unknown if dispute resolution through international arbitration and enforcement of arbitral awards has ever occurred in Cambodia. According to the Ministry of Commerce,⁵⁶ Cambodia acceded on January 5th, 1960 to the New York Convention and is obligated by the terms of the Convention.⁵⁷ Cambodia also signed the Convention on the Settlement of Investment Disputes (ICSID)⁵⁸ on November 5, 1993, but it has not been ratified by the Parliament yet. If it is approved, ICSID arbitral awards can be enforced in Cambodia.

William R. Wiebe, Esq, commented that Cambodian judges seem reluctant to enforce foreign arbitration awards because (i) the judges may be unfamiliar with international arbitration and with their responsibilities under the New York Convention; (ii) they may

50 Law on Family and Marriage, Art 42 (1989)

51 Labor Law, Art.300-301, and 303 (1997)

52 Su-decree on the Organization and Functioning of the Cadastral Commission, Art 7-11 (2002), and Royal Decree on the Establishment of the National Authority of Land Dispute Resolution, Art 3 and Article 15 (2006)

53 Code of Civil Procedures, Article 97 O

54 Cambodian Labor Law, Art 309 (1997), and Prakas 099 on Arbitration Council dated 21 April 2004

55 See KONG Phallack, Labor Arbitration Council in Cambodia: Law and Practice: Cambodian Comparative Law, Year Book (first Publication), 2009, pp 163-171

56 The Reemergence of New Opportunities- Business & Investment Handbook, published in 1996 by the Ministry of Commerce

57 If the confirmation is true, the Convention is in effect in Cambodia under article 158 of the Cambodian Constitution

58 The World Bank Group, <http://www.worldbank.org/icsid/constate/c-states-en.htm>

feel that it is unfair to enforce a foreign arbitration award in Cambodia (especially if the award is against a Cambodian business or national); (iii) they may believe that the dispute should have been brought to the Cambodian courts, and they may not want to enforce the award in order to penalize the party for not coming to the Cambodian courts first, instead of arbitrating the dispute abroad; and (iv) they may be uncertain of the authenticity of the award and may think that it was obtained by persuading the party through fraud or corruption even when there is no evidence of this.⁵⁹ Consequently, in current practice there are no statistics of arbitral awards enforced by the Cambodian courts.

5. The Cambodian Legal Profession

The Cambodian legal profession officially came into existence in 1932 through the Royal Declaration No.32 dated March 15, 1932 and Royal Kram No. 648 dated March 30, 1951⁶⁰. Traditionally, people who practiced laws were called “*Sma-Kdey*” or “*Neak Thak Nay Kdey*”⁶¹ which means lawyers in present day language.

The current legal profession is a product of the country’s turbulent history and it is an independent and autonomous profession involved in serving justice. The legal profession may only be pursued from within the framework of the Bar Association of the Kingdom of Cambodia (the BAKC).⁶² The BAKC was established in 1995 and its governing body is called the Bar Council which is composed of a president and members and assisted by the secretariat. The president is elected for a term of two years. The members of the Bar Council are elected by registered lawyers for a term of three years.⁶³

The Law on the Bar Association provides two gateways⁶⁴ to enter the legal profession in Cambodia, one through the training at the Lawyer’s Training Center⁶⁵ and the other through two years of working experience in the legal field.⁶⁶

59 William R. Wiebe, Esq, *supra* note 29, at 36

60 Bar Association of the Kingdom of Cambodia, *Legal Profession in Cambodia*, 2005, p.14

61 *id.*, p.14

62 Law on the Bar Association of the Kingdom of Cambodia, art 1 (1995)

63 Bar Association of the Kingdom of Cambodia, *supra* note 60, Ch.5, pp.71-84

64 Bar Association of the Kingdom of Cambodia, *supra* note 60, Ch.4, pp.55-70

65 Law on the Bar Association of the Kingdom of Cambodia, art 31 (1995). Article 31 of the Law on the Bar states: A person may engage in the profession as a lawyer, provided that he or she has fulfilled the conditions hereunder:

1. Shall have Khmer nationality.
2. Shall have a Bachelor of Law degree (Licence en Droit) or a law degree declared equivalent.
3. Shall have a Certificate of Lawyer’s Professional Skill. This Certificate of Lawyer’s Professional Skill shall be issued by a Center for Training of the Legal Profession. The organization and the functioning of this center shall be determined by sub-decree.
4. Shall never have been convicted of any misdemeanor or felony, nor received any disciplinary action or administrative penalty, such as removal from any function, or dismissal for any act contrary to honor or any act of moral turpitude. Shall not have been declared personally bankrupt by a court.

66 Law on the Bar Association of the Kingdom of Cambodia, art 32 (1995). Article 32 of the Law on the Bar states that: Neither the Certificate of Lawyer’s Professional Skill nor the Bachelor of Law degree (Licence en Droit) shall be required for:

According to the Law on the Bar, apart from those lawyers who are members of the BAKC, no one may perform this profession, provide legal consultation, or prepare legal documents for compensation, except when such legal consultation or preparation of documents is an ancillary job to their profession or is a function permitted by law.⁶⁷

Foreign lawyers can practice law in Cambodia only with authorization from the Bar Council. This authorization will depend on the sufficiency of the qualifications of the foreign lawyer and will only be granted when the country of origin of the foreign lawyer provides this same possibility to Cambodian lawyers. This authorization may be withdrawn if there is malpractice during the practice of the legal profession in the territory of Cambodia.⁶⁸

The structure of legal practice in Cambodia can be classified into solo law practice (sole proprietorship) and group practice (partnership).⁶⁹ According to the Law on the Bar, a Cambodian law firm must have the character of a civil company in which all of its members are lawyers.⁷⁰ However, the term “civil company” is not defined by law. Lawyers’ offices are referred to as a “law office, law firm, or law group”. Individuals or entities other than lawyers are not permitted to use the terms “law office”, “law firm” or “law group”.⁷¹ The legal professions of other countries in the region have undergone structural changes in recent years as a part of the liberalization of legal services. When comparing the legal profession in Cambodia to the legal profession in other countries in the region it becomes apparent that there is an urgent need to amend the Cambodian Law on the Bar to meet and reflect the changes and requirements of the World Trade Organization. For instance, in Singapore, law firms which were traditionally operating in a sole proprietorship or general partnerships were allowed to practice as limited liability partnerships and limited liability companies.⁷²

– judges who have served their profession for over 5 years and former judges who have a Secondary Certificate in Law (Certificate de la Capacité en Droit) and have served their profession for over 2 years.

The Certificate of Lawyer’s Professional Skill shall not be required for:

- those who have received a Bachelor of Law degree (Licence en Droit) and who have been working in the legal or judiciary field for over 2 years.
- those lawyers who originally had Khmer nationality and who have been registered in the Bar of a foreign country.
- those who have received a Doctorate of Law degree.

67 Law on the Bar Association of the Kingdom of Cambodia, art 4 (1995)

68 Law on the Bar Association of the Kingdom of Cambodia, art 6 (1995)

69 Law on the Bar Association of the Kingdom of Cambodia, art 46.1 (1995). Article 46 states Lawyers may practice their profession individually or within the context of a group of a Law Firm which is lawfully established.

70 Law on the Bar Association of the Kingdom of Cambodia, art 46.2 (1995)

71 Bar Association of the Kingdom of Cambodia, *supra note* 60, Ch.6, pp.85-96

72 Charles Lim Aeng Cheng, *Secretary – General, Asean Law Association (2003-2006)*, Legal Systems In Asean – Singapore Chapter 6 - The Legal Profession, (see http://www.aseanlawassociation.org/papers/sing_chp6.pdf)

III. Recent effort at legal and judicial reform

There have been initiatives for legal and judicial reform in Cambodia by the Royal Government of Cambodia (RGC) and development partners since a government was formed in 1993. From 1993 to 2002, the RGC set up the Council for State Reform under which a Council for Legal Reform and a Council for Judicial Reform were established.⁷³ During this period, the RGC has conducted its legal and judicial reform based on its own political platform and policies whereas development partners provided support to legal and judicial reform based on their own policies and agenda. Therefore, the legal and judicial reform was not well organized because the RGC and development partners had different policies. However, there was an effort to harmonize the RGC and development partners' policies through the Harmonization and Alignment Policy.

Between 2003 and 2005 the Council of Ministers adopted two main documents, namely the Legal and Judicial Reform Strategy in 2003, and the Plan of Action for the Implementation of the Legal and Judicial Reform Strategy in 2005 (the Plan of Action).⁷⁴ The purpose of adopting these two main documents was to harmonize and align the policies of the RGC and its development partners in relation to legal and judicial reform in order to ensure the consistency of law and prevent the overlapping of resources, as well as improving cooperation and information sharing between the RGC and development partners. Through this effort, the policies of the RGC and its development partners have been integrated. Thus the following sections explain the methodologies of formulation for the legal and judicial reform strategies, its implementation, achievement and its associated monitoring system.

1. Methodologies for the formulation of legal and judicial reform strategies

The legal and judicial reform strategies in Cambodia were developed based on four basic concepts set out in the 1993 Constitution⁷⁵ as agreed during a participatory process involving the RGC and the Danish Institute for Human Rights (DIHR).⁷⁶ This method allowed government agencies and justice sector stakeholders (donors and civil society) to work together to develop a Values Document for the Justice Sector in Cambodia (the

⁷³ See Royal Decree On the Establishment of the Supreme Council of State Reform, 1999 and Royal Decree on the Establishment of the Council of Judicial Reform, 2000

⁷⁴ The Council of Ministers approved the Legal and Judicial Reform Strategies on June 20, 2003 and the Plan for Action for the Implementation of Legal and Judicial Reform on April 29, 2005

⁷⁵ Council for Legal and Judicial Reform, Legal and Judicial Reform Strategies, 2003, p.7. The four basic concepts/principles from the 1993 constitution namely: (i) Liberal Democracy; (ii) Rule of Law; (iii) Separation of Powers; and (iv) Individual Rights.

⁷⁶ *id.*, p.3. The Council for Legal and Judicial Reform approved the first draft of legal and judicial reform strategies on January 27, 2003 and the Consultative Workshop with all stakeholders was held on February 12, 2003

Values Document), which serves as the basis or guiding principle for the formulation of strategies for legal and judicial reform.

The legal and judicial reform strategies were developed by a planning base team which was composed of a Danish legal advisor from the DIHR, and two Cambodian jurists from the Council of Jurists of the Council of Ministers (Mr KONG Phallack and Mr Thong Chenda) in cooperation with the a legal and judicial reform team of the Council of Ministers led by the late H.E Sum Manit, Secretary of State for the Council of Ministers and advisor to the RGC. When the first draft of the Legal and Judicial Reform Strategy was completed and supported by the Council of Ministers, the RGC decided to establish an institution in charge of legal and judicial reform. Consequently, three levels of institutions were established in 2002 under the umbrella of the Council of Ministers. These institutions were the Council for Legal and Judicial Reform (CLJR),⁷⁷ the Permanent Coordinating Body,⁷⁸ and the Project Management Unit (29).⁷⁹ Following the establishment of these institutions, the Legal and Judicial Reform Strategy was approved by the Council of Ministers on June 20 2003,⁸⁰ and the Plan of Action was also approved by the Council of Ministers some years later on April 29, 2005.⁸¹

2. The Values Document

The Values Document, which informs the legal reform process, is based on four basic concepts and principles from the 1993 Constitution, namely: (i) liberal democracy; (ii) rule of law; (iii) separation of powers; and (iv) individual rights.⁸² The concept of liberal democracy in the Values Document was designed based on the values of: (a) representation; (b) decentralization of powers; (c) promoting a free market economy; and (d) provision of public services.⁸³ The concept of rule of law in the Values Document is determined based on the values of: (a) the hierarchy of laws; (b) predictability; (c) transparency; (d) accountability; (e) due process; and (f) enforcement.⁸⁴ The concept of separation of powers in the Values Document is based on the values of: (a) division of functions between the three branches of government; (b) checks and balances; and (c) the independence of

77 Royal Decree No. NS/RKT/0602/158 Of June 19, 2002 on the Establishment of the Council for Legal and Judicial Reform; and Sub-Decree No. 87/ANK/BK Of August 21, 2002 on the Organization and Functioning of the Council for Legal and Judicial Reform

78 Sub-Decree No. 87/ANK/BK Of August 21, 2002 on the Establishment of the Permanent Coordination Body of the Council for Legal and Judicial Reform

79 Sub-Decree No. 128/ANK/BK Of December 26, 2002 on the Establishment of the Project Management Unit of the Council for Legal and Judicial Reform

80 Council for Legal and Judicial Reform, the Legal and Judicial Reform Strategies on June 20, 2003

81 Council for Legal and Judicial Reform, the Plan for Action for the Implementation of Legal and Judicial Reform on April 29, 2005

82 Council for Legal and Judicial Reform, *supra note 75*, p.7

83 Council for Legal and Judicial Reform, *supra note 75*, pp.13-14

84 Council for Legal and Judicial Reform, *supra note 75*, pp. 15-17

the judiciary.⁸⁵ The concept of rights of the individual in the Values Document is based on the values of: (a) personal freedoms and rights; (b) property rights; (c) participation; (d) access to justice and the right of appeal; and (e) access to information.⁸⁶

3. Vision statement for the legal and judicial sector

In order to achieve the above mentioned basic concepts and values responding to each concept, vision statements⁸⁷ for legal and judicial reform were determined as follows:

- secures the personal freedom and rights, including property rights, of all individuals throughout country through the timely, effective and fair delivery of justice;
- protects the existence of a liberal democracy within the sovereign Kingdom of Cambodia;
- ensures a credible and stable legal and judicial framework within a system of separation of powers, including an independent and capable judiciary;
- upholds the rule of law in a market-based economy;
- relies on institutions that uphold principles of good governance;
- ensures effective access to justice for all in the due process of law before a court or other conflict resolution mechanisms in all settlement of disputes between the State and individuals and between individuals;
- ensures the timely and impartial enforcement of all legal decisions;
- is transparent and promotes awareness by citizens of their rights and obligations;
- the judiciary earns the confidence and respect of the citizens and is held to high standards of professionalism, ethics and accountability.

4. Interventions for legal and judicial reform

In order to achieve the above mentioned basic concepts and values responding to each concept, 63 interventions⁸⁸ were determined responding to each concept and values. The 63 interventions can be sub-divided roughly into nine component areas such as:

- a legal reform programme;
- laws pertaining to the functions of the justice sector;
- implementation of certain laws pertaining to the functions of justice sector institutions;
- implementation of certain laws pertaining to the independence of the judiciary;
- implementation of certain laws pertaining to the administration of justice;

85 Council for Legal and Judicial Reform, *supra note 75*, p.15

86 Council for Legal and Judicial Reform, *supra note 75*, pp.12-13

87 Council for Legal and Judicial Reform, *supra note 75*, p.7

88 Council for Legal and Judicial Reform, *supra note 75*, pp.18-20

- implementation of certain laws pertaining to enforcement;
- implementation of certain laws pertaining to accountability;
- legal education and training; and
- transparency and information.

5. The Legal and Judicial Reform Strategy

The goal of the Legal and Judicial Reform Strategy is “the establishment of a credible and stable legal and judicial sector upholding the principles of the rights of the individual, the rule of law and the separation of powers in a liberal democracy fostering private sector led economic growth”. In order to achieve this goal, seven strategic objectives⁸⁹ were determined as follows:

- Strategic objective 1: Improve the protection of personal rights and freedoms.
- Strategic objective 2: Modernization of the legislative framework.
- Strategic objective 3: Provide better access to legal and judicial information.
- Strategic objective 4: Enhance quality of legal processes and related services.
- Strategic objective 5: Strengthen judicial services i.e. the judicial power and prosecutorial services.
- Strategic objective 6: Introduce alternative dispute resolution methods.
- Strategic objective 7: Strengthen legal and judicial sector institutions to fulfill their mandates.

In addition to the vision set out by the Constitutional principles, an overall strategy for legal and judicial reform in Cambodia needed to exist within the framework of the Governance Action Plan and be in compliance with and complemented by the overall country development strategies, including the National Poverty Reduction Strategy (NPRS). Extensive work was therefore carried out to complement the shared justice sector vision with the overall country development strategies and align it with the Governance Action Plan.

6. Development of the Plan of Action for Reform

The Plan of Action which was formally adopted by the Council of Ministers on 29 April 2005 is the document describing how to implement the Legal and Judicial Reform Strategy and comprises 97 priority actions and corresponding interventions for each of the strategies defined for the achievement of the seven strategic objectives in the Legal and Judicial Reform Strategy. For each of the seven objectives, the strategies and their corresponding priority actions describe how to achieve the strategic objectives. They are clustered into short, medium and long-term priorities, creating a complex but logical hierarchy of plans

⁸⁹ Council for Legal and Judicial Reform, *supra note* 75, pp.21-31

for legal and judicial reform. As has been detailed above, the reform process, with its various plans and strategies, is detailed but somewhat complex.

The Permanent Coordination Body and the Project Management Unit of the CLJR were the two main players in developing the Action Plan. The Action Plan was the product of a national workshop held in December 2003 organized by the Permanent Coordination Body.⁹⁰

7. Implementation of the legal and judicial reform strategy

Legal and judicial reform is currently in the implementation phase.⁹¹ The Secretariat of the Council for Legal and Judicial Reforms (GS-CLJR) has played a key role in developing, facilitating and supporting the implementation of legal and judicial reform. Furthermore, the GS-CLJR is responsible for monitoring the implementation of the reforms, including all projects related to the Action Plan.⁹² Each project or action of the reform is implemented by the specific legal and judicial sector agency (relevant ministries) and respective development partner.⁹³ The Technical Working Group on Legal and Judicial Reform (TWG-LJR) is another forum used for the mobilization of partnerships (Partnership Groups) and funds required for the implementation of projects and it is also an information sharing forum on legal and judicial reform.

Based on the chart of the status of the implementation of the Action Plan, there has been no progress in the implementation of the Action Plan.⁹⁴ However, it is hard to see changes in the legal and judicial sector because the reform is often intangible. Therefore, the RGC, especially the GS-CLJR should promote awareness programs on legal and judicial reform to inform the public about the government efforts and commitment in building a strong and credible legal and judicial system.

90 The Permanent Coordination Body was designated by the Council for Legal and Judicial Reform to make the Strategy mentioned above operational by developing an action plan whose implementation would lead to the achievement of the Strategy. A national workshop was conducted in December 2003 with the participation of the relevant authorities, national and international civil society organizations, and international donor and technical assistance agencies, at which the Strategy was presented. On the basis of this workshop, five working groups with participation from all these groups were established to work on plans for the implementation of the seven strategic objectives, securing a participatory process and the necessary coordination and support.

91 Implementation phase of the legal and judicial reform started from 2005 to present.

92 The General Secretariat of the Council for Legal and Judicial Reform (GS-CLJR) was established by Sub-decree No. 52 ANK/BK Of April 6, 2009. GS-CLJR is the successor of PCB and PMU because PCB and PMU were dissolved by Sub-decree No. 52 ANK/BK Of April 6, 2009

93 See Council for Legal and Judicial Reform, the Plan for Action for the Implementation of Legal and Judicial Reform on April 29, 2005

94 Council for Legal and Judicial Reform, Chart of the Status of the Implementation of Legal and Judicial Reform Strategies in Cambodia, 2009

In conclusion, the legal and judicial system in Cambodia is at the crossroads because different legal cultures have been integrated, transplanted and transformed into the Cambodian legal and judicial system, which can be called a hybrid legal system. Therefore, there is a need to conduct a baseline study on the current legal and judicial system in Cambodia to identify, gaps, strength, weaknesses, and errors arising from the current amalgamation of different systems in order to ensure a sound legal and judicial system. This baseline study can be included in the legal and judicial reform of the RGC, especially the CLJR. However, this issue is not primarily addressed in the Legal and Judicial Reform Strategy and the Action Plan outlined by the RGC.

THE MODERN ERA OF CAMBODIAN CONSTITUTIONALISM

Constitutional Analysis of Historical and Contemporary Development

HOR Peng

CONTENTS

I. Introduction.....	25
II. The Historical Development of Western Modern Constitutionalism.....	26
III. The Historical Development of Cambodian Modern Constitutionalism	31
1. The First Constitution of 1947: Kingdom of Cambodia (1947-1970).....	33
2. The Second Constitution of 1972: Khmer Republic (1970-1975).....	34
3. The Third Constitution of 1976: Democratic Kampuchea (1975-1979).....	35
4. The Fourth Constitution of 1981: People’s Republic of Kampuchea (1979-1989).....	36
5. The Fifth Constitution of 1989: State of Cambodia (1989-1993)	37
6. The Paris Peace Agreement on Cambodia’s Political Settlement (1991-1993).....	38
7. The New Constitution of the Kingdom of Cambodia (1993-Present).....	39
Characteristic of National Sovereignty.....	40
Characteristic of Democracy	41
Characteristics of Human Rights.....	44
Characteristic of Rule of Law	47
Characteristic of Kingship	48
Characteristic of Separation of Powers.....	52
Legislative Power: The National Assembly and the Senate.....	54
Executive Power: The Council of Ministers/ The Royal Government of Cambodia.....	57
The Judicial Power: The Supreme Court and the Constitutional Council.....	59
The Ensuring Principle of Regular Functioning of Institutional Eternity	64
IV. A Concluding Remark.....	65
REFERENCES.....	67

THE MODERN ERA OF CAMBODIAN CONSTITUTIONALISM

Constitutional Analysis of Historical and Contemporary Development*

HOR Peng**

I. Introduction

The year 2010 is sixty-three years after the establishment of a modern constitutional state. In Cambodia, the unfettered study of constitutional law has been rare, even though the new Constitution of 1993 grants the legal guarantee of academic freedoms. From the historical context, the Cambodian people, as most legal scholars know, have struggled for real democracy and civil liberty by instituting constitutional revolutions. The first written modern Constitution (1947-1970) introduced a political process with a constitutional monarchical system of a parliamentary democracy, but it was abrogated by the *coup d'état* of 18th March 1970, which resulted in the overthrow of the monarchical system and the establishment of the Khmer Republic. The second written modern Constitution (1970-1975) introduced a liberal democracy with a republic system of a presidential democracy but soon afterward it was overthrown by the People's Liberation Movement on 17th April 1975, in which the radical Khmer Rouge revolutionaries claimed a communist revolution. The third written Constitution of Democratic Kampuchea (1975-1979) introduced a pseudo-democracy with a communist system of government which produced killing fields in which two million people died. It was soon overthrown by the National United Front for National Salvation on 7th January 1979, the people's movement that claimed national liberation. The fourth written Constitution (1979-1989) introduced a democracy with a socialist system of parliamentary government, and it was then replaced by the fifth Constitution (1989-1993) which attempted to introduce a democracy with a moderated socialist system of a parliamentary government. Lastly, the sixth written Constitution (1993) has introduced not only a liberal multi-party democracy but also social welfare with a modern constitutional monarchy system of a parliamentary democratic government.¹

* This Article was written during my scholarly visit at Graduated School of Law, Nagoya University (Japan) from June to September 2010. It was presented on August 28, 2010 at CALE, and September 10, 2010 at RULE.

** Dr. HOR Peng is a former Professor of Law and Dean at Royal University of Law and Economics. Currently he is Rector of National University of Management.

1 See Raoul M. Jennar, *The Cambodian Constitutions (1953-1993)*. This book was a short brief of records on the constitutional changes in Cambodia with English translation of original constitu-

However, from the foreign scholars' viewpoint, the constitutional democracy of the past regimes had little success² and the nation was under a period of discontinuity, rupture and revolutions³; the Cambodians had their authoritarian governments.⁴ However, since the liberation day of the 7 January 1979, and then especially the new Constitution of 1993, which is presently in force, there has been a strong political reaction to the constitutional problems of the past regimes by including measures to ensure that the policies and practices of the past shall never be allowed to return.⁵ It tries not only to re-introduce a liberal multi-party democracy but also recognizes and respects the universal principle of fundamental freedoms of citizens by enforcing the principle of constitutional restriction on the state powers as well.

This article aims at making a study of constitutional law (modern constitutionalism) by academic research. Cambodia's modern constitutional law system started with the strong influence and impact from those of foreign countries. Since then, it has become Cambodia's practice to study concepts of modern constitutional law systems in the foreign countries, especially those of France, USA, Great Britain, Germany, and Japan. The article tries to review briefly from a general concept of modern constitutionalism to particular concepts of Cambodia's constitutionalism within an analysis of its *de facto* historical and contemporary development. The article will be useful in making important contributions to the promotion and development of public understanding on modern constitutionalism.

II. The Historical Development of Western Modern Constitutionalism

The core concepts of modern constitutionalism are primarily based on three basic principles: the principle of a limited government, the principle of civil liberty (personal freedom/human rights), and the principle of rule of law. The modern concept of a liberal democratic state, in order to safeguard basic civil rights and liberty, requires legal restriction on the powers of the State. The established rule of law and the separation of power within a system of checks and balances, which are legally effective means to protect and

tional texts since 1947. *See also* David P. Chandler, the Tragedy of Cambodian History: Politics, War, and Revolution since 1945, Yale University Press, 1991 and A History of Cambodia, Westview Publishers: Boulder Colorado, 2008. *See also* John Tully, A Short History of Cambodia: From Empire to Survival, 2006.

2 *See* the Preamble of the 1993 Constitution, paragraph 2, "we the people of Cambodia, ...having endured suffering and destruction and having experienced a tragic decline in the course of last two decades...".

3 Raoul M. Jennar, *see at supra* note 1, p.1.

4 *See* John Tully, *see at supra* note 1.

5 *See* the Paris Agreement on a Comprehensive Political Settlement of the Cambodian Conflicts 1991, at Article 15 [2].

promote civil liberty and democracy.⁶ These concepts became key features for developing a constitutional state or constitutional democracy worldwide.

Its history begins with the western civil revolutions in which the people struggled for personal freedoms (to be *free* and *equal*) and to escape from arbitrary political rule (to be *fair*) for almost three centuries (from sixteenth to eighteenth century–Age of Enlightenment).⁷ In England, the people experienced two important constitutional revolutions– the so called bourgeois revolution (*puritan* revolution in 1628 and the *glorious* revolution in 1688), which eventually led to a successful, modern constitutional monarchy state.⁸ The British revolutions provoked a lot of interest from scholars who explored empirical scientific findings amidst the change from the old world into a modern world. Amongst them were Thomas Hobbes (*Leviathan*, 1652), John Locke (*Two Treatises of Civil Government*, 1690), Montesquieu (*The Spirit of Law*, 1748), Jean Jacques Rousseau (*Social Contract*, 1762), Jeremy Bentham (*Principles of Morals and Legislations*, 1780), Immanuel Kant (*Perpetual Peace*, 1795), and John Rawls (*Political Liberalism*, 1993), who are well known modern liberalism scholars, and who tried to develop empirical theories of a modern state in different ways in order to establish a well-organized society on the grounds of not only legal restriction on the power of the constitutional government, but also impose positive duties and rights on the State to promote and protect civil liberty, public welfare and social justice.

In America, the revolution for independence took place in 1776, and then a modern written constitution was passed in 1787 to establish a modern constitutional state, incorporating the principle of a limited government following the doctrine of separation of powers with mutual checks and balances, and the principle of rule of law with the doctrine of constitutional supremacy and independence of judicial power. It was then soon amended in 1791 to incorporate a constitutional catalogue of fundamental human rights protection (American people call it “civil liberty”). Until now it has never been changed; however, it has been the subject to twenty-six amendments.⁹ The most important event, in 1803, a new constitutional doctrine of judicial review was developed and established by the Supreme Court (not the Congress) in the well-known case of *Marbury v. Madison*.¹⁰ The judicial review is the legal power of the court to review the constitutionality

6 See Charles McIlwain, *Constitutionalism: Ancient and Modern*, p.2, 1947. See Thomas C. Grey, *Constitutionalism: An Analytic Framework*, and See Paul Sigmund, Carl Friedrich’s Contribution to the Theory of Constitutionalism–Comparative Government, in *NOMOS-XX* (New York University Press, 1979, pp.189-209 & pp.32-43). See also Prof. Moto Hidenori, *Japanese Constitutional System and the Rule of Law in the Report of Cross-Cultural Program for Student Dialogue*, February 21 to March 6, 2005, Nagoya University Graduate School of Law (CALE Report), p.27-30.

7 See Gordon J. Schochet, *Introduction: Constitutionalism, Liberalism, and the Study of Politics*, in *NOMOS XX, Constitutionalism*, Yearbook of the American Society for Political and Legal Philosophy, New York University Press, 1979, pp.1-15.

8 Moto Hidenori see at *supra* note 6.

9 See Richard H. Fallon, Jr., *The Dynamic Constitution: An Introduction to American Constitutional Law*, Cambridge University Press, 2004, at p.1-27.

10 http://en.wikipedia.org/wiki/Marbury_v._Madison

of the law through any concrete case in order to safeguard the rule of law and protect citizen's civil liberty. The US Constitution says nothing about this, but it was established by court jurisprudence.

In France, the well-known revolution demanding modern constitutionalism took place in 1789 by the very famous Declaration of the Rights of Man and Citizens and then a written modern constitution was soon first promulgated in 1791, establishing a constitutional monarchy of parliamentary democracy. Soon afterwards, France moved to a republic system of a parliamentary democracy by the First Republic Constitution of 1793. However, the French modern constitutionalism was a political struggle, creating civil republic revolutions that produced numerous past constitutions (seventeen Constitutions). Until 2010, the French nation has had the experience of changing five republic constitutional regimes, the latest one in 1958 (the so-called Fifth Republic) – a republic, democratic state of semi-presidential democracy currently being enforced. The Constitution of 1958 has been the subject of eighteen amendments up to 2010.¹¹

In Germany, the revolution for a constitutional state unification started in 1849, but this nation-state went through several constitutional regime changes before achieving the latest one (the current basic law). The first written, modern Constitution (Frankfurt Constitution 1849) attempted to introduce democracy and liberalism but it did not go into force.¹² Then the second written Constitution (the Bismarck Constitution) was adopted and put into force in 1871, but this Constitution had priority to national unity rather than in modern political democratic process. The Constitution provided greater importance to the Emperor (*Kaiser*), the government, and the bureaucracy than to the people, the legislature, and the political parties. In 1919, after World War I, the third constitution (Weimar Constitution) was adopted and put into force to replace the undemocratic Bismarck Constitution, introducing democracy, liberalism and socialist ideas, but it still had a lot of weaknesses and paved the way for Hitler to establish a dictatorship.¹³ In 1949, after World War II, the fourth and latest constitution (so called the Basic Law), was adopted under the influence of the Allies to introduce a liberal democratic federal state, but it was put into force only in Western Germany, and not the whole country, because of the division with East Germany that existed until full reunification in 1990.

In Japan, the revolution for a modern constitutional state took place in 1868 (the so-called *Meiji Restoration*).¹⁴ The first modern written constitution (*The Constitution of*

11 See Louis Favoreu, Collection Droit Public Positif: La Constitution Constitutionnelle en France de 1789 à 1989, Journées d'études mars 16-17 mars 1989, Association Française des Constitutionnelles. See also the Remark on the Constitution of French Republic in *The Constitutions of the Countries of the World*, Flanza VII, Oceana New York, Issued the August 2007.

12 See David P. Currie, *The Constitution of the Federal Republic of Germany*, The University of Chicago Press, 1994. See also Shiro Kiyomiya, *The Development of German Constitutional Law, and Its Characteristics in The Japan Annual of Law and Politics*, N.4, 1956, pp.47-48.

13 Id. Shiro Kiyamiya, p.48.

14 See Masami Ito, *The Modern Development of Law and Constitution in Japan*, in edited by Lawrence W. Beer. *Constitutional Systems in Late Twentieth Century Asia*, p.129-174. See also Moto Hidenori

the Empire of Japan or Meiki Constitution) came firstly into force in 1889 in attempting to introduce a constitutional monarchy state. However, the Meiji Constitution of 1889 had characteristics of the German Prussian Constitution (1850), which provided much power to the Emperor (*tenno*), the government and the bureaucracy rather than the people, legislature and the political party. In 1946 after World War II, the second and latest constitution (The Constitution of 1946) was promulgated and put into force under the influence of the Allies to introduce a modern constitutional system not only within a liberal democracy but also public welfare and social justice – a so-called social liberal democracy.

If we examine from the academic point of view, a modern constitutional state is not a state that has a constitution, but a state that functions according to a constitution.¹⁵ Constitutionalism, from an academic viewpoint, means “a system of effective regularized restraints upon political and government action by a constitution”¹⁶, or “a state is restricted by constitutional law in the use of its powers, and that the government is conducted in accordance with the constitution and all pursuant laws and orders”¹⁷; or broadly speaking it is “a legal standard of legitimacy of political action through the act of a ... people constituting a government”¹⁸, or “the act of general will”¹⁹ or a social status (a social contract and manifesto) that binds a nation-state”.²⁰

However, in historical development, the principles of modern constitutionalism could exist on different grounds by either making, just existing, or by interpreting. From the western constitutional characteristics’ point of view, a constitution (written or unwritten) is a supreme law of the nation in which its supremacy is composed by three basic elements: (1) a constitution is superior to the law; (2) any law contrary to the constitution is not law, it is void; (3) if a law is void, it must not be enforced. Moreover, according to Prof. Michel Troper²¹, the argument for the supremacy of constitution has a variety of interpretations; for example, for Prof. Marshall, the constitution is superior because it comes from the sovereign people themselves, who intended to limit the power of their representatives. Moreover for Kelsen and Barak, it is superior because the foundation of

at supra note 6. p.27.

15 See Clauspeter Hill & Jörg Menzel, *Constitutionalism in Southeast Asia*, Vol. 2, (TimeEdge Publishing Pte Ltd, 2008) p.5

16 See Carl J. Friedrich, Cf. Dante Germino, Carl J. Friedrich on Constitutionalism and “the Great Tradition” of Political Theory in *NOMOS XX*, 1979, pp.19-31.).

17 See Masami Ito, *The Modern Development of Law and Constitution in Japan* in edited by Lawrence W. Beer, *Constitutional Systems in Late Twentieth Century Asia* (University of Washington Press, 1992), pp.129-1774.

18 See Tomas Paine, *The Rights of Man*, in *the Essential Tomas Paine*, p.203, 246-248.

19 See Rousseau (*Social Contract, 1780*) and Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, (1795).

20 See Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals and Ideology – Toward a Layered Narrative*, in *International Journal of Constitutional Law*, Volume 4, Number 3, July 2006, pp.439-459.

21 See Michel Troper, Marshall, Kelsen, Barak and the Constitutionalist Fallacy, in *International Journal of Constitutional Law*, Volume 3, Number 1, January 2005, pp.24-38.

validity of the law–constituent power is superior over legislative power and it requires to be justified by judicial review.²²

In a democratic system of constitutional enforcement or in a democratic system of safeguarding constitutionalism, from a western practical point of view, there exist three optional constitutional approaches in order to enforce constitutional norms. The first approach is moral-binding enforcement, in which Prof. Gordon J. Schochet claimed, “it ultimately depended upon the good will of public officials. [...] when good will failed, there was nothing other than coercive ability of various social agencies to enforce constitutionalism”²³ The second approach is political-binding enforcement by political institutions (in the hand of legislative branch – a parliamentary supremacy, or in the hand of executive branch – the monarchy or the president), and it requires a completed political responsibility of the government to the governed. The third approach is special legal-binding enforcement. It is the doctrine of judicial review that requires an established court competence and independence.²⁴ These three components of constitutional procedures of enforcement, moral, political, and legal are important for the effectiveness of constitutional democracy in a modern nation-state.

However, according to Prof. George Kateb, a constitutional democracy needs to be enforced through only two constitutional procedures: political and legal procedures (no need to have morally binding enforcement). He warned, though, that the two procedures must be neutral and regular because neutrality and regularity are a matter of an efficient functioning of constitutional democracy.²⁵ The political procedure is the mode of political restriction on which the filling of offices through contested election on the basic of universal suffrage–electoral system and the legal procedures (due process of law) is the mode of legal restriction on state action to protect civil rights and liberty. However, Professor John Rawls has a different idea in arguing that a well-ordered constitutional democracy requires a deliberative democracy composing of ideas of public reason.²⁶

22 See Michel Troper, (1) for Marshall’s supremacy argument – a constitution is supreme or simple superior to ordinary law, because it was made by a sovereign people or that it is necessary to limit the power of the representatives, means either (a) that an ordinary law cannot amend the constitution or (b) that any law contrary to the constitution is void; (2) for Kelsen’s supremacy of argument – a constitution is supreme, because democracy requires to justify by judicial review in a ground the constitutional norms are superior over legislative norms, means the constitutional court does not really issue a decision on the merits of legislation but confines itself to pointing out that the measure under consideration must be enacted in constitutional rather than legislative form; (3) for Barak’s supremacy argument – a constitution is supreme because it based on a distinction between constituent power and legislative power, and if these two powers are separate, the first is superior to the second.

23 See Gordon J. Schochet, at *supra* note 7.

24 See Thomas C. Grey, at *supra* note 6, p.196.

25 See George Kateb, Remarks on the Procedures of Constitutional Democracy, in *NOMOS XX*, Constitutionalism, Edited by J. Roland, Pennock and John w. Chapman, New York University Press, 1979, pp.215-237.

26 See John Rawles, Political Liberalism, Columbia University Press, 2005, origin in 1993, at p.448.

What then are the core elements of modern constitutionalism? As I partly mentioned above, from the origin of the liberal point of view, the core elements of modern constitutional development are based upon three basic modern principles which have a long history in the western nation-states and currently have become accepted worldwide, i.e. the principle of a limited government, the principle of civil rights and liberty, and the principle of rule of law. The principle of a limited government requires countries to establish the legal limits to arbitrary power [separation of power] and a complete political responsibility of government to the governed [regular election]. The principle of civil rights and liberty requires the establishment of a legal catalogue of human rights protections [freedom and justice are under the law]. The principle of rule of law requires the establishment of judicial review and independence of judicial power. However, in its contemporary development, there are supplementary democratic elements, i.e. social justice and public welfare which grant a positive duty and right to the state to protect individual and people, not only restraints.

III. The Historical Development of Cambodian Modern Constitutionalism

*“... according to legend, the Kingdom was founded thousand years ago by a Kampu prince from India, and the queen of Naja (sea serpents) ... the contraction of words Kambu and Naja produces the words Kambuja which, pronounced by the Khmers, becomes Kampuchea; by the English Cambodia; by the French, Cambodge ...”*²⁷

Cambodia is an old nation-state in Southeast Asia which has a history of great civilization under rulings of kingship.²⁸ However, the nation fell under the French protectorate (*de facto* colony of France–colonialism) from 1863 to 1953 for the ninety-year period.²⁹ The

27 See Norodom Sihanouk, *Histoire “Souvenirs doux et Amers” Bittersweet Memories*, It has been published and available free on his official website (www.norodomsihanouk.info).

28 According to history of Cambodia, the Angkor Empire period was a great achievement of civilization in Southeast Asia, in which both foreign and Cambodian historians had recognizes and gave a well analysis on its socio-economic development.

29 See John Tully, *France on the Mekong, A History of the Protectorate in Cambodia 1863-1953* (Lanham, Maryland: University Press of America, 2002). According, Patricia M.E. Lorcin, a reviewer of the book, Tully produced a thorough examination of the socio-political developments of Cambodia under French rule. The relationship between France and Cambodia, Tully argues, was a Faustian bargain in which Cambodia sold its soul for French protection from internecine struggles and outside incursions. The ensuing arrangement, sanctioned by the treaty of August 11, 1863, was a legal fiction as Cambodia was not so much a protectorate as a *de facto* colony. For Tully the colonial era was a discrete period of Cambodian history, with three well-defined stages. The first, or erotic, phase extends from 1863 to the death of King Norodom in 1904. The second encompasses the reigns of Sisowath (1904-29) and Monivong (1927-41) and constitutes the halcyon days of colonial rule, while the last, from 1941 to 1953, was distinguished by the rising star of Norodom Sihanouk against a backdrop of colonial

French occupation was not welcomed by Cambodian people because the people's liberation movement for independence and sovereignty was gradually increased throughout the colonial period. Cambodia regained independence on 9th November 1953. However, the nation-state's political commitment to build a constitutional state had existed since 1947. The first written Constitution was adopted and promulgated on 6th May 1947 by "the Constituent Assembly", which was the first representative body of the people, having been elected by the democratic election in Cambodia on 1st September 1946.³⁰

Can we ask, then, did Cambodia have a constitution under the ancient regime (prior to 1947)? There was, of course, no written constitution until 1947. However, as matter of *de facto* historical fact, a constitution of a nation could exist by making (written) or un-making (unwritten) one, and so its existence is dependent upon its contents. If the contents of "a constitution" are just a set of written and unwritten norms used for standardizing and legalizing state's action, the ancient regimes in Cambodia had always had a constitutional law. The ancient constitution of Cambodia, like that of Asian kingship nations, applied local customary, social and religious norms: for example, (1) legitimacy of the kingship –conditions for succession to the throne of kingdom, (2) duty and right of the king, (3) relationship of the king, religion and his own citizens. From the Cambodian people's image, they referenced the king as a God on earth in which all powers were focused in the King himself. However, the ancient constitution is not the objective of this article, so I leave it for future research.

If we look into the contents, there were interesting arguments about the enforcement of modern constitutionalism in Cambodia. According to Raoul M. Jennar, unlike Western history, Khmer constitutional history was not characterized by the struggles against arbitrary power marked by its own constitutional texts *per se* but by a constitutional system based upon nepotism and favouritism, and this system was developed throughout all regimes of the past.³¹ He claimed that Cambodian people did not see the constitutional text as a supreme law binding upon their public life. On the other hand, Professor Jörg Menzel, in his academic article on *Cambodia: From Civil War to a Constitution to Constitutionalism?* (2008) notes that Cambodia has gained a constitution, but the spirit of constitutionalism, belief in the advantages of legally limited government, separation of powers and the protection of fundamental rights are still under development.³² However, in my view, the new culture of modern constitutionalism is gradually developed and accepted by the public and the old culture of authoritarianism seems to be apparently ended. The whole State system was constitutionally democratized, all politicians, nationally as well

decline and eventual decolonization. John Tully is also the author of *A Short History of Cambodia: From Empire to Survival*, (Sydney and Chiang Mai: Allen & Unwin and Silkworm, 2006).

30 See Hor Peng, at *supra* note, p. 2. .

31 Raoul M. Jennar, see at *supra* note 1, p. 2.

32 See Jörg Menzel, *Cambodia: From Civil War to a Constitution to Constitutionalism?* in Clauspeter Hill & Jörg Menzel, *Constitutionalism in Southeast Asia*, Vol. 2, TimeEdge Publishing Pte Ltd, 2008, pp.37-67.

as locally, have been democratically elected regularly every five years, the powers of the State has been functioned separately, and the principles of rule of law are fairly enforced. On the other hand, in the past, if we observe inside the previous constitutional texts, conceptually, officially, legally, there existed a *status change* towards constitutionalism; however, a huge gap between texts and reality existed. At that time, the nation was at civil war and the cultural restraint of favouritism remained strongly. As a matter of principle, rule of law cannot exist at the time of war and it also cannot achieve without the existence of a competent and independent judiciary.

However, this article aims to trace the development of constitutionalism in Cambodia, through consideration of characteristics of the Constitution of 1947, the Constitution of 1972, the Constitution of 1976, the Constitution of 1981, the Constitution of 1989, and the new Constitution of 1993.

1. The First Constitution of 1947: Kingdom of Cambodia (1947-1970)

“We, Norodom Sihanouk Varman ..., King of Cambodia,...grant to Our people, ... the Constitution of ...” [The Preamble of The Constitution of 1947]

For the first time, in Cambodian modern history, on 6th May 1947, a modern written Constitution was promulgated by King Norodom Sihanouk Varman, after the Constituent Assembly, the elected representative of the people, drafted, discussed and adopted it on behalf of the people. The Constitution of 1947 had most similar characteristics with the French Constitution of the Fourth Republic (1946).³³ However, the Constitution of 1947 had mixed concepts of traditional and modern constitutionalism – the concept of traditional constitutionalism was the kingship, royal institutions and the religion, which remained *status quo*.³⁴ The principle of modern constitutionalism, a limited government, civil and political rights, and due process of law were partly incorporated. The power of the King was limited and he fulfilled his state functions in accordance with constitutional provisions in which most powers were transferred to the elected representative bodies of the people – legislative, executive, and the judiciary branches.³⁵ The catalogue of human rights of the people incorporated important political rights (the right to election), in which all politicians were required to be directly elected by the people through general election in

³³ See Hor Peng at *supra* note 2, p.

³⁴ Article 21 “All powers emanate from the King...”, Article 35 “The King shall be the Supreme Head of State. His person should be sacred and inviolable” Article 28 deals with the composition of the Council of the Throne which maintained traditional continuity in appointing the heir to the Throne, Article 8 “Buddhism is the religion of the State”.

³⁵ Article 22 vested legislative power to the National Assembly, Article 23 vested executive power to the Ministers, Article 24 vested judiciary power to the court. These three organs fulfilled the functions on behalf of the King separately (Article 73, Article 97-112, Article 113-114).

order to fulfill political positions in the government.³⁶ There was no constitutional court or constitutional council, but constitutional democracy approached political enforcement by the National Assembly, which had legal right to interpret the Constitution.³⁷

However, the Constitution of 1947 ignored some important democratic elements of modern constitutionalism: for example, the *de jure* popular sovereignty, judicial review, judicial independence, and substantive positive rights (social and economic rights, public and social welfare) on the one hand, and on the other hand, negative rights (civil and political rights) which the Constitution proclaimed were merely recognized but left them behind the protection by separated legislations.

The constitutional text was divided into twelve chapters with 122 Articles. Chapter I dealt with the Nature of the State that proclaimed Cambodia as a monarchy. Chapter II expressed Freedoms, Rights, and Duties of the people. It was the first constitutional catalogue of fundamental human rights of the people that created negative rights, particularly civil and political rights of individuals. Chapter III dealt with the legitimated sources of laws and powers. It defined the laws as the expression of the national will that was influenced by the French Declaration of the Rights of Man and Citizens in 1789. However, all powers remained with the King and not the people. Chapter IV dealt with the Kingship. It expressed the legal conditions for succession to the throne of the kingdom, that the Council of Throne had the final say on the kingship. Chapters V, VI, VII, VIII, IX, X dealt with a democratic system of parliamentary government which had the king as a Supreme Head of State: the National Assembly, the Council of Kingdom, the Local Popular Assemblies, the National Congress, the Ministers, and the Courts. The Ministers had political collective responsibility to the National Assembly for conducting public policy and administration affairs. Finally Chapter XI and XII dealt with general and special provisions on the principle of constitutional amendment and legal restraints on political institutions in order to protect the monarchy and a parliamentary government.

2. The Second Constitution of 1972: Khmer Republic (1970-1975)

“We, the Khmer People, ... proclaim this Constitution...”

[The Preamble of The Constitution of 1972]

After the *Coup d’Etat* of 18th March 1970, the Republic was proclaimed on 9th October 1970, to replace the constitutional monarchy regime, and then two years later a second Constitution was promulgated on 10th May 1972 to replace the first Constitution of 1947.³⁸

³⁶ Article 3-14: civil rights (life, freedom, property), Article 49-51: political rights in election.

³⁷ Article 119 “The right to interpret constitutional texts shall belong in the last resort to the National Assembly”.

³⁸ See Raoul M. Jennar, at *supra* note 1, at p.57.

The Constitution of 1972 had legal characteristics partly with the French Constitution of the Fifth Republic and the U.S. Constitution.³⁹ Ideally the Constitution of 1972 adopted a liberal democratic system of presidential government. The popular sovereignty was first *de jure* proclaimed and realized throughout political constitutional procedure, having both parliamentary and presidential elections. The Constitution of 1972 adopted a bicameral system of parliament composing of a National Assembly and a Senate. The catalogue of fundamental human rights of the people was clearly adopted by the Constitution, especially positive rights of the poor.⁴⁰ However, the freedom from capital punishment, the freedom of expression, the freedom of association and assembly and the privacy right were still subjected to suspension in case of state emergency or war.⁴¹ On the other hand, the process of constitutional democracy approached special legal binding enforcement in which the doctrine of judicial review by “*a constitutional court*” with a principle of independent judiciary power was first *de jure* established.⁴² Ideally the Constitution of 1972 attempted to create a status change in constitutionalism in terms of a strong reaction to the Constitution of 1947 by acknowledging and legalizing the sovereignty of the people, the social rights of the poor, and independent judicial review. However, due to the fact that the nation was in a heavy civil war, this Constitution never came into full effect, and the regime itself was plagued with rampant corruption and disorganization, and then it totally collapsed.⁴³

3. The Third Constitution of 1976: Democratic Kampuchea (1975-1979)

“On the basis of sacred and fundamental desires of the people, workers, peasants, and other labourers as well as those of the fighters and cadres of the Kampuchean Revolutionary Army,...the Constitution of Kampuchea states...”
[The Preamble of Constitution of 1976]

39 See Hor Peng, at *supra* note 2, p.30.

40 It expressed in Article 15 “... rights to receive welfare assistance” Article 17 “the State shall seek to create employment for all citizens ...” Article 19 “the State shall ensure all citizens right of education ...and basic education shall be compulsory and free...”

41 Article 6 “...Capital punishment is abolished except when the nation is proclaimed to be in danger”, Article 22 “the exercise of the rights and freedoms guarantees by Article 7 [freedom of expression], Article 8 [freedom of association and assembly], Article 11 and 12 [right to privacy] of this Constitution may be suspended in a state of emergency or martial law or if the nation is proclaimed to be in danger or at war”.

42 Article 81 “the judicial branch shall be independent...impartiality”. Article 91 “the Supreme Judicial Council shall ensure the independence and discipline of the Bench...” Article 95 “the Constitutional Court shall rule upon the regularity of the election...interpretation of the Constitution...” Article 97 “the High Court of Justice shall have the power to judge the President of the Republic, the Vice-President, members of Cabinet, members of Parliament, members of Constitutional Council and members of Supreme Court for crimes and offences committed in the exercise of their functions”.

43 See Jörg Menzel at *supra* note 31.

The Constitution of 1972 [Khmer Republic] didn't maintain Cambodia in peace but in war. On 17th April 1975 the Kampuchea Revolutionary Army [Khmer Rouge] entered Phnom Penh and proclaimed revolutionary victory; soon afterwards, a third Constitution was promulgated on 5 January 1976.⁴⁴ The Constitution of 1976 proclaimed Cambodia as a State of People, Workers, Peasants and all of the other Kampuchea labourers were officially named "Democratic Kampuchea".⁴⁵ It didn't express characteristics of modern constitutionalism at all – i.e. no limited government by election, no system of separation of power and check and balance, no legal guarantee of civil and political rights, and no system of due process of law, which the previous Constitution of 1947 and the Constitution of 1976 had in force. It attempted to adopt characteristics of a radical communist state by proclaiming not only to abolish all private properties and civil and political rights but also to enforce a collective socialization that the people's State [*Angkar*]⁴⁶ had absolute power: "All important general means of production are the collective property's of the people's State and the common property of the people." The constitutional text was designed into sixteen chapters with only 21 Articles. However, as a matter of fact, the Constitution appeared on paper, but constitutionalism didn't exist.

4. The Fourth Constitution of 1981: People's Republic of Kampuchea (1979-1989)

"Throughout thousands of years, the Kampuchea people have struggled to build and defend their countries of which the Angkor civilization is proof and pride. But they never enjoyed the fruits of their labour...under the oppressive yoke of regimes of slavery, feudalism, and imperialism...the People's Republic Constitution is the result of long struggle...reflects the will and objective of our entire people to firmly defend national independence and to build the fatherland, which is gradually advancing toward socialism..." [The Preamble of Constitution of 1981]

The *pseudo*-constitutionalism of the Democratic Kampuchea [Pol Pot's Political Regime] was ended by the Kampuchean National United Front for National Salvation (KNUFNS) on 7th January 1979, in which Cambodian people notified a historic day for their liberation.⁴⁷ Two years later, the fourth Constitution was promulgated on 9 July 1981. The Constitution of 1981 officially re-named Cambodia as the "People's Republic of Kampuchea" and it had

⁴⁴ See Raoul M. Jennar, at *supra* note 1. p.81.

⁴⁵ See Article 1 of the Constitution of 1976.

⁴⁶ the term "*Angkar*" didn't express in the Constitution of 1976 at all but as a matter of facts, the term "*Angkar*" was widely used to train the people to absolutely obey it. *Angkar* seemed to be doctrinaire of the Khmer Rouge that represented all policy aspects of the Khmer Rouge including their communist party, laws, government, parliament, court, and *Pol Pot* himself.

⁴⁷ If the ECCC found that Khmer Rouge's rulers committed a crime of genocide and a crime against humanity which they are currently under the process of trials, the 7th January, 1979 was a liberation day at least in terms of human rights.

most similar characteristics to socialist constitutionalism.⁴⁸ The socialist constitutionalism [socialist democracy] and modern constitutionalism [liberal democracy] are different. The socialist constitutionalism conceptually rejects the separation of powers but establishes people's sovereignty through the principle of parliamentary supremacy; it has a constitutional catalogue targeting on human rights but focusing only on collective rights of workers and peasants and the civil liberty of individuals were very limited. It has no system of judicial independent review, and due process of law is nonexistent due to the people's court fulfills the role to defend the State's authority rather than the rights of individuals.

The constitutional text of 1981 contained ten chapters that composed ninety-three articles. Chapter I expressed a political system that adopted a single party ruling. Chapter II expressed the economic system, which is a system of economic planning by the State. Chapter III expressed the rights and duties of citizens that focused much on positive rights with duties to defend collective property but had a little fundamental negative rights of the citizens: political rights, property rights, as well as right to association. Chapter IV dealt with the National Assembly that had sole legislative power and was the supreme organ of the State power. Chapter V dealt with the Council of State which was a standing organ of the National Assembly. Chapter VI dealt with the Council of Ministers holding executive powers and was politically responsible to the National Assembly. Chapter VII, VIII and IX dealt with the Local People's Revolutionary Committees, the Jurisdictions and Courts, and the National Emblem, National Flag, National Anthem and Capital. Finally Chapter X dealt with the effects of and amendment to the Constitution which expressed the Constitution as a supreme law of the nation, and the constitutional amendment was under the sole authority of the National Assembly within the two-third majority vote of the deputies of the National Assembly. This Constitution was in effect until 1989.

5. The Fifth Constitution of 1989: State of Cambodia (1989-1993)

In 1989, due to international politics of the ending of the Cold War, especially between the socialist bloc and the capitalist bloc, and the demand for national reconciliation gradually increasing the power of the Cambodian People's Party which represented highest majority of Cambodian people, endeavored a reform in attempt to achieve full national reconciliation and full peace. The Constitution of 1981 was dramatically amended on 30 April 1989 by the National Assembly of the People's Republic of Kampuchea, and it was put into force on 20 May 1989, as the so-called Constitution of State of Cambodia or the Constitution of 1989. The Constitution of 1989, in which had no preamble, tried to maintain the *status quo* of the state organs but changed the name of Cambodia from "People's Republic of Kampuchea" to the "State of Cambodia." However, the constitutional content

⁴⁸ See Evan Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of State Building* (Yale University Press, 2000).

of the economic system was changed fundamentally from a *system of economic planning* into a *free market system*. The constitutional catalogue of fundamental human rights was fundamentally approached to restore traditional continuity with modern democratic characteristics: Buddhism was re-established as the State's religion and private property, especially rights to landownership, was constitutionally re-allowed. However, political rights, especially the right to form a political party, right to expression, and right to association and assembly were still not allowed until the 1991 Peace Agreement was fully put into force by UNTAC and the National Supreme Council of Cambodia in 1992.

6. The Paris Peace Agreement on Cambodia's Political Settlement (1991-1993)

Throughout two decades of a long civil war (since 1970), all Cambodian political parties together with international efforts tried to seek full peace, and the political negotiation process was started in December 1987 between Samdech Sihanouk and Prime Minister Samdech Hun Sen. On October 23 1991, the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict were signed by Cambodia and eighteen other nations in the presence of the United Nations Secretary-General in Paris.⁴⁹ The Paris Peace Agreements of 1991 consisted of a Final Act and three instruments: (1) the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict; (2) the Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia; and (3) the Declaration on the Rehabilitation and Reconstruction of Cambodia. In enforcing the agreement, the Paris Peace Agreement of 1991 called for establishment of two institutional transitional components. First, the Supreme National Council of Cambodia (SNC) was the unique legitimate body and source of authority in Cambodia, in which, throughout the transitional period, national sovereignty and unity were enshrined, and which represented Cambodia externally. Second, a United Nations Transitional Authority in Cambodia (UNTAC) with civilian and military components, which acted with full respect for the national sovereignty of Cambodia, was responsible for the organization and conduct of free and fair elections.

In addition, the Paris Peace Agreement of 1991 also recommended that Cambodia shall adopt a new Constitution based on at least six basic principles: (1) the Constitution shall be a supreme law of the land; (2) the Constitution shall include a declaration of catalogue of fundamental human rights; (3) the Constitution will declare Cambodia's status as

⁴⁹ See full text of the Paris Peace Agreement on a Comprehensive Political Settlement of the Cambodia Conflict. The states participating in with fully granted a signed international guarantee namely Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Socialist Republic of Vietnam and the Socialist Federal Republic of Yugoslavia.

a sovereign, independent and neutral State, and the national unity of Cambodian people; (4) the Constitution will state that Cambodia will follow a system of a liberal democracy on the basis of pluralism; (5) the Constitution will declare an independence of judiciary; (6) the Constitution will be adopted by a two-thirds majority of the member of the constituent assembly.⁵⁰ Conceptually this 1991 Paris Agreement served as pre-conditions for modern constitutionalism, however as a matter of implementation, it didn't bring Cambodia into full peace.

7. The New Constitution of the Kingdom of Cambodia (1993-Present)

“We, The Khmer People ...inscribe in the Constitution of the Kingdom of Cambodia as following ...” [Preamble of the Constitution of 1993]

The present Constitution of the Kingdom of Cambodia is the sixth Constitution and the latest one, however it has been amended seven times till 2010. It was adopted by the Constituent Assembly of a representative of the Cambodian people which was born from a democratic election organized by UNTAC after two decades of a long civil war, on 21 September 1993; it was then promulgated by the Head of State, Samdech Norodom Sihanouk, on 24 September 1993, in compliance with the Peace Agreement on Cambodia's Political Settlement of 1991. It is called the new Constitution of 1993.

The new Constitution of 1993 was made under the influence of the United Nations and the International Community. It has reflected not only universal and modern constitutional characteristics – democracy, human rights, and rule of law – but also to its own historical and traditional characters in an attempt of restoring historical continuity: kingship, state religions and state institutions.⁵¹ In addition, the Constitution of 1993 prefers a British/Japanese model of parliamentary democracy of government; it does not adopt the French or American system of presidential democracy with the strict separation of powers. This section examines basic constitutional principles of the Constitution of 1993.

From a common spirit point of view, the new Constitution of 1993 adopts special democratic characteristics of modern constitutionalism: (1) national sovereignty, (2) democracy, (3) human rights, (4) rule of law, (5) constitutional monarchy system of a parliamentary government, (6) separation of power, and (7) regular process of institutional eternity. I am going to do an analysis of its evolutionary process on the basis of historical,

⁵⁰ It expressed at the Annex 5 of the Paris Peace Agreement of 1991.

⁵¹ See Hidenori Moto, A Comment on Cambodian Constitution at International Conference on Cambodian Constitutionalism held on 10-11, 2003, at Royal University of Law and Economics in collaboration with Nagoya University Graduate School of Law. Professor Moto is a Japanese Constitutional Scholar.

political and legal development of contemporary constitutionalism. It might be useful for promoting constitutional understanding and application in Cambodia as well.

Characteristic of National Sovereignty

The new Constitution of 1993 adopts Cambodia's status as a sovereign and independent state in compliance with international law. In international law theory, the legal status of the sovereignty of the state has two basic legal elements: the absolute right of legal equality of states and the obligation of the states for non-intervention in domestic affairs of the other states.⁵² In principle, the legal equality of the states is to offer legal protection for weaker states in the face of pressure from the more powerful states, and the principle of non-intervention in domestic affairs is to offer legal protection for the territorial sovereignty and the domestic jurisdiction of states on an equal basis.⁵³ However, in contemporary development of international law, the principle of state sovereignty has shifted from the absolute rights of state leaders to respect for the popular will and internal forms of governance based on universal standards of democracy and human rights.⁵⁴

If we look inside the Cambodian context, the constitutional principle of state sovereignty applies, along with at least five legal features related to international relation: (1) Cambodia is a independent and sovereign state, (2) Cambodia is a peaceful co-existent state, (3) Cambodia is a permanently neutral state, (4) Cambodia is a non-aligned state, and (5) Cambodia is an indivisible state.⁵⁵ The development of these legal features is not only a reflection in compliance with international law, but also in the light of its own history. Cambodians endured suffering from external invasion, occupation, and division for a long period in their modern history. After the Angkor Empire collapsed in the thirteenth century, Cambodian people struggled against outside incursion in particular from powerful neighboring nations. Soon afterwards, Cambodia was under *de facto* French occupation in the name of *pseudo* protectorate for a ninety-year period. From 1970-1975 American imperialism came to interfere into internal politics and led a military *Coup* to establish the Republic and consequently caused a break of politicians into several fractions that led to civil wars and genocide⁵⁶, at the same time Cambodia's status of state sovereignty and independence were in question. To prevent this problem from happen-

52 In accordance with Article 2(1-7) of the UN Charter 1945.

53 See Document(s).22 of 37 (State Sovereignty) in International Development Research Centre (IDRC) (*in* www.idrc.ca). This web has a very detailed documents on international laws and international relation.

54 Cf. IDRC (Reisman, "Sovereignty and Human Rights in Contemporary International Law," pp. 867).

55 It is expressed in Article 1(2), Article 3, Article 53-55 and Article 55. Article 1(2) "The Kingdom of Cambodia shall be an independent, sovereign, peaceful, permanently neutral and non-aligned country". Article 3 "The Kingdom of Cambodia is an indivisible state". Article 53 "The Kingdom of Cambodia adopts a policy of permanent neutrality and non-alignment. The Kingdom of Cambodia follows a policy of peaceful-co-existence with its neighbors and with all other countries thought the world..."

56 See David Chandler and see also John Tully at *supra* note 1.

ing again, the Paris Agreement in 1991 pledged a guarantee for respect of Cambodian sovereignty and neutrality.⁵⁷

I personally do not agree with some foreign historians who argue that the Cambodians were not the peace-loving people which they were so often made out to be.⁵⁸ I personally think that the claim was completely wrong in terms of international law and the law of nature. Cambodians were the victims from acts of invasion and occupation, and the struggle for self-defense and self-determination is lawfully permitted by international and customary law. On the other hand, the principle of a peace-loving people is the law of all human which I think that every human being equally naturally wishes.

In the Cambodian image, the legal concept of pacifism and neutralism seemed to be key points to maintain, preserve, and defend her legal status of an independent and sovereign state. The concept begins in the 1950s by Samdech Sihanouk, but it was completely damaged because of the Cold War. However, it today remains one of constitutional values in Cambodia's foreign policy. The Preamble of the present Constitution proclaims that "We, the Khmer people [...] hav[e] awakened to restore the nation into an 'Island of Peace' [...]" On the one hand, Article 53 declares that Cambodia adopts a policy of permanent neutrality and peaceful-co-existence with its neighbors and with all other countries throughout the world. On the other hand, the principle of pacifism is also one of the major goals of the UN Charter, as well as international law, which says all state members have the duty to maintain international peace and security. After the Second World War, Japan was the first country in the world that adopted the UN principle of pacifism into her own contemporary constitutionalism.⁵⁹

Characteristic of Democracy

The Constitution of 1993 re-adopts a democracy on the basis of liberalism and pluralism, called "principle of liberal multi-party democracy." The principle of liberal multi-party democracy is a core characteristic of modern constitutionalism in Cambodian politics, which is expressed throughout the whole body of the Constitution. The principle was re-born from the Paris Peace Agreement of 1991, in which all parties concerned in political conflicts reached unanimously that "Cambodia will follow a system of liberal democracy

57 Article 18 [Paris Peace Agreement 1991]: Cambodia undertakes to maintain, preserve and defend, and the other Signatories undertake to recognize and respect, the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity of Cambodia, as set forth in a separate Agreement.

58 See John Tully, *France on the Mekong: A History of the Protectorate in Cambodia, 1863-1953*. Cf. *H-France Review* Vol. 4 (December 2004), No. 121, Review by Patricia M.E. Lorcin, University of Minnesota-Twin Cities. The text of review is available on the website of H-France Review: <http://www.h-france.net/>.

59 See Article 9 of the 1947 Constitution of Japan. According Professor Moto Hidenori, pacifism in the Constitution of Japan consisted of three elements: renunciation of all kinds of war including threat and use of forces, abolition of all kinds of war potential including armed forces, and the right to live peace.

on the basis of pluralism.”⁶⁰ In reflecting this affirmative duty, the Constitution adopts this basic principle with the following original provisions:

The Preamble of the Constitution explicitly proclaims that “[T]he People of Cambodia, [...] hav[e] awakened [...] to build the nation up to again be an ‘Island of Peace’ based on a liberal multi-party democratic system [...].” Article 1 of the Constitution expresses that “Cambodia is a Kingdom that the King shall rule according to the Constitution and the Principle of liberal multi-party democracy [...].” Article 52 of the Constitution says again that “the Kingdom of Cambodia adopts a policy of liberal multi-party democracy [...].” Article 153 of the Constitution restricts that “revisions or amendments of the Constitution affecting the system of liberal multi-party democracy and the regime of constitutional monarchy shall be prohibited.” Article 50 imposes that “Khmer citizens of both sexes shall respect the principles of [...] liberal multi-party democracy [...].”

What is a “liberal multi-party democracy?” In Cambodian technical linguistics, it comes from a combination of three core constitutional doctrines: democracy, multi-party system, and liberalism. The term “*liberal multi-party democracy*” as a very simple meaning is that “a government rules by the elected representatives of the people with granting very much respect to political and civil rights of the people.” In the Cambodian context, liberal multi-party democracy is constitutionally more analogous to a representative democracy than a direct democracy, and the people exercise their powers by means of election and voting and through the organs of elected government. It is quite similar to democracy in England, Germany and Japan. In this sense, democracy in Cambodian constitutionalism attempts to standardize “a government of the people, by the people, and for the people” in which the sovereignty of the people shall be upheld throughout the whole constitutional procedures enforcement that bind all politicians with three key pillars of moral, political and legal responsibility and accountability.

As a matter of morality, the stability of politics in the democratic society partly depends upon personal attitude of politicians towards political justice. Aristotle’s method (The Politics, 350 B.C) approached political justice based on *telos* (purpose).⁶¹ If the purpose of a human being is to live a good life, then society should promote the good life by ensuring that citizens have the resources necessary for living a good life, and by encouraging them in the pursuits that make for a good life.

Jeremy Bentham (Introduction to the Principles of Morals and Legislation, 1780) approached political justice based upon great happiness of the great majority. In his own view, the right thing to do in democratic politics is to do whatever will produce the greatest amount of happiness for the greatest number of people, and whatever is necessary to prevent the greatest amount of unhappiness. However, John Stuart Mill (Utilitarianism, 1863) moderated Bentham’s concept to balance between the majority and minority.

⁶⁰ See in *Annex 5* at point 4 of the Paris Peace Agreement of 1991.

⁶¹ Cf Michael Sandel, Justice with Michael Sandel, Readings (Episode 9-10). It is available on the web: www.justiceharvard.org.

Mill's morality of political justice based upon higher pleasure of the majority but do not make harm to individual rights [minority rights]. The higher pleasure as justification for protecting rights, and the protecting individual rights is the best way to increase the sum of happiness in long run.

Immanuel Kant (Groundwork for the Metaphysics of Morals, 1785)⁶², argues that morality of political justice is based neither on the principle of utility nor on a law of nature, but on human reason. According to Kant reason tells us what we ought to do, and when we obey our own reason only then we are truly free. On the other hand, it is a very quite interesting in John Rawls (Political Liberalism, 1993), in which he argued that in a modern liberal democratic regime, the citizens are free and equal and that society should be a *fair* system of cooperation.⁶³ According to him, a basic feature of democracy is the fact of reasonable pluralism⁶⁴, and in this sense, justice as fairness should be a fundamental political justice; then the political justice is a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions. It applies to what he calls the basic structure of society.⁶⁵ The exercise of political power is fully proper only when it is exercised in accordance with constitutional provisions.⁶⁶

From these moral points of view, if we take a short look into the historical context, Cambodia is based upon a form of representative democracy by election, not just beginning in 1993 but since 1947, however the morality of political justice was subject to different approaches according to individual rulers.

The form of representative democracy in which the people exercise their power by election, in principle, requires the election shall be fair and the electoral process shall be neutral. From my view, Cambodian current practice has been approaching to these principles. Cambodia adopts the election system of proportional representation by a party list system and put into force for all types of elections at the national and local levels, totaling five elected representative main organs. The people vote for a party and not for any individual candidate, and so the independent individual candidate is not allowed in the Cambodian election system. The political party nominates party candidates into a party list for all type of elections through party congress. In this sense, the political party that wins in election represents the popular will, and the principle of party sovereignty has been developed and respected.

62 Id. Readings (Episode Six)

63 See John Rawls, Political Liberalism (Columbia University Press, 2005, origin in 1993), at p.3-46.

64 Id. at p.441.

65 Id. at p.11.

66 Id. p.37.

ELECTION SYSTEM OF PROPORTIONAL REPRESENTATION BASE CONSTITUENCIES

Representative Organ	Region (8)	Province (24)	District (193)	Commune (1621)	Election
<i>National Assembly</i>		✓			<i>direct</i>
<i>Senate</i>	✓				<i>indirect</i>
<i>Council of Reachteany/Kbat</i>		✓			<i>indirect</i>
<i>Council of Krong/Srok/Khan</i>			✓		<i>indirect</i>
<i>Council of Khum/Sangkat</i>				✓	<i>direct</i>

Characteristics of Human Rights

The present Constitution of 1993 proclaims to recognize and respect all fundamental human rights which are stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the Covenants and Conventions related to Human Rights, women's rights and children's rights (art.31) on the one hand, and on the other hand, it adopts specifically a catalogue of fundamental human rights for all Khmer citizens. Therefore, in the Cambodian context, generally speaking, if we talk about a constitutional catalogue of fundamental human rights, we have to examine not only constitutional texts but also international human rights laws as well. However, as a matter of practice, the international human rights laws are rarely direct applied by local courts. Until 2007 there had been progress that the Constitutional Council justified legitimate sources of national law including all international conventions Cambodia ratified.⁶⁷ This attempts to remind the Court that it needs to use all relevant sources of law for possible fundamental human rights interpretation and protection.

The new Constitution of 1993 adopts a detailed catalogue of basic rights including both civil rights and social rights: rights to equality before the law, and freedom from discrimination (art.31[2]); right to life, freedom and personal security, and freedom from capital punishment (art.32); freedom from deprivation of nationality, and freedom from deportation (art.33); right to vote and stand as candidates for an election (art.34); right to participate actively in political, economic, social and cultural life of the nation (art.35); right to work, right to obtain social security, and right to form trade unions (art.36); right to strike and right to organize peaceful demonstrations (art.37); right to human dignity, freedom from torture, right to due process, right to defend him/herself, right to be in-

⁶⁷ See the Decision of the Constitutional Council (2007). I was a constitutional review on the law of criminal aggravating circumstance 2002. According to the Constitutional Council, the national law means a Constitution and all existing laws including international convention Cambodia ratified.

nocent until having final conviction by the court (art.38); right of petition or of making complaints for compensation for damages caused by any break of law by institution of the State (art.39); freedom of movement, and right to privacy of residence, of communication and of correspondence (art.40); freedom of expression, freedom of information, freedom of assembly (art.41). right to establish association and political parties (art.42); right to freedom of religion and belief (art.43); right to private ownership (art.44); right to equality between men and women, and right to non-discrimination against women, and right to marriage (art.45); right to freely sell products (art.60); right to obtain public and social welfare for improving the standard of living, of education, and of health (art.65-75).

However, none of these rights and freedoms is absolute. These rights and freedoms are expressively made subject to restriction by statutes [legislations]. The rights and freedoms which are expressed in statutes are made subject to legal restrictions on the basis of the right of others, the public orders, the national security, social justice, public and social welfare, and the good moral and customs of Khmer society. In the context of human rights protection, the Cambodian Constitution not only recognizes and respects negative rights of individuals (freedoms from State) but also imposes a positive duty and right on the State (legislators and administrators) to promote public welfare, social justice, and protect individuals (art.46, 48, 52-75). It is quite similar to German Basic Law and the Japanese Constitution, and which was interpreted by the Courts to mean that the State shall have rights and duties to preserve, promote, protect and safeguard public welfare and social justice.⁶⁸

What is the concept of public welfare? According to Professor Nobuyoshi Ashibe, public welfare is the principle of substantial fairness for reconciling the conflicts and contradictions among human rights. When public welfare operates together with the principle of the liberal state (the passive state) in order to guarantee rights and freedoms equally to each person, they recognize only the minimum necessary restraints on rights and freedoms. However, when the public welfare is joined with the principle of the social state (the positive state), regulation as necessary of economic freedom and social rights is acceptable; that is to effectively guarantee the rights to livelihood and the fundamental rights of workers, restrictions on property rights are important in some cases.

In Japan, the restraint principle on individual freedom has been developed with the principle of public welfare by the Supreme Court through a concrete case in 1966 that “such rights should be understood to be subject to inherent restriction, justified from the standpoint that the interests of the nation as whole have to be protected.”⁶⁹ The Court sets four conditions as standards for judging inherent restraints: (a) that the limitation

68 See David P. Currie, *The Constitution of the Federal Republic of Germany*, University of Chicago Press, 1994, p.13-24. See also Nobuyoshi Ashibe, *Human Right and Judicial Power*, in edited by Lawrence W. Beer, *Constitutional Systems on Late Twentieth Century Asia*, University of Washington Press, 1992, pp.224-269. See also Akira Osuka, *Welfare Rights*, in edited by Percy R. Luney, Jr., and Kazuyuki Takahashi, *Japanese Constitutional Law*, University of Tokyo Press, pp.269-287.

69 Cf. Nobuyoshi Ashibe, at id. p.233.

be the reasonable minimum necessary; (b) that its use be confined to cases of unavoidable necessity to ward off a serious threat to the livelihood of the people; (c) that any sanctions imposed not go beyond what is necessary, with criminal sanctions restricted to cases of absolute necessity, and (d) that some sort of compensatory measures should be devised for cases of rights violation.⁷⁰ The Court of Japan fulfills very important roles to protect human rights.

In Cambodia, the new Constitution of 1993 imposes positive duties to individuals and the State. For individuals, it imposes five duties: (1) customary duty of parents and children to take good care of each other (art.47); (2) duty to respect the Constitution and Laws (art.49[1]); (3) duty to take part in national reconstruction and to defend the mother land (art.49[2]); (4) duty to respect the principle of national sovereignty and liberal multi-party democracy; and (5) duty to respect public property and legal acquired private property (art.50). For the State the Constitution imposes a specifically positive duty and right: (1) duty and right to protect and promote women, children and disabled persons (art.46,48,74); (2) duty and right to protect independence, sovereignty and territorial integrity of the nation; (3) duty and right to protect national unity, protect good customs and traditions of the nation; (4) duty and right to protect legality, public order and national security; (5) duty and right to promote public and social welfare and social justice (art.52); (6) duty and right to preserve and protect natural environment (art.59); (7) duty and right to promote economic development (art.61); (8) duty and right to protect the price and products for the farmers and crafters and find marketplace for them (art.62); (9) duty and right to protect and promote the quality of education (art.65); (10) duty and right to preserve, protect and promote national culture, Khmer language, ancient temples and artifacts and redecorate historic sites (art.69); (11) duty and right to establish the social security system (art.75). These affirmative duties and rights of the State might be derived from historical legacy of the socialist people's democracy during 1979-1993. In socialist state theory, economic, social and cultural rights are guaranteed through positive actions of the State, collective rights of the State or social state theory.

However, the catalogue of fundamental rights (civil liberty) is the most important. If we take a brief look into the western constitutional model of fundamental rights protection, one of them is a constitutional doctrine of judicial review that is a very effective means to protect rule of law and basic rights of the people against the public powers. In the context of Cambodian constitutionalism, as in France, Germany, Japan and America, it also applies a concept of judicial review which grants the Constitutional Council to safeguard and interpret the Constitution, and to review the constitutionality of statutes, whilst the Court to review executive regulations when having complaints by the people. In real practice, the fundamental rights of the Khmer people are systematically protected through the constitutional legislative review as well as judiciary process within existing

70 Cf. Nobuyoshi Ashibe, at id. p.233.

constitutional provisions. In Germany, even the Basic Law establishes constitutional restraints on the federal parliament; however, the Constitutional Court has gradually developed and imposes other new additional constitutional norms of restrictions on legislative power in order to promote more effective protection of constitutional rights of German citizens. Any legal measures, which impose legal restriction on the people requires compliance within the principle of necessity, reasonableness and proportionality.⁷¹

Characteristic of Rule of Law

The new Constitution of 1993 declares an established rule of law to safeguard democracy and fundamental human rights. Even though the Constitution does not express the term of rule of law explicitly, it imposes basic elements of the rule of law: (1) the principle of constitutional supremacy within a judicial review system (art.150, 136, 142); (2) the principle of equality before the law (art.31[2]); (3) the principle of constitutional restraints on legislative power (art.17, 91-92, 152-153); (4) the principle of the constitutional obligation of the people to respect the Constitution and laws and democracy; (5) the principle of separation of powers (art.51[4]); and (6) the principle of judiciary independence and impartiality (art.128). These principles mean that both the people and the State are strictly bound by the Constitution and laws. The law which is adopted by legislative powers is subject to the reviewing of its constitutionality. The executive regulations are subject to judicial control.

The supreme law in Cambodia's legal system is the Constitution, not the parliamentary statutes. The Cambodian legal system has been derived from the concept of the Roman German legal system or a civil law concept of legal system. It began with the French colonization. The rule of law from civil law concept requires a compliance with the basic principle of legal certainty (legality) in order to make sure that the state's tasks and structures were written down in the Constitution and laws.⁷² In addition, the rule of law in democratic countries of civil law tradition is the concept that all laws need to be adopted by a democratically elected parliament.⁷³ Jean Jacques Rousseau, *The Social Contract*, first published in 1762, states that law could only emanate from the general will of the community; the legislative power is the exercise of the sovereign will of the people. According to him, this power cannot be alienated or delegated, and any attempt to create generally applicable rules from any other sources represents a usurpation of popular sovereignty and cannot result in law. In the Cambodian context, due to the form of the government based upon parliamentary democracy, the rule of law based parliamentary laws (the law adopted by the National Assembly and the Senate) are very important, and

71 Id. p.19-24.

72 John Henry Merryman, *The Civil Law Tradition, An Introduction to the Legal Systems of Western Europe and Latin American*, Stanford University Press, Second Edition 1985, p.48-55.

73 See Jörg Menzel, see at supra note 31.

conceptually as well as legally the hierarchy source of law is definitely established by “a constitution, to parliamentary legislations, to executive regulations, and to customs”.

However, as to the application of rule of law, there are apparent practical trends between legislative and executive powers, that is the legislative delegation by the parliamentary adopted laws in forms of executive regulations – *decree*, *sub-decree* and *prakas*. It seems to be a practical challenge in terms of separation of powers. However normally in democratic nations the principle of delegation from legislative to executive is allowed by the form of adopted law. On the other hand, judiciary independence is gradually progressed in terms of legal principles and trial procedures but it still challenges in terms of professionalism and individual ethic responsibility mostly came from judges themselves.

Characteristic of Kingship

*“I swear to be respectful to the Constitution and Laws of the Kingdom of Cambodia and to pledge all my efforts to working for the interests of the State and the People”*⁷⁴

In a general view, in a monarchy system, the King theoretically has sovereign power and so it seems to be contradictory to a liberal democratic system in which the people are sovereign. However, if we look inside the historical evolution context, the monarchy system has become well developed and flexible within a liberal democratic system, most particularly in England and in Japan—a system of constitutional monarchical regime. In a constitutional-monarchical regime, the King reigns and rules in accordance with the Constitution and laws. In 1947, Cambodia attempted to apply this regime but it had little success and then changed to a republic regime from 1970-1975 and to socialist regime from 1975-1993. However, before and after the election in 1993, the new idea of restoration of a kingship system was publicly discussed with question on what constitutional regime Cambodia should adopt—a republic or a monarchy? The Paris Peace Agreement of 1991, of course, recommended that “the Cambodian Constitution [...] follow a system of liberal democracy on the basis of pluralism...”; however, it said nothing on whether Cambodia should be a republic or a monarchy.

If we look back to the campaign of the election in 1993, two dominant political parties, the Cambodian People’s Party and FUNCINPEC played a role as key political actors for restoration of the modern kingship.⁷⁵ On the election day, the Cambodian people

⁷⁴ The official oath of allegiance of the King of the Kingdom of Cambodia (in Annex 4 of the present Constitution of 1993). The oath seems to be reflected in Article 1 of the Constitution.

⁷⁵ See more detail in the party policy of Funcinpec and the CPP at during electoral campaign in May 1993. It was available in the UNTAC report on Election 1993.

decided to grant their votes for these two major parties, and the idea of a monarch was politically settled and become a single unique for national reconciliation.⁷⁶

The elected Constituent Assembly, which was dominated by the FUNCINPEC (58 seats) and the CPP (51 seats), began its inaugural session on 14 June 1993. At its inaugural session, the Constituent Assembly adopted a resolution to make Prince Sihanouk Head of State retroactive to 1970, and making the military coup d'état of 18 March 1970 null and void officially.⁷⁷ At the same time, it was constitutionally raising a constitutional continuity whether the retroactive approach would lead to a legitimate restoration of the old constitution of 1947 – a constitutional monarchy system. However, on the following day on 30 June 1993, the Constituent Assembly established a Permanent Committee on drafting the new Constitution composing of twenty-one members (13 full-capacity members and 8 reserved members) with five legal expert assistants.⁷⁸ During the drafting process, the Permanent Committee on Drafting the Constitution politically as well as technically took a secret approach (closed meeting) even though they faced technical difficulty, while UNTAC took a hands-off approach, insisting that it was a job for Cambodians.⁷⁹ After two months in a closed process of consulting and drafting, the Committee recommended to restore a modern constitutional monarchial regime of a parliamentary government in compliance with the principle of liberal democracy.⁸⁰

Professor Kuong Teilee, in his article titled “Development of the Post-Conflict Constitutionalism in Cambodia (1993-2003)”, argued that “Cambodia adopted a constitutional monarchy system was perhaps not any single leader’s authoritative desire or creation; but rather the final choice of a constitutional monarchy was seemingly the natural results of

76 According to the result of election in 1993: FUNCINPEC had 48%, and CPP had 43%, and the other 9%.

77 SIPRI Research Report No. 9, Oxford University Press, 1995, p.95-97. It also reported in UNTAC Report 1993.

78 According to an official list in which it published at the back side of the 1993 constitutional text of Cambodia.

79 See in SIPRI Research Report at supra note 80.

80 According to the Committee of Drafting of the Constitution’s Report to the second session of the Constituent Assembly on September 15, 1993, the committee produced a first draft of the constitution introduced neither monarchy nor republic but a democratic government with separation of powers and respect for human rights. However, after the first consultation with the Head of State Norodom Sihanouk on August 30, 1993 in Pyong Yang North Korea, the restoration of the monarchy was decided in consensus. On the other hand, in Los Angeles Times at September 04, 1993 On the question that whether Cambodia should be a republic or monarchy, Prince Norodom Ranariddh said “My father will be King” together with Samdech Hun Sen said “Monarchy” after the two co- prime ministers returning from talks with the Prince Sihanouk in North Korea. In another report by the United States Institute of Peace in 1993 which is published on the website (www.princeton.edu) claimed that in the consulting process, there was two textual drafts, one written by the committee, and the other one by FUNCINPEC, were presented to the Head of State, Prince Sihanouk, the Prince made some change to the FUNCINPEC’s draft and returned it back to the Constituent Assembly. The drafting committee’s draft was not re-submitted to the Assembly. After further review the Constituent Assembly adopted the amended draft 113 in favor and 5 opposed with two absentions. However, it was inconsistent with the committee’s report to the plenary session of the Constituent Assembly during the debate on constitutional draft, by H.E. Chem Sguen, vice president of the drafting committee.

real political maneuvers through which the leading political figures of the time finally discovered that this system would be the last best option for the country and for an acceptable national reconciliation.”⁸¹

The new Constitution of 1993 proclaims that Cambodia is a Kingdom in which the King shall rule according to the Constitution and the principle of a liberal multi-party democracy (art.1). In order to safeguard a liberal multi-party democratic system of government, the new Constitution of 1993 establishes the sovereignty of the people (art.51) and requires that the King shall reign but shall not govern (art.7[1]), and this constitutional principle is permanent and it shall not be amended (art.17).

However, the new Constitution of 1993 grants to the King constitutional roles as the guarantor and the protector of national unity, national sovereignty and liberal multi-party democratic system. For instance, (1) the King shall be the Head of State for life (art.7[2]); (2) the King shall be inviolable (art.7[3]); (3) the King shall be a symbol of the unity and eternity of the nation (art.8[1]); (4) the King shall be the guarantor of national independence, the sovereignty and territorial integrity of Cambodia (art.8[2]); the King shall be the guarantor of the rights and freedom of all citizens and of international treaties (art.8[2]); (6) the King shall be the arbitrator to ensure the regular execution of public powers (art.9); (7) the King shall be the guarantor of the independence of the judiciary (art.132); (8) the King shall be the President of Supreme Council of the Magistracy (art 134[2]); (9) the King shall be the Supreme Commander of the Royal Khmer Armed Forces; and (10) the King shall be the Chairman of the Supreme Council of National Defense (art.24).

In addition, the new Constitution also grants to the King constitutional duties and rights to act as the Head of State. The legal rights of the King are: (1) the King has the right to grant pardons or amnesties (art.27); (2) the King has the right to establish and confer national decoration (art.29); (3) the King has the right to appoint two senators to each term of the Senate (art.100); (4) the King has the right to appoint three members to the Constitutional Council (art.137); (5) the King has the right to communicate with the Senate and the National Assembly by royal messages, and those royal messages are not subject to discussion (art.18); (6) the King has the right to request to the National Assembly to hold closed sessions if necessary (art.88[2]); (7) the King has the right to send the laws adopted by the National Assembly to the Constitutional Council for review before promulgation, or in case after any law is promulgated, the King has the right to request the Constitutional Council for review of the constitutionality of that law (art.140 and 141); and (8) the King has the right to consult with the Constitutional Council on all proposals to amend the Constitution (art.143).

On the other hand, the constitutional duties of the King are: (1) the King shall receive letters of credential from ambassadors or envoys extraordinary and plenipotentiary of foreign countries accredited to the Kingdom of Cambodia (art.25); (2) the King shall

⁸¹ See Kuong Teily, Development of the Post-Conflict Constitutionalism in Cambodia (1993-2003) in *Asian Law Review*, Volume 3, No.2 December 2006, pp.73-99.

sign Royal Proclamation promulgating the Constitution and laws passed by the National Assembly and completely reviewed by the Senate, and shall sign any Royal Decrees proposed by the Council of the Ministers (art.28); (3) the King shall sign and ratify international treaties and conventions after they have been approved by the National Assembly and the Senate (art.26); (4) the King shall appoint the Prime Minister and the Council of Ministers in accordance with constitutional procedures (art.19); (5) Upon the request of the Council of the Ministers, the King shall sign Royal Decrees (Reach Kret) appointing, transferring or removing from office, senior civil and military officials, ambassadors, and envoys extraordinary and plenipotentiary (art.21[1]); (6) Upon the request of the Supreme Council of the Magistracy, the King shall sign Royal Decrees appointing, transferring or terminating the appointment of judges; (7) the King shall grant official audiences twice a month to the Prime Minister and the Council of Ministers to hear their reports on the current situation of the nation (art.20); (8) with the approval of the National Assembly and the Senate, the King can declare war (art.24[2]); and (9) with the joint approval of the Prime Minister, the President of the National Assembly and the President of the Senate, the King can make a proclamation to the people putting the country into a state of emergency (art.22).

On the succession to the throne, the present Constitution of 1993 sets up legal conditions: (1) the kingship of Cambodia is an elected regime, and the King has no power to appoint his successor to the throne (art.10); (2) the King shall be a member of the royal family, be at least 30 years old and descend from the bloodline of the King Ang Duong, King Norodom or King Sisowath (art.14[1]); (3) the selection of the new successor to the throne is immediately required within a period not more than seven days after the death of the King or upon the request by the King for abdication or retirement (art.13[1]); (4) the Council of the Throne, which is composed of nine members, the President of the Senate, the President of the National Assembly, the Prime Minister, the two Chiefs of Buddha Monk (Mohanikay and Thammayunikay), the First and Second Vice-President of the Senate, and the First and Second Vice President of the National Assembly, has constitutional power to choose a new King (art.13[2]); and (5) upon enthronement, the King shall take an oath of allegiance (art.14[2]).

On constitutional roles of the Queen, the Consort of the King, the present Constitution of 1993 adopts constitutional restrictions. The Queen of the Kingdom of Cambodia shall not have the right to engage in politics, to assume the role of the Head of State or the Head of the Government, or to assume other administrative or political roles (art.16[1]). However, the Queen is required to exercise duties that serve social, humanitarian and religious interests and assist the King with protocol and diplomatic functions (art.16[2]). This constitutional restriction is an attempt of a positive reaction to the past.

If we examine the *de facto* constitutional development, there exists a very positive development in what I call a constitutional revolution of the current kingship system in Cambodia. From a democratic point of view, even if the Constitution still grants a lot of

constitutional rights and duties to the King to engage in politics, the King himself has completely democratized [delegated] his constitutional roles to the elected representative bodies of the people, and he has officially acted only upon the requests from them. This means that the constitutional roles of the King were completely out of the politics, and the people's sovereignty has been upheld through the elected representative bodies. This practical constitutional kingship in the case took place in British and Japanese contemporary constitutionalism.

From the legal point of view, there exist legal factors that made the kingship system consistent with popular sovereignty. First, the Cambodian kingship system is an elected regime in which the majority of the Council of the Throne, consisting of the most popular elected politicians, has final say in selecting a new King. In my view, the kingship in Cambodia is democratically elected, and in natural consequence the king and the government is politically morally coherent. Second, there exists status change of the constitutional norm since 2004, which allowed the King for abdication or retirement. In Japan or in England, the kingship is completely independent from politics because they apply a hereditary system of a succession of the throne, however, the king and public is single unique.

Characteristic of Separation of Powers

The new Constitution of 1993, like the Constitution of Japan and German Basic Law, adopts a constitutional doctrine of separation of powers within a system of a parliamentary government. Article 7 proclaims that “the King of Cambodia shall reign but not govern.” Article 51 proclaims a popular sovereignty, a representative democratic government, and a separation of powers: “the Kingdom of Cambodia adopts a policy of liberal multi-party democracy”; “Khmer citizens are masters of their own country”; “all power belongs to the citizens”; “the citizens shall exercise their power through the National Assembly, the Senate, the Royal Government, and the Judiciary”; and “the power shall be separated among the legislative, the executive and the judicial.” From the constitutional context, citizens exercise their power by means of elections and voting and through the organ of government. On the other hand, because Cambodia adopted a parliamentary democratic government, theoretically the doctrine of separation of powers is not quite strictly separated. However, there are significant structural as well as functional limits to the concentration of the state authority in Cambodia. The elected Parliament (the National Assembly and the Senate) is granted legislative power (art.90 & 99); the Council of Ministers is granted executive power; the Supreme Court is granted judiciary power (art.129); and the Constitutional Council holds a special power of constitutional review (art.136).

From an academic point of view, the doctrine of separation of power, in original understanding, is a means of checking arbitrary action by state organs and as a fundamental safeguard of civil liberty. John Locke (*Two Treatises of Civil Government, 1690*) who is famous as a father of modern constitutional law, observed that a *de facto* development of

British modern constitutionalism at the end of the 17th century adjusted into two separate branches between the parliament (legislative power) and the monarch (executive power). However, until the 18th century, Montesquieu (*The Spirit of Law, 1748*) re-adjusted the doctrine of separation of power into three branches: the legislative branch which has the power to make law, the executive branch which has the power to enforce the law, and the judicial branch which has the power to adjudicate. In order to secure an effectiveness of separation of powers, it requires an establishment of a system of check and balance that the three branches of powers may dissolve each other when having an abuse of power.

If we look inside the historical development of Cambodian modern constitutionalism, we find that constitutional doctrine of separation of power was imposed as far back as 1947. However, the Constitution of 1947 adopted a doctrine of separation of powers in terms of division of function, not powers, because the National Assembly and the King had very central role in politics.⁸² Then the Constitution of 1972 seemed to adopt separation of powers with a presidential government and most particularly the division in judiciary jurisdictions.⁸³ However, the Constitution of 1976, the Constitution of 1982, and the Constitution of 1989 never explicitly address this issue. It was influenced by the socialist theory of constitutionalism, which accepted only a doctrine of parliamentary and party sovereignty. Under the new Constitution of 1993, the separation of powers has been legally imposed with a system of a parliamentary government. The system of checks and balances can be applied only within legal conditions because parliamentary stability is most important. It is different from the British and Japanese model in which the system of checks and balances particularly among the legislative and executive is applied in free options. However, the Cambodian approach looks similar with the German system within legal conditions.

82 See in the Constitution of 1947. Article 21 “All powers emanate from the King. They shall be exercised in the manner established by this Constitution.” Article 22 “Legislative power shall be exercised in the name of the King by the National Assembly...” Article 23 “Executive power shall be exercised in the name of the King by the Ministers.” Article 24: Judicial power shall be exercised in the name of the King by the courts of different degrees and jurisdictions”.

83 See in the Constitution of 1972. Article 3 “All powers shall be derived from the people. The executive, legislative, and judicial powers shall be exercised in conformity with the provisions of this Constitutions” Article 23 “the President of the Republic shall exercised the executive powers entrusted to him by the people” Article 45 “the Parliament shall be composed of the National Assembly and the Senate” Article 64 “Parliament shall make laws...” Article 81 “...Judicial power shall be vested in the Supreme Court and the lower courts.” Article 95 “the Constitutional Court shall rule upon the regularity of the election of the President and Vice-President of the Republic and shall proclaim the result thereof... It shall decide in cases of contested elections of members of Parliament... It shall make the final interpretation of constitutional provisions...” Article 97 “the High Court of Justice shall have the power to judge the President of the Republic, the Vice-President of the Republic, members of the Cabinet, members of Parliament, members of the Constitutional Court, and members of the Supreme Court for crimes and offences committed in the executive of their functions.” Article 104 “the Council of State shall participate in the preparation of laws. It shall be the final judge in administrative matters.”

Legislative Power: The National Assembly and the Senate

*“We, the President, Vice Presidents and the members of the National Assembly (or Senate) of the Kingdom of Cambodia, in the presence of His Majesty, Samdech Preach Sangkareach and Heaven Being, would like to make an oath as following... (1) to be respectful to the Constitution and to serve in both present and future for all interests of the people, the nation and the motherland...”*⁸⁴

If we look inside Cambodian modern constitutionalism historical context, the parliament was a bicameral system. The Cambodian Parliament had a National Assembly and a Council of Kingdom under the Constitution of 1947, and a National Assembly and a Senate under the Constitution of 1972. However, during the socialist revolution (1975-1993), the parliamentary system became an unicameral system because in socialist’s theory the popular sovereignty should be under a single representative body of the people and it would not be separated. In 1993, the new Constitution still maintained an unicameral parliamentary system that granted the National Assembly sole authority of lawmaking with a *raison d’être* based on inadequate resources. At the same time Cambodia needed a more efficient lawmaking system.⁸⁵ However after 1999, the parliamentary system was changed to be a bicameral system in which required the creation of a Senate with a *raison d’être* based on a reconciliation of party politics and expanded practical democracy.⁸⁶ In the democratic theory of elected parliament, a bicameral system is qualified for lawmaking and political flexibility if both houses are going to be politically and legally mutually checking each other. In political process, it is important for an expanded democracy because it promotes political representative participation.

According to the new Constitution of 1993, the Parliament of Cambodia, having legislative power, is currently composed of a National Assembly and a Senate. The National Assembly consists of at least 120 members. The deputies are elected every five years by a free, universal, equal, direct and secret ballot. The election system to the National Assembly applies proportional representation with 24 provincial/municipal constituencies.⁸⁷ The requirements of the candidate for the election to the National Assembly are: (1) be Khmer national from birth; (2) be at least twenty-five years of age on the date of election; (3) be eligible to vote and registered in the voting list; (4) has a residence in the Kingdom

⁸⁴ The official oath of allegiance of the National Assembly and the Senate the Kingdom of Cambodia is officially expressed in a separate form but it has similar contexts (it is expressed in Annex 5 and 7 of the present Constitution of 1993).

⁸⁵ See more detail in parliamentary record on constitution making which debate in the Constituent Assembly in 1993.

⁸⁶ See more detail in parliamentary record on constitutional amendment which debate in the National Assembly in 1999.

⁸⁷ See Article 5 of the Law on the Election of the National Assembly (2002).

of Cambodia; (5) be nominated by a registered political party.⁸⁸ The Senate should not exceed half of the number of the deputies of the National Assembly. Out of the senators, four are nominated and the rest (currently 57 senators) are elected every six years non-universally.⁸⁹ The election system to the Senate applies proportional representation with eight regional constituencies; however, the voting organs are only relative deputies and members of the commune council, not the whole people.⁹⁰ The legal conditions of a candidate for the election to the Senate are similar merits with all conditions of the candidate for the election to the National Assembly, except the age must be at least 40 on the date of election. However, the election of deputies is paramount because Cambodian parliamentary democracy is well designed inside the National Assembly.

The Parliament of Cambodia holds ordinary sessions twice a year, and each session is at last three months (art.83[1] & 107[1]). However, at a request by the King, or the Prime Minister, or at least one third of deputies, or one-third of senators, the Standing Committee of the National Assembly or the Standing Committee of the Senate shall convene in its extraordinary session (art.83[2] & 107[2]). In principle, all sessions of the National Assembly or the Senate shall be held in public; however, they could be subject to closed sessions at the request of the President or one-tenth of deputies or one-tenth of senators, or of the Prime Minister or of the National Assembly President in case of the Senate's session. Sessions of the National Assembly or the Senate are considered valid, only if there is a quorum of more than two-thirds of all members, for any votes which require a two-thirds majority of all members, or there is a quorum of more than a half of all members for any votes which require a relative or absolute majority of all members (art.883 & 1113). All deputies and all senators enjoy full parliamentary immunity from arrest, from prosecution, or from detainment because of opinions expressed in the exercise of his/her duties inside as well as outside the Parliament (art.80 & 104).

In the Cambodian legislative process, a drafted law is submitted by the Prime Minister on behalf of the Council of Ministers and a proposed law is submitted by the deputies or by senators (art.91). The Parliament of Cambodia applies a committee system, not a reading system. The National Assembly and the Senate have similar structure and procedure in the lawmaking process, in which each house has one standing committee and nine technical commissions.⁹¹ A drafted law, a proposed law or a treaty becomes a Cambodian law on passage by the National Assembly and the Senate. Local ordinances (*dekar*) established by elected Councils of Commune, Districts, Cities, Capital City, and

88 See Article 76 of the Constitution of 1993. It goes into more detail at Article 33 (new) of the Law on the Election of the National Assembly (2002).

89 Article 100 says that the King shall appoint two Senators; the National Assembly shall elect two Senators by majority vote; and the other senators shall be elected through a non-universal election.

90 See the Law on the election of the Senate 2005.

91 See Internal Regulation of the National Assembly and the Senate. Each House has own internal regulation but its established structure and procedure of lawmaking is similar.

Provinces must fall within it.⁹² The executive regulations of decree, sub-decree or prakas are issued pursuant to only a Parliament passed law.⁹³ In relation of both houses, the National Assembly has more lawmaking power than the Senate. It is designed in flexibility with historical and democratic points of view. From a historical point of view, the Senate was a law reviewing organ, not an initiative- lawmaking organ. From a democratic point of view, the constitutional structural designs of the National Assembly are directly closer to the people in terms of the election system as well as the relation with executive branch. In addition, in the process of lawmaking, the Senate has only a right of suggestion, not a real power of veto.⁹⁴ However, the Senate has a legal duty to coordinate the work between the National Assembly and the Government.⁹⁵ From a legal point of view, the Senate stands far away from the people.

Constitutional Powers	The National Assembly	The Senate
1. Lawmaking Authority	Adopt	Review
2. Forming a Government	Yes	No
3. Controlling (oversight) Gov's Action	Yes	No
4. Constitutional Amendment	Yes	No
5. Proposing Amendment to Constitution	Yes	No
6. Initiating new Legislation	Yes	Yes
7. Representing the People	Yes	Yes

The new Constitution of 1993 sets up constitutional restraints on legislative powers: (1) in any circumstance, the legislative right of the constitutional amendment is prohibited if the revisions or amendments affecting liberal multi-party democracy and the regime of constitutional monarchy or principle of king reigns but does not govern (art.17 & 153); (2) in case of state emergency or war, the legislative right of any constitutional amendment is totally prohibited (art.152); (3) the legislative right to propose amendment to the law cannot be accepted if they might have the effect of reducing public income or increasing the burden on the people (art.91); (4) any decision of the National Assembly that contradicts the principles of preserving national independence, sovereignty, neutrality, territorial integrity of the nation, and affects the political unity or the administration of the nation are annulled (art.55 & 92). To safeguard these constitutional restraints, all decisions of the National Assembly and the Senate are subject of any constitutional review by the Constitutional Council (art.92, 136, 142).

92 See Law of the Council of Commune, Law of Council of District, City, Capital City, and Province.

93 See Law on Establishing and Functioning of the Council of Ministers.

94 See Article 113 of the Constitution of 1993.

95 See Article 112 of the Constitution of 1993.

In practice, there is legislative delegation. Of course, theoretically as well as technically, a legislative delegation is allowed in democratic nations. The trend is not bad in our parliamentary democracy because Cambodia has set up already a system of constitutional review on the one hand, and on the other hand, the principle of legislative delegation in practice has been conducted through only the form of parliamentary adopted law. In German and Japanese parliamentary democracy, legislative delegation is a subject of strict constitutional review. The German Constitutional Court imposes a strict application of the non-delegation principle.⁹⁶ In Japan, legislative delegation without a very strict limit is unconstitutional.

The second trend is a parliamentary oversight function. As a matter of a principle, in order to enforce political accountability to the parliament, the Constitution grants broad investigative power to the National Assembly to enable it to better perform its oversight function (art.89, 94, 96-98). In Cambodia, both the legislative and executive branches and the deputies seems to be working together [harmonization], rather than separation especially among the ruling coalition. In my observation, throughout the process, the oversight function has gradually developed especially within the informal intra party system.

Executive Power: The Council of Ministers/The Royal Government of Cambodia

*“We, the Prime Minister and the members of the Government of the Kingdom of Cambodia, in the presence of His Majesty, Samdech Preach Sangkareach, and Heaven Being would like to make an oath as following: (1) to be respectful to the Constitution and to serve in both present and future for all interests of the people, the nation and motherland...”*⁹⁷

The new Constitution of 1993 vests executive power in the Council of Ministers (or the Royal Government of Cambodia) that is led by one Prime Minister assisted by Deputy Prime Ministers, and by Senior Ministers, Ministers and Secretaries of State as members (art.118).⁹⁸ The Council of Ministers is collectively responsible to the National Assembly for all policy affairs of the government; each member of the Council of Ministers shall be individually responsible to the Prime Minister and the National Assembly for his/her own conduct (art.121), and his/her membership is incompatible with professional activities in trade or industry and with the holding of any position in the public service (art.120). The Council of Ministers meets weekly in plenary session or working session (art.123).

⁹⁶ David P. Currie, at *supra* note 69, p.125-134.

⁹⁷ The official oath of allegiance of the King of the Kingdom of Cambodia (it is constitutionally expressed in Annex 4 of the present Constitution of 1993). The oath seems to reflect to the Article 1 of the Constitution.

⁹⁸ In the first term of a parliamentary government (1993-1998), due to the priority for national reconciliation and national unity, Cambodia had co-prime minister and co-ministers which had no precedent in the world.

As the democratic form of executive organ, the Council of Ministers is created by the National Assembly which is a direct elected representative organ of the people. The process of its creation goes with two legal options. The first option is expressed in its original constitutional text (art. 119, 90, 19), and the second is expressed in a new law on additional provisions to the Constitution in 2004.⁹⁹ In its initial session with a request by the political party having the largest number of seats, the National Assembly votes for a Council of Ministers and then requests to the King for appointment.¹⁰⁰ However, there are legal conditions for membership of the Council of Ministers: (1) in order to be a candidate, the prime minister is required to be a deputy of the political party having the largest number of seats in the National Assembly, and be proposed by his/her own party (art.119 /art.3-4 of ad.const.); and (2) to be a legal candidate of the members of the Council of Ministers, they are required to be proposed by the political party having seats as either a deputy or a non-deputy in the National Assembly.

The process of executive formation is completely different from parliamentary democracy in Japan, England and Germany, in which in those countries, the lower Houses (House of Representative, House of Commons, Bundestag) elect only the head of executive (Prime Minister/Federal Chancellor) based upon a majority vote, and then the elected prime minister goes to form his/her own Cabinet that is appointed by the King (Japan/England) or by the President (Germany). The prime minister in those countries has a lot of power to appoint or dispose the member of cabinet at his/her will, but it is not the case in Cambodia. In Cambodia, the whole Cabinet (the Council of Ministers), the Prime Minister or each member must be approved by a vote of confidence by the National Assembly before going to any official appointment by the King. It was developed from the beginning of its own historical context in which the Constitution of 1947 attempted to create a strong democratic parliament in order to control the executive Cabinet.

In conducting its own business, the Council of Ministers is subject to any dissolution power by a vote of no confidence of the national assembly majority (art.98). In England and Japan, there is no legal limitation on the power to dissolve, and the Cabinet can dissolve the lower House with a clear system of check and balance;¹⁰¹ however, in Germany there are legal conditions (art.67-68 Basic Law). In Cambodia, there is a legal limitation in which the executive branch has no constitutional power to dissolve the National As-

99 The special law on additional provisions to the constitution to ensure the regular process of the national institutions was adopted by the third session of the National Assembly (2003-2008) to solve constitutional crisis in 2003-2004. It is a part of additional constitution of Cambodia which established an optional constitutional procedures for formation of the Council of Ministers because at that time, the constitutional procedures which stipulate in article 119 could not be enforced. The first option was applied at the first (1993-1998) and the second (1998-2003) of the parliamentary government; and the second option has been applied for the third (2003-2008) and the fourth (2008-2013) of the parliamentary government.

100 For first option see art. 119, 90 & 19 or for the second option see additional provisions to the constitution 2004.

101 See Masami Ito, at supra note 16, p.153.

sembly at its will unless the National Assembly twice disposed the Council of Ministers within a period of twelve months.¹⁰² It seems to impose a parliamentary stability rather than a system of checks and balances. Since the enforcement of the Constitution in 1993, they have neither disposed nor dissolved the National Assembly or the Council of Ministers before the end of each parliamentary term. The relation between these two political branches is very smoothly; and in my view it is good for parliamentary democracy in terms of promotion of debate and participation.

In an historical context, at the beginning, Cambodian parliamentary democracy tended to make all efforts for democratization of the parliament and the cabinet by making a strong people's parliament to control (oversight) in an executive branch led by a prime minister and make them politically responsible to the elected parliament, and at the same time it tried to make a legal limitation to the kingship (constitutional monarchy).

The Judicial Power: The Supreme Court and the Constitutional Council

The new Constitution of 1993 vests judicial power into two distinct key organs, the Supreme Court and the Constitutional Council, with the realization of the guarantee of judicial independence and judicial review (art.128, 136). The judicial power vests in the Supreme Court and in all courts of all sectors and levels to exercise jurisdiction over all civil, criminal and administrative cases (art.128[3]); whilst the Constitutional Council exercises special jurisdiction over guaranteeing the full respect of the Constitution, interpreting the Constitution and laws adopted by the National Assembly and reviewed by the Senate, and examining and deciding on all election disputes (art.135). The realization of the independence of judicial power is in compliance with the Paris Peace Agreement of 1991; the cause of judicial review is from the influence of French and German system of constitutionalism.

The Independence of the Judicial Power

The theory of separation of power requires the adoption of the modern concept of judiciary independence. The requirement of judicial independence is to protect the Court against outside influence, especially by other branches of government.¹⁰³ Montesquieu says “the judiciary should function independently from the legislative and executive arms of government”, and Locke says that “established law with the right to appeal to independent judges are essential to a civilized society and that societies without them are still

102 Article 78 of the Constitution of 1993 “The term of National Assembly is five years and ends on the day when the new National Assembly takes office. The National Assembly shall not be dissolved before the end of its term except when the Royal Government is twice deposed within a period of twelve months. In this case, the King shall dissolve the National Assembly, upon a request by the Prime Minister and with the approval of the President of the National Assembly...”

103 Wilhelm Karl Geck, Cf. David P. Currie at *supra* note 69, p.153.

in a state of nature”.¹⁰⁴ John Locke and Montesquieu are generally considered to have the most influence on the evolution of the modern concept of judicial independence.¹⁰⁵

In the new Constitution of 1993, the judicial independence is explicitly expressed with the guarantees of legal protection of both the institution (the court) and individual (the judge) in exercising judicial functions. The new Constitution of 1993 grants a legal protection against outside intervention: “no state organ of executive or legislative power can carry out judicial power” in which the King is legal guarantor, and “the King shall be a guarantor, and the Supreme Council of Magistracy shall assist the King in this matter” (art.130, 132). The legal protection of the judge and prosecutor is also clearly expressed in that “only judge has the right to adjudicate, and the judge shall fulfill this duty wholeheartedly and conscientiously with strict respect to the laws” (art.129), and “Only the Department of Public Prosecutor shall have the rights to file criminal suits” (art.131). In these viewpoints, the independence of the judiciary requires judicial power vested in the judges, and the status of the judges shall be guaranteed on the basis of the separation of powers.

In the constitutional procedure of judge’s appointment, all judges and prosecutors are officially appointed by the King upon a request by the Supreme Council of Magistracy. The Supreme Council of Magistracy is a constitutional organ having a constitutional duty and right to assist the King to protect judicial independence through exercising direct supervision over the appointment, promotion and discipline of judges and prosecutors (art.132-135). According to the new law on establishment and functioning of the Supreme Council of Magistracy (SCM Law), it is composed of nine full members: the King as the President, the Minister of Justice, the President of the Supreme Court, the General Prosecutor to the Supreme Court, the President of the Court of Appeal, the General Prosecutor to the Court of Appeal, and the three elected judges, as the full members. However, in respecting the judge’s status of judicial independence, when deciding on disciplinary actions against judges or prosecutors, the Supreme Council of Magistracy meets under the chairmanship of the President of the Supreme Court or the General Prosecutor to the Supreme Court, depending on whether the case relates to the judges or the prosecutors (art.134); in this case, both the King and the Minister of Justice shall not join in the meeting (art.12 of SMC.Law). From this particular viewpoint, it is unlike the old system; structurally and procedurally, the Cambodian court system has been gradually separated from the other branch of the government. It has three structural levels and each legal case goes from bottom up: the court of first instance (setting up at provincial/municipal/city level) to the court of appeal (only one in Phnom Penh) and finally to the supreme court (the top of the court pyramid).

104 John Locke (Two Treatises of Civil Government 1689) and Montesquieu (The Spirit of Law 1748), Cf. Justice F.B. William Kelly, *An Independent Judiciary: The Core of the Rule of Law*, 2000, p. 2-3.

105 Hon. Ken Marks, “Judicial Independence” (1994) 68 *Australian Law Journal* 173, Cf. Justice F.B. William Kelly, *An Independent Judiciary: The Core of the Rule of Law*, 2000, p.3.

As a matter of application, the independence of judicial power has been criticized by some scholars as not being well developed. However, in my view, it is gradually progressing in terms of trial process and new codification. Of course, the management of the court facilities and the operation of the courts administratively and financially are not completely separated from the other branch yet, but at the same time, intra courts system, mostly individual judges and prosecutors, are gradually developed in terms of their legal professionalism and ethics.

In the Cambodian historical context, the court system was born inside the administrative organ. It was a part of an administrative authority that recognized the King as being the final supreme judge in all legal cases. The modern legal concept of a civil law system came into Cambodia following French colonization; the court system was partly separated from administrative authority but put under control of the technical ministry of justice which exercised direct supervision over the appointment, promotion and business of judges. It was limited to the exercise only of the jurisdiction over civil and criminal cases. Under the Constitution of 1947, the principle of separation of the court system was first expressed and it required the protection of a judge under a special law (art.24, 113). However, judicial independence was not formally realized. The Constitution of 1947 imposed in Article 24 that “Judicial power shall be exercised in the name of the King by the courts of different decrees and jurisdiction.” On the other hand, the King was the president of the Supreme Council of Judiciary, which also included the Minister of Justice as a very active member, to enforce judiciary disciplinary measures, appointment and promotion of the judges; at the same time, the financial and administrative affairs of the court system were under direct control of the ministry of justice in the name of the executive branch. Later, the concept of judicial independence was first expressed in the Republic’s Constitution of 1972 (art.91), but procedurally and legally the court system was still under the executive branch’s control because the elected President of Khmer Republic was a president of the Supreme Council of Judiciary, which was an organ to enforce judicial discipline and appointment (art.97). In the socialist revolution period (1975-1993), the court system mostly collapsed and a people’s court was established to protect and defend the state authority, not human rights and the freedom of individuals.

The situation of the current court system of Cambodia seems to be mostly similar with the Japanese court system under the Meiji era (1890-1946). In Japan, at that time, according to Professor Hideo Saito, the independence of judicial power was authorized by the Meiji Constitution of 1890 through making the guarantee of the status of judges; however as a matter of practicality, the judicial independence was not developed in a substantial sense because the management of the facilities and the operation of the court system was in the hands of the executive, in which there was no distinction in status between the staff of the court and other governmental officials. The courts’ financial account and the personnel-administration, and the supervision of judges and other court-personnel, were vested to the hands of the Minister of Justice. In addition, there was no separation

between the public prosecutor's office and the courts but the public prosecutor's office shared its facilities and financial management with the courts, and the prosecutor was a member of the staff of the court. In 1947, the new Constitution, thoroughly changing the system, brought to realization the autonomy of the courts and the separation of the public prosecutor's office from the courts following on the lines of the American, German and French system. The Constitution of Japan vests the courts with power to administer the judiciary and the Supreme Court with the power to determine the rules of procedures and other matters by its own court regulations (art.77[1]). The judicial independence in Japan is in a more substantial sense.

The courts have been free from the control of the Ministry of Justice, and the public prosecutor is an executive agency of the government incompetent to exercise the judicial power. The public prosecutor's office has been separated from the court and put under the control of the Minister of Justice, with the power of investigation and prosecution. The independence of judicial power has been completely strengthened under the Japanese Constitution in order to prevent the judicial organization from being subject to the pressure of the legislature and the executive, or being influenced by political parties or by class-interests. The independence in exercising judicial functions is firmly guaranteed to all the judges by the Constitution along with their compensation and special status. The judges are especially required to be politically neutral to perform their duties, and it is also demanded that not only trial and judgments should be fair but also the attitudes of judges must be relied on to be fair by the general public.¹⁰⁶ According to the Constitution of Japan, the Emperor appoints the Chief Justice of the Supreme Court as designated by the Cabinet and all of them are subject of popular referendum, while the other judges of the Supreme Court are appointed by the Cabinet. The judges of the inferior court are appointed by the Cabinet from a list of persons nominated by the Supreme Court, thus giving the latter substantial power to determine personnel policy toward these judges (art.6[1], art.79-80).¹⁰⁷

Judicial Review

The new Constitution of 1993 clearly imposed the doctrine of judicial review in two separate jurisdiction organs: (1) the administrative review of executive act is vested in the Supreme Court and in all courts of all sectors and levels (art.128[3])--where any ministerial organ or administrative agency has performed an adjudicative function, the courts have the power to review its decision by judicial concrete cases; (2) the constitutional review of legislative act or the review of constitutionality of legislation and the interpretation of the Constitution are exclusively vested in the Constitutional Council (art.136). The Con-

106 Cf. the Hon Toru Miyoshi, Chief Justice of Japan, in the opinion concerning "Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region" Beijing, 19th August, 1995.

107 See Hideo Saito, The Independence of the Judicial Power in Japan, in *The Japan Annual of Law and Politics*, N.4, 1956, pp.83-94.

stitutional Council under the Constitution of 1993 is designed not to protect state authority but as a Constitutional Court to ensure “a government of law” because the Council has power to interpret the Constitution, to review the constitutionality of the legislative acts and in examining and deciding the election disputes in a final say. The Constitutional Council is composed of nine members who are appointed for an official term of nine-years in which one-third of the members are replaced every three years. Three members are appointed by the King’s prerogative, three members are appointed by the National Assembly, and the other three members are appointed by the Supreme Council of Magistracy (art.137[1]). The qualification of a legitimate candidate is a person selected from among dignitaries with a higher-education degree in law, administration, diploma or economics and someone who has considerable work experience (art.138). To secure neutrality and the separation of power, the doctrine of constitutional incompatibility is imposed to all members of the Constitutional Council (art.139).

In a modern theory of constitutionalism, the doctrine of judicial review is one of constitutional methods establishing to protect rule of law, constitutional supremacy, or constitutional democracy in a particular viewpoint. In England, where the unwritten Constitution is based upon a doctrine of parliamentary sovereignty, the judicial review over the administrative regulations of the government is officially realized in order to insure that the administration follows the parliamentary statute, but any review over legislative acts (legislation) by the court has not been allowed. In America and Japan, the judicial review is exclusively vested to the court with the power to review both in legislative and executive decisions through any judicial concrete case. In Germany, it is powerful; the Constitutional Court by the Basic Law has the power of judicial review in both ways by either individual concrete or abstract cases (art.19[4], art.93[4]). In France, the doctrine of judicial review is authorized by the Constitution of 1958 through two separated constitutional organs: the Conseil Constitutionnel with the power of review on constitutionality of the legislation by any abstract sense, and the Council of State (*Conseil d’Etats*) with the power to review administrative actions.¹⁰⁸

In the Cambodian historical context, the doctrine of judicial review by the Court was not allowed until 1993. Under the Constitution of 1947, there was no system of judicial review. Instead, the National Assembly had power to interpret the Constitution (art.119). The Constitution of 1972 textually recognized judicial review by the multiple types of the Court, i.e. the Supreme Court, the Constitutional Court, the High Court of Justice, the Council of State, and among them the Constitutional Court was granted power to review the constitutionality of legislation and the Council of State was granted power to review the regulations of the executive power. However, the Constitution of 1972 was just an imported concept and it was never fully enforced because the country was in a civil war;

108 Dominique Rousseau, The Conseil Constitutionnel Confronted with Comparative Law and the Theory of Constitution Justice (Or Lous Favoreu’s Untenable Paradoxes) in International Journal of Constitutional Law, Volume 5, Number 3, July 2007, pp. 28-68.

shortly after, the regime collapsed, and then the nation was moved under the socialist revolution until 1993, where the doctrine of judicial review was not permitted.

Under the new Constitution of 1993, following the western model, the Constitutional Council, separated from the system of regular courts, has the right to review the constitutionality of legislation by the legislative branch, but the right to review administrative regulation of the executive branch is vested to the regular courts. As a matter of practice, from foreign view, it is hard to say if in Cambodia the principle of judicial review has been well realized and well developed in a substantial sense. This is because the proof of the administrative review of executive decisions has been limited with regard to judicial concrete cases, and at the same time even though the review of legislation has gradually increased but not in substantial form. The constitutional review of legislation in substantial form from the democratic nations require a look into legal reasoning with the establishing of methodology of legal interpretation and the principle of legitimate source as well.

The Ensuring Principle of Regular Functioning of Institutional Eternity

This ensuring principle was established in 2004 by the law of the Additional Constitution. Article 1 of the Law expresses that “this Constitutional Law aims to ensure the efficient functioning of national institutions in all circumstances in accordance with the basic principles of liberal multi-party democracy if so required by the necessity of the country.” Article 2 imposes that “at the beginning of each new term, the National Assembly which is presided over by the oldest Member of the National Assembly may, before starting its work and after deciding on the validity of the mandate of each Member, adopt any constitutional text or any law in order to achieve the goal as stipulated in Article 1.” This new principle was additionally imposed to settle the constitutional crisis in 2003 because during that time, the process of the legislative and the executive formation was not going smoothly in accordance with the constitutional procedure (art.119 and 82). On the other hand, at the time of its adaptation, the Constitutional Council interpreted that the additional Law is the Constitution.

In a contemporary development context, the law of the additional constitution, thoroughly changing the system, has brought to realization not only the supremacy of the Constitution but also the sovereignty of the parliament under special circumstances. In Cambodia, as the law says, at every beginning of its term, the National Assembly may adopt any constitutional text or any law in order to secure a regular process of institutional continuity. It is academically raising the question whether or not the elected parliament is bound by the constitutional provisions. The answer might be yes, because constitutional restraint is fully enforced by judicial review except at a transitional period of each beginning term, the National Assembly could represent as the Constituent Assembly.

IV. A Concluding Remark

(1). It is true that, unlike the old Constitutions, the new Constitution of 1993 has conceptually and practically brought Cambodia into a modern constitutionalism based liberal democracy, human rights and the rule of law. Of course, there inevitably exists a gap between constitutional text and reality; however, there is an effort to close the gap through making amendments, enacting the law on additional provisions to the Constitution, interpreting the Constitution by the Constitutional Council, interpreting the Constitution by the executive and the legislative, or by writing academic scholars for any proper application, so that reality better reflects the norms of the written Constitution.

(2). The modern constitutionalism in Cambodia, theoretically as well as intentionally creates a democratic parliament and a cabinet by making a strong people's parliament to control (oversight), an executive branch led by a prime minister, and to make them politically responsible to the parliament. At the same time it tries to impose a constitutional restraint on the kingship (a modern constitutional monarchy). In practice it produces not only a peaceful constitutional monarchy following the British and Japanese monarchy model, but also a democratic parliament with a strong cabinet.

(3). The Cambodian parliamentary democracy is approached as a representative democracy, not a direct democracy, and the people exercise their powers by means of election and voting and through the organs of government. It is quite similar to democracy in England, Germany and Japan. A multi-party system quickly grew up, and for the most part, the political parties have worked within the constitutional structure and have fulfilled representative roles in supporting parliamentary democracy.

(4). As a matter of principle, the State and the individuals recognize and respect civil liberty. The guarantee of civil liberty is granted to all individuals not only civil and political rights but also economic and social rights. The State guarantees and protects the respect of the fundamental human rights through the Courts and the Constitutional Council within the special powers of judicial review.

(5). There are practical trends to be discussed from the particular viewpoint of the rule of law and judicial review. As a matter of practice, democracy and human rights are safeguarded as required by an established rule of law. The core aim of an established judicial review, following the principle of independence of judicial power, is to protect the rule of law, to ensure all state organs are bound by constitutional orders, and to ensure constitutional restraints are going into force to limit public powers. An experience from the democratic nations, the independence of judicial power produces substantial judicial review but it requires a guarantee of judicial autonomy financially as well as structurally.

(6). It is difficult to predict the future of constitutionalism in Cambodia. As a matter of general concept, it depends very much on its constitutional procedures towards its regularity, neutrality, and fairness. However, as a matter of practice, it depends very much on political, economical and social conditions. If the conditions are affirmative in the current development, the idea of continuity of the modern constitutionalism might be thoroughly accepted.

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CAMBODIAN PRIVATE LAW: A SNAPSHOT

KORK Boren

CONTENTS

I. Abstract.....	73
II. History, Scope and Trends	73
1. Private Law vs. Public Law	73
Distinction based on the subjects of law	74
Distinction based on the authority	74
Distinction based on the interests	74
2. Sources of Cambodian Private Law	75
Constitution.....	75
Civil Law.....	75
Commercial Law	76
3. Trends in Cambodian Private Law	76
III. Basic Principles.....	77
1. Recognition of Legal Personality.....	77
2. Recognition of the Right to Ownership.....	79
3. The Principle of Private Autonomy	80
4. The Principle of Liability based on Negligence	81
IV. Property Rights.....	82
1. Real Rights.....	82
Ownership.....	83
Possessory Rights.....	84
Limited Real Rights.....	85
2. Personal rights (claims)	92
V. Obligations.....	93
1. Definition of Obligation	93
2. Types of Obligation.....	93
3. Management of Affairs without Mandate	93
4. Unjust enrichment.....	94
5. Tort	95

CAMBODIAN PRIVATE LAW: A SNAPSHOT

*KORK Boren**

I. Abstract

Private law is quite a broad topic. A detailed description of the subject could fill a book of hundreds of pages. This article is intended to provide only a snapshot of some key aspects of Cambodian private law. It begins by examining the history and scope of private law in Cambodia and current trends in this area. It then considers the basic principles on which Cambodian private law is based, providing brief examples of each principle in order to clarify the concepts presented. Finally, the article discusses property rights and obligations under Cambodian private law. Due to the fact that a complete set of commercial laws does not exist in Cambodia, this article will not discuss this topic. Instead this article will focus on extensive discussions of the 2007 Civil Code. Specifically, it will elaborate upon each type of property law covered in the 2007 Civil Code, and provide illustrations of each of these. Due to the fact that aspects of family law will be discussed elsewhere in this publication, this article will not include a discussion of familial and succession matters.

II. History, Scope and Trends

Prior to beginning a discussion of private law, it is essential to make a distinction between private law and public law.

1. Private Law vs. Public Law

Private law regulates property and familial relationships between private persons, while public law regulates the relationships between private persons and the State or other public institutions. Though this simple definition appears unproblematic, this is only one of many different criteria applied in an attempt to distinguish private law and public law. There are endless debates concerning where to draw a distinctive line between the two.

* Dr. KORK Boren obtained her degree of Doctor of Laws (Comparative Law) from Nagoya University Graduate School of Law in 2010.

Three of the most common definitional criteria for distinguishing between private law and public law are set out below. None of them, however, are considered decisive.

Distinction based on the subjects of law

According to the criteria introduced above—the “distinction based on the subjects of law” standard—public law is applicable where one or both parties in the relevant legal relationship is a State or a public institution, and private law is applicable where both parties are private persons. However, given that State and other public institutions are increasingly involved in private activities (e.g. state-run enterprises), this standard cannot be used in many circumstances.

Distinction based on the authority

According to the “distinction based on the authority” standard, public law is applicable when one party in the relevant legal relationship has authority over another party who is submissive to that authority. In contrast, private law applies when both parties are of equal standing in the legal relationship. This standard is easy to apply, as the essential difference between the two parties is apparent. However, at the present time, state and other public institutions are increasingly involved in the provision of services to citizens. In such cases this standard fails to make a clear distinction between private and public laws, since private parties are not always submissive to the authority of the State or other public institutions.

Distinction based on the interests

According to this standard, public law has the objective of serving the public interest, while private law has the objective of serving private interests. However, there are many cases where public and private interests cannot be clearly distinguished. Moreover, it cannot be said that activities within private relationships only advance private interests.

Note that besides these three standards there are numerous other theories which attempt to make distinctions between public and private law. However, none of them singularly provide a sufficient explanation. The difficulty in clarifying a distinction between public and private law arises from the assimilation process of public and private parties. On one hand, the increased involvement of the State and other public institutions in private economic activities leaves room for the application of private law in a field that is conventionally governed by public law. On the other hand, the increased intervention of the State into the economic activities of individuals and private enterprises leaves room for the application of public law in a field that is conventionally governed by private law. For example, such laws as labor law, economic law, social security law, and land law are classified as neither public nor private law, but rather as a combination of both.

2. Sources of Cambodian Private Law

Constitution

After decades of war and turmoil, a new page in Cambodia's history was turned with the conclusion of the Paris Peace Accord on October 23, 1991. A new constitution was adopted on September 24, 1993¹ by constituents selected through a national election organized by the United Nations Transitional Authority in Cambodia ("UNTAC"). Setting out the principles of liberal democracy and pluralism and establishing a constitutional monarchy,² the Constitution is the supreme law of Cambodia, located at the top of the legal hierarchy.³ Among other things, the constitutional rules outline the legal framework in which private relationships unfold. In fact, the constitutional provision that proclaims Cambodia will embrace a market economy system⁴ has established the very playing field upon which private relationships operate.

Civil Law

Having been a French colony and protectorate for nearly a century (1863-1953), Cambodia used the French legal model to plan its own legal system. The first Civil Code, almost entirely inspired by the Napoleonic Code of 1804, was promulgated on February 25, 1920. This code was in use until 1975, the first year of the Khmer Rouge Regime. As Cambodia emerged from that regime in 1979, the country followed the socialist path under the name of the "People's Republic of Cambodia," which was later changed to the "State of Cambodia" in 1989. In terms of civil law, the Decree Law No. 38 on Contract and Other Liabilities⁵ and the Law on Marriage and Family,⁶ were adopted in 1988 and 1989, respectively. Rules governing private relationships may also be found in two mixed public and private laws, namely the Labor Law of 1997⁷ and the Land Law of 2001.⁸

As a necessary preparation for the country's membership into the World Trade Organization ("WTO"), the Royal Government of Cambodia (the "RGC") set out a policy on legal and judicial reform. Eventually, a new Civil Code was drafted, compiling the scattered provisions pertaining to civil matters and complementing them with updated rules. After almost a decade of drafting, a unified and consistent Civil Code was brought into existence⁹ and promulgated by the Head of State on December 8, 2007 (the "Civil Code").

1 Constitution of the Kingdom of Cambodia, September 24, 1993, as last amended on March 9, 2006 [*hereinafter* Constitution].

2 Constitution, *supra* note 1, at art.1.

3 *Id.* at art.131.

4 *Id.* at art.56.

5 Decree Law No. 38 on Contract and Other Liabilities, October 28, 1988 [*hereinafter* Decree Law No. 38].

6 Law on Marriage and Family, July 26, 1989 [*hereinafter* Law on Marriage and Family].

7 Labor Law, January 24, 1997 [*hereinafter* Labor Law].

8 Land Law, August 30, 2001 [*hereinafter* Land Law 2001].

9 Civil Code, December 8, 2007 [*hereinafter* Civil Code].

Its application date, however, will be set by another law, which will cover all necessary items, including transitional measures regarding the application of this law.¹⁰ Two factors may be considered as the reasons for the postponement of the application of the Civil Code. First, the enforceability of this code necessitates the existence of certain accessory laws, such as: a law on bailiffs, a law on a deposit system, a law on personal status litigation, a law on civil fines, and a law on non-suit civil case procedure. These laws are currently still in the process of being drafted. Second, certain provisions of the Civil Code, whose concepts are inspired by the civil law tradition, have been disregarded or are in conflict with specific laws influenced by the common law tradition. As a result, an attempt at harmonizing these laws with the Civil Code has delayed its adoption and application.

The new Civil Code sets forth general principles of private law governing legal relationships in civil matters, which are divided into property-based relationships and family relationships.¹¹ Property-based relationships include the controlling relationship between a person and a thing (real right) and the property-based relationship between persons (obligation). Meanwhile, family relationships concern marriage, parent-child relationships and succession. Since family relationships are discussed elsewhere in this book, this article will cover only property-based relationships.

Commercial Law

Commercial law is one type of specific law within Article 1 of the Civil Code, which provides that, “except where otherwise provided by special law, the provisions of this code shall apply to property-based relationship and family relationship.” That is to say, commercial law applies in the first place to a given property-based legal relationship. The Civil Code starts where the commercial law stops.

The scope of commercial law is confined to the commercial relationship between merchants and/or commercial enterprises. Nevertheless, due to the limited scope of this article, matters related to commercial law will not be discussed.

3. Trends in Cambodian Private Law

At the outset of its establishment, the Cambodian legal system drew heavily on the French legal model based on the continental civil law tradition.

The practice of following the French model of civil law continued until the country fell under the control of the Khmer Rouge, who ruled the nation with an extreme Maoist doctrine under which codes and other laws were no longer used. After the collapse of the lawless Khmer Rouge regime, new leadership took power with a political and legal system influenced by communist ideology.

¹⁰ Civil Code, *supra* note 9, at art.1305.

¹¹ Civil Code, *supra* note 9, at art.1.

When Cambodia eventually turned to the liberal democratic path after the adoption of its constitution in 1993, the practice of accepting the French model of civil law once again resumed.

However, recent developments within the Cambodian legal system have deviated from the long tradition of French civil law practice. In fact, due to the lack of human and financial resources for the prescribed policy of legal and judicial reform, Cambodia has very much relied on financial and technical legal assistance provided by different donor countries with varying legal systems.

In the field of private law, Cambodia drafted the Civil Code with full assistance provided by the Japan International Cooperation Agency (“JICA”). The Civil Code was originally drafted by a group of Japanese scholars and, unsurprisingly, follows the model of the Japanese Civil Code, which is rooted in German civil law. Despite the shift from the French model to the Japanese model, the fundamental concepts laid down in the Civil Code still belong to the continental civil law tradition.

Alternatively, the drafting of other laws, specifically those governing commercial issues, have been completed with assistance from countries employing a common law legal system. As a result, some conflicts exist within the concepts used by the Civil Code and those specific common law influenced legal provisions, which are now under discussion for possible harmonization. If the harmonization is successful, Cambodia will have a hybrid legal system, which borrows from both civil law and common law traditions.

III. Basic Principles

As previously mentioned, the discussion in this article is confined to property-based legal relationships within the scope of the Civil Code. Accordingly, this article does not cover commercial-related matters, nor issues related to family relationships. Therefore, the basic principles to be discussed herein and in the next chapters are those related to property-based relationships only.

The most important basic principles on which the Cambodian private law stands are those related to freedom and equality, which may be divided into four principles as follows:

1. Recognition of Legal Personality

According to Article 1 of the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. This principle is incorporated into the Cambodian constitution through Article 31, which provides that: “*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in ... the Universal Declaration of Human Rights...*”

The Civil Code confirms this principle.¹² The application of this principle results in the acquisition of legal capacity and the capacity to carry out legal acts (capacity to act). *Legal capacity* refers to the suitability or capacity of a person to hold rights and obligations (subject of rights and obligations).¹³ The Civil Code stipulates that the time at which the legal capacity commences is birth, while it prescribes death as the time for the loss thereof.¹⁴ Therefore, according to the Civil Code, by the mere fact of being a person, every person has legal capacity.

Since birth will attribute the capacity to every individual, the matter in question here is the presumption of birth. For example, a fetus may die hours after birth. Any presumption of a non-existence of a life in such a case will consequently alter the course of succession rights.

The Civil Code, however, provides a few provisions that may help abolish such concern. Article 9 (2) stipulates that a fetus in existence at the time of the death of a decedent who dies intestate shall be entitled to succession after it is born. Meanwhile, Article 9 (3) prescribes that a fetus in existence at the time of the death of a testator shall be entitled to the effect of the testament.

Apart from this, because the civil capacity of a person is extinguished by death, the definition of death is important. It may be inevitable to pass such a definition to the rule of medical science. However, it is also important to have some stipulations in the law.

Capacity to act is the capacity to enforce legal acts, to acquire rights and to assume obligations.¹⁵ Each individual is entitled to full capacity to exercise rights. However, the Civil Code has expressly established some limitations for particular types of natural persons who cannot fully exercise their rights. Those persons are incompetent persons or persons with limited capacity to act: (1) minors, (2) adults in guardianship, and (3) persons under curatorship.¹⁶

As mentioned in the preceding paragraphs, law provides that each person is entitled equally to rights and obligations. However, such recognition is not limited to only natural persons. Under particular requirements, laws of many countries recognize that rights and obligations can attach to a convergence of a group of people (association) or a convergence of properties (foundation). Such convergence is called a legal person or a juristic person.

Therefore, the concept of legal personality here is not limited to only natural persons, it is extended to legal persons as well. Legal persons are artificial constructions resulting from the endowment of certain legal rights and obligations beyond individuals with personifying attributes.¹⁷

12 See Civil Code, *supra* note 9, at art.2.

13 TERESA RODRIGUEZ DE LAS HERAS BALLELL, INTRODUCTION TO SPANISH PRIVATE LAW 29 (2010).

14 Civil Code, *supra* note 9, at art.8.

15 HERAS BALLELL, *supra* note 13, at 29.

16 Civil Code, *supra* note 9, at art.16.

17 HERAS BALLELL, *supra* note 13, at 72.

2. Recognition of the Right to Ownership

Article 17 of the Universal Declaration of Human Rights recognizes the right to ownership by stipulating that: “[e]veryone has the right to own property alone as well as in association with others...” Such a principle is incorporated into the Cambodian Constitution through Article 44, which provides that: “[a]ll persons, individually or collectively, shall have the right to ownership.”

The Civil Code confirms the right to ownership through its Article 2, by providing that: “[t]his code gives concrete embodiment to the concept of dignity of the individual, the equality of the sexes and the guarantee of property rights as provided in the constitution.”

The remarkable feature of the right to ownership is its exclusiveness and absoluteness over an owned thing. The owner of a thing will enjoy the right to use, benefit from and dispose of that owned thing. This concept of absoluteness attached to the ownership is precise in the new Civil Code, as it firmly stipulates that ownership refers to the right of an owner to freely use, receive income and benefits from and dispose of the thing owned.¹⁸ In private law, it is important that the concept of privatization is admitted before the idea of ownership is recognized.

Although the right to ownership of an individual is exclusive and absolute, depending on the policy of each country, there are some restrictions imposed on ownership, especially of land.

The Constitution of Cambodia declares that the right to ownership over land is recognized only for Khmer citizens and legal persons with Khmer nationality.¹⁹ Due to constraints laid down by the Constitution, Article 8 of the Land Law 2001 reaffirms this limitation on land ownership for foreigners. The restriction aims to prevent foreigners from occupying lands in Cambodia due to the fact that land prices are quite low and this may allow wealthy foreigners to purchase large tracts of Cambodian territory.

Recognition of freedom or rights to ownership by private individuals is significant, while placing the emphasis on public interest is also pivotal in building up a welfare state. In so far as the notion of public interest is concerned, ownership, especially that over land, may face severe limitations. Regardless of its exclusiveness and absoluteness, the right to ownership may be confiscated from any person, if fair and just compensation is paid in advance.²⁰

Recently, Cambodia adopted the Law on Expropriation that allows the deprivation of ownership over land for the public and national interests.²¹ In this case, the owner is entitled to fair and just compensation based on actual damages.²²

18 Civil Code, *supra* note 9, at art.138.

19 Constitution, *supra* note 1, at art.44.

20 Constitution, *supra* note 1, at art.44.

21 Law on Expropriation, February 26, 2010, art.7.

22 *Id.* at art.23.

However, questions arise over how to define the “public interest” and the “national interest,” as well as what constitutes “fairness” and “justice” in terms of compensation.

3. The Principle of Private Autonomy

The principle of private autonomy establishes that the State should not interfere in private life, especially the civil transactions of individuals. Instead, the State should leave it to individuals to freely decide and to take responsibility. This principle has been developed as the principle of freedom to perform legal acts and the principle of freedom of contract.²³ Freedom of contract refers to the freedom (1) to conclude or not to conclude a contract, (2) to determine the content of a contract, (3) to select the other party to a contract, and (4) to determine the form of a contract.

What does “free intention” mean ?

Rights and obligations under the Civil Code may be formed, transferred, and altered depending on particular facts. Facts or circumstances that serve as the basis for the formation, transfer, or alteration of rights or obligations are legal conditions and what occurs as a result of these legal conditions is a legal effect.

For example, A and B conclude a sale and purchase contract for land that belongs to A and, as a result of this contract, the ownership of the land is transferred to B. In such a case, the sale and purchase contract between A and B is the legal condition. Alternatively, in another case, B may receive the transfer of ownership of the land through succession upon the death of A. In this case, the legal condition for the transfer of ownership is the death of A.

As in the previous examples, there are various legal conditions such as the legality or illegality of a contract, the mental function of a person, the death of a person or the lapse of time. However, what is especially important is the contract. In principle, the contract establishes rights and obligations of parties. A sale and purchase contract, for instance, enables the buyer to acquire ownership over the subject matter of the sale, while at the same time it obligates the buyer to pay the purchase price. Since the obligation is imposed on both parties, once a contract is concluded, the parties must keep the promise. It is the burden of the parties to perform the obligations.

Where does such a binding effect derive from?

The modern law requires that private persons with equal freedom be bound by the obligation established by their own intention. Therefore, it is logical that the buyer be obligated

²³ Zukai Ni Yoru Houritsu Yougo Jiten 219 (2003).

to make a payment because that person wants to buy that thing, which means he places himself in a legal relationship with a binding effect by his own intention. The logical aspect of having the obligation to allow the other person to use his own land is that by his own intention the person admits the right to use the land by the other through a lease agreement. As such, from the concept that intention can result in binding agreements, the concept of the formation, transfer, and alteration of rights based on intention was born, bringing about the idea that intention is an element of a legal act.²⁴

In Article 3, the Civil Code also adopts the principle of private autonomy, whereby legal relationships among private persons, including legal entities, are equal and equivalent with respect to the free intention of the individuals. Although it widely recognizes this principle, the Civil Code does not let such freedom go beyond its general limits; law, morality, and public order (those limits will be discussed in the following sections of this article).

4. The Principle of Liability based on Negligence

In a modern capitalist society, it often happens that in the pursuit of one interest, other interests are violated. If every economic act that caused damage to the interests of another led to an obligation to compensate the injured party, we could not expect free economic activities to take place. Therefore, liability to pay compensation is limited to cases where there exists intent or negligence.²⁵ In this sense, a person is not liable if his tortious act does not arise out of his intent or negligence.

This theory was incorporated into the Article 1382 of the French Civil Code, which states that: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.”²⁶ Article 1383 further stipulates that: “Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.”²⁷ According to these provisions, the French Civil Code prescribes that a person is liable for harm. Supposedly, French law is simple, because a person is liable for harm regardless of its economic nature.

After its adoption, Article 1382 influenced legislative provisions in other countries, including Japan.²⁸ Article 709 of the Civil Code of Japan dictates that: “A person who intentionally or negligently infringes any right of other, legally protected interests of others, shall be liable for compensating any damage resulting in consequence.”²⁹

The German Civil Code, however, adopts a different theory. The Civil Code of Germany in its Article 823(1) stipulates that: “A person who intentionally or negligently unlawfully injures the life, body, health, freedom, property or similar right of another is

²⁴ Id. at 34.

²⁵ IGARASHI KIYOSHI, *SI HOU NYUMON* 23 (3rd ed. 2007).

²⁶ French Civil Code, as last amended on April 4, 2006, art.1382 [*hereinafter* French Civil Code].

²⁷ French Civil Code, *supra* note 26, at art.1383.

²⁸ KIYOSHI, *supra* note 25, at 23.

²⁹ Japanese Civil Code, art.709.

bound to compensate him for any damage that thereby occurs.”³⁰ The term “unlawfully” here emphasizes that a person may intentionally or negligently harm another and still not be liable because he is not at fault (for example, if the person harms another in self defense).³¹ In the case of self defense, under the French Civil Code, the so-called tortfeasor may not be liable either, the only question concerns the explicitness of French law.

Following the same approach as Japanese law, the Civil Code adopts the principle of liability based on negligence by stipulating that: “A person who intentionally or negligently infringes upon the rights or benefits of another person in violation of law is liable for the payment of damages for any harm occurring as a result.”³² Even if it is non-economic harm, the person who causes damages shall be liable for the compensation.³³

In the field of tort, in principle, negligence is an important element that constitutes the liability of the tortfeasor. However, there are certain exceptions to this general principle, whereby a person is liable for compensation of damages even without negligence. For instance, Article 753 of the Civil Code stipulates that: “[w]here harm results to another due to a failure in the installation or control of a structure affixed to or appurtenant to land, the person who manages the structure and the owner of the structure are jointly liable for damages. However, the person who manages the structure shall be exempted from liability if he proves that he exercised proper control over the structure.” According to this article, whether or not there is negligence, the owner of the structure must be liable for the compensation of damage caused to the victim.

IV. Property Rights

As mentioned in Section I(A), private law deals with property and familial relationships between private persons. Under the Civil Code, it is not only property that can be the object of rights; rights over property are transferrable and can be offered as security in addition to the property itself. Property rights under the Civil Code can be divided into two main types. The first type is real rights and the second type is personal rights or claims.

1. Real Rights

According to the Civil Code, a real right is the right to control a thing directly, and may be asserted against all persons.³⁴ The right to control can be interpreted as a right with

30 ARTHUR TAYLOR VON MERHEN ET AL., AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW: READINGS, CASES, MATERIALS 234 (2006).

31 *Id.* at 235.

32 Civil Code, *supra* note 9, at art.740.

33 *See* Civil Code, *supra* note 9, at art.741.

34 Civil Code, *supra* note 9, at art.130.

substantial purpose whose contents can be realized only according to the intention of the right holder and which is not necessarily depending on the acts of others.³⁵

An example of possession of land can facilitate an understanding of the idea of “control” or “right to control” of a thing. In such a case, the owner of the land can, as a matter of course, freely use the land by himself (right to use). The owner can also lease out the land to others and receive rent (right to benefit). Furthermore, the owner can sell this land and receive the proceeds from the sale (right to dispose). Within this meaning, a person who holds ownership, which is a real right in relation to the land (which is the thing), is entitled to the right to use, benefit from and dispose of that thing.

There are two important features of control, one being directness and the other exclusiveness. It is not the act of intervention of others that makes it important, but the real right, which gives direct control over a thing.³⁶ In other words, for example, the land of A has been set up usufruct for B. Therefore, according to Article 256 of the Civil Code, B is entitled to the right to use and enjoy the profits from the land. As a result, B can directly use that land.

As it has been previously mentioned, a real right is the right to control a thing, and the nature of this control is absolute and exclusive (monopoly).³⁷ For example, if land belongs to A, there is no way that the land simultaneously belongs to B. Furthermore, as raised in the example in the preceding paragraph, in the case where the land is set up usufruct for B, rights to use and enjoy profits are transferred to B, but A alone shall have the right to dispose. The control of the thing is a real right, as explained it is what is known as absolute and exclusive.

In principle, a real right can be established according to the law. Therefore, the Civil Code has enlisted a number of types of real rights that may be established.³⁸ To simplify, real rights under the Civil Code can be categorized as follows:

Ownership

As provided for in Article 138 of the Civil Code, ownership refers to the right of an owner to freely use, receive income and benefits from, and dispose of the thing owned, subject to applicable laws and regulations.

Thus, it can be understood that ownership is the exclusive right to enjoy and dispose of property without more limitations than those established by law. Drawing a conclusion from this, the deeper understanding of the scope of the exercise of rights based on ownership lies in the knowledge of its limitations set forth by law.

For example, to prevent the possible nuisance that may occur on the property of others due to activities carried out by an owner of land, the Civil Code dictates that: “A land-

³⁵ Kiyoshi, *supra* note 25, at 64.

³⁶ Koji Ohmi, *Minpou Kougi II* : Bukken Hou 4 (3rd ed. 2006).

³⁷ *Id.* at 4-5.

³⁸ Civil Code, *supra* note 9, at art.132.

owner may not use the land for the sole purpose of hindering the activities of another or in order to create a nuisance.”³⁹ In cases where a nuisance occurs on the land of another due to activities involving gas, steam, odor, smoke, soot, heat, sound, vibration, and so on, an owner of land that is severely harmed by the nuisance may demand appropriate compensation from the person causing such nuisance.⁴⁰

Another limitation to ownership is the exhaustion of the right to enjoy the treasures buried under the earth. Although the Civil Code recognizes that ownership of land extends to the areas above and below the surface of the land to the extent that the owner derives benefit there from, it also imposes a limit to such. Article 141(1) of the Civil Code stipulates that: “A landowner cannot assert ownership over any type of statue, bas-relief, antiquity, or other cultural artifact discovered in the ground. Such items comprise assets of the State, and the owner of the land is obligated to return them to the Ministry of Culture and Fine Arts.” Furthermore, Article 141(2) goes further and states: “A landowner cannot assert ownership over minerals in the ground, which are governed by a separate law. Such minerals comprise assets of the state, and the right to mine and acquire them shall be owned by the person to whom mining rights have been granted by the State.”

The limitations discussed may be based on the rationale that public interest should prevail over private interest. Unless the term “public interest” is strictly defined, the exercise of public authority by the State based on the “public interest” notion will put the “private interest” in danger.

Due to the fact that ownership provides the fullest control over property and embraces a wide range of faculties and powers, ownership can be regarded as the core of a real right, because, besides ownership, the holder of other types of real right can only control a part of the thing subject to real right. Those other real rights, as a result, are called limited real rights (see the discussions in Section iii).

Possessory Rights

The keyword here is not “possession,” but “possessory rights.” The Civil Code stipulates provisions related to possessory rights from Article 227 to Article 243 in Chapter 3 of Book III. Possession refers to the holding of a thing, meaning the state of controlling a thing as a matter of fact, whether directly or indirectly.⁴¹ Possession becomes the basis that constitutes possessory rights, which endows various legal effects (advantageous and disadvantageous) to the holder of those possessory rights.⁴²

It is a bit ambiguous regarding the purpose of having a possessory rights system, although it is explained that such a system exists in order to respect and preserve the actual control of objects.⁴³ However, there are some particular effects arising from these

³⁹ Id. at art.139(2).

⁴⁰ Id. at art.140.

⁴¹ Civil Code, *supra* note 9, at art.898.

⁴² MASAOKI YASUNAGA, *KOUGI: BUKKEN TANPOU BUKKEN HOU* 191 (1st ed. 2009).

⁴³ Id. at 192.

possessory rights. From one perspective, there are the effects of presumptions of rights (substantial rights),⁴⁴ the right to demand protection of possession,⁴⁵ the right to demand the return of the thing in possession,⁴⁶ the right to demand the removal of disturbance,⁴⁷ and the right to demand prevention of disturbance of possession.⁴⁸ From the other perspective, possessory rights will give rise to effects in relation to prescriptive acquisition of ownership,⁴⁹ immediate acquisition of ownership,⁵⁰ conditions for perfection related to the formation, transfer and alternation of real rights regarding movable,⁵¹ conditions for establishment and perfection of retention rights and pledge,⁵² liability for payment of damages of possessor,⁵³ and the right to demand compensation.⁵⁴

To conclude, the possessory rights system does serve particular functions, such as maintaining social order (right to action based on possessory rights), presuming substantial rights (presumption of lawful rights, *bona fide* acquisition of ownership over movable, etc.), and serving as a means to acquire ownership of particular substantial rights (prescriptive acquisition, occurrence of effect of right of retention, etc.).⁵⁵

Limited Real Rights

The Civil Code does not employ the term “limited real rights” explicitly. However, from reviewing the provisions in the Civil Code, one will find that there are two main types of limited real rights provided by the Civil Code, one of which is usufructuary real rights and the other is security rights.

Usufructuary Real Rights

Usufructuary real rights are the rights to use and get benefits from the immovables of others. Under Article 132 of the Civil Code, the usufructuary real rights can be subdivided as follows:

Perpetual Lease refers to a long-term lease of immovable for a term of no less than 15 years.⁵⁶ Although this perpetual lease may be renewable, its primary lease term must not exceed 50 years.⁵⁷ To establish this kind of limited real right, it is important that

⁴⁴ Civil Code, *supra* note 9, at art.234.

⁴⁵ Id. at art.236.

⁴⁶ Id. at art.237.

⁴⁷ Id. at art.238.

⁴⁸ Civil Code, *supra* note 9, at art.238.

⁴⁹ Id. at art.160-169.

⁵⁰ Id. at art.193.

⁵¹ Id. at art.134.

⁵² Civil Code, *supra* note 9, at art.780, 816, 829.

⁵³ Id. at art.750, 753.

⁵⁴ Id. at art.239.

⁵⁵ YASUNAGA, *supra* note 43, at 193.

⁵⁶ Civil Code, *supra* note 9, at art.244.

⁵⁷ Id. at art.247.

it be made in explicit form (writing)⁵⁸ and in order to assert against the third party it is required that such right be registered.⁵⁹

Usufruct is defined by the Civil Code as the right to use and enjoy the profits of the immovable of another person, for a period that may not exceed the life of the usufructuary.⁶⁰

The usufructuary has the right to use the immovable that is the subject of the usufruct for its intended purposes, and to enjoy the natural and the legal benefits arising from the immovable.⁶¹

According to the Civil Code, usufruct can be established either by agreement of parties or by law.⁶² However, it is hard to understand in which situations a usufruct is established based upon law.

Beside the two limited real rights above, the Civil Code provides special provisions on the right of use and the right of residence, which may not be found in some other legislation.

Right of Use–Right of Residence The right of use refers to the right to enjoy benefits of the immovable, to the extent of the needs of the right holder and his family. Meanwhile, right of residence refers to the right to occupy part of a building, to the extent required for residence by the right holder and his family.⁶³ There are some remarkable features about these rights. First, these special limited real rights can be established either orally or in writing.⁶⁴ Second, the condition for perfection against the third party is the actual use and residence. Even if the ownership of the land or the building is transferred, the holder of right of use or right of residence can be asserted against the transferee of the ownership by the act of actual using or residing.⁶⁵ Hence, registration is not a requirement for perfection.

More remarkably, such rights will still exist even if there is an increase in the number of members of the family who are the rights holders.⁶⁶ To clarify, if a person holds a right of residence on a room of an apartment, if he later gets married and has children, his wife and his children can also live with him in that room. This not only means that the right of residence will not cease to exist, but the right holder's dependents can also enjoy that right. Above all, the right of use or right of residence is as strong as ownership. The holder of such right can exercise the same rights to demand re-

58 Id. at art.245.

59 Id. at art.246.

60 Civil Code, *supra* note 9, at art.256(1).

61 Id. at art. 256 (2).

62 Id. at art. 257.

63 Id. art.274.

64 Civil Code, *supra* note 9, at art.276(1).

65 Id. at art.277.

66 Id. at art.279.

turn, to remove disturbance and to prevent disturbance vis-à-vis an infringement of his right as the owner of the immovable.

The last of the first type of limited real rights is easement.

Easement is the right to use the land of another (servient land) for the benefit of one's own land (dominant land) in accordance with the purpose specified in the contract of creation. An easement may not be created if it contravenes public order (limit to scope of private autonomy).⁶⁷

Since an easement benefits and binds the land itself, easement continues despite any change of ownership of either dominant land or servient land (appurtenant of easement).⁶⁸

According to the Civil Code, an easement can be formed by either oral agreement or written agreement. However, an easement established not in the form of writing may be extinguished at any time as determined by the owner of the servient land through the notice of extinguishment.⁶⁹ The Civil Code does not explicitly categorize the type of easement, yet as it proceeds to classify the different effects of easement once it is established, the easement under the Civil Code can be theoretically divided into positive easement and negative easement.

To understand positive easement, it is necessary to look at a provision in the Civil Code. Paragraph 1 of Article 292 (1) stipulates that: "The easement holder may erect structures necessary for the exercise of the easement on the servient land." For example, the owner of the dominant land may dig a ditch on the servient land so as to ease the free flow of rain water from the servient land. Other direct acts such as walking or traveling through the servient land carried out by the owner of the dominant land can be a positive easement.

On the contrary, the Civil Code prescribes another effect which enables us to label the easement as negative, which requires the owner of the servient land to refrain from carrying out some particular acts. Such effect can be found in Article 294, which provides that an easement holder may exercise the same rights to demand return, to remove a disturbance and to prevent a disturbance vis-à-vis an infringement of the easement as the owner (real right of claim of easement holder). For example, the owner of the dominant land may demand that the owner of the servient land remove a structure that blocks the rain water from freely flowing from the dominant land across the servient land to a drainage pipe.

In summary, the first group of limited real rights under the Civil Code comprises of perpetual lease, usufruct, right of use and right of residence, and easement, which fall under the umbrella of usufructuary real rights.

⁶⁷ Id. at art.285.

⁶⁸ Civil Code, *supra* note 9, at art.289.

⁶⁹ Id. at art.286.

Security Rights

The other group of limited real rights under the Civil Code are labeled as security rights. Before getting into a discussion on each particular right, it is helpful to first understand some primary concepts concerning security rights.

Security rights aim to secure the collection of a claim (especially pecuniary claims). It is a special right that enables the creditor of a particular claim to acquire the property (movable or immovable) or right that belongs to the debtor or a third person. In a case where the debtor does not or cannot perform the concerned obligation, the creditor can exercise that right (security right) to convert that secured property or secured right into cash (compulsory sale). Through a security right system, the security right holder can satisfy a secured claim in preference to other creditors (preferential right). Such a security system may also be known as *security in rem* while another system of security is named *security in personam*; however, the second system of security is not discussed here.

Under the Civil Code, security rights consist of (1) right of retention, (2) preferential right, (3) pledge, (4) hypothec, and (5) transfer of title for security purposes. Due to its complicated nature, these security rights have been incorporated into one book in the Civil Code, which is Book VI (Security).

Theoretically, these security rights can be divided into two main categories, one of which is security rights based on law and the other being security rights established by agreement of parties.

Security Rights based on Law

These rights include the right of retention and preferential rights.

Right of retention refers to the right to retain a thing subject to a particular performance and the right to refuse to return the thing until the holder of the thing receives the payment of a claim.⁷⁰ For example, a mechanic can refuse to return a motorbike to the owner until the owner pays the repair fees. In this case, even if there is no advance agreement between the owner and the mechanic, the mechanic is entitled to the right to possess (retain) the property until the mechanic receives the performance of the obligation (payment of repair fees) from the owner. Such right is endowed to the mechanic by law.

The Civil Code stipulates detailed provisions related to the right of retention from Article 774 to Article 780.

Preferential Right is another type of security right that arises from the stipulations of law. It is the right that enables a creditor to receive payment of a particular claim in priority to other creditors.

70 GEN SHIMIZU, PUROGURESSIPU MINPOU: TANPOU BUKKEN HOU 161 (2008)

According to the Civil Code, preferential rights are divided into three types: general preferential rights, preferential rights over movable property, and preferential rights over immovable property.

With general preferential right, a person with a claim arising from the expenses for a common benefit, funeral expenses, supply of daily necessities, or claims held by an employee has a preferential right over all of the property of the debtor.⁷¹

As for the preferential right over movable property, it can be understood that a creditor will be entitled to a preferential right over a specific movable of the debtor. In order for such a preferential right to arise, the claim of the creditor must arise out of an event such as the lease of immovable property, carriage of passengers or goods, preservation of movable property, sale of movable property, or supply of seeds, seedlings, fertilizer, breeding stocks, progeny and forage of creatures. Any of these circumstances would give rise to a preferential right over the specific movable of the debtor.⁷²

With regard to the preferential right over immovable property, the Civil Code stipulates that a person whose claim arises out of any such events as preservation of an immovable, work on an immovable, or ale of an immovable has a preferential right over a specific immovable of the debtor.⁷³

The following example provides a better understanding of the meaning of preferential rights.

Suppose that A is a lessee and becomes bankrupt. The only properties he owns are furniture in a rented house, some money and a car. A has many creditors ranging from his landlord (lessor) (B), his maid (C), the dealer who sold the car to him (D) and the owner of a grocery store who previously delivered food to him on a regular basis (E). The question is, how are those creditors treated under these limited properties?

The Civil Code stipulates provisions which determine the order of preferential rights, and the handling of claims accordingly, from Articles 803 to 806.

Security Rights Established by Agreement of Parties

Security rights established by agreement of parties cover pledge, hypothec, and transfer of title for security purposes.

Pledge can be translated as the right to receive a payment of claim in priority over other creditors from the object belonging to either the debtor or a third party, which the creditor possesses as a security to his claim.⁷⁴ For example, D has set up a pledge on jewelry for C to secure a debt. Due to this establishment of security, C can possess that jewelry and refuse to return it to D until C receives the payment of the claim.

71 Civil Code, *supra* note 9, at art.783.

72 Id. at art.788.

73 Id. at art.799.

74 SHIMIZU, *supra* note 71, at 137.

Unlike other types of contracts where consent alone is necessary, pledge requires the delivery of the concerned thing as a prerequisite for the establishment of a pledge contract (condition for establishment). Hence, the possession of the thing pledged by the creditor is a special characteristic of the pledge.

According to the Civil Code, there are three types of pledges. The first type is a pledge over movable property. To assert against the third party, the pledgee must continuously hold possession of the thing pledged.⁷⁵ This kind of pledge consists of two remarkable features. The first feature explains that besides the use of the pledged thing for the sake of its preservation, by way of agreement, the pledgee can use and lease the pledged thing for his own benefit.⁷⁶ The second feature of this kind of pledge is that with reasonable grounds, the pledgee can apply to the court to have the pledged object appropriated to himself in satisfaction of the debt to the extent of its value if he does not obtain satisfaction of his claim (summary enforcement of a pledge).⁷⁷ The second type is a pledge over immovable property. Through this kind of pledge, the creditor (pledgee) receives the immovable and possesses it until the creditor receives the payment of the claim from the debtor (pledgor). During his possession, the pledgor can use and receive profits from the pledged immovable.⁷⁸ In the event that the debtor (pledgor) fails to pay the claim, the creditor (pledgee) can convert that pledged immovable into cash and receive the payment in priority to other creditors. The last type of pledge is a pledge over a right or claim. The Civil Code stipulates that property rights can be subject to pledges as well.⁷⁹ Therefore, a debtor may offer his intellectual property rights, company shares, etc. as the subject matter of a pledge. Although in principle a claim is transferable, any claim can be offered as security through a pledge contract.⁸⁰ However, the law imposes restrictions on some claims that cannot become the subject matter of a pledge since the creditor cannot assert such a pledge against the bona fide third party.⁸¹

Hypothec, unlike a pledge over an immovable, can be established only through the consent of the parties involved, additionally, there is no requirement of delivery of the object (transfer of possession).⁸² The hypothec (creditor) is entitled to obtain satisfaction of his claim in preference to other creditors out of the immovable property that has been furnished as security.⁸³ Such security can be provided by either a debtor himself or a third party.

⁷⁵ Civil Code, *supra* note 9, at art.829.

⁷⁶ *Id.* at art.831.

⁷⁷ *Id.* at art.832.

⁷⁸ *Id.* at art.834.

⁷⁹ Civil Code, *supra* note 9, at art.840.

⁸⁰ SHIMIZU, *supra* note 71, at 153.

⁸¹ Civil Code, *supra* note 9, at art.841.

⁸² *Id.* at art.844.

⁸³ *Id.* at art.843(3).

The system of hypothec enables the debtor to continue enjoying his or her possession and use of the land and structures offered as security to his or her creditor. As a result, the owner of the land or structure can still enjoy the profits from the rental of that land or building, even if it is offered as security for a claim, until such immovable is disposed of through compulsory sale.

Although hypothec can be established only through consent of the parties, in order to assert such hypothec against a third party the instrument creating hypothec must be notarized and registered in the land registry.⁸⁴ Registration in this case not only serves as a condition for perfection against a third party, but it also functions as a determinant of the priority of the creditor (hypothec), who can obtain the satisfaction of respective claims in preference to other creditors from the proceeds of the sale of that hypothec.⁸⁵

Transfer of Title for Security Purpose describes the transfer of the ownership of a prescribed movable owned by a debtor or a third party, to the creditor, for the purposes of securing a debt. In this event, the ownership over the property shall be re-transferred to the person who provided the security when the debt is paid in full.⁸⁶

The following case study may offer a deeper understanding.

B, the owner of a construction company, concludes a loan for a consumption contract having a value of 25,000 USD with F, the owner of a finance company. B offers a construction machine S (whose value at the time of contract is 50,000 USD) as security. The essence of security here is to transfer ownership (title) of machine S to F. As for the condition for perfection, there must be a transfer of possession of machine S from B to F.⁸⁷ Thus, the direct possession by B of S must move to F.

If B can pay the claim either in due time or after the due date, ownership and possession of S will revert to B (right of retrieval).⁸⁸ However, if B fails to pay, S will belong to F. As a result F can convert S to cash in order to satisfy his claim (conversion to cash) or acquire ownership on his own (conclusive transfer of ownership).⁸⁹

84 Id. at art.845.

85 Civil Code, *supra* note 9, at art.863.

86 Id. at art.888.

87 See Civil Code, *supra* note 9, at art.890.

88 See Id. at art.899.

89 See Id. at art.898.

2. Personal rights (claims)

Under this classic concept, a claim refers to the right that a particular person has to demand another person to perform (or not to perform) a particular act.⁹⁰ According to this definition, the content of a claim is either “performance of a particular act” or “not to perform a particular act.” For example, the act of paying sale and purchase fees, act of handing over possession of land, or the act of performing a labor duty.

Claims arising out of the provisions of law (for example, unjust enrichment or tort) are usually pecuniary claims. However, there are various types of claims depending upon the contents of the contracts.

In so far as the sale and purchase contract is established, the claim of the buyer is to demand the delivery of goods, while the claim of the seller is the payment (Article 515). In the case of a lease, the claim of the lessee is the right to demand that the lessor allows him to use the leased item, while the claim of lessor is the right to demand payment of rent from lessee (Article 597). Upon the termination of the lease, the lessor has right to demand that the lessee restore the leased property to its original condition and return it to the lessor (Article 618).

Drawing a conclusion from the examples in the preceding paragraph, a claim can be classified as either a monetary claim or a non-monetary claim.

A monetary claim can be explained as a claim whose purpose is the delivery of a fixed amount of money.⁹¹ Meanwhile, a claim whose purpose is not related to the delivery of money can be classified as a non-monetary claim. For example, a non-monetary claim may be a claim related to a specific object whose content of performance is the delivery (transfer of possession) of that particular object.

The Civil Code stipulates a number of provisions constituting a more detailed classification of claims. As a result, the Civil Code embraces claims concerning specified things: fungible claims, monetary claims, claims on interests, and claims of choice.

⁹⁰ HIROYASU NAKATA ET AL., MINPOU 4: SAIKEN SOURON 7 (1st ed. 2004).

⁹¹ KOJI OHMI, MINPOU KOGI IV : SAIKEN SHOURON 36 (3rd ed. 2009).

V. Obligations

1. Definition of Obligation

This section will introduce various types of obligations under the new Civil Code.

Under the Civil Code, an obligation is defined as a legal relationship that connects a particular person with a specified person by having the particular person assume a certain duty with respect to the specified person.⁹²

2. Types of Obligation

Obligations can theoretically be divided into two types; an obligation created based upon the intention of parties and an obligation created by law. The former covers obligations arising out of contracts (such as sale and purchase contracts, lease contracts, loan for consumption contracts, contracts for work, or mandate) or unilateral legal acts. The latter, on the other hand, embraces obligations arising out of management of affairs without mandate, unjust enrichment, and tortious acts (or a provision of law).

The following discussion is devoted to introducing basic concepts covering each type of obligation created by law.

3. Management of Affairs without Mandate

Although there is no obligation imposed by law or created by a contract, a person may enter into the management of affairs on behalf of another person. Such management is called management of affairs without mandate (Article 729).

Why is there such a system in private law?

By nature, a person has freedom and should avoid interfering with other people's affairs. However, because there is a necessity in society that people help each other, the law admits that even if there is no obligation based upon law, law should allow the act of one person in managing the affairs for the other person.⁹³

For example, A is a neighbor of B. While B is on holiday abroad, a storm destroys the roof of B's house. A asks a repairman to fix the roof.

According to this example, if B has asked A to manage his house during his absence, there exists a contract of mandate between A and B, and A has an obligation which

⁹² Civil Code, *supra* note 9, at art.308.

⁹³ TOYOHIRO NOMURA, *Min Ji Hou Nyu Mon* 123 (5th ed. 2008).

*arises from the contract to ask the repairman to fix the roof and demand reimbursement of the expenses upon B's return.*⁹⁴

However, if B has never asked A to manage his house during his absence, A does not have an obligation to fix the roof of B's house. Nonetheless, the act of A asking the repairman to fix the roof for B even without such an obligation is known as management of affairs without mandate. In such a case, A is called the manager (of affairs), while B, the receiver of benefits (in this example), is called the principal (Article 729).

4. Unjust enrichment

A situation where a person, without legal cause, derives a benefit from the property or services of another and thereby causes loss to the said person is called unjust enrichment.⁹⁵ In such a case, the beneficiary must return that benefit.⁹⁶

For example, C withdrew 100 USD from his account, however due to a technical error, the data on the bank records showed that only 50 USD was withdrawn. Another example is that A intended to transfer 1000 USD to his creditor, however, by mistake, A transferred that amount to an unknown B. In both cases, C and B must return those benefits.

In order to constitute an unjust enrichment, four conditions must be met. Those conditions are: (1) the receipt of a benefit from the property or services of another, (2) the loss caused to that other person as a result of that receipt, (3) the causal relationship between the benefit and the loss, and (4) lack of legal cause (for such receipt of benefit).

Therefore, in principle, once the unjust enrichment occurs, the person who lost the benefit can demand the return of such benefit from the person who has received the benefit. Nevertheless, the scope of the return may vary depending on whether or not the person is a *mala fide* beneficiary. If the beneficiary is *bona fide* (did not know about the lack of legal cause upon the receipt of benefit), he is obliged to return such benefit to the extent that a benefit subsists.⁹⁷ On the contrary, if the beneficiary is *mala fide*, he has obligation to return not only the benefit, but also the interests calculated based upon the benefit as the principal.⁹⁸

Although in general, the beneficiary must return a benefit acquired due to unjust enrichment, the Civil Code includes a provision to protect the good faith creditor from the liability to return the payment based upon unjust enrichment. As a result, a person who affects performance cannot demand the return of the delivered benefit from a creditor

⁹⁴ See Civil Code, *supra* note 9, at art.637, 639, 646.

⁹⁵ Civil Code, *supra* note 9, at art.736.

⁹⁶ Id. at art.736.

⁹⁷ Id. at art.736.

⁹⁸ Id. at art.737.

who is unaware of the mistake, believing that such performance constitutes a valid discharge of the obligation which leads to the destruction of the documentary evidence of the existence of the obligation or relinquishment of a security thereof.⁹⁹

So long as public order and proper prevailing custom are concerned, the individual interest still finds its place in the closed room. The Civil Code dictates that the demand for the return of unjust enrichment by the person who has suffered loss must not be permitted if such return would be in breach of public order, morality or any applicable law.¹⁰⁰ For example, the winner of a gambling act cannot demand his counterpart to pay the gambling money according to the gambling contract because the content of such contract contradicts public order, morality and law.

Without involvement of a third party, the relationship between the person who receives the benefit and the person who loses the benefit is not complicated as it will occur once the four conditions are established. Nonetheless, unjust enrichment will become complicated once a third party becomes involved.¹⁰¹ For instance, R stole money from P. R delivered the stolen money to C as a payment of debt (C is the creditor of R). Can P claim for the return of that money from C based on unjust enrichment?

5. Tort

A tortious act refers to an act in violation of law based on the intent or negligence of a tortfeasor that infringes the rights or benefits of another who is known as a victim.¹⁰² The victim in a tortious act may claim compensation of damages against a tortfeasor.¹⁰³ Tort may serve a society through three functions as follows.¹⁰⁴

Recovery of Damages—By employing this tort system, the victim can recover the damages that he has suffered. Through the tort system, the tortfeasor is liable for the compensation of damages caused to the victim.¹⁰⁵ Because usually the harm is caused by the act of the tortfeasor, imposing liability for compensation on a tortfeasor is normal and will satisfy justice for the parties.¹⁰⁶

Sanctions Against a Tortfeasor—Tort functions as punishment against the person who commits a wrongdoing. By not allowing the victim to exercise their right to compensation through using their own method such as taking “an eye for an eye,” modern law has

99 Civil Code, *supra* note 9, at art.740.

100 *Id.* at art.741.

101 NOMURA, *supra* note 94, at 127.

102 *Id.* at 108.

103 Civil Code, *supra* note 9, at art.743.

104 NOMURA, *supra* note 94, at 109.

105 *See* Civil Code, *supra* note 9, at art.743.

106 NOMURA, *supra* note 94, at 109.

provided a better mechanism to bring justice to the victim while at the same time maintaining social order and stability. Thus, by employing a tort system, the tortfeasor will be punished through the provisions of tort law.

Prevention of Harm—Tort may also function as a prevention of harm. Due to sanctions against a tortfeasor and the stipulations of law that any person who intentionally or negligently infringes upon the rights or benefits of another in violation of the law is liable for the payment of damages for any harm occurring as a result,¹⁰⁷ those wishing to avoid such sanctions must be appropriately careful with their own acts.

However, the effectiveness of this third function depends upon how strictly the sanction against the tortfeasor is enforced.

In order to establish tortious liability, it is necessary that some prerequisites be fulfilled. First, intent or negligence is a necessary element for the commission of a tortious act.¹⁰⁸ The Civil Code sets out particular acts that are regarded as intentional acts and negligent acts.¹⁰⁹ Second, a causal relationship must exist between the intent or negligence of the wrongdoer and the harm caused to the victim.¹¹⁰ The third element of a tort is the competence of the wrongdoer to assume liability.¹¹¹ In other words, if someone who causes harm to another is an incompetent person as specified by law, that wrongdoer is not liable for the harm caused by his act. The final element of a tortious act is illegality.¹¹²

¹⁰⁷ Civil Code, *supra* note 9, at art.743.

¹⁰⁸ *Id.* at art.743 (1).

¹⁰⁹ *Id.* at art.742.

¹¹⁰ *Id.* at art.743 (3).

¹¹¹ Civil Code, *supra* note 9, at art.745.

¹¹² *Id.* at art. 74 (1).

CIVIL CODE

KIYOHARA Hiroshi

CONTENTS

I. Introduction.....	99
II. General Rules of The Civil Code (Book 1)	100
III. Persons (Book 2)	101
IV. Real Rights (Book 3).....	103
V. Obligations (Book 4).....	107
VI. Particular Types of Contracts, Torts and Others (Book 5)	115
VII. Security (Book 6).....	122
VIII. Relatives (Book 7).....	126
IX. Succession (Book 8).....	130

CIVIL CODE

*KIYOHARA Hiroshi**

I. Introduction

In Cambodia the former Civil Code was promulgated by the King on February 25th of 1920. Then, on December 8 of 2007 a new Civil Code was promulgated. This new code is designed not only to respect Cambodian traditions and customs, but also to make the Cambodian civil and legal system more suitable for market-oriented economic reforms. This article will provide an introductory explanation on the history and structure of the new Civil Code as well as the general rules and principles stipulated in the Code.

1. Brief history of the new Cambodian Civil Code

Since 1999, the Cambodian Ministry of Justice (MOJ) and the Japan International Cooperation Agency (JICA) have been cooperating in drafting the Civil Code through the Legal and Judicial Development Project. The joint drafting team successfully completed the draft Civil Code and submitted it to the Minister of Justice of Cambodia in March 2003. Afterwards, both the National Assembly and the Senate passed the draft Civil Code in 2007, and the Civil Code was promulgated by the King on December 8th of 2007.

2. Structure of Cambodian Civil Code

This new Civil Code is divided into 9 books with 1305 articles in total. The titles of 9 books are as follows: General Rules (book 1), Persons (book 2), Real Rights (book3), Obligations (book 4), Particular Types of Contracts / Torts (book 5), Security (book 6), Relatives (book 7), Succession (book 8) and Final Provision (book 9). The Civil Code covers all aspects of the Cambodian people's daily lives such as marriage, family and relatives, succession, land ownership and other property rights, sales contracts, lease contracts, torts, and so on. That is why the Civil Code is significant as a fundamental civil law.

* Mr. KIYOHARA Hiroshi is a former JICA expert who served as a legal adviser at the Ministry of Justice (MOJ). Currently he is a lawyer in Japan and the United States of America

3. Implementation of Cambodian Civil Code

Even though the Civil Code was promulgated in 2007, it has not yet started its application because there is a necessity to draft some ancillary laws for appropriate implementation of the Civil Code. More time is also required to disseminate the code all over the country, since the code is composed of more than a thousand articles and contains a number of new legal terms and concepts for the Cambodian people to understand. Thus, Article 1305 of the Civil Code provides that this code shall be applicable from the date to be designated by another law. Such “another law” is called “the Law on Application of the Civil Code” which the joint drafting team between MOJ and JICA successfully drafted in early 2011. The National Assembly and the Senate have already passed the draft law. Therefore, the Civil Code is supposed to start its application around the end of 2011.

II. General Rules of The Civil Code (Book 1)

The Civil Code sets forth the general principles governing legal relations in civil matters such as property-related matters and family-related matters¹. In other words, the code provides general rules of private law. “Private law” is a law dealing with private persons and their property and relationships, whereas “public law” is a law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself, such as constitutional law, criminal law and administrative law. Since the Civil Code is the comprehensive body of private law, it covers property law, contract and tort law, family law, and the law of succession.

The Civil Code gives concrete embodiment to the concepts of the dignity of the individual, the equality of the sexes and the guarantee of property rights provided in the Constitution². In order to achieve this goal, the code stipulates three fundamental rules governing legal relations in civil matters: the principle of private autonomy, prohibition of abuse of rights, and the principle of good faith and fair dealing.

First, the individuals can create their legal relations in civil matters according to their intentions. Article 3 of the code provides that “Under this code, legal relations among private persons, including corporations, shall be equal and equivalent, with respect for the free intention of the individual. Public corporations shall be deemed private persons in connection with their legal relations that arise from transactions.” This is what is called “the principle of private autonomy.” For instance, suppose that you have a car. You can use it by yourself or lend it to your friend or sell it to a car dealer. It totally depends on your free intention. And when you sell your car, you and the buyer can freely decide the terms of the contract, the price, and the date of delivery according to the agreement be-

¹ Article 1 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

² Article 2 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

tween you and the buyer. No other people can interfere the free intention of you and the buyer. The courts and government need to respect and admit the agreement between you and the buyer. Private autonomy is the most significant principle in private law.

Second, the abuse of rights shall not be permitted. If a right is used beyond the scope of the protection originally anticipated, the exercise of such right shall not be valid³. This is called “prohibition of abuse of rights.” The exercise of one’s right can be regarded as abusive if it unreasonably infringes upon another’s rights. No intention to harm on the part of the holder of the right is necessary.

Finally, rights shall be exercised in good faith and fair dealing, and also duties shall be performed in good faith and fair dealing⁴. This is what is called “the principle of good faith and fair dealing.” This principle is applied in various circumstances, but it is mainly used in cases where a particular relationship, such as a contract, exists between the parties. For example, in cases of lease contract, the court can resort to this principle to protect the lessee of a house or land from eviction.

III. Persons (Book 2)

Book 2 (Persons) of the Civil Code deals with the capacity of natural persons and juristic persons.

1. Natural Persons

Legal Capacity

All natural persons are entitled to have rights and assume duties⁵. This means all natural persons have legal capacity without exception. Natural persons shall acquire legal capacity by birth, and shall lose it by death⁶. Legal capacity extends to a child in the womb in relation to tort liability and inheritance. For example, a fetus in existence at the time that a tortious act is conducted shall be entitled to seek damages for the harm arising from such act after it is born⁷.

Capacity to Act

The capacity to act is distinguished from legal capacity mentioned above. The capacity to act means the capacity to obtain rights, assume duties, and incur liability via acts. Not all persons with legal capacity can act on their own and acquire rights and assume duties.

3 Article 4 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

4 Article 5 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

5 Article 6 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

6 Article 8 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

7 Article 9 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

The Civil Code provides for “incompetent persons,” which means persons who do not have this capacity to act, or have only limited capacity to act. They are a minor, a person under general guardianship and a person under curatorship⁸.

Minors are persons under the age of eighteen⁹. They are required to obtain the consent of their parental power holder or guardian to acquire rights or assume duties. An act conducted by a minor without the consent of his parental power holder or guardian may be rescinded. However, this shall not apply to an act performed in order to obtain a right or to discharge a duty or obligation, or to an act conducted in the course of daily life¹⁰.

With respect to a person who remains in a habitual condition of lacking the ability to recognize and understand the legal consequences of his actions due to mental disability, the court can declare the commencement of a general guardianship¹¹. A person who receives such a declaration of commencement of general guardianship is called “a person under general guardianship,” and shall be placed under the care of a general guardian¹². An act conducted by a person under general guardianship may be rescinded. However, this shall not apply to an act necessary in the course of daily life¹³. It should be noted that Book 7 of the Civil Code contains a lot of detailed provisions on the legal relationship between a person under general guardianship and the general guardian.

With respect to a person whose ability to recognize and understand the legal consequences of his actions is substantially impaired due to mental disability, the court can declare the commencement of curatorship¹⁴. A person who receives such a declaration of commencement of curatorship is called “a person under curatorship,” and shall be placed under the care of a curator¹⁵. Some important acts (e.g., incurring or guaranteeing a debt) conducted by a person under curatorship without the consent of the curator may be rescinded, except where such act is conducted in the course of daily life¹⁶. It should be noted that Book 7 of the Civil Code contains some provisions on legal relationship between a person under curatorship and the curator.

2. Juristic Persons

As in many countries, juristic persons under the Cambodian Civil Code have legal capacity as well as natural persons. The code provides for two types of juristic persons: incorporated associations and incorporated foundations¹⁷.

8 Article 16 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

9 Article 17 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

10 Article 18 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

11 Article 24 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

12 Article 25 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

13 Article 26 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

14 Article 28 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

15 Article 29 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

16 Article 30 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

17 Article 46 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

An incorporated association is a group of persons who combine themselves to achieve a certain purpose (either non-profit purpose or for-profit purpose). The General Meeting of members is the association's decision-making body. Articles of incorporation are adopted by the members as the fundamental rules governing its organization and activities. In contrast, an incorporated foundation is a set of properties endowed for a certain purpose (but only a purpose for public benefit), and has no members. The foundation of an incorporated association and an incorporated foundation is administered in accordance with its articles of incorporation.

A juristic person shall come into existence upon registration at the registry having jurisdiction over its principal office¹⁸. The domicile of a juristic person shall be the place in which its principal office is located¹⁹.

IV. Real Rights (Book 3)

Book 3 of the Civil Code provides for “real rights.” Real rights are rights to directly control a thing, and may be asserted against all persons²⁰. No real right may be created except as permitted by the Civil Code or under special law²¹. The code lists eleven kinds of real rights: ownership, possession, perpetual lease, usufruct, right of use/ right of residence, easement, right of retention, statutory lien, pledge, hypothec, and transfer of title for security purpose²². Since the last five kinds of real rights are categorized as “security rights”, which secure the payment of obligation, they are also provided in Book 6 (Security).

1. General Rules

The Civil Code defines a thing as a corporeal object or substance comprising a gas, liquid or solid²³. Things are divided into immovables and movables. An immovable comprises land or anything immovably fixed to land, such as a building or structure, crops, timber, etc. A movable is any thing that is not an immovable²⁴.

The distinction between immovables and movables has practical effects in creation, transfer and alternation of real rights. The creation, transfer and alternation of a real right shall take effect in accordance with those agreed upon between the parties²⁵. However, except for a right of possession, a right of retention, a right of use, and a right of resi-

18 Article 49 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

19 Article 51 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

20 Article 130 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

21 Article 131 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

22 Article 132 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

23 Article 119 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

24 Article 120 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

25 Article 133 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

dence, the creation, transfer and alternation of a real right pertaining to an immovable cannot be asserted against a third party unless the right is registered in accordance with the provisions of the law and ordinance regarding registration. Also, the transfer of a real right regarding a movable cannot be asserted against a third party unless the movable has been delivered²⁶. Furthermore, a transfer of ownership by agreement pertaining to an immovable shall come into effect only when such transfer is registered²⁷. Where a right is registered in the immovable register, it is presumed that such right belongs to the person to whom it is registered²⁸.

2. Ownership

Ownership refers to the right of an owner to freely use, receive income and benefits from and dispose of the thing owned, subject to applicable laws and regulations²⁹. Ownership of land extends to the areas above and below the surface of the land to the extent that the owner derives benefit therefrom, subject to applicable laws and regulations³⁰. As you see, ownership is not considered as absolutely inviolable. For example, there are various limitations on ownership arising from relationship between neighboring properties stipulated from Article 143 to Article 154.

One of the attributes of ownership is that whenever the exercise of ownership is infringed, the owner may sue to eliminate the infringement. The three types of action based upon ownership against infringement are actions for recovery, actions to eliminate infringement, and actions to prevent infringement. For example, in actions for recovery, an owner may demand that a possessor return a thing. However, such demand shall be denied where the possessor is entitled to possess the thing as against the owner³¹. In actions to eliminate infringement, where the exercise of ownership has been hindered, the owner may demand that the person causing such hindrance abate the hindrance. In actions to prevent infringement, where the exercise of ownership is actually in danger of being hindered, the owner may demand that the person creating the danger of such hindrance prevent the hindrance³².

Ownership of a thing can be acquired by different means set forth in the Civil Code and other laws³³. The most common means are contract or inheritance. Ownership may also be acquired through prescriptive acquisition. For example, a person who peacefully and openly possesses an immovable for a period of twenty years with the intention of

26 Article 134 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

27 Article 135 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

28 Article 137 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

29 Article 138 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

30 Article 139 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

31 Article 155 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

32 Article 159 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

33 Articles 160 and 187 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

ownership shall acquire ownership thereof. If a person has possessed an immovable peacefully and openly and took possession in good faith and without negligence, he will acquire ownership in ten years³⁴. In the case of prescriptive acquisition of ownership of movables, the period of possession is shortened to ten years or five years³⁵. Furthermore, movables can also be acquired through bona fide acquisition³⁶, attachment, mixture, consolidation³⁷, processing³⁸ and so forth.

Ownership of a thing can be held or shared by several persons. The Civil Code has two types of joint ownership: co-ownership and indivisible joint ownership. Co-ownership is defined as ownership of a single thing by multiple persons wherein the size of each owner's ownership interest is limited to such owner's share of the thing³⁹. The share of co-owners are presumed to be equal⁴⁰. Each co-owner can transfer his share and provide it as security⁴¹. Also each co-owner may demand at any time a partition of the co-owned thing⁴². Indivisible joint ownership is defined as co-ownership by persons who own adjacent parcels of land of a partition that distinguishes such parcels of land or buildings on the land from each other, such as a partition wall, moat, bank or hedge, in an indivisible manner⁴³. Unlike co-ownership, each of indivisible joint owner cannot demand a partition of the jointly owned thing.

3. Possessory Right

Possession refers to the holding of a thing, and "holding" is defined as the state of controlling a thing as a matter of fact, whether directly or indirectly⁴⁴. Indirect possession means that a thing is possessed through another person⁴⁵.

Since possession of a thing is protected as a real right, a possessor, whether direct or indirect, may demand return of the dispossessed thing or removal of disturbance or prevention of disturbance to possession in accordance with provisions set forth in Article 237 through 241⁴⁶.

34 Article 162 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

35 Article 195 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

36 Article 193 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

37 Article 198 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

38 Article 199 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

39 Article 202 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

40 Article 203 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

41 Article 204 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

42 Article 211 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

43 Article 215 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

44 Article 227 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

45 Article 228 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

46 Article 236 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

4. Usufructuary Real Rights

In the Civil Code, there are four types of real rights which allow a person to make use of immovable property that does not belong to him. These are perpetual lease, usufruct, right of use/right of residence, and easement. All of them are classified as “usufructuary real rights.”

Perpetual Lease

Perpetual lease is defined as a long-term lease of immovable for a term of not less than fifteen years⁴⁷. A perpetual lease shall be established by writing⁴⁸. Unless the perpetual lessee registers the perpetual lease, it cannot be held up against the third parties. This means that if the ownership of the immovable that is subject of a perpetual lease is transferred, a registered perpetual lease may be held up against the transferee⁴⁹.

The term of a perpetual lease may not exceed fifty years. If a perpetual lease is established with a term exceeding fifty years, it shall be shortened to fifty years. A perpetual lease may be renewed, but the renewed term may not exceed fifty years counting from the date of renewal⁵⁰.

The perpetual lessee shall pay the rental to the perpetual lessor at the stipulated time. If there is no stipulation of time for payment of rental, the lessee shall pay the rental at the end of each year⁵¹.

Usufruct

Usufruct is defined as a right to use and enjoy the profits of the immovable of another person, for a period that may not exceed the life of the usufructuary⁵². A usufruct may be created in writing or otherwise⁵³. Unless a usufruct is registered, it cannot be held up against the third parties⁵⁴.

A specified term may be provided for a usufruct. If no term is specified for a usufruct, it shall be deemed to continue until the death of the usufructuary⁵⁵.

Right of Use and Right of Residence

Right of use is defined as a right to collect the fruits of immovable, to the extent of the needs of the right holder and his family. Right of residence is defined as a right to occupy a part of the building, to the extent required for residence by the right holder and

47 Article 244 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

48 Article 245 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

49 Article 246 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

50 Article 247 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

51 Article 248 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

52 Article 256 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

53 Article 258 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

54 Article 259 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

55 Article 260 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

his family⁵⁶. Right of use and right of residence may be created in writing or otherwise⁵⁷. Unless the holder of a right of use or right of residence actually uses the immovable or resides therein, such right cannot be held up against the third parties⁵⁸.

A specified term may be provided for a right of use or right of residence. If no term is specified for a right of use or right of residence, it shall be deemed to continue until the death of the right holder⁵⁹.

Easements

Easement is defined as a right to use a land of another for the benefit of one's own land in accordance with the purpose specified in the contract of creation. The other person's land that is used for the benefit of one's own land is referred to as the "servient land," and the land that enjoys the benefit of the easement is referred to as the "dominant land"⁶⁰. An easement may be created by writing or otherwise⁶¹. Unless an easement is registered, it cannot be held up against the third parties. An easement that has been registered may be held up against a person acquiring the servient land⁶².

Where a term is prescribed in the contract that creates the easement, the easement shall be extinguished at the expiry of such term. Where a term is not prescribed in the contract of creation of easement, the owner of the servient land may apply to the court for extinguishment of the easement⁶³.

An easement may be acquired by acquisitive prescription, but only where it is continuous and apparent⁶⁴.

V. Obligations (Book 4)

An obligation is a legal relationship that connects a particular person with a specified person by having such particular person assume a certain duty with respect to such specified person. The person assuming the duty shall be called the obligor, and the person receiving the benefit of performance of such duty shall be called the obligee⁶⁵. The obligee has a right corresponding to the duty assumed by the obligor, which is called a "claim."

Claims which are rights arising from obligational relationships, need to be distinguished from real rights stipulated in Book 3 of the Civil Code in two ways. First, real rights are

56 Article 274 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

57 Article 276 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

58 Article 277 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

59 Article 278 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

60 Article 285 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

61 Article 286 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

62 Article 287 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

63 Article 296 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

64 Article 300 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

65 Article 308 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

rights which allow one to take control of , use, and make profits from a specified thing, while claims are rights to require another person (i.e., the obligor) to do or not to do something. Secondly, real rights can be asserted against any other person, whereas in claims only the two parties (i.e., the obligor and the obligee) are usually involved, and the relationship exists only between them. This distinction has some practical consequences, because in cases of infringement a holder of real rights is entitled to demand cessation of such infringement by any person, while as a rule a holder of claims (i.e., the obligee) does not have such power against the third party.

Book 4 of the Civil Code covers comprehensive rules concerning obligations. These rules are applicable to all kinds of obligations. For example, Book 4 contains provisions on formation of contract, performance of contract, remedies for breach of contract, burden of risk, effect of obligation against third parties, extinction of obligation, assignment of claims and assumption of obligation.

1. General Rules Concerning Obligations

An obligation may arise from a contract, unilateral legal act, management of affairs without mandate, unjust enrichment, tortious act, or provision of law⁶⁶. The Civil Code defines a contract as the matching of intentions held by two or more parties to create, change or extinguish an obligation⁶⁷. The code also defines a unilateral legal act as an act that creates, changes or extinguishes an obligation through the unilateral expression of an intention to dispose of property or through the exercise of a right granted by contract or provision of law⁶⁸.

The subject matter of an obligation may be the transfer of ownership of, or the right to possess, property or money, or to perform or not to perform a certain act⁶⁹. Obligations can be subject to conditions, time, and period as provided in Articles 325 through 335.

2. Formation of Contract

A contract comes into effect when an offer and an acceptance thereof conform to each other. However, a contract in which one of the parties bears a duty to transfer or to acquire ownership on an immovable, shall come into effect only when such contract is made by notarized document⁷⁰. The Civil Code defines an offer as an invitation to enter into a contract based on the offeror's intention to be legally bound by the other party's acceptance thereof. An offer takes effect when it reaches the other party. The code also

⁶⁶ Article 309 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

⁶⁷ Article 311 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

⁶⁸ Article 312 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

⁶⁹ Article 313 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

⁷⁰ Article 336 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

defines an acceptance as an expression of intention to agree to the offer, which is made by the party who receives the offer. An acceptance takes effect when it reaches the party who made the offer⁷¹. Therefore, a contract is formed when the acceptance reaches to the offeror⁷².

The code lists various situations where a party to a contract may rescind the contract because of defective declaration of intention. These cases are where the declaration of intention is made as a result of mistake, where the declaration of intention is made as the result of the other party's fraud, duress or misrepresentation, and where the declaration of intention is made as the result of the other party's act that aims to obtain excessive profits and exploits the surrounding situation⁷³. All requirements for rescission of contract in each case is provided in Articles 346 through 351.

In addition, the code provides for validity of contract. A contract made by "mental reservation" shall not be void (Article 352), while a contract made by "fictitious declaration of intention" shall be void (Article 353). Furthermore, a contract shall be void when the contract is against a "mandatory provision of law" or the "public order and good customs" (Article 354). On the other hand, "initial impossibility" does not make a contract void (Article 355).

A contract can be formed through agency. Agency is defined as a relationship where the effects of the contract are imputed directly to the principal when an agent enters into a contract with another party by stating that he is acting on behalf of a principal within the scope of the agency authorization⁷⁴. Therefore, we find the three requirements for valid agency: (1)agency authorization, (2) showing of name as agent, and (3) validity of the agent's act. The most important requirement of the three is agency authorization. If a person conducts an act as agent for another without agency authorization, the effects of that act shall not be attributable to the putative principal⁷⁵. However, there is the exception to this principle, which is called "agency by estoppel" stipulated in Article 372.

Sometimes a contract is formed for the benefit of a third party. The parties to a contract can agree to confer a right or benefit arising under the contract upon a third party. In this case, the person who is to perform a duty under the contract for the third party is termed the contract donor, and the other party to the contract is termed the contract donee. The person to receive the right or benefit is termed a third-party beneficiary. A third-party beneficiary is entitled to make a direct demand on the contract donor for performance⁷⁶.

71 Article 337 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

72 Article 340 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

73 Article 345 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

74 Article 364 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

75 Article 369 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

76 Article 379 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

3. Performance of Contract

An obligor needs to perform his contractual obligation in accordance with the purpose of the contract and the principle of good faith and fair dealing. The obligation of a party is extinguished by a performance that complies with this standard⁷⁷.

However, non-performance can be justified in two situations: (1) defense of simultaneous performance (Article 386) and (2) defense of insecurity (Article 387). Each party to a bilateral contract may refuse to perform his own obligation until the other party tenders the performance of his obligation. Also, a party to a bilateral contract who is required to perform an obligation in advance of the other party may refuse to perform the obligation if there is a significant risk that the other party will not substantially perform his obligation in accordance with the intended purpose.

4. Remedies for Breach of Contract

The Civil Code defines non-performance as an obligor's failure to perform an obligation arising from a contract. The code lists the four types of non-performance: (1) delayed performance, (2) impossibility of performance, (3) incomplete performance, and (4) other non-performance⁷⁸. The details of each type of non-performance are explained in Articles 391 through 394.

When the obligor does not perform his obligation, we need to protect the obligee. Therefore, the Civil Code provides three kinds of remedies available to the obligee. These are (1) specific performance, (2) damages, and (3) termination of the contract⁷⁹. Where multiple remedies are available to the obligee, the obligee may select any or all of such remedies so long as they are not in mutual conflict⁸⁰.

Specific Performance

Where an obligor does not voluntarily perform an obligation, the obligee may seek an order of specific performance from the court, except where the nature of the obligation is not suitable for specific performance. The proceedings of specific performance is set forth in the Code of Civil Procedure⁸¹.

Damages

The Civil Code provides that “where an obligation is not performed, the obligee may demand damages from the obligor for any resulting harm. However, if the obligor proves

77 Article 384 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

78 Article 389 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

79 Article 390 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

80 Article 395 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

81 Article 396 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

that the non-performance was not the fault of the obligor, the obligor is not liable for damages⁸². Therefore, we find two requirements for damages: (1) non-performance and (2) the obligor's negligence. In cases of monetary obligations, however, the obligor is not exempted from payment of interest for delay even where the obligor proves that the delay in payment was the result of force majeure⁸³.

When the requirements for damages are satisfied, the obligee may demand as damages (1) compensation for the benefit of performance that would have been received under the contract, (2) expenditures that were wasted due to the non-performance, and (3) additional expenditures or burdens resulting from non-performance. In addition, the court may, upon a demand from the obligee, order payment of damages for mental harm. The amount of damages payable for mental harm shall be determined by the court after consideration of the surrounding circumstances⁸⁴.

Termination of Contract

The Civil Code provides that “where one of the parties to a bilateral contract commits a material breach of the contract, the other party may terminate the contract immediately⁸⁵”. The material breach is defined as cases where, as a result of one party's breach of contract, the purpose of the contract for the other party cannot be achieved⁸⁶. For example, we can find a material breach in the case where a party fails to perform at the specified time and the purpose of the contract cannot be achieved if performance is not made at the specified time. When there is a material breach of the contract, a party can terminate the contract by expressing an intention of termination to the other party who breached the contract⁸⁷.

In summary, there are three requirements for termination of contract: (1) bilateral contract, (2) material breach of contract, and (3) declaration of intention to terminate a contract. It is notable that the breaching party may not prevent termination of the contract even if the breach of contract occurred without fault on his part.

Termination of a contract relieves both party of their obligations under the contract except for the duty to pay damages. A party that has received all or part of a performance under the contract shall return those items received as performance to the other party⁸⁸. This is what is called “obligation of restitution.”

A right to terminate a contract will become extinct when five years pass after non-performance. This is the same to a right of restitution based on termination of a contract. Such right of restitution will become extinct five years after non-performance. These are

82 Article 398 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

83 Article 399 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

84 Article 400 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

85 Article 407 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

86 Article 408 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

87 Article 409 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

88 Article 411 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

called “extinctive prescription for a right to terminate a contract,” which is stipulated in Article 413.

5. Burden of Risk

If performance of an obligation has become impossible without the fault of the obligor, the obligation shall be extinguished and the obligee may not demand performance thereof⁸⁹. For example, if a specific property which is the subject matter of sales contract has been destroyed or lost without negligence of the seller, then the seller cannot perform his obligation to transfer the property to the buyer, and such seller’s obligation shall be extinguished.

Then, we will face one difficult problem: “Shall the buyer’s obligation to pay the sales price also be extinguished or not?” This problem is called the problem of “burden of risk.” There are two optional viewpoints. The first viewpoint is “when the seller’s obligation is extinguished, the buyer’s obligation to pay the sales price also shall be extinguished.” According to this viewpoint, the seller is supposed to bear the risk because the seller lost the property and cannot obtain the sales price. On the other hand, the second viewpoint is “even though the seller’s obligation is extinguished, the buyer’s obligation to pay the sales price shall not be extinguished.” According to this viewpoint, the buyer is supposed to bear the risk because the buyer needs to pay the sales price for the destroyed property.

Which viewpoint does the Civil Code take? The code principally adopts the first viewpoint which means that the seller shall bear the risk. Paragraph 1 of Article 416 provides that “where the subject matter of a bilateral contract is to transfer ownership of a specific property and the property is destroyed, lost or damaged without the faults of either party, the obligor shall bear the risk thereof, and may not demand counter-performance.” However, there are three exceptional cases in which the obligee (i.e., the buyer) shall bear the risk (Article 416, Paragraph 2). In addition, the obligee shall bear burden of risk in cases where the obligee has negligence in impossibility of performance⁹⁰.

6. Effect of Obligation against Third Parties

The Civil Code lists two cases in which claims have an effect against the third party: (1) subrogation by the obligee and (2) avoidance of fraudulent act.

Subrogation by Obligee

An obligee may, where necessary to preserve his claim, exercise a right held by the obligor in place of the obligor. The obligee may also, where necessary to receive satisfaction of a claim held by the obligee, exercise via subrogation a right possessed by an obligor

⁸⁹ Article 415 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

⁹⁰ Article 421 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

having a close connection to the obligee's claim⁹¹. This is what is called "subrogation by the obligee." For example, the obligee has a claim of \$10,000 against the obligor, and the obligor has a claim of \$10,000 against a third party. When the obligor fails to pay \$10,000 back to the obligee, the obligee can exercise the obligor's claim in place of the obligor. This means that the obligee can demand the third party to pay \$10,000 back to the obligor. Also, if the obligor refuses to receive the payment of \$10,000 from the third party, then the obligee can demand the third party to pay \$10,000 directly to the obligee himself, and the obligee can receive the money⁹². This is one of methods for the obligee to collect money when the obligor fails to pay it back.

Avoidance of Fraudulent Act

Paragraph 1 of Article 428 provides that "an obligee may petition the court to order that an act conducted by the obligor with the knowledge that the act would infringe on the obligee's claim be rescinded, and that a person who receives a benefit from the act of the obligor return the thing delivered or make restitution for the value thereof." According to this provision, the obligee may rescind an act conducted by the obligor with the knowledge that such an act would infringe on the obligee's claim. For example, the obligor does not have money enough to pay the obligee's claim, but the obligor has a car which is the only valuable property of his own. If the obligor donates this car to a third party, he would have no valuable property and this would cause damages to the obligee. Therefore, Article 428 permits the obligee to rescind the donation of the car in order to protect the obligee's claim. One important point is that avoidance of fraudulent act can be exercised only through the court. This means that the obligee always needs to file an action with the court to rescind a fraudulent act.

7. Extinction of Obligation

The Civil Code lists many grounds for extinction of obligation: (1) performance, set-off, release, novation, and merger; (2) impossibility of performance without the fault of the obligor; (3) the fulfillment of a condition subsequent; (4) extinctive prescription; and (5) the exercise of a right of rescission⁹³.

Performance, Set-off, Release, Novation and Merger

Performance is the most typical ground for extinction of obligation. When a valid performance of an obligation has been made, such obligation shall become extinct. Performance can be made by a third party as well as the obligor⁹⁴. It is notable that performance is

91 Article 422 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

92 Article 426 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

93 Article 433 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

94 Article 434 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

completed when the obligee receives such performance. Where the obligee does not receive a tender of performance made by the obligor, the following five effects shall occur: (1) the obligor is relieved of liability of non-performance (Paragraph 2 of Article 453); (2) the obligor is not required to pay interest afterwards (Paragraph 3 of Article 453); (3) the risk is transferred to the obligee (Item A of Article 455); the obligee loses the defense of simultaneous performance (Item B of Article 455); and (5) the obligor may be exempted from the obligation by carrying out deposit (Item C of Article 455).

Set-off is widely used in a society, especially in the business sector, because it is a very easy method to extinguish obligations between two parties. For example, A has an obligation to pay \$100 to B. On the other hand, B has an obligation to pay \$100 to A. If both obligations are due for performance, one party (A or B) can extinguish both obligations by declaring the intention of set-off to the other party. This is called “Statutory Set-off” which is provided in Paragraph 1 of Article 464. The statutory set-off can be made by only one-side party’s declaration of intention of set-off⁹⁵. On the other hand, there is another type of set-off, which is “Set-off Contract” (Paragraph 2 of Article 464). Set-off contract can be made by agreement of both parties.

An obligation is also extinguished when an obligee expresses to the obligor an intention to release the obligor from the obligation⁹⁶. In addition, an obligation is extinguished by novation. Novation is defined as a contract that extinguishes the original obligation and creates a new obligation in its place between the same obligee and obligor⁹⁷. Furthermore, where an obligation and a claim belong to the same person, such obligation and claim shall be extinguished via merger⁹⁸.

Extinctive Prescription

Extinctive prescription regarding a claim refers to the extinction of a claim based on an obligee’s continuous failure to exercise the claim for a certain period⁹⁹. The extinctive prescription period is five years in general cases¹⁰⁰. Extinctive prescription runs from the time that the claim is capable of being exercised¹⁰¹, but it can be interrupted by occurrence of certain events, such as filing a lawsuit, partial payment and so forth¹⁰².

95 Article 465 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

96 Article 473 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

97 Article 476 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

98 Article 479 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

99 Article 480 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

100 Article 482 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

101 Article 481 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

102 Article 489 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

8. Assignment of Claims and Assumption of Obligation

A claim may be assigned from the obligee to the assignee and the assignee becomes a new obligee¹⁰³. The assignment of a claim takes effect by agreement between the obligee seeking to assign the claim and the assignee¹⁰⁴. However, in order to assert the assignment of a claim against the obligor or a third party, the assignor (i.e., the obligee) needs to give a notice of the assignment to the obligor or the obligor has to consent to the assignment¹⁰⁵.

On the other hand, an obligation can be assumed by a third party¹⁰⁶. The assumption of an obligation takes effect by agreement between the obligor and the person assuming the obligation or between the obligee and such person¹⁰⁷. An obligee's rights against the obligor are not extinguished by an assumption of an obligation. Therefore, the obligor and the party assuming the obligation owe joint and several liability to the obligee. However, the party assuming the obligation may exempt the obligor from liability with the consent of the obligee¹⁰⁸.

VI. Particular Types of Contracts, Torts and Others (Book 5)

At first Book 5 of the Civil Code lists various types of contracts: sale, exchange, gift, loan for consumption, lease, loan for use, mandate, contract for work, contract of employment, bailment, partnership, life annuity, and compromise. Then, Book 5 lists the three non-contractual legal relations which cause obligations: management of affairs without mandate, unjust enrichment, and torts. It is notable that provisions in Book 4 (Obligations) of the Civil Code are applicable to obligations arising from all of these contractual or non-contractual relations. Since some general rules concerning contract have already been explained in Book 4, the following puts a main focus on the non-contractual legal relations, especially torts.

1. Sales, Exchanges and Gifts

Sales, exchanges and gifts have a common purpose, which is transferring ownership or other property rights from one party to the other party. Transferring of ownership of immovable or movable by these contracts is subject to the general principles provided in Book 3 (Real Rights) of the Civil Code¹⁰⁹.

103 Article 501 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

104 Article 502 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

105 Article 503 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

106 Article 507 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

107 Article 508 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

108 Article 509 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

109 Articles 528, 567 and 569 of the Civil Code of the Kingdom of Cambodia dated December 8th 2007.

In Civil Code a sale is defined as a contract whereby one party, called the “seller,” is obligated to transfer ownership or other property rights to the other party, called the “buyer,” and the buyer is obligated to pay the purchase price to the seller¹¹⁰. A sale contract is formed based only on the agreement of the parties thereto unless otherwise provided by law¹¹¹, such as Paragraph 2 of Article 336 of the Civil Code.

An exchange contract becomes effective by the mutual promises by the parties to transfer any property right other than money¹¹². An exchange is different from a sale because an exchange is a contract exchanging between properties other than money while a sale is a contract exchanging between property other than money and money. Despite this difference, both contracts have a lot in common, and thus the rules relating to sale apply *mutatis mutandis* to exchange¹¹³.

A gift is a contract which comes into effect when one party, called the “donor,” manifests the intention to give property gratuitously to another party, called the “donee,” and the donee accepts it¹¹⁴. A writing is not necessary to form a gift contract. However, if a gift contract is not put into writing, the party to the contract may revoke the gift contract by withdrawing his manifestation of intention of the gift before the gift is performed¹¹⁵.

2. Loans for Consumption, Leases and Loans for Use

Loans for consumption, leases, and loans for use have a common purpose, which is lending a certain thing to another party.

A loan for consumption is a contract whereby one party, called the “lender,” assumes an obligation to entrust the free use of money, foodstuffs, paddy or other fungible objects for a specified term to another party, called the “borrower,” who assumes the obligation to return objects of the same type, quality and quantity as those received from the lender upon the expiry of the said term¹¹⁶. A contract of loan for consumption is formed by agreement of the lender and the borrower¹¹⁷. Either party can revoke at any time a contract of loan for consumption without interest that is not in writing, before the lender delivers the object of the loan to the borrower¹¹⁸.

A lease is defined as a contract whereby one party allows another party to use and profit from a certain thing (movable or immovable) for consideration¹¹⁹. This means that a lease contract comes into effect when one party, called the “lessor,” promises to allow

110 Article 515 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

111 Article 516 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

112 Article 566 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

113 Article 567 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

114 Article 568 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

115 Article 570 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

116 Article 578 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

117 Article 579 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

118 Article 580 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

119 Article 596 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

the other party, called the “lessee,” to use and take profit from a certain thing, and the lessee promises to pay rent in exchange¹²⁰. A lease may be entered into with or without stipulating a period, but a lease of an immovable not in writing is deemed to be a lease without stipulation of period. A lease of an immovable for a period of fifteen years or more shall be complied with the provisions concerning perpetual lease in Book 3 of the Civil Code¹²¹.

A loan for use refers to a contract whereby one party, called the “lender,” allows another party, called the “borrower,” to use and profit from a certain thing free of charge¹²². A loan for use comes into effect when the borrower receives a certain thing from the lender, promising to return it after using and profiting it free of charge¹²³.

3. Mandates, Contracts for Work and Contracts of Employment

Mandates, contracts for work, and contracts of employment have a common purpose, which is providing work or service to another party.

A mandate is defined as a contract whereby one party, called the “mandator,” grants to another party, called the “mandatary,” the power to administer business on behalf of the mandator¹²⁴. A mandate may be for value or gratuitous. If no intention is manifested that the mandate be for value, it shall be deemed to be gratuitous¹²⁵. A contract of mandate can be formed by agreement of the parties¹²⁶. The mandatary has the obligation to administer the mandated business with the care of a good manager in compliance with the purpose of the mandate¹²⁷.

A contract for work is a contract whereby one party, called the “contractor,” assumes the obligation to complete agreed work and the other party, called the “principal,” assumes the obligation to pay remuneration for the results of such work¹²⁸. Because the contractor’s obligation is completing the work without defect¹²⁹, the remuneration is paid simultaneously with the delivery of the object of the work to the principal. If no delivery of a thing is required, the contractor may demand the remuneration after the completion of the work¹³⁰.

A contract of employment is formed by the promises of one party, called the “employee,” to perform services under employment, and another party, called the “employer,”

120 Article 597 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

121 Article 599 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

122 Article 625 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

123 Article 626 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

124 Article 637 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

125 Article 638 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

126 Article 639 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

127 Article 640 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

128 Article 652 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

129 Article 654 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

130 Article 653 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

to pay wages for such services¹³¹. Employment contracts shall be governed by the provisions of the Labor Law as well as those of the Civil Code¹³².

4. Bailment, Partnership, Life Annuity and Compromise

A bailment is defined as a contract whereby one party, called the “depository,” accepts a thing for custody for a certain period from another party, called the “depositor,” and promises to return the identical thing to the depositor upon the expiry of the period of custody. Except where there is specific agreement, the depositor assumes no obligation to pay remuneration to the depository¹³³. A contract of bailment is formed when the depository received the thing based on the agreement¹³⁴.

The Civil Code defines a partnership contract as a contract for establishment of an organization without juristic person’s status for the purpose of carrying on a common undertaking with contributions made by each party¹³⁵. Therefore, a partnership is not a juristic person (e.g., incorporated association) provided in Book 2 (Persons) of the Civil Code, even though it is an organization established by agreement of partners to contribute to and carry on a common undertaking¹³⁶. Since a partnership does not have a juristic person’s status, it cannot hold ownership of partnership property. All partnership property shall be co-owned by all the partners¹³⁷.

A contract of life annuity refers to a contract whereby one party, called the “annuity debtor,” promises to assume an obligation to deliver money periodically to another party, called the “annuity creditor,” or to a third party, until the death of the annuity debtor, annuity creditor, or the third party, and in exchange the annuity creditor promises to assume an obligation to pay the principal as consideration¹³⁸.

A compromise is a contract involving mutual promises by the parties to a dispute to resolve such dispute by concession¹³⁹. In order to make a compromise, the parties must have the power to dispose of the subject matter involved in the compromise¹⁴⁰.

5. Management of Affairs without Mandate

The Civil Code defines “management of affairs without mandate” as entering into the management of business for another person despite the fact that it is not authorized to

131 Article 664 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

132 Article 668 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

133 Article 669 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

134 Article 670 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

135 Article 699 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

136 Article 700 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

137 Article 701 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

138 Article 719 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

139 Article 724 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

140 Article 725 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

do so. The person conducting such act is referred to as the “manager”¹⁴¹. A typical example of management of affairs without mandate is the case where someone repairs the roof of a neighbor’s house in his absence when the area is hit by a storm. There are also cases where a person repays the debt of another person without being asked to do so.

The manager shall take the care of a prudent manager and manage the business in accordance with the nature of the business, using the method that best conforms to the interests of another person called the “principal.” If the manager is aware of or should be aware of the intension of the principal, the manager shall conduct the management in accordance with such intention.

If the manager has incurred necessary or useful expenses for the principal, the manager may claim reimbursement of those expenses from the principal¹⁴². In general cases, however, the manager does not have a right to demand remuneration to the principal. Only in cases where the management is included in the occupation or business of the manager, the manager may demand that the principal pay the amount of normal remuneration for management of business carried out by the manager after the principal becomes aware of the fact of management¹⁴³.

6. Unjust Enrichment

As a general rule, a person shall not be allowed to unreasonably enrich himself at the expense of another. Thus, the Civil Code provides that, “a person who has benefited from the property or labor of others without legal cause and has thereby caused loss to said others shall assume an obligation to return that benefit to the extent that the benefit exists¹⁴⁴.” For example, a landlord who loses his ownership, but keeps taking rent from the tenant, enriches himself without legal ground and is obliged to reimburse the rent to the new owner.

In another case where a person receives the performance under a contract, if such contract is void or becomes void by rescission of the contract, the person receiving the performance shall assume an obligation to return the benefit from the performance to the person who made such performance¹⁴⁵. For example where, after the buyer paid the price, the sales contract was rescinded. In this case, the seller has an obligation to return the money received as payment, plus interest¹⁴⁶.

141 Article 729 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

142 Article 734 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

143 Article 735 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

144 Paragraph 1 of Article 736 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

145 Paragraph 2 of Article 736 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

146 Article 737 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

7. Torts

General Rules Concerning Torts Liability

Paragraph 1 of Article 743 of the Civil Code provides a general rule concerning torts liability as follows: a person who intentionally or negligently infringes on the rights or benefits of another in violation of law is liable for the payment of damages for any harm occurring as a result. Thus, we can find four elements which constitute tort. First, the tortfeasor should be at fault (i.e., he acted either with intent or negligently). Secondly, the act has to be unlawful. Thirdly, causality should exist between the tortious act and the loss. Finally, loss should have been incurred.

With regard to the first requirement (i.e., fault), the Civil Code defines an intentional act as an act that harms another where the actor has foreseen that a particular result would occur but accepted the occurrence of such result. The code also defines a negligent act as an act with respect to which (1) a person having the same profession or experience as the actor could have foreseen that a particular result would normally occur from the act, but the actor failed to foresee the result due to an absence of care, and (2) the actor owes a duty to avoid the occurrence of such result but neglected to fulfill such duty¹⁴⁷. To be negligent, both (1) and (2) above are required.

The person seeking damages who is usually the victim of a tortious act, must prove the intent or negligence of the tortfeasor, the causal relationship between the tortious act and the occurrence of loss, and the loss suffered by the victim¹⁴⁸. When such person successfully proves them, the tortfeasor must pay not only pecuniary damages but also non-pecuniary damages¹⁴⁹. Damages shall be paid in money in principle. However, where money would not provide an appropriate remedy, the injured party may demand restitution or injunctive relief. For example, a person who suffers harm to their honor or reputation may demand, in addition to damages, that the tortfeasor take measures to restore the injured party's honor or reputation, such as a published apology¹⁵⁰.

Even when the requirements of fault, an unlawful act, causality, and loss are fulfilled, there are some instances where the perpetrator is not liable, such as self-defense and emergency escape. Self-defense is the case where someone acts in defense of his or another's rights against a tort by a third person. The Civil Code defines an act of justifiable self-defense as a harmful act that is made against an unlawful harmful conduct but is necessary in order to defend the physical well-being or the property of oneself or another from such conduct, and involves a situation in which the harmful conduct and the act of self-defense are closely related in time and there is no disparity in the means of self-defense employed and the severity of the harmful conduct. The code also defines

147 Article 742 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

148 Paragraph 3 of Article 743 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

149 Article 744 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

150 Article 757 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

an act of emergency escape as an act that causes harm to another but was necessary in order to defend the physical well-being or the property of oneself or another from a present or impending danger, and involves the situation in which there is no disparity in the means of emergency escape and the severity of the danger¹⁵¹. In both cases above, the perpetrator is not liable for damages.

Special Provisions Concerning Torts Liability

Although Paragraph 1 of Article 743 of the Civil Code (i.e., the general provision on tort) is based upon the principle of fault, some provisions in the code are close to strict liability (i.e., liability without fault). Provisions concerning the liability of parents and persons who have a legal duty to supervise the mentally unsound are examples. A person in charge of supervising a minor under the age of fourteen is held liable for the minor's act even though such person himself is not at fault¹⁵².

Besides, the provision on the liability of employers for the act of their employees is a typical example of strict liability. The code provides that “a person who uses an employee to perform work is liable for damages caused in violation of law to another in the performance of that work by the employee through the employee's intent or negligence”¹⁵³. The employer may claim indemnification from the employee after he has paid damages to the victim.

Another provision of the Civil Code which has moved toward strict liability is the provisions on the liability of animal possessor. The possessor of an animal is liable for damages for any harm caused to another by the possessed animal¹⁵⁴. The code also has a special provision on product liability as follows: “where an unreasonably dangerous defect exists in a manufactured movable and harm results to another due to such defect, the manufacturer of the movable is liable for damages. However, this shall not apply where the defect could not have been discovered based on the scientific standards existing at the time of manufacture”¹⁵⁵.

Furthermore, where harm results to another due to a failure in the installation or control of a structure affixed to or appurtenant to land, the person who manages the structure and the owner of the structure are jointly liable for damages. While the owner is liable without fault, however, the person who manages the structure can be exempted from liability if he proves that he exercised proper control over the structure¹⁵⁶.

151 Article 755 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

152 Article 746 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

153 Article 747 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

154 Article 750 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

155 Article 751 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

156 Article 753 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

Finally, the Civil Code has a provision dealing with torts committed by several persons. It provides that where harm is caused jointly by the acts of several persons, each actor is jointly liable for the resulting harm¹⁵⁷.

VII. Security (Book 6)

Book 6 (Security) of the Civil Code lists various methods to secure payment of obligations. These are (1) five types of real security rights, (2) guaranty, and (3) joint obligation.

1. Real Security Rights

General Rules Concerning Real Security Rights

The types of real security rights are limited to those established in the Civil Code or in special laws, and no other type of real security rights may be created. The Civil Code established the five types of real security rights: (1) rights of retention, (2) statutory liens, (3) pledge, (4) hypothec, and (5) security right by way of transfer of title¹⁵⁸.

A real security right is established in order to secure an existing obligation. Thus, where the obligation is not formed due to the absence of the necessary elements thereof, a real security right is not formed as well. Also, where the obligation is void or rescinded due to a defective declaration of intention or other reason, the real security right is extinguished as well. Furthermore, where the obligation is extinguished due to satisfaction, prescription or other reason, the real security right is also extinguished¹⁵⁹. These are what is called “subordinate nature of real security right.”

Where the holder of a real security right does not receive satisfaction of the secured claim, he may enforce the real security right in accordance with procedures provided in the Code of Civil Procedure¹⁶⁰.

Rights of Retention

Where a person possessing a thing belonging to another has a claim arising in regard to such thing, the person may retain the thing until the claim is satisfied. For example, if A repaired B’s motorbike, A may retain it until B pays for the repair. The right of retention arises only in cases where the creditor already has possession of the property. The property can be either movable or immovable. The obligation secured by the right of retention must have arisen in relation to the retained property. For example, A may not retain B’s motorbike to secure B’s payment for a car which B had purchased from A.

157 Article 754 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

158 Article 767 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

159 Article 769 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

160 Article 773 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

Statutory Liens

In cases prescribed by the Civil Code, a creditor is granted a preferential right to secure payment, either from a specified property or the assets of the debtor in general, in preference to other creditors. Such preferential right is called “statutory lien.” A statutory lien held by a creditor over all of the property of the debtor is called the general statutory lien. A statutory lien held by a creditor over a specified property of the debtor is called a special statutory lien¹⁶¹.

Statutory liens arise automatically when certain conditions prescribed in the code are met. A creditor with a statutory lien may demand that the property be auctioned and his claim be satisfied from the proceeds of the auction. For example, wages of employees are secured by a statutory lien over all the employing company’s assets. If the company goes bankrupt and its assets are auctioned, employees have a preferential right to all unpaid wages out of the proceeds of the auction¹⁶².

Pledge

In contrast to the right of retention and a statutory lien, pledge is created by agreement between the parties. A pledgee is entitled to possession of the property pledged to him, and in case of the pledgor’s default the pledgee may have the property auctioned¹⁶³. An actual transfer of possession to the pledgee is required to create pledge¹⁶⁴. Pledge is not only limited to movables. Immovables, securities, and intellectual property rights can also be pledged¹⁶⁵.

A pledgee is entitled to demand the sale by auction of the pledged property when the debtor fails to perform his obligation. However, the pledgee is prohibited from acquiring the pledged property except by the formal court’s enforcement procedure¹⁶⁶. This is to prevent the pledgee from obtaining excessive profit from the collateral.

Hypothec

Hypothec is, like pledge, created by agreement between the parties. Whereas pledgees have possession of the property, however, in hypothec possession of the property is not transferred to the creditor. Both the title to and possession of the property remain with the person who hypothecated it¹⁶⁷. Thus, the debtor creating hypothec over a property may borrow money while continuing to use such property.

The Civil Code limits the object of hypothec to ownership, perpetual lease, and usufruct of immovables. A creditor who has hypothec over an immovable can receive payment

161 Article 781 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

162 Article 785 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

163 Article 816 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

164 Article 819 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

165 Articles 834 and 840 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

166 Article 827 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

167 Article 843 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

from the proceeds of its sale by auction in preference to other creditors if the debtor does not perform his obligation. The existence of hypothec is made known by registration in the land registry. Without registration, the creditor who has hypothec cannot assert his rights against other creditors with hypothec or any purchaser of the property¹⁶⁸. Situations where several hypothecs exist over one and the same property are not rare. In such situations, the priority of the various hypothecs is decided in accordance with the order of registration¹⁶⁹. This means that a creditor who registered earlier has priority over other creditors. For example, A borrows \$50,000 from B and \$30,000 from C. A hypothecates his land worth \$100,000 to B and C. B registers his hypothec before C registers his hypothec. Thus, B's hypothec is the first hypothec and C's hypothec is the second hypothec. In the case of default, if the proceeds of an auction were \$60,000, B would take \$50,000 from the proceeds and C would take the remaining \$10,000. It should be noted that when a hypothec which has priority is extinguished, the hypothec of the next rank is upgraded. If A pays \$50,000 back to B, B's first hypothec extinguishes and C obtains priority, which means that C's second hypothec automatically becomes the first hypothec. In this case C could receive full payment of \$30,000 from the proceeds (\$60,000) of the auction, and the residue \$30,000 would return to A.

A special type of hypothec is provided in the Civil Code. This is called "revolving hypothec." A revolving hypothec is created between a creditor and a debtor to secure unspecified claims, up to the limit of a maximum amount that may occur from a certain type of continuous transactions¹⁷⁰.

Transfer as Security

A transfer as security is defined as a transfer of the ownership of a specified movable owned by a debtor to the creditor for the purposes of securing an obligation. When the obligation is performed in full, the ownership over the property shall be re-transferred to the debtor¹⁷¹.

A transfer as security is, like pledge and hypothec, created by agreement of the parties¹⁷². However, unlike hypothec, the object of a transfer as security is limited to ownership of movables. Also, unlike pledge, an actual transfer of possession of the property to the creditor is not required to create a transfer as security. In pledge the debtor who is the owner of the collateral is deprived of possession of the collateral. On the other hand, A transfer as security is designed to secure a debt while allowing the debtor to continue using the property.

168 Article 845 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

169 Article 851 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

170 Article 867 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

171 Article 888 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

172 Article 889 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

If the obligation is not performed, the creditor with a transfer as security can obtain the ownership of the property conclusively by giving a notice to the debtor¹⁷³.

2. Guaranty

Guaranty is one of the most common methods to secure a loan. A guarantor is liable if the principal obligor does not perform the obligation. Guaranty is created by a contract between the creditor and the guarantor, without the consent of the principal obligor¹⁷⁴. A writing is not necessary to form a guaranty contract, but a guaranty contract without a writing can be revoked at any time except where the guarantor has voluntarily performed the guaranty obligation¹⁷⁵.

Where a principal obligation does not exist, a guaranty cannot be created. The extinction of the principal obligation shall operate to extinguish the guaranty obligation as well. When the principal obligation is assigned, guaranty shall be deemed to be assigned as well¹⁷⁶.

In the absence of an agreement to the contrary, the guarantor is bound to perform the guaranty obligation jointly and severally with the principal obligor. This means that the guarantor may not (1) demand the creditor that performance be demanded from the principal obligor prior to the guarantor, or (2) exempt oneself from enforcement of the guaranty obligation by establishing that the principal obligor has sufficient resources to tender performance and is easily subject to execution¹⁷⁷.

There is a variation of guaranty, which is called “floating guaranty.” In a continuing relationship such as that between a bank and its customer, or a trading house and a manufacturer, it is necessary to secure an unspecified number of obligations, the amount of which varies. In this case, floating guaranty is very useful and Article 902 of the Civil Code is applicable.

3. Joint Obligation

Joint obligation is a kind of obligation involving several obligors. In joint obligations, the creditor may demand performance from any or all of the obligors¹⁷⁸. This means that the creditor may demand all obligors to pay the total amount of debt or ask any of them to pay the same amount. If the debt is paid by any of the obligors, the obligation is extinguished and the obligors who paid the debt can be indemnified by other obligors¹⁷⁹.

173 Article 898 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

174 Article 900 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

175 Article 901 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

176 Article 904 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

177 Article 908 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

178 Article 921 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

179 Article 932 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

VIII. Relatives (Book 7)

Book 7 (Relatives) of the Civil Code deals with various family relations, such as engagement, marriage, parents and children, parental power, guardianship, curatorship, and support. For the sake of convenience, the following focuses (1) marriage and divorce, and (2) parents and children.

1. Marriage and Divorce

Engagement

An engagement is formed by promising to marry in the future between a man and a woman and performing the ceremony of engagement¹⁸⁰. Where an engagement is dissolved, a party who has presented an engagement gift to the other party in the expectation of the formation of marriage may demand the return of such gift from the other party¹⁸¹. Where an engagement is revoked by one of the parties without good reason, the other party may demand compensation for damages arising from such revocation¹⁸².

Formation of Marriage

Marriage comes into effect by registration in accordance with the regulations concerning civil status registrations¹⁸³. Naturally, registration of marriage has to coincide with the intention of the parties to marry. If there is no intention of the parties to marry despite registration, marriage is void¹⁸⁴. Registration is accepted when the requirements set out by the Civil Code are met¹⁸⁵.

Neither a man nor a woman may marry until they have reached the age of eighteen. However, if one of the parties has attained the age of majority and the other party is a minor at least sixteen years of age, the parties may marry with the consent of the parental power holders or guardian of the minor¹⁸⁶. Minors acquire full legal capacity upon marriage¹⁸⁷.

A person who has a spouse may not marry again¹⁸⁸. A woman may not remarry until 120 days have elapsed from the day of the dissolution or annulment of her previous marriage¹⁸⁹. This is intended to avoid difficulties in determining the father of any children born after the dissolution or annulment of the previous marriage.

180 Article 944 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

181 Article 945 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

182 Article 946 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

183 Article 955 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

184 Article 958 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

185 Article 956 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

186 Article 948 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

187 Article 968 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

188 Article 949 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

189 Article 950 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

Effect of Marriage and Matrimonial Property System

A married couple may use the surname of the husband or the wife, or their respective surname prior to the marriage, in accordance with their agreement at the time of the marriage¹⁹⁰. A husband or wife who has changed his or her surname on account of marriage may again use the original surname or may use the surname that was being used at the time of the divorce¹⁹¹.

The husband and wife have to cohabitate, cooperate and assist each other¹⁹². A breach of this duty to live together, cooperate and support each other without justifiable reason can be a ground for divorce.

Any and all property acquired during the marriage by one or both spouses constitutes “common property,” which is jointly owned by the couple¹⁹³. However, the followings are treated as “separate property” belonging to one of the spouses alone: (1) property held by a spouse before the marriage, (2) property acquired by a spouse during the marriage through gift, succession or testamentary gift, and (3) property obtained as the consideration for disposing of property described in (1) and (2) above¹⁹⁴. Husband and wife have equal rights to use, enjoy the benefit from and manage the common property, and each of them has the right to use, enjoy the benefit from and manage their own separate property¹⁹⁵. Common property may not be sold or otherwise disposed of without the consent of both party¹⁹⁶.

Expenses incurred during the marriage are shared by husband and wife, taking into account their property, income and all other circumstances¹⁹⁷. Husband and wife are jointly liable for expenses for the maintenance of the cohabitation of the husband and wife and expenses for the care of children such as educational and medical expenses¹⁹⁸.

Prior to or after their marriage, husband and wife may enter into a contract governing their property relationship¹⁹⁹. Such matrimonial property contract needs to be concluded in writing. Where a matrimonial contract differs from the statutory property system described above, such contract cannot be held up against third parties unless it is registered²⁰⁰.

Divorce

Marriage is dissolved by the death of either spouse, a declaration of disappearance, or divorce. Where husband and wife have agreed to divorce, they may petition the court for

190 Article 965 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

191 Article 981 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

192 Article 966 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

193 Article 973 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

194 Article 972 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

195 Article 974 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

196 Article 976 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

197 Article 971 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

198 Article 975 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

199 Article 969 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

200 Article 970 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

divorce. After the court confirms that husband and wife really desire to dissolve their marriage by divorce, the court may grant a divorce²⁰¹. There is no restriction on the ground for such divorce by agreement.

When the parties fail to reach agreement, husband or wife can bring a suit for divorce. The Civil Code lists five grounds for divorce by court judgment: (1) infidelity, (2) desertion without good reason, (3) the death or life of the spouse being unknown for a year or more, (4) living apart contrary to the spirit of marriage for a year or more, and (5) matrimonial relationship being broken down without any expectation of reconciliation²⁰².

When divorce is granted, issues concerning the property of the spouses must be settled. When husband and wife divorce, the matrimonial property shall be divided fairly in accordance with their agreement. If the spouses cannot reach agreement, the property will be divided by the court proceedings, taking into account the contribution of each spouse to acquisition, maintenance and increase of the property, the period of marriage, the age, mental and physical condition of each spouse, their occupations, income and earning capacity, the welfare of children, and so forth²⁰³.

If a divorcing couple has a minor, the couple has to determine, by agreement, which party is to become the parental power holder of the minor. When they cannot reach agreement, the court will make a decision by taking into account the interests of the child²⁰⁴. After divorce, the parent not having the parental power has the right to meet and socialize with the child, and also has an obligation to share the cost of care of the child. Therefore, a divorcing couple needs to consult and agree on the mode of meeting and socializing with the child and the sharing of the cost of care for the child. Again, when they cannot reach agreement, the court will, upon a motion of a party, make a decision²⁰⁵.

2. Parents and Children

When a child is born, the father or mother of a child shall report the birth not later than thirty days from the date of birth to the commune or sangkat office²⁰⁶. It is quite clear that the woman who gives birth to a child is the child's mother²⁰⁷. On the other hand, it is sometimes not so clear who is the father of the child. Thus, the Civil Code provides that when a child is conceived by the wife during marriage, the husband is presumed to be the father of the child²⁰⁸. This is what is called "presumption of paternity." If this presumption is against the truth, the husband and the child may deny the paternity²⁰⁹.

201 Article 979 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

202 Article 978 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

203 Article 980 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

204 Article 1037 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

205 Article 1040 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

206 Article 985 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

207 Article 987 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

208 Article 988 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

209 Article 989 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

When a child is born to an unmarried couple, the presumption of paternity does not work. In this case, the father of the child may acknowledge the child²¹⁰. If the father does not make the acknowledgment, the child may file a suit for acknowledgment²¹¹.

Parents-children relationship are also created by adoption. There are two types of adoption: full adoption and simple adoption²¹². In cases of full adoption, the relationship between the child and the birth parents is severed²¹³, whereas in cases of simple adoption it is not²¹⁴.

Parents have rights and duties to care for and bring up the child. A child who has not yet attained majority is subject to parental power, which is usually exercised jointly by the parents. Parents have the right and duty to educate the child²¹⁵. Parents may discipline the child to the extent necessary²¹⁶. Also, parents have the rights to designate the child's place of residence and give consent to the choice of occupation²¹⁷. Where a father or mother abuses these parental rights, or neglects his or her duties, the court may order the suspension or divestment of the parental rights²¹⁸.

Those with parental power also have the right and duty to manage the child's property and act on the child's behalf in financial matter²¹⁹. In cases of conflict of interest between the child and the parents (e.g., transfer of the child's property to the parents), a special representative for the child must be appointed by the court²²⁰.

When a minor is left without both parents, or when there is no one to exercise parental power for other reasons, guardianship of a minor starts and a guardian for minor is appointed²²¹. Unless the person who last held parental power had designated a guardian for minor, the court makes the appointment²²². A guardian for minor has the same rights and duties as a parental power holder²²³. In addition, like a parental power holder, a guardian for minor has a right to manage the minor's property and act on the minor's behalf in financial matter²²⁴.

210 Article 993 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

211 Article 1001 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

212 Articles 1007 and 1020 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

213 Article 1014 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

214 Article 1026 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

215 Article 1043 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

216 Article 1045 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

217 Articles 1044 and 1046 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

218 Article 1048 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

219 Article 1053 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

220 Article 1065 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

221 Article 1067 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

222 Article 1068 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

223 Article 1079 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

224 Article 1080 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

IX. Succession (Book 8)

Book 8 of the Civil Code deals with succession, covering general rules, statutory succession, testamentary succession, legally secured portions, acceptance and renunciation of succession, management and partition of the succession property, non-existence of successors, demand for recovery of succession.

Succession opens upon the death of the decedent. Succession is carried out in accordance with the provisions of the law or the wishes of the decedent. Succession in accordance with the provisions of the law is called “statutory succession,” and succession in accordance with the wishes of the decedent is called “testamentary succession”²²⁵. For the sake of convenience, the following first explains the outline of statutory succession, and then gives a brief explanation on testamentary succession.

1. Statutory Succession

The details of rules concerning the distribution of inherited property in cases of intestate succession are prescribed in the Civil Code. For example, a surviving spouse is always an heir²²⁶. Children of the decedent are heirs of the first rank, lineal ascendants (e.g., parents or grandparents) are heirs of the second rank, and brothers and sisters come third²²⁷. Thus, where a wife and two children survive a deceased husband, the heirs of the second and third rank have no share in estate. In such case, the estate is distributed to the surviving wife and two children, each of three getting a share equally. If there is a wife but no children, the estate is divided among the wife and the lineal ascendants (e.g., parents of the deceased husband). The wife takes one-third of the estate and the remaining two-third is divided equally between the parents. If the parents have already died, the wife and siblings of the deceased husband divide the estate. The surviving wife takes a half of the estate, and the siblings take the remaining half²²⁸.

If a prospective heir (children or siblings) has already died before the deceased, but there is a surviving lineal descendant of such prospective heir (i.e., grandchildren, niece, or nephew), this lineal descendant becomes the heir²²⁹. This is what is called “succession by representation”.

An heir can be disqualified on grounds listed in Article 1150 of the Civil Code. For example, where the heir has killed or attempted to kill the decedent or other heirs who have priority, such heir will be disqualified and cannot get a share of the estate. Also,

225 Article 1145 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

226 Article 1161 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

227 Articles 1156, 1159 and 1160 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

228 Article 1162 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

229 Articles 1157 and 1160 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

where the heir forged the will or forced the decedent to alter his will, such heir will be disqualified.

In addition, a person may apply to the court for disinheritance of the prospective heir on the grounds listed in Article 1151 of the code. Disinheritance can be effected by will, too²³⁰. The grounds for disinheritance are, for example, maltreatment or serious insult to the decedent, or gross misconduct on the part of the prospective heir.

An heir has a choice to accept or renounce succession²³¹. The heir may also accept succession with reservation by declaring that he is liable for debts of the decedent only to the amount of the inherited estate²³². This type of acceptance is called “qualified acceptance.” Renunciation or qualified acceptance has to be effected within three months after the person has become aware of the death of the decedent and of the fact that he is to inherit the estate. When an heir fails to effect renunciation or qualified acceptance within three months, he is deemed to have accepted the inheritance absolutely²³³.

As an effect of succession, the heirs succeed to all of the rights and duties pertaining to the property of the decedent²³⁴. This means that the estate of the decedent as well as his or her debts pass directly to the heirs. Until the estate is distributed among the heirs, it belongs to them jointly²³⁵. The actual distribution (i.e., partition) of the estate is effected in accordance with agreement by all heirs. The heirs may, at any time after the lapse of one month from the opening of the succession, commence a consultation on the partition of the estate²³⁶. When they fail to reach agreement, an heir may apply to the court for partition²³⁷. Partition of the estate shall be made by taking into account the type and nature of the property, the age of the heirs, their occupation, their mental and physical health, the circumstances of their life, and all other circumstances²³⁸.

An heir whose right to inherit the estate has been ignored, may claim recovery of his share within five years after the estate has been transferred in accordance with the partition of the estate²³⁹.

230 Article 1152 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

231 Article 1248 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

232 Article 1256 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

233 Article 1255 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

234 Article 1147 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

235 Paragraph 2 of Article 1148 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

236 Article 1266 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

237 Article 1270 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

238 Article 1267 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

239 Articles 1301 and 1304 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

2. Testamentary Succession

If there is a will of the decedent, the distribution of the estate is effected in accordance with the will. Persons who have attained the age of majority and minors who have been released from guardianship or parental power, may make a will²⁴⁰. A will can be revoked at any time by testator²⁴¹. A will becomes effective upon the death of the testator²⁴².

A will must follow the formalities prescribed in the Civil Code. A will that does not conform to the formalities shall be null and void²⁴³. There are three kinds of ordinary wills: wills by notarized document (Article 1173), wills by privately produced document (Article 1174), and wills by secret document (Article 1175). A will by notarized document is made by dictating the will to a notary in the presence of two or more witnesses. It must be signed by the testator, witnesses, and the notary. A will by notarized document does not need probate by the court. A will by privately produced document must be written by the testator with the date of the will and the name of the testator. A privately produced will written by another person or using a typewriter or other machine is null and void. Witnesses are not required. In order to have effect, probate must be obtained from the court²⁴⁴. In a will by secret document, the testator can write the will by himself, or have someone write it on his behalf. It can be written by using a typewriter or another machine. The testator signs it, and puts it in an envelope. The envelope is then sealed and signed by the testator, a notary, and two or more witnesses. A will by secret document also requires probate by the court.

The decedent may by will designate the succession shares of the heirs²⁴⁵. He may also by will determine the manner of partition of the estate²⁴⁶. Furthermore, he may by will dispose of the whole or any part of his property as a testamentary gift²⁴⁷. However, a certain kind of heirs have a legally secured portion of the estate of which they cannot be deprived even by will. This is intended to safeguard the family from arbitrariness on the part of the decedent. Heirs entitled to this legally secured portion are lineal descendants (e.g., children and grandchildren), the parents or the grandparents, and the spouse of the decedent. When the parents or the grandparents are the only heirs, one-third of the estate is reserved for them. Otherwise, a half of the estate is reserved. If there are two or more heirs, each heir entitled to a legally secured portion can receive the legally secured portion in proportion to his or her share in the succession²⁴⁸. For example, when a wife and two children survive the deceased husband, they are entitled to a half of the

240 Article 1168 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

241 Article 1188 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

242 Article 1194 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

243 Article 1170 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

244 Article 1213 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

245 Article 1182 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

246 Article 1183 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

247 Article 1184 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

248 Article 1230 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

estate regardless of the will of the deceased husband. This half of the estate is divided equally to the three survivors (i.e., the wife and two children).

An heir entitled to a legally secured portion may demand abatement of a testamentary gift against a person who has obtained property that is subject to abatement for a legally secured portion, to the extent necessary to preserve such legally secured portion²⁴⁹. It should be noted that the right to abatement is subject to extinctive prescription²⁵⁰.

²⁴⁹ Article 1235 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

²⁵⁰ Article 1245 of the Civil Code of the Kingdom of Cambodia dated December 8th, 2007.

CAMBODIAN FAMILY LAW: DEVELOPMENT AND CHALLENGES AHEAD

SAR Senera

CONTENTS

I. Abstract.....	137
II. Scope of this article	138
III. A step towards codification	139
IV. Concept of family law	140
V. Bases of Cambodian family law.....	140
1. Principle of Individualism	140
2. Principle of Equality	142
Spousal Rights and Obligations	143
Property System.....	144
Parental Power.....	145
Divorce	146
3. Succession and Wills	147
Statutory Succession	147
VI. The new family law: application and challenges.....	150
System of Registration	150
Scope of Spousal Obligations	150
Separate Property	150
VII. Conclusion	151
REFERENCES.....	152

CAMBODIAN FAMILY LAW: DEVELOPMENT AND CHALLENGES AHAED

*SAR Serena**

I. Abstract

Although the world has been geographically divided into five major continents, there are two major legal systems that dominate our world – that is, the civil law system and the common law system.

Regardless of whether a country has adopted a civil law or a common law legal system, that system generally includes a particular set of laws governing familial relations and issues. Those laws are called “family law.”

However, when referring to “family law” in England, France and Germany, the term does not include laws relating to succession. This means family law in these countries covers only provisions concerning relatives. On the contrary, in Japan the term “family law” covers both laws on relatives and laws on succession.

The term “family law” employed in the title and in further discussions in this article will embrace both “law on relatives” and “law on succession”, referring to provisions stipulated in Book 7 and Book 8 of the new Civil Code of the Kingdom of Cambodia 2007. There are two rationales for this definition of family law: (1) the significant influence of the contemporary Japanese Civil Code on the drafting of the new Civil Code; and (2) the prospective influence of Japanese legal theories on the way the provisions in the new Civil Code are interpreted.

Due to constraints of space, this article will provide readers with a brief introduction to the development of the family law of Cambodia, utilizing the Law on Marriage and Family 1989 and the new Civil Code as reference points.

As the development of family law in Cambodia is quite a broad topic, to limit the scope of this article I have chosen only some fundamental features of family law for discussion. These include the codification process and basic principles of family law, based on legal provisions concerning marriage, divorce, matrimonial property systems and succession.

Finally, this article will discuss some possible challenges to be faced upon the application of the new Civil Code and the common opinions that the author shares with other scholars.

* Mr. SAR Senera is Lecturer of Civil Code and Code of Civil Procedure of Cambodia, Legal Consultant.

II. Scope of this article

Although the world has been geographically divided into five major continents, there are two major legal systems that dominate our world—that is, the civil law system and the common law system.

The civil law system is the basis for the legal systems of many countries in the world. Due to the reputation of their Civil Codes, France and Germany have always been referred to as the parents of the civil law system.

In contrast to its counterpart, the common law system has been employed in the countries formerly under the occupation of either Great Britain or the United States.

The two major legal systems have different fundamental characteristics. The different legal traditions on which the two systems are based have therefore led to differing points of departure for the development of legal systems around the world. Within the civil law system itself, the codification and interpretation of laws may vary depending on whether the legal system is based on the French or German model of the civil law system.

Regardless of whether a country has adopted a civil law or common law-based legal system, that legal system generally includes a particular set of laws governing familial relationships and the issues arising from such relationships. These laws are called “family law”. When referring to “family law” in England, France and Germany, the term does not embrace the parts on succession. This means family law in these countries covers only provisions concerning relatives.¹ The Japanese legal system can be considered a hybrid system, as it incorporates elements of both the civil law and common law legal systems. The 1890 Civil Code of Japan was heavily influenced by the French Civil Code.² A revision of the Civil Code in 1898 also incorporated influences from the German Civil Code.³ In Japan, the term “family law” embraces both law relating to relatives and law relating to succession.⁴ The term “family law” employed in the title of this article and in further discussions will embrace both “law on relatives” and “law on succession” and will refer to the provisions stipulated in Book 7 (Relatives) and Book 8 (Succession) of the new Civil Code of the Kingdom of Cambodia 2007 (the “new Civil Code”). This definition is based on two rationales: (1) the significant influence of the contemporary Japanese Civil Code in the drafting of the new Civil Code; and (2) the prospective influence of Japanese legal theories on the way the provisions in the new Civil Code are interpreted.

Constrained by the limit of pages, this article will provide readers with a brief introduction to the development of the family law of Cambodia, utilizing the Law on Marriage and Family 1989 and the new Civil Code 2007 as reference points.⁵

1 Toyohiro Nomura, *Minjihō Nyūmon* 148 (5th ed. 2007).

2 *Id.* AT 15-16

3 *Id.* AT 17

4 *Id.* AT 148

5 The new Civil Code of Cambodia (hereinafter referred to as Cam. Civ. Code 2007) was promulgated on 17 December 2007 by Royal Assent No NS/RKM/1207/030. However, due to the necessity for

III. A step towards codification

The Law on Marriage and Family of 1989 (hereinafter referred to as the “Family Law 1989”), which is still in force, covers only matters of marriage, divorce, and adoption. It does not cover the issue of succession, while we cannot find any law on succession separately from the current Family Law 1989.⁶

The adoption of the Family Law 1989 came a decade after the collapse of the Khmer Rouge regime in which all laws and regulations were abolished.⁷ The urgent need for basic law to govern familial relationships led to the adoption of a vague law with insufficient provisions. The Family Law 1989 might be roughly divided into three chapters: Chapter One covered general provisions, Chapter Two stipulated the law on marriage, and the last chapter sets out the law on divorce. The three chapters consist of 122 articles.⁸

Nearly two decades after the adoption and application of the Family Law 1989, Cambodia has finally adopted a new Civil Code, which includes 366 articles relating to family law. Provisions on family law, which amount to almost one third of the civil law provisions in the new Civil Code, are divided into two main Books: Book 7 (Relatives) and Book 8 (Succession).

The incorporation of family law into the new Code is another step in the development of family law in Cambodia, though the contents of the provisions relating to family law may still be the subject of academic argument and the application of the law may still pose some challenges.

The discussions in the following sections seek to provide the reader with a better understanding in this area by elaborating on the development of the family law of Cambodia and the challenges that may be faced upon the application of the new Code.

dissemination to all legal practitioners and ordinary people and the inevitability of compromising with relevant existing civil laws and bridging all the application of existing civil laws into the new Civil Code, the date from which the application of this new Civil Code starts will be determined by a separate law (law on application of Civil Code).

6 The Marriage and Family Law 1989 is still in use until the date of the writing of this article.

7 The collapse of the Khmer Rouge regime took place in January 7, 1979.

8 Family Law 1989 of Cambodia (hereinafter Family Law 1989).

IV. Concept of family law

The term “family” is difficult to define given that the concept may vary according to different cultures and traditions. Regardless of this difficulty, the term “family law” may be simply understood as law regulating familial relationships –that is, the personal status relationships within a group called family.

If compared to property law, “family law” can be explained as the law governing the property relationships that arise between family members during the economic life of a family. Family law deals with topics such as the intentions of those possessing the property, its accumulation either separately or within a marriage, and the calculation of the division of property upon divorce.⁹

To simplify, “family law,” as one kind of private law, has two main functions, one of which is to regulate dissolution of the marriage relationship, and the other is to ensure that the marriage breakdown of spouses will not leave any member of the family behind.¹⁰

Therefore, family law serves the welfare of the members of a family, and its goal is to free society from the burdens resulting from adverse impacts on the welfare of a family. To attain this purpose, family law often has to change rapidly to keep up with the dramatic changes in the family context within a society.¹¹

The development of Cambodian family law is discussed in greater detail below.

V. Bases of Cambodian family law

1. Principle of Individualism

One positive aspect of Cambodian family law is the departure from the classic concept that the head of the household is to be responsible for the welfare of all members of the family. Where family law is based on this principle, family members are generally expected to submit to the head of the household in exchange for his or her service. Practices based on this classic view have in many respects enabled the head of the household to interfere in the decision-making of the other members of the family.¹²

However, since the adoption of the Family Law 1989, Cambodian family law has been grounded in a principle that respects decision making by free will – the principle of individualism.

9 Koji Ono, *Kazokuhō – Shōzokuhō* 2 (4th ed. 2009)

10 R. H. Graveson, *Law: An Outline for the Intending Student*, 117 (Rutledge & Kegan Paul Ltd) (1967)

11 Senera Sar, *Parental Power in Cambodian Laws: Should Joint Parental Power Continue after Divorce?* (September 2005) (unpublished LL.M. Thesis, Nagoya University) (on file with Graduate School of Law Library, Nagoya University).

12 NOMURA, *SUPRA* NOTE 1, AT 149.

The principle of individualism is used here to mean that a person can make decisions based on his or her own free will.¹³ To illustrate, the State or any individual known as the head of the family shall not intervene in the decision making of any person who wishes to carry out any act according to the family law concerning marriage, adoption or making a will.

For example, if a person wishes to marry another individual, or to adopt a child or to make a will to dispose of his or her property, the State or any influential person in the family must not interfere with his or her intention to carry out such an act – his or her will in carrying out such an act must be respected. However, there are exceptions to this principle – in some instances a person intending to carry out such legal acts must be supervised because he or she is regarded by law as a person with limited capacity.

Although the Family Law 1989 did not include a large number of articles addressing familial issues, recognition of the principle of individualism might be best shown by referring to denotations and provisions related to freedom of marriage as follows.

Article 4 of the Family Law 1989 stipulated that:

“A man and woman reaching legal age have the right to self-determine the marriage. One party may not force another party to marriage against his/her will. No one can be forced to marry or prevented from having marriage as long as such marriage is in compliance with standards provided by this law.”

This article confirms the statement that the family law of Cambodia was rooted in the principle of individualism.

One question arising from this provision was what effect a lack of free will on the part of one or both parties would have on the validity of the marriage. Article 23 implied that a marriage should be considered void if either of the parties did not enter the marriage voluntarily.¹⁴ However, Article 23 required the party who claimed that they were forced to marry to file a complaint to the court within a 6 month period starting from the date that he or she was forced. Therefore, this article could be summarily interpreted to mean that the elements constituting a voidance of a marriage were (1) an assertion by one of the parties that they did not enter the marriage voluntarily; (2) within 6 months; and (3) a decision from the court. This provision led to a discussion about how this family law distinguished the concept of “void marriage or nullity of marriage” and “voidable marriage or annulment of marriage.”

If a legal act is void it has no effect from the beginning and it does not become effective by ratification. It is not necessary for a concerned person to assert the nullity of the act. The very nature of the act – contravening the compulsory provisions of a law or

¹³ ID. AT 149.

¹⁴ The Article 23 uses the term “force.”

regulation or contradicting prevailing customs and public policy – may allow a court to declare that such an act is void without having this asserted by a party to litigation. In contrast, annulment or rescission of an act must only be asserted by the concerned party.

English family law draws a distinction between “void marriage” and “voidable marriage.” The former means no valid marriage ever existed, any interested person may take proceedings – a ruling or judgment is unnecessary since the marriage never existed. The latter can be understood as a marriage that is valid unless annulled. Only the parties to the marriage can take proceedings. Unless a ruling or judgment is obtained the marriage remains valid.¹⁵

Section III of Chapter 2 of the Family Law 1989 employed the phrase “void of marriage.” However, all articles of Section III employed the term “void” while describing different conditions under which a marriage might be void. It could be concluded from this uniformity in the use of the term “void” in Section III that the Family Law 1989 was adopted with a misconception as to the distinction between void and voidable. Therefore, to understand under which conditions a marriage was void or voidable, one needed to consult the court’s decisions. Yet the court’s judgments might not be accessible and it was unlikely that one would see the critical opinions of judges handling each case once one can access the relevant judgments. Such constraints have a negative impact on legal development.

Given that the principle of individualism is important, the new Civil Code of the Kingdom of Cambodia sets out provisions that make it clear that marriage can and must be entered into with the free will of the parties. Free will is an essential element for entering into a marriage; without it the marriage will be void.¹⁶ In contrast to its counterpart, the new Civil Code clearly distinguishes the concepts of nullity of marriage and annulment of marriage with provisions setting forth the conditions for nullity and annulment and the effects arising from them.¹⁷

2. Principle of Equality

In this article, when referring to the principle of “equality” in the context of gender I mean non-discrimination against one particular sex by the other; men and women, thus, are equal in every aspect of marriage. Though feminist theory may also incorporate non-discrimination by the State and wider society into notions of gender equality, my use of the term in this article is not inclusive of these concepts.

Blackstone developed a theory about the legal unity of a husband and wife that long influenced the family law of the world. Blackstone described the legal relationship during marriage as follows:

¹⁵ Stephen M. Cretney et al., *Principles of Family Law* 36 (7th ed. London, Sweet & Maxwell 2002).

¹⁶ Cam. Civ. Code 2007, SUPRA NOTE 5, AT ART. 958

¹⁷ Id. at art. 958-968.

[the] very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover she performs everything...Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by marriage.¹⁸

This classic theory influenced the family law of many countries around the world, leading to the legal recognition of the supremacy of males in family law until modern legal reform introduced the concept of equality before the law.

Fortunately, the Family Law 1989 accepted the principle of equality and articulated a number of provisions in recognition of the principle. For example, Article 1 articulated that, “[...] the purpose of the Law on Marriage and Family is [...] to ensure equality of the spouses in marriage and family, [...]” The positive attitude towards the principle of equality of spouses could be seen by reviewing some provisions related to the effects of marriage according to the Family Law 1989 and its counterpart, the new Civil Code.

Spousal Rights and Obligations

Taking further steps away from the old civil code, the Family Law 1989 obligated spouses to respect, to care for and to help each other.¹⁹ The law stipulated further that both spouses were responsible for the expenses arising from the education of their children,²⁰ and that they were jointly liable for any debts and other obligations which they had consented to during their union, or any debts or obligations either one of the spouses had agreed to during the union with the consent of the other spouse.²¹ Therefore, in any circumstance, the consent of one spouse must be sought by the other.

The brevity of the provisions concerning spousal rights and obligations might have given rise to different interpretations by the courts on particular matters in different cases. However, empirical research on this issue was necessary.

The new Civil Code seems to have inherited the existing provisions from the Family Law 1989. However, it provides a more detailed overview of spousal rights and obligations with clearer and more precise wording and phrases.

As to the effect of marriage, the new Code stipulates that a husband and wife have an obligation to cohabit, cooperate and assist each other.²²

The incorporation of the existing provisions into the new Civil Code provides more detail and greater clarity; however, questions remain about how the introduction of the

18 Sir William Blackstone, Commentaries on the laws of England 449 (8 th ed. 1824 vol.1).

19 Family Law 1989, SUPRA note 8, AT ART. 30.

20 ID. AT ART. 35.

21 ID. AT ART. 35.

22 Cam. Civ. Code 2007, SUPRA NOTE 5, AT ART. 966

new Civil Code has affected the previous status quo.. The scope of the rights and obligations of spouses is ambiguous (see discussion in section V).

Property System

The concepts of separate legal personality and unity after marriage were accepted by the Family Law 1989 and are reflected in articles that acknowledge the distinction between separate property of spouses and common property.²³ The law entitled spouses to equal rights to use, obtain interests from and manage common property²⁴ in accordance with their needs and based on joint supervision of the property.²⁵ Joint property might be disposed of only with the consent of both spouses.²⁶ Each spouse retains exclusive ownership over their separate property.

When a marriage is harmonious, distinctions between “your property,” “my property,” and “our property” are often considered unimportant and are therefore neglected. However, when marital sentiment erodes and marriage becomes irretrievable, questions about the division of property inevitably arise.

Article 34 of the Family Law 1989 stipulated that any property which a spouse possessed prior to the marriage and any property which a spouse received as a gift, an inheritance, or a legacy during their marriage union should be regarded as the separate property of each spouse. It was unclear, however, whether property obtained as consideration for the disposal of separate property constituted separate or common property.

The new Civil Code, which includes more detailed provisions on matrimonial property than the Family Law 1989, provides an answer to this problem. Under the new Code, matrimonial property can be governed in two ways: (1) through a matrimonial property agreement; or (2) through the statutory matrimonial property system.²⁷ The former refers to a situation in which spouses conclude their own contract governing their property relationships, while the latter refers to the statutory rules governing the property of spouses where no such contract exists.

The statutory property system under the new Civil Code is subdivided into two different categories: (1) separate property; and (2) common property. Three types of property will be regarded as separate properties: (i) property held by a spouse from before the marriage; (ii) property acquired by a spouse during the marriage by gift, succession, or testamentary gift; and (iii) property obtained as the consideration for disposing of

²³ Family Law 1989, *SUPRA* NOTE 8, AT ART. 34

²⁴ *ID.* AT ART. 32.

²⁵ *ID.* AT ART. 36.

²⁶ Family Law 1989, *SUPRA* NOTE 8, AT ART. 37.

²⁷ Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 969.

property described in (i) and (ii).²⁸ In contrast, any property which is not in any category of separate property described from (i) to (iii) will be regarded as common property.²⁹

In addition to the ownership right over the separate property, the new Civil Code entitles each spouse to share equally in the management and use of the common property. To illustrate, husband and wife have equal rights to use, enjoy benefits from and manage the common property, yet only to the extent necessary for their daily life.³⁰

Although the new Civil Code has provided a thorough description of what should be regarded as separate or common property, it is still uncertain whether some particular assets accrued from the disposition of separate property must be regarded as separate property. Questions may arise, for example, in regard to the interest gained from an account to which one spouse contributes separate property or in regard to the profits from an investment made with separate property. It is unclear whether these earnings will be regarded as separate or common property (see discussion in section V).

Parental Power

Different countries employ different terminology concerning legal parental power. For example, the Children Act 1989 of England employs the term “parental responsibility” to sum up the collection of rights, powers, authority, duties, and responsibilities which by law a parent of a child has in relation to the child and his property.³¹ The Civil Code of France utilizes the term “parental authority” to refer to a set of rights and duties, together with the duties to administration and rights to enjoyment of the property of the child.³² The father and mother whom the parental authority is vested in until the child reaches the age of majority or emancipation are empowered and entitled to the obligations to protect the child for his security, health, morality, to ensure his education and allow his development, and to show regard to his person.³³

The Family Law 1989 and the new Civil Code opted to use the term “parental power” to describe the rights and duties of parents.

Laws of England and France make it clear that both spouses enjoy joint parental authority or joint parental responsibility. In contrast, one might not find any specific provision in the Family Law 1989 stipulating that both spouses were entitled to joint parental power over their children. However, despite the lack of any specific provision guaranteeing joint parental power over children, the concept could be read into or implied from the provisions concerning parental power.

28 *Id.* at ART. 972.

29 *Id.* at ART. 973.

30 Cam. Civ. Code 2007, *SUPRA* NOTE 5, at ART. 974.

31 Children Act 1989 of England, s 3(1).

32 Code Civil [C. Civ] art 382-83 (Fr.). See *Dernier texte modificateur: ordonnance no 2004-164 du 20 Feb. 2004* translated by GEORGES ROUHETTE & ANNE BERTON.

33 *Id.* at 371-1.

Even if joint parental power could be implied in the Family Law 1989, the scope of this joint parental power remained uncertain. The Family Law 1989 is silent about whether or not, for a good cause, one parent could independently exercise parental power without the consent of the other parent.

The new Civil Code, however, defines parental power as the right and duty to effect physical custody of the child and management of the child's property.³⁴

The new Civil Code stipulates precisely the scope of the parental power. It articulates the rights and obligations of parental power holders in relation to the education and residence of a child, rights to discipline the child, rights to permit the child to carry out an occupation or business, and the right to demand the hand-over of a child.³⁵ It further specifies the right and duty to manage the child's property and to represent the child in any act relating to the property.³⁶

According to the new Civil Code, both parents, in principle, must jointly exercise that parental power, and only if there is a dispute about the exercise of such power will the issue be decided by a court's decision.³⁷ However, the new Civil Code also makes it clear that one parent can independently exercise parental power if the other parent is not in a position to do so.³⁸

Divorce

Another area of family law in which the principle of equality was recognized is divorce – the grounds for divorce applied to all without any special exception. The Family Law 1989 stipulated that a husband or a wife could instigate a divorce complaint based on the same ground(s) (fault-based divorce).³⁹ Divorce under the Family Law 1989 was rigid; the purpose of this rigidity might be to discourage divorce and create an obstacle for speedy divorce. The new Code, like the Family Law 1989, requires that divorce be instigated by litigation; divorce, thus, will ultimately be determined by judgment.⁴⁰

In Japan, it is not necessary for parties seeking a divorce to file a complaint to court. Rather, it requires only the agreement of the parties and an entry in the Family Register (it is called *koseki* in Japanese).⁴¹

Both the Family Law 1989 and the new Civil Code adopt the principle of “fault-based divorce” and “no fault divorce” (or “divorce by agreement”). Whatever form it takes, divorce must be declared by judgment.

34 Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 1034.

35 *Id.* AT ART. 1043-1047.

36 *Id.* AT ART. 1053.

37 *Id.* AT ART. 1036.

38 Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 1054.

39 Family Law 1989, *supra* NOTE 8, AT ART. 39 and Cam. Civ. Code 2007, *supra* NOTE 5, AT ART. 978.

40 Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 982-984.

41 Ono, *SUPRA* NOTE 9, AT 63.

3. Succession and Wills

Succession refers to the practice of transferring exclusive legal rights over the property of a deceased person to heirs or successors – often family members or those who had close personal relationships with the deceased. In other words, the substance of succession is the inheritance of a legal relationship over the property of a person upon his death. Succession relates to the inheritance of exclusive rights and obligations rather than the inheritance of rights or obligations in part.⁴² A person entitled to succession rights is known as a successor.

Succession serves a number of different functions: (1) it serves as life security; (2) it may serve as tool for settlement of latent common relationship of members in the family; and (3) it maintains the stability of relationship of some particular rights.⁴³ Due to space limitations, this article will not provide further discussion of the details of each of these functions.

“Life is short, so live it up!” may be a common expression to English speaking people. Well, it may be shorter than one can ever expect.

An individual may pass away without caring about how his property should be divided and to whom, while others may be cautious enough to convey their intentions for their property should they pass away. In either of the cases the property of the deceased will be inherited. The inheritance of the property of those who died intestate shall be made in accordance with the provisions of law and is called “statutory succession,” while the inheritance made in accordance with the will of the deceased is termed “testamentary succession.”

Statutory Succession

The new Civil Code establishes a hierarchy of successors whereby the priority of a relative’s legal claim to the property of a deceased person is determined by how closely they are related to the deceased.

Under the new Code, the priority of successors is divided into three classes of persons. Children of the deceased are the successors of first rank and will inherit the property of the deceased in priority to successors of other ranks.⁴⁴ The new Civil Code abolishes discrimination against children born out of wedlock, making the succession provisions in the Code amongst the most modern to be found in countries with civil law systems. The new Civil Code makes no distinction between the succession rights of legitimate children and those of illegitimate children. Therefore, all children of the deceased are entitled to equal succession rights regardless of their status.

⁴² Mori Dachi, *Law on Relatives-Law on Succession* 135 (Revised ed. July 1984).

⁴³ Ono, *SUPRA* NOTE 9, AT 151.

⁴⁴ Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 1156 (1).

If a child of the decedent passes away prior to succession, or is disqualified from succession by the provisions of the Civil Code or disinheritance, the children of that person become successors (provided they are lineal descendants of the deceased) by virtue of succession by representation.⁴⁵

In the absence of children of the deceased or their representatives, lineal ascendants of the deceased – parents or grandparents for example – will become successors, referred to as second-rank successors.⁴⁶

However, if there are neither lineal descendants nor lineal ascendants to become successors, the new Civil Code stipulates that the siblings of the deceased will become successors, referred to as third-rank successors.⁴⁷

Another significant development of the family law of Cambodia in the field of succession is that the new Civil Code secures the succession rights of the spouse of the deceased. Under the statutory succession system the spouse of the deceased will become a successor in every case. If there are also other successors of first, second or third rank, the spouse is treated as a successor of equal rank with those other successors.⁴⁸ In short, the spouse will always become a successor, although the portion of the property subject to succession may vary according to the number of successors.

Testamentary Succession

People think of their loved ones. A man may think of the future livelihood of his wife, his children and his relatives after his death. He then, with his human heart, may establish a measure to deal with this concern. That measure is a legal instrument known as a will. Successors can inherit the property of the deceased through a will. Such succession, as mentioned previously, is called testamentary succession.

What is a will?

Generally, a will can be simply explained as words left by a person indicating his intentions as regards his property and other matters after his death.⁴⁹ From the deceased's side, on one hand, such a will must be socially respected for the reason that it is his human act of setting up a future means to respond to the living problem of his wife, children and his relatives. From the survivors' perspective, however, it can be said that the realization of a testator's will is concerned with morality. The system to enable a person to realize their intentions after their death, based on the respect of humanity and morals, is called the "system of wills."⁵⁰

⁴⁵ ID. AT ART. 1157.

⁴⁶ Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 1159.

⁴⁷ ID. AT ART. 1160.

⁴⁸ ID. AT ART. 1161.

⁴⁹ Jun Nakagawa, *kazokuhō no gendaiteki kadai* 369 (ed. 1st January 1992)

⁵⁰ Nakagawa, *supra* NOTE 50, AT 369.

This system cannot function, however, if some fundamental systems and principles in civil law are not admitted by a State. In order that a person can dispose of his property, it is necessary for a State to have adopted a system of private property and for the State to recognize the principle of private autonomy. Fortunately, Cambodia has long utilized a system of private property and the new Civil Code has expressly recognized the principle of private autonomy.⁵¹

The new Civil Code includes various articles concerning the forms through which a valid will can be made and the formalities and procedure for the execution of a will (please refer to Articles 1168-1193).

Reversion of Succession Property to the State

It is very common that a person's property will be inherited by their successors after their death. However, there may be instances in which a person's property is not inherited because there are no successors. In such a case, the State will act as successor in inheriting the property of the deceased. The new Civil Code sets out the circumstances in which the State inherits property and the procedures that must be followed for such a transfer to take place.

The new Civil Code stipulates that if it is unclear whether there are any successors, the property will become a juristic person.⁵² The purpose of transforming the nature of the succession of property is to have it administered by a natural person.

Once the succession property becomes a juristic person, a court, by a motion from any of the persons specified by law, will appoint an administrator to manage the property.⁵³ Since the management of the succession property is an onerous task, the administrator will be compensated with remuneration determined by the court.⁵⁴

The administrator has responsibilities concerning public notice, peremptory notice to creditors, and public notice of the search for successors. The State will inherit the succession property only after it is determined that no successor exists and after liquidation. However, under Article 1299 of the new Civil Code the court may confer some parts of the succession property to a particular persons, such as a person who had shared their livelihood with or devoted themselves to the medical treatment and nursing of the deceased, or who had otherwise had a special connection with the deceased.⁵⁵ Succession property that has not been disposed of in this manner shall revert to the state. Thus the State will succeed the property in the last resort and only the remaining portions.

51 Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 3.

52 *Id.* at art. 1290.

53 Cam. Civ. Code 2007, *SUPRA* NOTE 5, AT ART. 1291.

54 *Id.* AT ART. 1293.

55 *Id.* AT ART. 1299.

VI. The new family law: application and challenges

Drafting a good law is not an easy task, but to apply a law effectively is an even more difficult task. The birth of the new family law is a big achievement of Cambodia in the field of legal development. However, questions remain about whether it will be properly applied. Below I focus on some of the issues that may arise in relation to specific articles in the new Civil Code.

System of Registration

Article 965 allows one spouse to change their surname after marriage. The question is whether there will be a system for the registration of shared surnames after marriage from the date that the new law is applicable. A change in the surname of one spouse will result in a changed legal identity, which will affect the existing legal relationships that the spouse has established prior to the change of their surname. If no effective registration system exists, the rights of the citizens provided for by law will not be realized.

Scope of Spousal Obligations

Spouses are obliged by Article 966 to cooperate and assist each other. However, if literally translated into English from the original Khmer version, the term “assist” can be read as “save/help.” Thus, husband and wife must cooperate and save/help each other. The question is the scope of the obligation to be exercised. This may affect the legal relationship with a third party. A case study may give a better understanding.

A wife is hospitalized with a critical illness. All the common property has been used and the separate property of hers is exhausted. In such a case, does the scope of the obligation under Article 966 also extend to the separate property of the husband?

Article 975 states that husband and wife must be jointly liable for obligations and other liabilities to a debtor or obligee that are agreed in writing by both spouses or assumed by one of the spouses with the written consent of the other spouse during the marriage. However, it is doubtful if the hospital will always require spouses to sign a form concerning debts relating to medical expenses as proof of the explicit agreement of both spouses to incur that debt.

Separate Property

According to Article 972(3), property obtained as consideration for separate property will also become separate property. However, a rigid application of this provision may cause harmful effects to one spouse upon divorce.

Suppose that a woman is a housewife who is supported financially by her working husband. It is undeniable that the income of the husband is common property. The income of the husband is just enough for both of them to live. The husband later resigns and starts a business on his own using his separate property. The business goes pretty

well. Article 972(3) suggests that the profits from the business are separate property because the business was created using separate property. If there is a divorce what will the wife get?

The issues pointed out above are just a few aspects among other concerns.

It is undeniable that it is the role of the courts to interpret and make a final decision on uncertain provisions in the new Civil Code. The application of the new Civil Code represents a new beginning for both the judiciary and legal practitioners. It is a lot more comprehensive than previous laws and contains a lot of technical terminology. This will affect legal practitioners who were comfortable and familiar working with the old law.

VII. Conclusion

In any society, scholarly opinions are indispensable for the promotion of the effective application of laws. Producing scholars is a huge investment of resources and time consuming. It requires not only hard work but also concerted efforts from both institutions and individuals.

To have everything written in the law for dealing with the issues of society is impossible. Thus, interpretation based on general rules or general principles is inevitable. However, as noted by a former expert from the Japanese International Cooperation Agency who was deeply involved in the process of drafting the new Civil Code, the science of legal interpretation does not yet exist in Cambodia.⁵⁶

It is, therefore, crucial that all parties concerned should take part in producing scholars who will be able to undertake research on particular fields of law and who are able to provide academic interpretation. Letting courts alone interpret and apply the law will likely lead to arbitrary decision making that will put the term “justice” in danger.

⁵⁶ Honma Yoshiko, *Hōritsu Kisogo No Kadai*, in *Hōritsu Jihō*, No.1, Vol.82 (January 2010), at 32.

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OVERVIEW OF CONTEMPORARY CIVIL PROCEDURE OF CAMBODIA

KONG Phallack

CONTENTS

I. Introduction.....	155
II. History and structure of Cambodian Code of Civil Procedures.....	155
1. Litigation Proceedings	156
Procedures of the Courts of First Instance.....	157
Procedures for Small Claim Actions	160
Demand Procedure.....	162
2. Trial procedures at the Higher Courts.....	163
Uttor Appeals	164
Satuk Appeal.....	166
Chomtoah Appeal.....	168
3. Special provision's relation to the litigation proceeding for retrial	168
Motion for retrial.....	169
Adjudication and decision on a motion for retrial.....	169
III. Compulsory Execution	170
1. Main Forms for Execution	170
2. Types of Execution	172
Execution of claims for monetary payment	172
Execution against security interest	173
Execution of Claim Rights of Which the Subject Matter Is Not Money	175
IV. Preservative Relief	177
1. Types of Preservative Relief	178
Provisional attachment	178
2. Flow of the Proceedings of Preservative Relief.....	178
Ruling of Preservative Relief	178
The execution of preservative relief	179
V. Conclusion	180

OVERVIEW OF CONTEMPORARY CIVIL PROCEDURES OF CAMBODIA

*KONG Phallack**

I. Introduction

The civil justice system in Cambodia is currently governed by the new code of civil procedure which was promulgated on July 06, 2006. This article will offer a rough explanation on history and structure of the Code of Civil Procedures, actions on a civil lawsuit beginning from the trial court proceeding to the high appellate court and other procedures regulated by the Code of Civil Procedures. The actual implementation of the code is not included in this article.

II. History and structure of Cambodian Code of Civil Procedures

Under the development of Cambodian laws, civil procedures were rewritten into a code called the Code of Civil Procedures which was promulgated on July 06, 2006 with the aim to regulate the procedures related to civil actions¹. This code is divided into 9 books with 588 articles in total. Book One provides general provisions of civil procedures include purpose and fundamental principles of civil procedures, the courts, parties, litigation cost and security under litigation. Book Two stipulates proceedings at the Court of First Instance which explain a suit, oral argument and preparation thereof, evidence, an interruption and suspension of litigation, judgment, conclusion of action not based on judgment, special provisions regarding small claim matters; date, term and services; and viewing of case record. Book Three covers appeals to the higher courts including general rules of appeal, Uttor Appeal, Satuk Appeal and Chumtoah Appeal. Books Four and Five have a single chapter related to Retrial and Demand Procedures respectively. Book Six

* Dr. KONG Phallack is Dean and Professor of Law of Faculty of Law and Public Affairs, Paññāsāstra University of Cambodia (PUC); Managing Director and Attorney at Law of KhmerLex Legal Solutions, a locally established law firm; Chief arbitrator of the Arbitration Council. He has handled 380 cases among 900 cases registered at the Arbitration Council. Dr. KONG Phallack has been selected to serve as a chairman of the Board of Director of the Arbitration Council Foundation; a member of Arbitration Panel of Kuala Lumpur Regional Centre for Arbitration (KLRCA), and a member of Inter Pacific Bar Association (IPBA).

1 Civil actions are lawsuits related to the legal relationship in civil matters (relationship among properties and among relatives) and having the purpose to let the court solve the civil disputes based on the law to protect the individual right.

establishes compulsory execution procedures including general provisions of compulsory execution, execution of claims having the object of monetary payment, specific rules governing enforcement of security interests, and execution of claim rights of which the subject matter is not money. Book Seven deals with preservative relief which is comprised of general provisions of preservative relief, ruling on preservative relief and execution of preservative relief. Book Eight explains transitional provisions and Book Nine explains the entry into force of the code.

In principle, the Code of Civil Procedures is composed of three types of procedures namely i) litigation proceedings which determine the existence or nonexistence of right or legal relationship between private individuals by rendering a judgment; ii) compulsory execution procedures in which rights are ultimately decided; and iii) procedures of preservative relief which ensures the future exercise of rights when parties win the case. Therefore, the following sections will briefly explain these three main procedures.

1. Litigation Proceedings

A civil law suit or civil action is the procedure determining the existence or nonexistence of rights and obligations or legal relationship of substantive laws (civil codes or other substantive laws).

In order to determine the existence or nonexistence of rights and obligations or legal relationship through litigation proceedings, there is a procedure called *Procedure of the Courts of First Instance* or simply called *common proceedings* which are the proceedings at the Courts of the First Instance (Provincial-Municipal Courts). In the case that either party to the law suit is not satisfied with the decision of the Courts of the First Instance, the party can file an appeal complaint which is called an appeal to the Higher Courts (Appeal Court and Supreme Court).

An appeal to the higher courts is the filing of an appeal complaint against the court's decision which is not yet final. The Code of Civil Procedures provides three types of appeals such as i) Appeal to the Appellate Court which is called an Uttor Appeal, ii) Appeal to the Supreme Court which is called a Satuk Appeal, and iii) Appeal to the higher courts against the courts' rulings which is called a Chomtoah Appeal. These appeals are governed by procedures which are called Procedures of the Higher Courts. In the case that judgments of the Courts of First Instance or judgments of the Higher Courts become final and have a defect in the proceedings or irregularities on the grounds of those judgments, the interested party or party whose interest is affected may file an appeal against those judgments and demand the competent courts to cancel them and re-examine the case through a procedure called *retrial proceedings*.

Procedures of the Courts of First Instance

Procedures of the Courts of First Instance are common procedures conducted by the Courts of First Instance, namely the Phnom Penh Capital Court and other Provincial Courts of the Kingdom of Cambodia. This procedure commences with filing of a lawsuit and ends with final judgment. The procedures of the Courts of First Instance comprises three important stages: i) Procedures of Filing a Lawsuit, ii) Preparatory Proceedings for Oral Argument, and iii) Oral Argument. In addition to these proceedings, the Code of Civil Procedures also provides special procedures regarding small claim matters in the value not more than one Million Riels. These special procedures are determined to settle disputes very quickly through summary procedures.

Procedures for Filing a lawsuit

Filing a lawsuit within the competent court is the first phase of a civil proceeding. According to the Code of Civil Procedures, a civil action shall be filed through a written complaint to a competent court, except for a small claim which can be filed orally². The complaint shall include important matters such as i) the parties and their legal representatives; ii) the content of the main text of the judgment sought by the plaintiff (the content of the claim by the plaintiff); and iii) the facts necessary to specify the claim (the fact which clearly determines the rights or legal relationship thereto)³. In addition to the above matters, the plaintiff should provide details in writing on i) the facts necessary to support the claims contained therein (primary fact or facts which determines the rights or legal relationship in point 3 above); ii) key facts related to the facts necessary to support the claims (indirect facts) and evidence relating to such facts⁴. Once the complaint is filed, the judge assigned with it shall check whether the complaint is in correct form as stated in paragraph 2 of article 75; however, the court is not supposed to check whether conditions in the claim are reasonable or not. Furthermore, the court shall check if the plaintiff has paid the tax for filing the suit as stipulated in paragraph 1 of article 61 of the Code of Civil Procedure. After checking, if there are defects in the complaint, the court shall order that the defects giving rise to said violation be cured within a reasonable period of time set by the court⁵. If the plaintiff fails to cure the defect, the court shall dismiss the complaint via ruling. A Chamtoah appeal may be made against the ruling⁶. After checking the complaint, and if it is correct in form set forth in the above paragraph, the court clerk shall service the complaint to the defendant⁷. However, in case that the complaint can not be serviced because the address of the defendant is incorrect or the plaintiff fails to pay the appropriate service fee, the court shall order that the defects be cured or the

² Code of Civil Procedures, Article 225.1

³ Code of Civil Procedures, Article 75.1 (A and B)

⁴ Code of Civil Procedures, Article 75.3

⁵ Code of Civil Procedures, Article 78.1

⁶ Code of Civil Procedures, Article 78.2-3

⁷ Code of Civil Procedures, Article 79.1

delivery fee be paid within a reasonable period of time. If the plaintiff fails to cure the defects or pay the delivery fee, the court shall dismiss the complaint via ruling⁸. If the plaintiff can prove that s/he has tried her/his best to find the domicile, residence or other location to serve the complaint, but still cannot find it even after a reasonable attempt, the plaintiff can then submit a request to effect service through publication⁹.

When a complaint is filed, the court shall promptly set a court date for preparatory proceedings for oral argument and summon the parties to appear¹⁰. The date set shall fall within 30 days of the date of filing of the complaint; on the other hand, in the real practice after checking and receiving the complaint, the court shall determine the date of initial preparatory proceedings for oral argument and effect service along with the summon of defendant to the court within the date set¹¹.

Preparatory Proceedings for Oral Arguments

During preparatory proceedings for oral argument, the court shall arrange and organize the allegations and arguments of the parties, clarify the points at issue in the case, and organize the evidence pertaining to points at issue¹². However, the court shall first seek to effect a compromise settlement, unless the court determines that the parties have no intention to enter into compromise or rights or legal relationship which an objective of the action does not allow to initiate the compromise¹³. In case that the reconciliation does not work, the court shall begin preparatory proceedings by requiring parties to submit preparatory documents setting forth offensive or defensive measures as well as statements in opposition to the offensive or defensive measures of the other party¹⁴. Offensive and defensive measures shall be advanced at the appropriate time in accordance with the progress of the litigation. Furthermore, the preparatory proceedings for argument shall be recognized as a proper phase for submitting offensive and defensive measures¹⁵.

Where an offensive or defensive measure is advanced by a party after the proper time through willful intent or gross negligence, the court may dismiss such measures by its ruling upon motion or on its own authority if it determines that the measure would delay the conclusion of the litigation. Where the purpose or effect of the offensive or defensive measure is unclear and in the event the party fails to provide a necessary explanation or fails to appear on the date on which such explanation is to be provided, the court may also dismiss such measures¹⁶.

8 Code of Civil Procdures, Article 79.2,

9 Code of Civil Procdures, Article 255.1 (A)

10 Code of Civil Procdures, Article 80.1

11 Code of Civil Procdures, Article 80.2

12 Code of Civil Procdures, Article 103

13 Code of Civil Procdures, Article 104

14 Code of Civil Procdures, Article 101.1-2

15 Code of Civil Procdures, Article 93

16 Code of Civil Procdures, Article 94

Within the proceedings for argument, restriction shall be imposed on some activities such as checking evidence, but in order to organize the allegations of the parties, determine the points at issue in the case, and organize the evidence pertaining to points at issue to be examined during the oral arguments, the court may conduct necessary activities such as issuing a ruling regarding the offering of evidence as stated in article 126, paragraph 1 of article 143 and article 152. Moreover, the court may issue any other ruling as permitted by the code of civil procedure on a date other than the court date for oral argument which includes a ruling permitting or refusing to add or change objectives of complaint. The court may examine documentary evidence to the extent necessary to arrange disputed issues (reading the documents)¹⁷.

Oral Arguments

In principle, the court must hold oral argument proceedings before rendering a judgment on the claims (the importance of oral arguments)¹⁸. The oral argument (hearing) is the form of trial in which the court and parties to a dispute at trial make oral statements and listen to the statements during the publicly open hearing on the date which both parties are able to appear¹⁹. However, the court can still hold the oral argument and issue a judgment called a *default judgment* when one party to the dispute is absent, except in cases in which the court is not permitted to issue the default judgment as provided in article 202 of the code of civil procedure²⁰. The party who receives the default judgment may file a petition to set aside the judgment because of failure to make a timely appearance on the court date due to an unforeseeable or unavoidable reason and the petition shall be made within two weeks from the date of receipt of service of the default judgment²¹.

On the date of initial oral arguments, the parties shall present the results of the preparatory proceedings for oral argument. With this presentation, allegation of facts, evidence offering, result of examination of documentary evidence and result of arranging the disputed issues during the proceedings for oral argument are deemed oral arguments. Therefore, advancing offensive or defensive measures again shall be limited when the advancement is contrary to article 108²².

The court shall recognize facts based on evidence in principle and this is called *the Principles of Ruling by Evidence*. However, facts admitted to by a party in court and facts the existence of which is obvious to the court, need not be proven by evidence²³. After the parties present the result of preparatory proceedings, the court shall examine the evidence offered by the parties. However, for the evidence that has no relevance to the facts

17 Code of Civil Procedures, Article 106

18 Code of Civil Procedures, Article 114

19 Code of Civil Procedures, Article 115

20 Code of Civil Procedures, Article 202.3

21 Code of Civil Procedures, Article 204.1-2

22 Code of Civil Procedures, Article 116.3

23 Code of Civil Procedures, Article 123.1-2

to be proven and evidence that the court otherwise finds unnecessary or the request to examine the evidence does not fall within the allowed period as provided in article 94 of the Code of Civil Procedure, the court shall dismiss the evidence without examination²⁴. The method of examining evidence shall be in line with the types of evidences such as documents, witness testimony, and expert witness testimony. In principle, the examined evidence shall be within the phase of oral argument after the proceedings for oral argument. However, in special cases (such as a witness who is in a life threatening situation or the existence of easily damaged objects), the court may examine the evidence before the date of oral argument. Such arrangement is called preservation of evidence²⁵.

After concluding the oral arguments, the court shall determine the date of issuing judgment and the content of judgment²⁶. When the judgment becomes final and binding, the action is ended; however, the judgment which is effective in finalizing the action shall be the judgment finalizing the whole action or part of the action. Such judgment is called *final judgment*. On the contrary, an action can also be ended without final judgment in the case of discontinuance of an action, compromise settlement and the abandonment or acknowledgement of the claim. This is called *conclusion of an action by parties*²⁷. Where a party's existence is terminated through death or merger, if there is no person that succeeds to the right or obligation comprising the subject matter of the litigation, or if such right or obligation devolves to the same person, the litigation proceedings shall be terminated. In this case, the court shall issue a judgment called *natural termination of litigation proceedings*²⁸.

Procedures for Small Claim Actions

The procedures for small claim actions are special procedures to promptly settle the dispute via easy procedures with small amounts of money. It is also called the *summary procedures of the first trial* and these procedures are provided in the Code of Civil Procedures from article 223 to article 239.

Conditions

In order to conduct litigation through procedures for small claim actions, the following conditions shall be satisfied:

1. The subject matter of the action is a demand for the payment of money in an amount no greater than 1 million riels (conditions related to the action).
2. An application for a trial and decision based on small claim procedures shall be made when the complaint is filed²⁹.

²⁴ Code of Civil Procedures, Article 126

²⁵ Code of Civil Procedures, Article 163.1

²⁶ Code of Civil Procedures, Article 180.1

²⁷ Code of Civil Procedures, Article 217, Article 220, Article 221 and Article 222

²⁸ Code of Civil Procedures, Article 174

²⁹ Code of Civil Procedures, Article 224

Distinction between common procedures and small claim procedures

The procedure for small claim actions has distinct features from ordinary procedures as follows:

1. The procedure is easy and quick because the small claim actions let the plaintiff to have an oral institution as provided in article 225 of the code of civil procedure and this procedure isn't within the preparatory proceeding for oral argument. When a [small claim] action is filed, the court shall promptly designate a date for oral argument and summon the parties thereto within 30 days from the date of filing an action³⁰. In a small claim action, the court shall conclude the trial on the initial date set for first oral argument (the date for judgment is only once) and this is called *principle of one-day trial*.
2. In special circumstances such as a witness who is unable to appear due to health conditions or in circumstances involving unexpected witnesses or pieces of evidence, the date of oral argument shall be extended³¹. In the procedures for small claim actions, an examination of evidence can be conducted only with regard to evidence that can be examined immediately (initial clarification provided in article 131) and a cross-action may not be filed in a small claim action³². However, examination of witness is easy because parties do not need to submit the documents which determine issues to be examined and do not need to take an oath³³. When the oral argument finishes, in principle the court shall render the judgment immediately on the same day unless the court deems necessary such that the parties wish to try reconciliation.

Judgment for Payment Deferment and Installment Payment

According to the Code, although the court issues a judgment that authorizes a claim, the court may, upon determining it especially necessary in light of the defendant's financial state, establish a time for payment deferment or establish a period for making installment payments within a time frame not to exceed three years from the date of pronouncement of judgment and shall designate a provision regarding the loss of benefit of the term if the loser does not abide by the decision of the court³⁴.

Prohibition of objection against the judgment

Parties, who are not satisfied with the final judgment in the small claim actions, cannot file an Uttor or Satuk appeal except that appeal is against the default judgment³⁵.

30 Code of Civil Procedures, Article 228

31 Code of Civil Procedures, Article 229.1

32 Code of Civil Procedures, Article 227 and Article 231

33 Code of Civil Procedures, Article 232

34 Code of Civil Procedures, Article 237

35 Code of Civil Procedures, Article 238

Execution of Judgment in Small Claim Actions

In principle, the execution of judgment in small claim actions is similar to the one in ordinary proceeding but without any execution clause³⁶. Even though the procedure for small claim action is easy, quick and suitable with the objective of the claim, such procedure restricts the fundamental rights of parties, and is less guaranteed than in the ordinary procedure. For example, the judgment shall comply with the one-day trial principle and evidence that can be presented is limited; therefore, the law provides freedom of choices to parties on the claim for judgment and issuing the ruling based on the small claim matters or ordinary case even though the objective of litigation meets the conditions for small claim matters. In this case, the defendant in procedure for small claims action may transfer the action to ordinary procedure by making statements before the oral argument on the first date of oral argument. This is called *a transfer to ordinary procedures pursuant to defendant's statement*³⁷. However, although both parties decide to choose the procedure for small claim actions, the action can still be transferred to ordinary procedure pursuant to court ruling with consideration that i) the action cannot become the objective of small claim action, ii) summons to appear on the initial date set for oral argument cannot be made on the defendant by means other than service by publication, and iii) where it is deemed improper by the court to conduct such trial and decision based on small claim procedures³⁸.

Demand Procedure

Demand procedure is the procedure which allows the obligee to quickly and easily receive execution title necessary to advance the compulsory execution for claim for payment of money as recognized as the procedure replacing the action claiming for performance (ordinary action). This procedure begins with a motion called *a motion seeking an issuance of demand ruling and ends with the demand ruling*.

Entitlement to a claim through the demand procedures shall satisfy the requirements of i) a claim in which the objective of the action is the claim for payment of money and ii) the demand ruling service can be done in a manner other than service by publication³⁹. Apart from this, the motion seeking an issuance of the demand service shall detail the issues necessary as provided in paragraph 2 of article 75 and the motion shall be submitted to the court of first instance having jurisdiction over the corresponding location as provided in paragraph 1 of article 320 of the civil procedure code⁴⁰. In order to issue the demand ruling, the court shall examine whether a motion seeking issuance of a demand ruling meets the requirement or violates the provisions of article 319 (requirements for

³⁶ Code of Civil Procedures, Article 354.1(A-B)

³⁷ Code of Civil Procedures, Article 233

³⁸ Code of Civil Procedures, Article 234

³⁹ Code of Civil Procedures, Article 319

⁴⁰ Code of Civil Procedures, Article 321

demand ruling) or article 320 (motion seeking issuance of demand ruling) and without grounds for the claim, the court shall dismiss the motion via ruling and the ruling cannot be objected. However, the obligee can advance with the ordinary procedure⁴¹. In case the motion is accepted, the court shall issue the demand ruling which provides the key issues as stated in article 324 and service the ruling to obligor and obligee. The demand ruling shall take effect when service thereof is made on the obligor⁴². Where an obligor fails to bring an objection to a demand ruling within two (2) weeks of the date of receipt of service thereof, or where a ruling dismissing an objection to issuance of demand ruling brought prior to a declaration of provisional execution becomes final and binding, the court shall make a declaration of provisional execution thereof at its own discretion. The demand ruling with the declaration will become the executable title of execution⁴³.

Where a valid objection to issuance of demand ruling is brought by the obligor prior to a declaration of provisional execution and the objection motion is not dismissed, the demand ruling shall lose legal effect to the extent of the objection raised thereto. This makes the declaration of provisional execution impossible and the objection to the demand ruling shall be deemed a title for litigation requiring the demand procedure be transferred to ordinary procedure⁴⁴. However, even if the obligor does not seek to object within 2 weeks and the demand ruling is already declared to be provisionally executed, the obligor still has the title to object to the demand ruling after the declaration of provisional execution if the title of objection is made within 2 weeks after serviced the demand ruling with the declaration of provisional execution⁴⁵. If the obligor does not make a motion of objection to the demand ruling within the given period, the demand ruling shall have the effect of a final and binding judgment⁴⁶.

2. Trial procedures at the Higher Courts

The trial procedure at the higher courts is the procedure for the trial and ruling on appeal of the parties to the higher courts to dismiss or change the decisions (a judgment issued by a Court of the First Instance, a judgment issued by higher courts or their rulings) rendered by the lower courts before the decision becomes final and binding. Trials at the higher courts are divided into three types: Trials for Uttor appeal, Satuk appeal and Chomoah appeal.

⁴¹ Code of Civil Procdures, Article 322

⁴² Code of Civil Procdures, Article 325

⁴³ Code of Civil Procdures, Article 328

⁴⁴ Code of Civil Procdures, Article 327

⁴⁵ Code of Civil Procdures, Article 329

⁴⁶ Code of Civil Procdures, Article 333

Uttor Appeals

Uttor appeal is the appeal to appellate courts against a judgment of Court of the First Instance that not yet become final⁴⁷. The court which hears the Uttor appeal is called *an Appellate Court* and such a trial is called the second trial. However, in some cases provided in special provisions such as an appeal against a decision of the Bar Association to the appellate court is called the first trial.

Filing Uttor Appeals

Uttor appeal can be made by the plaintiff or defendant who loses their interest due to judgment of the first trial. The party who loses interests is the party who has interest in filing the Uttor appeal; therefore, in principle the party which completely wins a case in the first trial, is not entitled to appeal because he or she has no interest in appealing. If the winning party files Uttor appeal, the appeal will be dismissed on the grounds of unlawfulness⁴⁸. On the other hand, the right to Uttor appeal may not exist if the parties have agreed not to make an Uttor appeal and have agreed to reserve the right to make a Satuk appeal after the court issues a final judgment or after the right to Uttor appeal exists, the party who makes a statement waives their right. Where the party waives the right to make appeal after making Uttor appeal, the statement of the waiver of right shall be made at the same time as withdrawing the motion of the Uttor appeal⁴⁹. In addition, the right to Uttor appeal is limited by the amount of claim in civil or commercial case tried by court of the first instance and the amount at stake does not exceed 5,000,000 riels⁵⁰.

An Uttor appeal must be filed within one month from the date that service of the written judgment was received or the date that a ruling denying or dismissing a motion to set aside a default judgment⁵¹. The above period may not be extended; however, if the party with right to Uttor cannot file Uttor appeal based on the grounds that are not the mistake of that party, the party shall advance the litigation within one week after the ground is extinguished⁵².

However, after the judgment of the first trial is declared, despite absence of service or prior to the date of notifying about the ruling refusing or dismissing an objection to the default judgment or the party is entitled to make an objection, waives such right, the Uttor appeal can still be made prior the period of filing the Uttor appeal⁵³. Although the right to Uttor appeal is extinguished, (waiver of right to Uttor appeal or after expiry of Uttor appeal period), the Uttor appeal can still be made and such appeal is called *inci-*

47 Code of Civil Procdures, Article 259.1

48 Code of Civil Procdures, Article 268

49 Code of Civil Procdures, Article 260.1 (A), and article 263

50 Code of Civil Procdures, Article 260.1(B)

51 Code of Civil Procdures, Article 264.1(1)

52 Code of Civil Procdures, Article 264.2, and article 245

53 Code of Civil Procdures, Article 264.2(1)

*dental Uttor appeal*⁵⁴. Incidental Uttor appeal is the appeal filed by the appellee which is incidental to the appellant's Uttor appeal. When the appellant files Uttor appeal, the appellee who is an opponent of the Uttor appeal can file the incidental Uttor appeal in order to amend the part of the original judgment which is not beneficial for the appellee.

An Uttor appeal shall be made with the original court (court of the first trial or first instance)⁵⁵. The written Uttor appeal shall contain identity of the parties and an indication of the judgment of court of the first instance and a statement indicating that an Uttor appeal is being filed with regard to such judgment⁵⁶. The written Uttor appeal should include specific grounds for the dismissal or amendment of the judgment of court of first instance. However, if such grounds are not stated in an appeal, the Uttor appellant can file with the Uttor appellate court a written document containing such grounds within thirty days of the filing of the Uttor appeal. Even though the Uttor appellant did not submit such document, the Uttor appeal cannot be deemed unlawful and shall not be dismissed because the grounds for Uttor appeal are not important points to be written in the motion of Uttor appeal⁵⁷.

When receiving a motion of appeal, the appellate court shall examine the motion. If the motion is found to contain defects (contradiction to paragraph 2 of article 265 or the tax on the motion is not yet collected as provided in paragraph 4 of article 61), the court shall order the cure of defects. If the Uttor appellant does not make any remedy to the defect, the Uttor appellate court shall dismiss the motion of appeal via ruling⁵⁸. In case the motion of appeal is lawful, the court clerk shall service the motion to the Uttor appellate defendant. Where the service cannot be done together with the failure to pay the service fee in advance, the motion of that appeal is deemed incorrect in form⁵⁹.

Trial by Appellate Court

In the trial of Uttor appeal, the appellate court shall consider the reasonableness of an appeal against the original judgment and render a judgment by conducting an oral argument only to the extent necessary to adjudicate a party's demand for amendment of the judgment rendered by the court of first instance⁶⁰. The trial at the Appellate Court is a continuation of an oral argument which was concluded once in the trial by the Court of First Instance, so the actions (a motion for facts, a motion for evidence examination, admission ect.) conducted at the court of first instance shall be given effect at the Uttor appellate review⁶¹. Moreover, in the trial of Uttor appeal, the parties shall be granted a

54 Code of Civil Procedures, Article 270.1

55 Code of Civil Procedures, Article 265.1

56 Code of Civil Procedures, Article 265.2

57 Code of Civil Procedures, Article 265.3

58 Code of Civil Procedures, Article 266.1-2

59 Code of Civil Procedures, Article 267

60 Code of Civil Procedures, Article 272.1

61 Code of Civil Procedures, Article 274

chance to advance offensive or defensive measures which was not advanced in the trial at the court of first instance but the acceptance of the offensive and defensive measure unless in contrast to article 108 and article 94 of the Code of Civil Procedures⁶².

The Appellate court shall issue a final judgment regarding the Uttor appeal and incidental Uttor appeal. Where an Uttor appeal is unlawful and the defects cannot be remedied, the appellate court may dismiss [without prejudice] the Uttor appeal via judgment without hearing oral argument. This is called a *judgment dismissing Uttor appeal*⁶³. The appellate court shall deny the Uttor appeal if the judgment made by the court of first instance was appropriate. Even where the judgment of the court of first instance is found inappropriate for the reason given, an Uttor appeal shall be denied if the judgment is appropriate for another reason, which is called a judgment of denial of Uttor appeal⁶⁴.

On the other hand, if the appellate court deems that the judgment of the court of first instance was inappropriate, or a serious procedural error occurred in the trial by the court of first instance, the appellate court shall cancel the judgment of the court of first instance⁶⁵. Where the judgment of the court of first instance was cancelled, the appellate court shall adjudicate the case de novo instead of the court of first instance and in this case, the decision of the appellate court produces two features as follows: reversal of the judgment of the court of first instance, and amendment of the judgment of the court of first instance⁶⁶. The appellate court shall, in cases where it cancels a judgment of the court of first instance which dismissed the unlawful action, return the case to the court of first instance. However, this shall not apply to cases in which no further argument is required⁶⁷. The appellate court may return the case to the court of first instance if further argument is required (in case that there is no consideration of amount of money of the claim etc..) ⁶⁸. Where a case is returned to the court of first instance due to a procedural error in the court of first instance, all proceedings previously carried out in such court in regard to that case shall be automatically cancelled⁶⁹.

Satuk Appeal

A Satuk appeal may be made to the Supreme Court against a final judgment of the Uttor appellate court. Only the *Satuk appellate court* (Supreme Court) has a jurisdiction on the trial of a Satuk appeal called *the final trial*. The Satuk appellate court adjudicates on the merits of final judgment in only legal matters. Since the purpose of Satuk appeal is to protect the party who suffered from damages arose from unfair trial and to achieve a

⁶² Code of Civil Procdures, Article 273

⁶³ Code of Civil Procdures, Article 268

⁶⁴ Code of Civil Procdures, Article 277

⁶⁵ Code of Civil Procdures, Article 279.1

⁶⁶ Code of Civil Procdures, Article 279.2

⁶⁷ Code of Civil Procdures, Article 280.1

⁶⁸ Code of Civil Procdures, Article 280.2,

⁶⁹ Code of Civil Procdures, Article 280.3

common legal interpretation, the party may not file a Satuk appeal on a basis of damages by Uttor judgment as the subject matter of Satuk appeal. Only laws or legal documents are used as the basis for Uttor judgment.

Method of filing Satuk appeal

A Satuk appeal may be made to the Supreme Court against a final judgment of the Uttor appellate court, a final judgment issued the Uttor appellate court in the first trial pursuant to special provisions and a final judgment of the court of first instance in which both parties agree to reserve right to make a Satuk appeal⁷⁰. A Satuk appeal must be filed within one month from the date that service of the written judgment or the original judgment as similarly provided the period for filing an Uttor appeal⁷¹.

A Satuk appeal shall be brought by submitting a written Satuk appeal to the original court (Uttor appellate court or the court of first instance). In this case, the original court shall promptly send the written Satuk appeal and the record of the case to the Satuk appellate court⁷². Apart from identities of the parties and the notion of judgment of 2nd trial, Satuk appellant shall provide the grounds in Satuk appeal against the judgment⁷³.

Where the grounds for Satuk appeal are not provided in the motion, or a written statement of grounds for Satuk appeal is not submitted within 30 days or some defects in Satuk appeal, the Satuk appellate court shall order that such defects be cured within an appropriate period of time, or the Satuk appeal is unlawful and such defects may not be cured, the court shall dismiss the Satuk appeal via a ruling⁷⁴.

Trial of Satuk appeal

The Satuk appellate court shall adjudate on the merits of original judgment or original judgment within the scope of objection only based on the grounds for Satuk appeal legally submitted⁷⁵. In the trial on the merits, the Satuk appellate court shall examine documents such as motion of the appeal, the statement of grounds for Satuk appeal, the initial preparatory document submitted by the appealee and any other documents, and the Satuk appellate court deems that grounds for granting a Satuk appeal do not exist, it may deny the Satuk appeal via judgment without an oral argument⁷⁶. Even if there is an oral argument, the Satuk appellate court shall deny the Satuk appeal if it deems that the grounds for granting a Satuk appeal do not exist. In case, there are appropriate grounds for Satuk appeal, the court shall quash the original judgment, meaning that the Supreme Court cancels the original judgment. After quashing the original judgment, the court shall

⁷⁰ Code of Civil Procedures, Article 283.3

⁷¹ Code of Civil Procedures, Article 286.3

⁷² Code of Civil Procedures, Article 287.3

⁷³ Code of Civil Procedures, Article 289.3

⁷⁴ Code of Civil Procedures, Article 290 and Article 291.3

⁷⁵ Code of Civil Procedures, Article 295

⁷⁶ Code of Civil Procedures, Article 294

not examine and recognize again on the facts of the case. The court shall then remand the case to the original court⁷⁷. A court which receives a case via remand shall conduct oral argument again through procedure of trial at the court level. In this case, factual and legal determinations on which the Satuk appellate court based on its reversal shall be binding on the court to which the case is remanded⁷⁸. This means that the original court may not adjudicate with the same result as the previous judgment based on the law which the Satuk appellate court also used to quash the original judgments. Apart from the reversal on the case which is remanded, the Satuk appellate court may adjudicate the case de novo instead of remanding if there are grounds as stipulated in article 300 of the Code of Civil Procedures.

Chomtoah Appeal

Chomtoah Appeal is a independent and summary process of filing an appeal to the higher courts against a court ruling. The Court ruling is not a judgment of the Courts of First Instance or judgments of the Higher Courts. The Court that conducts the trial of Chomtoah appeal is called a *Chomtoah Appellate court* (It is either an Appeal Court or Supreme Court). The rulings that can be appealed are the one provided in the law including a ruling dismissing a complaint in the case of failure to cure the defects. However, a ruling over Chomtoah appeal can not be appealed by the Chomtoah appeal motion⁷⁹.

A motion and trial of Chomtoah appeal must conform to provisions on Uttor appeal and Uttor appeal proceedings. For the ruling made by the court of first instance as provided in article 263, paragraph 2 of article 265, article 268, article 270, and article 273 can be applied with the Chomtoah appellate court proceedings except to the extent that such provisions are inconsistent with nature of such appeals or procedures⁸⁰. According to the Code of Civil Procedures, provisions on Ottor Appeal or Satuk appeal and its processes respectively shall be applied to Chomtoah appeal⁸¹.

3. Special provisions relation to the litigation proceeding for retrial

Retrial is a method of special objection against a final and binding judgment to request the court to cancel judgment of the courts of first instance or the higher courts and reexamine as well as re-adjudicate the case because of serious defect in the proceedings or irregular defect in the grounds of judgment of the courts of first instance or the higher courts.

⁷⁷ Code of Civil Procedures, Article 299.1

⁷⁸ Code of Civil Procedures, Article 299.2 (2)

⁷⁹ Code of Civil Procedures, Article 259.2-3

⁸⁰ Code of Civil Procedures, Article 304.1

⁸¹ Code of Civil Procedures, Article 304.2

Motion for retrial

Motion for retrial is made against the final and binding judgments of the courts of first instance or the higher courts, and requests readjudication based on grounds of retrial stipulated in the law. A motion for retrial can only be made if i) judgments become final and binding, ii) the action with grounds provided in article 307 and article 308, and iii) a claim shall be within the period provided in first sentence of paragraph 1, and paragraph 3 of article 311.

Adjudication and decision on a motion for retrial

Litigation proceeding for retrial is also a type of proceeding; therefore, provisions on litigation proceedings shall be applied to the trial of motion for retrial pursuant to each level of court. This means that if the retrial is conducted on the judgment of the first trial, the provision on the first trial proceeding shall be applied and if the trial is to be conducted on the judgment of the second trial and judgment of the Uttor appellate court, provisions related to the Uttor appellate proceeding shall also be implemented. Furthermore, if the trial is to be conducted on the judgment of the third trial and judgment of the Satuk appellate court, provisions related to the Satuk appellate proceeding shall be implemented⁸².

When a motion for trial is submitted, the court shall check the merits of the motion and if found illegal, the court shall dismiss the motion via ruling or if the motion for retrial does not contain any grounds for retrial, the court shall deny the motion for retrial via a ruling called adjudication and decision on the merits of request for retrial. This ruling can be appealed but in the case of final denial ruling, parties can no longer file a motion for retrial⁸³. However, if there are grounds for retrial, the court shall issue a ruling to begin the trial and such ruling can be appealed by the defendant⁸⁴.

When the ruling to begin a retrial becomes final and binding, the court shall adjudicate and decide on the action concluded by the the judgment by the court of first instance or appellate court or the supreme court pertaining to the extent of objection⁸⁵. This trial is called *trial on the merits* which is to retry the previous action. Depending on the result of the adjudication, if it's found that the judgments by the court of first instance or appellate court or the Supreme Court are incorrect, the court shall cancel the judgments in scope of objection and issue another judgment instead⁸⁶. On the other hand, if the judgment is correct, the court shall issue a judgment denying the motion for retrial even though the grounds for retrial exist⁸⁷.

82 Code of Civil Procdures, Article 310

83 Code of Civil Procdures, Article 314

84 Code of Civil Procdures, Article 315.1

85 Code of Civil Procdures, Article 316.1

86 Code of Civil Procdures, Article 316.3

87 Code of Civil Procdures, Article 316.2

III. Compulsory Execution

1. Main Forms for Execution

The procedure through execution for an entitlement of right provided by the Civil Code is called *Compulsory Execution*. This procedure aims at achieving a final decision on claim rights of a private individual. Therefore, first of all, the benefits of the creditor in execution shall be considered and protected, and the procedure shall be carried out smoothly and promptly.

The compulsory execution shall be carried out through an organ called *execution organs* as an independent of judicial power, and this organ consists of *an execution court and a bailiff*, both of which have different characteristics in term of subject matter of compulsory execution and type of execution⁸⁸. The execution court has a duty to conduct a compulsory execution and to involve in the proceedings of compulsory execution. The court of first instance shall be determined as an execution court⁸⁹. The bailiff functions within an independent jurisdiction in charge of serving documents issued by the court and carries out the compulsory execution as provided by the law. Apart from the Code of Civil Procedure, the bailiff shall be governed by a separate law⁹⁰.

In the compulsory execution, the party who files a motion for compulsory execution called *Creditor in Execution*, and another party in execution is called *Debtor in Execution*⁹¹. The debtor in execution consists of the third party who secures the object or right for the debts of the debtor, in case of security interest execution.

Properties as the subject matter of execution are called *Properties in Liabilities*. The property which the debtor shall be liable in compulsory execution is owned or possessed by the debtor. However, in the case of execution against security interests, the property being the subject matter of execution is limited to the subject matter of security interests only. In principle, even though all properties belonging to the debtor in execution become the property in liabilities, in case of special reason, particular objects or rights shall be exempted from the properties in liabilities such as: clothes, foodstuffs, salary or wage etc., whose attachment is prohibited by law⁹². Moreover, the legally transferred property to which the transferee has filled all conditions before the compulsory execution is not the property in liability of the debtor, except the debtor transferred its property in perceiving that the transfer would cause damage to the creditor, the creditor may rescind the transfer in order to make a restitution of the property in liability and advance the property as the subject matter of execution through the right of rescission against acts harming the

88 Code of Civil Procedures, Article 336.2

89 Code of Civil Procedures, Article 336.3

90 Currently, the prosecutor is empowered to play a role of a bailiff

91 Code of Civil Procedures, Article 347

92 Code of Civil Procedures, Article 380 and Article 382

creditor⁹³. Besides this, there is a case in which the property in liability is limited in its scope, and the compulsory execution may not be carried out against other properties of the debtor. For example, in a case that the successor (debtor) agrees on succession to a certain extent, the property shall only be in the scope of heritage and the creditor of the deceased may implement on the successor within only the scope of heritage⁹⁴.

Compulsory execution can be conducted in the following conditions:

1. Submit the written motion for execution of the creditor in execution to the competent execution organ (execution court or bailiff) according to the form in article 349 of the Code of Civil Procedure and other points requiring additional writing depending on types of execution procedures such as some certified documents relating to the subject matter of execution provided in article 403, article 417 paragraph 3, and article 455 paragraph 3.
2. Authenticated copy of enforceable title of execution.

The compulsory execution shall be conducted according to the title of execution⁹⁵. The title of execution is the document which certifies the claim rights of delivery of any specific payment determined under the private law, and the document may achieve the claim rights through the compulsory execution. The title of execution consists of a decision of the court (judgment or *Uttor* or *Satuk* judgment or ruling) and *other records in the court proceedings which carry the same effect as the court's decision. The notarized documents made by the Notary based on the statement of the party and has fulfilled some conditions of claims and the management of clerk on the final determination of the court fee*⁹⁶. Receiving the title of execution, may not immediately effect the compulsory execution. Instead, the compulsory execution shall be made on the basis of the authenticated copies of the title of execution attached with an execution clause, except in the judgments of small claim actions⁹⁷. The execution clause is the sentence which is additionally written and certified by the clerk or the Notary in the lower part of the authenticated copy of title of execution which certifies officially the existence and meaning of the power of compulsory execution of the title of execution. To obtain an execution clause, the creditor in execution shall file a written motion and write a number of points as stipulated in article 355, paragraph 1. However, if the title of execution is a decision with no effect and is not yet a final decision, the creditor shall attach with the certified finalization of the decision (the certified petition of the final judgment according to article 258 paragraph 1)⁹⁸. On the contrary, if the claim rights determined in the title of execution attached with a suspending condi-

93 Civil Code, Article 428

94 Civil Code, Article 1256 and 1258.1

95 Code of Civil Procedures, Article 350.1

96 Code of Civil Procedures, Article 350.2

97 Code of Civil Procedures, Article 354.1

98 Code of Civil Procedures, Article 355.2

tion or an uncertain time stipulation or the compulsory execution determining the person other than the person in the title of execution to act as the creditor in execution and the debtor in execution, it would then be necessary to have used another execution clause called *Special Execution Clause*⁹⁹. In principle, the execution clause shall be granted only one copy. But in the case that the objective can be fully achieved, only if the execution is implemented in many ways such as execution on many places or against movable and immovable properties based on one title of execution. The creditor is necessary to ask for many execution clauses¹⁰⁰. So, to apply the compulsory execution, it is necessary to file a motion for the compulsory execution attached with the authenticated copies of enforceable title of execution which have an effect to apply (authentic documents attached with the execution clause).

2. Types of Execution

There are 2 types of Compulsory Execution: execution of claims for monetary payment (this type includes the execution of security interests), and execution of claim right of non-monetary objects. Methods of execution of claim rights include: direct execution, substituted execution and indirect enforcement.

Execution of claims for monetary payment

The compulsory execution to collect money from the properties of the debtor to achieve the claim rights are called *execution of claims for monetary payment*. The flow of proceedings of execution of claims for monetary payment is attachment, change into money, and allocation. To achieve the execution of claims for monetary payment, the compulsory execution against the property of debtor includes the movable properties, immovable properties and the right on debt or the right on other properties and vessel. On the other hand, in this guide book, the compulsory execution against vessel is not mentioned.

1. Compulsory execution against movable properties is provided from article 384 to article 401, and method of execution is applied through attachment by the bailiff. The attached object shall be sold by means of putting up on sale (face to face or by envelope) with proceeds allocated to the creditor and for procedural fees. The rest of the money shall be handed over to the debtor in execution¹⁰¹.
2. Compulsory execution against the claims or right on other properties is the execution to achieve a claim right for monetary payment of the creditor by means of attachment in claims for money (bank account or income from the house rent) are called *collection*

⁹⁹ Code of Civil Procedures, Article 356.1-3

¹⁰⁰ Code of Civil Procedures, Article 358

¹⁰¹ Code of Civil Procedures, Article 398 and Article 399

suits or handover of movable properties of the debtor possessed by the third party¹⁰². The compulsory execution against claims is provided from articles 402 to 416 of the Code of Civil Procedure; the method of execution shall be complied with a ruling of attachment of the execution court. Where a ruling of attachment becomes effective, the debtor in execution may not collect rights on the debt under attachment or clearance, or other managements such as transfer, exemption, or payment etc.. the third party debtor shall be forbidden from paying off the debt to the debtor in execution. In case the third party debtor has paid the debtor in execution without caring about the effect of a ruling of attachment, the third party debtor shall pay again if the creditor in execution demands later to collect claims under attachment¹⁰³. Normally, the claims which were attached, the execution court shall allocate to the person without putting on sale, but in a particular case, the court may order the bailiff to sell the claims which have been attached upon a motion of the creditor in execution¹⁰⁴.

3. The execution against immovable properties is a complicated proceeding and is provided from article 417 to article 453 of Civil Procedure Code. The compulsory execution against immovable properties shall be made by means of compulsory sale; in such the execution court makes an attachment of immovable properties of the debtor in execution, and sell the immovable properties to pay for the claims. Compulsory sale shall commence with a ruling of compulsory sale rendered by the execution court upon a motion of the creditor in execution, and then the execution court shall make an attachment of the immovable properties¹⁰⁵. After the attachment, the court shall determine the means of sale, date and the place of sale, and order the bailiff to carry out the sale procedure and determine a request of purchase with an offer at a minimum price¹⁰⁶. Then the court shall render a ruling to permit for sale or no sale, and when the ruling becomes final and binding, the execution court shall determine the date which the buyer is to make payment. After receiving the payment, the execution court shall determine the date for allocation¹⁰⁷.

Execution against security interest

Execution against security interest is regarded as a kind of compulsory execution of claims for monetary payment which, in principle, shall comply with general provisions of compulsory execution provided in chapter 1, book 6 of Civil Procedure Code. Similarly, compulsory execution shall be based on the title of execution as stipulated in article 350, but the execution against security interest shall be based on the title of execution (1) the first trial judgment or final *Uttor* or *Satuk* judgment which certifies the existence of se-

102 Code of Civil Procedures, Article 402.1

103 Code of Civil Procedures, Article 403.5

104 Code of Civil Procedures, Article 413

105 Code of Civil Procedures, Article 419.1

106 Code of Civil Procedures, Article 436 and Article 439

107 Code of Civil Procedures, Article 440 and Article 447

curity interests (the judgment granting a complaint of a claim for an action claiming the existence of security interests) or the petitions carrying the same effect as the first trial judgment or the final Uttor or Satuk judgment (the record acknowledging a claim for an existence of mortgage) and (2) the notarized document has been made by the notary certifying the existence of security interests (mortgage agreement)¹⁰⁸. Determination of procedure of execution against security interests shall depend on specific kinds of property which is the subject matter of security interests and this includes the execution of security interests against movable properties, claims and rights on other properties including the execution of security interests against immovable properties.

Enforcement of Security Interests against Movable Properties

According to the Code of Civil Procedures, the security interests against movable properties as a subject matter include statutory lien on movable properties and pledge. The procedures of execution of security interests against movable properties shall commence with attachment of movable properties which is the subject matter of execution by the bailiff similar to the procedure of compulsory execution against movable properties (the sale of movable and allocation). But regarding the pledged movable, the law specially provides a simple procedure for enforcement meaning that the owner of pledged movable may file a motion to the court of first instance at the place of execution to render a ruling to permit and take the pledged properties as a payment owed by the pledgee at once, the obligation of this enforcement called summary enforcement of pledge¹⁰⁹.

Execution of Security Interests against Claims and Other Properties

Execution of Security Interests against claims refers to the right on debt (claims) requiring monetary payment or handover of movable properties as determined in paragraph 1 of article 402 and there are special provisions on the execution of claims by subrogation. The execution by subrogation means that a person with security interests may exercise their rights on money or other things which the debtor receives from selling or renting instead of the original subject matter of security interests pursuant to the provisions in articles 782, 817 and 849 of the Civil Code¹¹⁰. Execution of Security Interests against claims and other properties and the subrogation shall commence with a ruling of attachment by the execution court as the compulsory execution against claims in paragraph 4 of article 403¹¹¹. In the procedure of converting the claims and other properties into money and the subrogation which have been attached shall comply with the same procedures as the compulsory execution against claims. On the contrary, the subrogation may be applied by means of changing claim rights of handover into money as provided

108 Code of Civil Procedures, Article 496

109 Code of Civil Procedures, Article 504

110 Code of Civil Procedures, Article 506

111 Code of Civil Procedures, Article 508

in article 414 or ordering for sale in article 413 according to types of rights which is the subject matter of subrogation.

Enforcement of Security Interests against Immovable Properties

Security Interests against immovable properties refers to mortgage, pledge of immovable, and statutory lien on immovable properties or general statutory lien effective on immovable properties. The enforcement of security interests shall be applied by means of compulsory sale against immovable properties, except in the special provisions. In the method of compulsory sale of the immovable, if registered, such as real right to usage and outcome together with the immovable as the subject matter, the issue shall be what to do. In such case, the right to usage and production which may clash with (the first class creditor of mortgage) the security interests of the creditor in execution shall continue its existence after the compulsory sale. Other rights together with the immovable may not be encountered (the second class creditor of mortgage) with security interests of the creditor in execution shall terminate after the compulsory sale¹¹². On the other hand, in the case where there is a motion for compulsory sale applied on the overlapped security interests, and if the court accepts the motion for the enforcement of security interests, then the court shall render a new ruling of commencement of compulsory sale¹¹³. Based on the Civil Code, when any immovable properties are attached to enforce the security interests, the effect of security interests against the immovable shall be active on the produces from the attachment date thereof¹¹⁴. Therefore, the Civil Procedure Code has provided the supplementary procedure of compulsory sale, and the procedure which the owner of security interests may achieve the effect of right. This means that the immovable which is the subject matter of security interests has been leased. The law permits the creditor in execution to file a motion for attachment of the income from the rent as stated in article 516, and after the attachment, the creditor may receive payment by a priority and the income from the rent.

Execution of Claim Rights of Which the Subject Matter Is Not Money

The content of execution of claim rights of which the subject matter is not money refers to the compulsory execution of claim rights of the handover of a tangible object (movable and immovable) which is the transfer of the direct possession to the creditor or the third party and the compulsory execution against claim rights to act or not to act. Through the compulsory execution against claim rights, the handover of a tangible object shall comply with the direct enforcement, whereas the compulsory execution against claim rights to act or not to act shall comply with an indirect enforcement or a substituted execution.

112 Code of Civil Procedures, Article 510

113 Code of Civil Procedures, Article 512

114 Code of Civil Procedures, Article 848

Compulsory execution of right to claim for tangible objects

Compulsory execution of right to claim for tangible objects refers to an execution through delivering (transferring the direct possession) of movable or immovable properties of the debtor in execution called the *direct execution*. In the compulsory execution against the immovables, the bailiff shall dispossess the debtor of execution of the subject matter and have the creditor in execution take possession thereof. However, in order to achieve this objective, the bailiff shall order the debtor to leave and in case the debtor does not agree to leave, the bailiff may use force or request the assistance of police if necessary as stipulated in article 338, paragraph 1¹¹⁵. Where the compulsory execution against the movables shall be made by the bailiff and the movable properties from the debtor shall be confiscated and handed over to the creditor in execution¹¹⁶. If a third party is in possession of the subject matter of the execution set fourth in the title of execution in possession, the compulsory execution based on the execution title may not be carried out against the persons other than the debtor in execution, except the title of execution has effect on the third party as stipulated in article 351. Though in such case, if the third party (possessor or third party debtor) holding the property which is the subject matter of the compulsory execution and in a case that the object shall be handed over to the debtor in execution, compulsory execution of delivery may be made through the method of withdrawing rights to delivery of the debtor in execution against the third party and permit the creditor in execution to exercise the said right to demand delivery. In contrast, even if the creditor made a claim, the third party refuses not to deliver, the creditor in execution may file a claim for the handover of the object which the third party is the defendant through the suit regarding a collection of debts as stipulated in article 412 and in article 524 and 525 regarding the compulsory execution by using a judgment of the Courts of First Instance or higher courts, where the creditor in execution win, as the title of execution¹¹⁷.

The compulsory execution of claim rights to act

The compulsory execution of claim rights to act such as: the dismantlement of building and constructions on the land may be made through the method of substituted execution. The substituted execution is a method which permits the creditor or the third party to achieve the substituted payment of the debtor and collect fee from the debtor. This method may be applied with only the obligations of substituted execution. The claim rights to act through the substituted execution refer to the claim rights in which an activity which is the objective of payments can be satisfied by other persons. Such activities include cutting trees, destruction of the building, or goods delivery. Nevertheless, some cases may not be made through the substituted execution such as film performances or drawings so there is only compulsory execution which uses the indirect enforcement.

115 Code of Civil Procdures, Article 524.1,

116 Code of Civil Procdures, Article 527.1,

117 Code of Civil Procdures, Article 526.1,

Upon motion by the creditor in execution, substituted execution be effected by the execution court's making a ruling permitting the said creditor to have the act performed by a third party in lieu of the debtor in execution, at the expense of said debtor¹¹⁸. This ruling is called *a ruling for authorization* and when the court issues this ruling, the competent court may order the debtor in execution to make payment in advance to the creditor in execution of the costs of performing the act prescribed in the ruling¹¹⁹.

The compulsory execution of claim rights not to act

The compulsory execution of claim rights not to act shall comply with the indirect enforcement. The indirect enforcement is a method which puts psychological pressures on the debtor to force implementing their obligations through a motion by the creditor in execution to the court to issue a ruling of indirect enforcement based on the title of execution in effect, specifying the claim rights to act which can not be substituted, or not to act. If the court accepts the motion, the court shall issue a ruling ordering the debtor in execution to pay the specified amount of money to the creditor in execution in lieu of the date or month of being late for payment, or to pay the specified amount of money at once if the debtor in execution has not acted properly within the time set by the court¹²⁰. For instance, the debtor in execution does not agree to carry out the obligations in starring or drawing etc. The debtor shall pay the creditor in execution in amount of money \$ 100 per day.

IV. Preservative Relief

Preservative relief is the proceedings in purpose of preserving the present situation through using state's power to protect any person's rights if there is an apprehension that the compulsory execution will become impossible or extremely difficult by reason of alteration of the state of the property of the debtor in execution, or that significant damage or imminent risk will arise affecting the status of one of the parties in relation to the right in dispute¹²¹. The preservative relief is the disposition through provisional attachment and provisional disposition (provisional disposition of subject matter of dispute and provisional disposition establishing a provisional status). There are two stages in the procedure of preservative relief such as: the ruling of preservative relief and the execution of preservative relief.

118 Code of Civil Procedures, Article 527.1

119 Code of Civil Procedures, Article 527

120 Code of Civil Procedures, Article 527

121 Code of Civil Procedures, Article 530

1. Types of Preservative Relief

Provisional attachment

The provisional attachment may be made through the ruling of provisional attachment by the court upon a motion of the issuance of the ruling of preservative relief against a claim having as its subject matter the payment of money even in cases where the claim is subject to a condition or determined period, the court may issue a ruling of provisional attachment as well (the guarantor's claim right of future payment)¹²².

Provisional disposition

There are two types of provisional disposition: provisional disposition of subject matter of dispute and provisional disposition establishing a provisional status¹²³. i) The provisional disposition is a method in which the court orders the debtor to act as determined by the court or prohibits not to act (ordering the removal of construction, the prohibition of building, or the prohibition of sale etc.), ii) Ordering the debtor to grant payments which is the ordering to act through direct enforcement, such as handover or payment of the monetary amount, and iii) Ordering for maintenance of the status quo of the subject matter of the dispute (transferring the possession of an object of the subject matter of the dispute from the debtor in execution to the custodian)¹²⁴.

2. Flow of the Proceedings of Preservative Relief

Ruling of Preservative Relief

The proceedings of preservative relief shall be conducted with a motion called *a motion for a ruling of preservative relief*¹²⁵. The motion shall include the particular points as stipulated in article 541 attaching with the certificate of preservation needs and right or the legal relationship to be preserved, and the motion shall be submitted to the competent court as stipulated in article 540. When the motion for a ruling of the preservative relief is submitted, the court shall review the motion for a ruling of preservative relief, but the ruling of preservative relief may be rendered without the prior oral argument except for the rulings of preservative relief in dispositions establishing a provisional status¹²⁶. If the court deems that the motion is appropriate, the court shall render a ruling of preservative relief and serve a ruling to the party¹²⁷ but if the motion is inappropriate, the court shall dismiss the motion for a ruling of preservative relief.

122 Code of Civil Proccures, Article 545

123 Code of Civil Proccures, Article 531

124 Code of Civil Proccures, Article 549

125 Code of Civil Proccures, Article 534

126 Code of Civil Proccures, Article 548

127 Code of Civil Proccures, Article 543

For this ruling, the creditor may make a Chomtoah appeal against a decision to dismiss a motion for preservative relief within two weeks of receiving notice thereof¹²⁸. The ruling of preservative relief may not be subject to an immediate Chomtoah appeal. However, a motion of objection may be filed with the court that has rendered the ruling at any time without being subject to a statute of limitation¹²⁹. Even if there is a motion of objection, the motion may not postpone the effect of a ruling of preservative relief automatically. There shall be another provisional ruling ordering a suspension of the execution of preservative relief, or cancellation of the preservation relief¹³⁰. In the trial on the motion of objection, the court shall make an oral argument or inquire both parties about appearing in court and the court shall decide the date to conclude a trial within a proper period. However, the court may declare instantly that the conclusion of a trial at the date of an oral argument or the date of inquiry on both parties who can appear¹³¹. The court shall decide on the motion of petition by recognizing the alteration and cancellation of the ruling of preservative relief. This means that if the court deems that the ruling of preservative relief is appropriate, the court shall render a ruling to recognize that ruling; if not, the court shall alter any part of the ruling and render a ruling of alteration or the court shall cancel the ruling of preservative relief¹³². The ruling cancelling a preservative relief ruling shall have no effect until it becomes final and binding, and if necessary the court may declare the ruling to have an immediate effect¹³³. Besides cancellation of a ruling upon an objection, the ruling of preservative relief shall be cancelled in cases where: i) cancellation of ruling of preservative relief due to failure to file suit in the principal case, ii) cancellation of preservative relief due to change of circumstances, and iii) cancellation of ruling of provisional disposition due to special circumstances as stipulated in article 557, article 558 and article 559.

The execution of preservative relief

The ruling of preservative relief shall have immediate effect. Therefore, the execution of preservative relief may be made with no execution clause but if the execution of preservative relief is against another person rather than the person prescribed in the ruling of preservative relief, an execution clause (Special Execution Clause) shall be separately attached¹³⁴. The execution of preservative relief shall be carried out in the same manner as the compulsory execution, except in contravention with the execution of preservative relief¹³⁵.

128 Code of Civil Procedures, Article 544

129 Code of Civil Procedures, Article 550

130 Code of Civil Procedures, Article 551

131 Code of Civil Procedures, Article 552

132 Code of Civil Procedures, Article 554

133 Code of Civil Procedures, Article 556

134 Code of Civil Procedures, Article 562

135 Code of Civil Procedures, Article 564

V. Conclusion

In conclusion, the Code of Civil Procedures has set out three basic frameworks for civil case processes in Cambodia which can be considered to be the most modern civil procedure in this century. These three processes include i) litigation proceedings which determine the existence or nonexistence of right or legal relationship between private individuals by rendering a judgment; ii) compulsory execution procedures in which rights are ultimately decided; and iii) procedures of preservative relief which ensure the future exercise of rights when parties win the case.

However, since the code is new and complicated to a certain extent, particularly in terms of terminology and legal procedures, problems of implementation cannot be avoided. Therefore, there is a need to conduct an assessment study to identify the best practices and challenges in order to strengthen and improve the law's implementation and its enforcement.

CAMBODIAN ALTERNATIVE DISPUTE RESOLUTION

Steven AUSTERMILLER

CONTENTS

I. Introduction.....	183
II. Negotiation.....	183
1. Cambodian Negotiation.....	184
2. Negotiation Conclusions.....	185
III. Mediation.....	185
1. Cambodian Mediation	187
2. International Comparisons in Mediation	189
3. Mediation Conclusions	190
IV. Arbitration	190
1. Cambodian Arbitration	191
2. International Arbitration	194
3. Arbitration Conclusions	194

Cambodian Alternative Dispute Resolution*

Steven AUSTERMILLER**

I. Introduction

ADR stands for Alternative Dispute Resolution. It refers to the various ways parties can settle disputes outside of the traditional, court-centered adjudication system. ADR encompasses many forms of dispute resolution, some of which are common and some of which are quite new. Arbitration, negotiation and mediation are the most common forms of ADR. In Cambodia, informal ADR has been practiced for centuries. However, until recently, ADR was never formally part of the official dispute resolution regime. Now, with a number of new laws passed, Cambodia has begun to incorporate ADR techniques into its legal system. This article will focus on how these three main forms of ADR have been incorporated into the Cambodian legal system and whether they meet international standards.

II. Negotiation

Negotiation is the process of back and forth communication, whereby parties submit and consider offers until an offer is made and accepted.¹ Negotiation is the most common form of dispute resolution process in the world, found both in civil law and common law jurisdictions.

Many jurisdictions favor negotiated settlement. Because most jurisdictions have significant case backlogs, one way to resolve disputes in a timely manner is to encourage the parties to discuss their disputes among themselves and try to reach an agreement. In the U.S., for instance, 90% of all cases are resolved by ADR,² and negotiation is the most popular form of ADR. In Cambodia, a World Bank survey of small firms found that negotiation was the most preferred method of dispute resolution.³ This should not be surpris-

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** Mr. Steven AUSTERMILLER is currently the American Bar Association's Legal Education Advisor in Cambodia.

1 *Gainey v. Brotherhood of Railway and S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 275 F. Supp. 292, 300 (E.D. Pa. 1967).

2 SUSAN PATTERSON AND GRANT SEABOLT, *ESSENTIALS OF ALTERNATIVE DISPUTE RESOLUTION* 5 (2nd ed., 2001).

3 *The Provincial Business Environment Scorecard in Cambodia: A Measure of Economic Governance and Regulatory Policy*, World Bank/IFC-MPDF and AusAid/The Asia Foundation, 40 (2007)[here-

ing to anybody who has spent time in Cambodia. Negotiations are common everywhere, from purchases at the market to resolution of high-level land disputes.

1. Cambodian Negotiation

The new Code of Civil Procedure of the Kingdom of Cambodia (CCP-KC) explicitly emphasizes negotiated settlement throughout the litigation process. Article 97 provides that “the court may attempt to effect a compromise settlement at any stage of the litigation.”⁴ Article 220 provides for the same, but with the emphasis on the parties.⁵ It says “[t]he parties may effect a compromise settlement of the action on a date set for oral argument, preparatory proceedings for argument or compromise.”⁶ The compromise may even be entered into *outside* the courtroom.⁷ Article 104 goes further and requires that “at the preparatory proceedings for oral argument, the court *shall* first seek to effect a compromise settlement...” [emphasis added].⁸ Under these articles, the court may encourage the parties to negotiate or may take a more active role, in which case the court intervention would be as a mediator.

If the parties successfully complete their negotiations, the CCP-KC provides that their settlement agreement can be treated as a judgment for enforcement purposes. The negotiated settlement agreement can be converted into a *judicial compromise* that is recorded in the court protocol (court record).⁹ Once all required steps are completed, this *judicial compromise* can be enforced like a court judgment.¹⁰ This means that if one party fails to abide by the terms of the parties’ agreement (such as making a required payment), the other party may petition the courts to enforce the agreement without having to re-litigate the merits of the dispute. If a party has breached the *compromise*, the aggrieved party should find the enforcement of that agreement expedited by the courts. Without this *judicial compromise* feature, the aggrieved party would have to file a new breach of contract lawsuit in the general civil courts. This should contribute to enforcement efficiency.

However, a *judicial compromise* is not sacred. Under the CCP-KC, a *judicial compromise* can be undone for fraud (and presumably misrepresentation or duress) in connection with either party’s declaration of intention in the agreement.¹¹ Therefore, a party

inafter Business Environment Scorecard]. The survey found that 92% of Cambodian firms choose negotiation as their top dispute resolution option. In contrast, only 1% of firms cited local courts as their most common dispute resolution method.

4 CODE OF CIVIL PROCEDURE OF THE KINGDOM OF CAMBODIA, 55 Official Gazette of Kingdom of Cambodia 5296, 5336, art. 97 (2006) [hereinafter CCP-KC].

5 CCP-KC, art 220.

6 *Id.*

7 *Id.*

8 *Id.* art. 104.

9 *Id.* art. 222.

10 *Id.*

11 TEXTBOOK ON CODE OF CIVIL PROCEDURE OF KINGDOM OF CAMBODIA, Working Group on the Code of Civil Procedure of Cambodia, Book Three, Ch. Four, Section II (V)(3)(a) at 110 (2007) [hereinafter CCP-

can invalidate its *compromise* and block its execution if it can successfully prove fraud¹² (or, presumably, misrepresentation or duress).

If the parties to a dispute are not in a formal lawsuit, they can still settle. However, their settlement agreement cannot become a judicial compromise and does not enjoy any special enforceability characteristics. The parties' settlement agreement is merely a contract that must be enforced with a breach of contract lawsuit in the general civil courts.¹³ Of course, a party can void a negotiated settlement if she can prove that the other side engaged in duress or fraud in order to induce her to enter into the settlement.¹⁴

As a result, these rules create an incentive for parties to file a complaint first and then try to settle the issues, so that the parties can claim a judicial compromise and enjoy the benefits of expedited enforceability. If they settle their disputes too soon, without resort to court action, they risk a more difficult future settlement enforcement process. In other words, there is a pre-litigation dis-incentive to settle.

2. Negotiation Conclusions

In general, these are excellent rules that will serve to encourage private negotiation between disputing parties. Since this is in the Cambodian state's interest as well as the parties' interests, these rules constitute good public policy. In addition, these rules are consistent with Cambodia's tradition of private negotiation of disputes.

These rules are similar to those of developed countries, where the policy is to encourage out of court settlement, where possible. Anecdotal evidence indicates that judges in the US and Europe, however, take a more systematic and proactive approach to settlement, whereas in Cambodia, the judges do not emphasize settlement as much.

III. Mediation

The second major form of ADR is called *mediation*. Mediation can be broadly defined as assisted or facilitated negotiation.¹⁵ Mediation usually involves two or more disputing parties attempting to negotiate a settlement with the assistance of a third party, the mediator, who is neutral towards the parties and the outcome. The mediator does not have

KC COMMENTARY].

12 *Id.*

13 CIVIL CODE OF THE KINGDOM OF CAMBODIA, art. 724 (2008)[hereinafter CC-KC]; CCP-KC COMMENTARY, *supra* note 11, at Book Three, Ch. Four, Section II (V)(1), p. 108.

14 See DECREE 38 ON CONTRACTS AND OTHER LIABILITIES, arts. 6 – 10, [hereinafter Decree 38]. Under Article 10, acts of deception, dishonesty, or misrepresentation can constitute a fraudulent act sufficient to void a contract such as a settlement agreement. In general Cambodian contract law, this can be called rescission based on fraud, misrepresentation or duress. See also CC-KC, *supra*, note 13, at arts. 347 – 349.

15 Patterson et al., *supra* note 2, at 53.

authority to impose a settlement. Rather, the parties retain the authority to decide whether or not to settle. In a mediation session, the mediator typically 1) listens to each party, 2) encourages each party to listen and consider compromise, 3) assists in the exploration of creative solutions, 4) helps the parties understand the facts and law as viewed by a neutral, and when appropriate, 5) helps develop the specific items in a settlement agreement.¹⁶

The term *mediation* and the term *conciliation* have been confused over the years, even by legal and judicial professionals and academics. Today, *mediation* and *conciliation* are often used interchangeably to refer to the same process. Although some have tried to draw a distinction, there is no common international legal authority defining how the terms might differ.¹⁷ Although the term *mediation* is found internationally, *conciliation* is the term most commonly used in international documents. For example, the UNCITRAL Model Law on International Commercial Conciliation (the “UNCITRAL Conciliation Law”)¹⁸ uses the term “conciliation” to refer to all types of proceedings where a neutral person or persons assists parties to reach an amicable settlement, including mediation proceedings.¹⁹

In contrast, mediation is the term most commonly used in the American legal system, with the term conciliation falling out of use. An example would be the American Uniform Mediation Act.²⁰ Both terms refer to a negotiation process facilitated by a neutral third

16 STEVEN AUSTERMILLER, *ALTERNATIVE DISPUTE RESOLUTION: CAMBODIA, A TEXTBOOK OF ESSENTIAL CONCEPTS* 82 (American Bar Assoc., 2009).

17 In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) states that there is considerable confusion in both Australia and elsewhere regarding these terms. *See generally*, NADRAC Terminology Discussion Paper, *available at* <http://www.nadrac.gov.au/agd/www/Disputeresolutionhome.nsf/Page/RWP7E251CA71B8E7700CA256BD100135550?OpenDocument> (last visited Oct. 19, 2008).

18 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, U.N. GAOR, 57th Sess, Supp. No. 17, U.N. Doc. A/57/17, Annex I, art.9 (2002) *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html (last visited September 28, 2011) [hereinafter UNCITRAL Conciliation Law]. UNCITRAL stands for United Nations Commission on International Trade Law. The UNCITRAL Conciliation Law is the UN’s effort at recognizing the growing interest in mediation and in promoting non-contentious methods of dealing with disputes. Luis M. Diaz & Nancy A. Oretskin, *The U.S. Uniform Mediation Act and the Draft UNCITRAL Model Law on International Commercial Conciliation*, in *INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 2002*, at 791, 797 (PLI Litig. & Admin. Practice Course, Handbook Series, Order No. H0-00GP, 2002). It also represents an effort to provide uniform mediation rules across various countries, especially in emerging commercial fields like Internet disputes. GUIDE TO ENACTMENT AND USE OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, ¶ 17 (2002) [hereinafter UNCITRAL Conciliation Guide]. In this author’s experience, the UNCITRAL Conciliation Law has gained widespread acceptance and many transitional countries have looked to it as an appropriate model. This may be due to the fact that the UNCITRAL Working Group was composed of representatives from a wide range of countries and legal traditions.

19 UNCITRAL Conciliation Guide, *supra* note 18, at ¶ 7; Diaz & Oretskin, *supra* note 18, at 797.

20 UNIFORM MEDIATION ACT (amended 2003), *available at* <http://www.law.upenn.edu/bl/ulc/mediat/2003finaldraft.pdf> (last visited September 28, 2011) [hereinafter UMA]. This was the result of collaboration between the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and a drafting committee of the American Bar Association. *See* Diaz & Oretskin, *supra* note 18, at 793. It was completed and approved in 2001. The purpose of the

party. In different countries and traditions, there is wide variation in the process and in the level of involvement by the neutral.²¹ In some traditions, the neutral is given freedom to actively promote settlement through private meetings with parties (sometimes called caucuses) and through suggesting specific solutions.²² In other traditions, the mediator or conciliator takes a more passive approach and allows the parties to control the process. Both approaches are valid and for the purposes of this article, the term *mediation* is used to refer to either conciliation or mediation. However, when a specific law uses the term conciliation, that term will be used.

1. Cambodian Mediation

In Cambodia, mediation has always played an important role in society. According to one report, “Cambodian culture and its legal system has traditionally favored mediation over adversarial conflict and adjudication. Thus compromise solutions are the norm...”²³ For example, family disputes were historically mediated by other family members or respected local leaders. Today, mediation continues to play an important role in Cambodian dispute resolution. A World Bank survey of small firms in Cambodia found that mediation was the most preferred method of dispute resolution after negotiation.²⁴

As a result of mediation’s importance to Cambodia, the national legal framework has evolved to include many mediation options and parties to a dispute can seek assistance

UMA is to provide uniformity in mediation laws throughout the United States. The UMA Prefatory Note indicates that legal rules affecting mediation in the United States can be found in more than 2,500 statutes, many of which could be replaced by this Act. UMA, at Prefatory Note, § 3. Ten American states (Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington) and the District of Columbia have already adopted the UMA and the UMA has been introduced as legislation in four others. See NCCUSL website at <http://uniformlaws.org/Default.aspx> (last visited September 28, 2011). In 2003, the UMA was amended to incorporate by reference the UNCITRAL Conciliation Law for international proceedings under the UMA. See 2003 AMENDMENT TO THE UNIFORM MEDIATION ACT, § 11.

- 21 *Id.*; M. Jagannadha Rao, *Concepts of Conciliation and Mediation and Their Differences* (2002) (compares the terms conciliation and mediation as used in India), available at http://1.1.1.1/472008168/472002888T08053111635.txt.binXMysM0dapplication/pdfXsysM0dhttp://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf (last visited Oct. 19, 2008).
- 22 There is authority in some countries to define conciliation as the process where the neutral takes a more active, solution-proposing role, while mediation is defined as the process where the neutral engages in a more passive, facilitative role. See, e.g., *Dispute Resolution Terms*, National Alternative Dispute Resolution Advisory Council (Australia) at 3 (2003), available at [http://1.1.1.1/467929504/472002888T080531121212.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~1Report8_6Dec.pdf/\\$file/1Report8_6Dec.pdf](http://1.1.1.1/467929504/472002888T080531121212.txt.binXMysM0dapplication/pdfXsysM0dhttp://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~1Report8_6Dec.pdf/$file/1Report8_6Dec.pdf) (last visited Oct. 19, 2008).
- 23 United States Department of Commerce, *Country Commercial Guide for Cambodia*, 53 (2006). See also, United Nations Conference on Trade and Development (UNCTAD) and International Chamber of Commerce (ICC), *An Investment Guide to Cambodia: Opportunities and Conditions*, 46, UNCTAD/IIA/2003/6 (Sept. 2003).
- 24 Business Environment Scorecard, *supra* note 3, at 40. The survey found that local firms choose mediation as their second best option, far ahead of court litigation.

from a variety of sources. In family disputes, parties can seek mediation assistance from the Ministry of Interior's officers or from the local Commune Councils. If a party is considering divorce there is a fifteen day "reconciliation" process that begins at the local commune level before the case is sent to the courts.²⁵ The Ministry of Labor helps mediate labor disputes between employers and employees.²⁶ If there is a land dispute, parties can request mediation from the government's Cadastral Commission or from the National Authority for Land Dispute Resolution.²⁷ Parties to a commercial dispute will soon be able to seek mediation at the new National Arbitration Center, under the auspices of the Ministry of Commerce.²⁸ Small civil disputes over issues such as debts, contracts, land borders, farms, slander, and violence without injury may be mediated at the local Commune Council level, through the government's Justice Service Center Program.²⁹

Cambodian judges are also empowered under the new Civil Procedure Code to mediate between parties in a formal lawsuit.³⁰ As mentioned in the previous section, CCP-KC Article 97 allows the court to "attempt to effect a compromise settlement at any stage of the litigation." This could mean encouraging the parties to negotiate or it could mean the court actually serving as mediator. CCP-KC art. 104 goes one step further and actually mandates that the court must try to settle the dispute at the preparatory proceedings for oral argument³¹ unless it is 1) improper (i.e., rights or obligations at issue are by their nature not disposable by agreement), or 2) inadvisable (i.e., the parties have no intention of compromising).³²

The Code's Commentary states that in attempting to mediate a compromise, the court may consider holding private caucuses (called *cross-interviewing* in the drafters' commentaries).³³ This is a technique whereby the mediator holds private discussions with one party and (usually) then the other party. Private caucuses allow parties to share private information with the mediator that they might not be comfortable sharing in front of the other side. For example, the party might not want to reveal a particular interest (like the company is short on cash and might have to file for bankruptcy/insolvency). Or, the

25 LAW ON MARRIAGE AND FAMILY OF THE KINGDOM OF CAMBODIA, art. 42 (1989).

26 LABOR LAW OF THE KINGDOM OF CAMBODIA, arts. 300 – 301, 303 (1997). The Ministry's full name was "Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation." In 2004, the name changed to "Ministry of Labor and Vocational Training."

27 ROYAL SUB-DECREE ON ORGANIZATION AND FUNCTIONING OF THE CADASTRAL COMMISSION, arts. 7 – 11, Royal Government of Cambodia, Sub-Decree #47 (2002); ROYAL DECREE ON THE ESTABLISHMENT OF THE NATIONAL AUTHORITY FOR LAND DISPUTE RESOLUTION, art. 3, 15 Official Gazette of the Kingdom of Cambodia 1190 (2006).

28 LAW ON COMMERCIAL ARBITRATION OF THE KINGDOM OF CAMBODIA, 37 Official Gazette of the Kingdom of Cambodia 3000, (2006) [hereinafter LCA].

29 MINISTRY OF JUSTICE AND INTERIOR PRAKAS #85, art. 3-4 (2006). This program may be terminated because of lack of outside funding.

30 CCP-KC, *supra* note 4, art. 97 and art. 104.

31 "At the preparatory proceedings for oral argument, the court shall first seek to effect a compromise settlement . . ." *Id.* art. 104.

32 *Id.* art. 104; CCP-KC COMMENTARY, *supra* note 11, at Book Three, Ch. Two, Section II (II)(3), p. 51.

33 *Id.* at 52.

party might want to further explore a settlement option that it was uncomfortable taking seriously in front of the other side, for fear of showing weakness.³⁴

In commercial disputes, under the new Law on Commercial Arbitration (LCA), which will be discussed in the next section, an arbitration forum may engage in mediation. The LCA provides liberal settlement provisions: prior to the commencement of formal proceedings, the tribunal 1) *may confer with the parties for the purpose of exploring whether the possibility exists of a voluntary settlement . . .* and 2) *assist the parties in any manner it deems appropriate.*³⁵ Any settlement made hereunder can have the force and effect of a court judgment.³⁶ As a result, arbitrators at the new National Arbitration Center, currently being established under the auspices of the Ministry of Commerce, will have the opportunity to mediate cases.

Finally, parties can always resort to mediation outside the formal Cambodian legal framework. In fact, this probably remains a more popular way to resolve disputes than through the formal system. One Cambodian legal expert found:

*“In rural areas where the court is perceived as remote and alien from the village point of view, the Wat (Buddhist temple) is more familiar and it is used by local people for resolving their differences with the assistance of a monk or Achar. Frequently such a settlement is conducted in daily life.”*³⁷

2. International Comparisons in Mediation

Private mediation enforcement rules vary widely throughout the world. In most Australian states, agreements reached through mediation outside the sphere of court-annexed mediation schemes cannot be registered with the court unless court proceedings are underway.³⁸ The rules are similar in the U.S. However, if there is a U.S. court proceeding underway, the court can usually decide to enter an order that incorporates the parties' settlement agreement into the judgment and this will be enforceable like a court order.³⁹ If the court does not incorporate the agreement into the order, the mediated agreement is merely a contract, enforceable through a breach of contract lawsuit. One exception is family law cases (divorce, child custody, visitation and support), where mediated agree-

³⁴ Austermilller, *supra* note 16, at 116-117.

³⁵ LCA, *supra* note 28, art. 38 (2006).

³⁶ *Id.* art. 38 (3).

³⁷ Kong Phallack, *Shaping Alternative Dispute Resolution System in Cambodia*, Master Thesis, Nagoya University Graduate School of Law, 47 (2001). Phallack also describes an interesting Cambodian ADR tradition called the *Preab Reach Savnakar* (Royal Hearing), whereby the Cambodian King hears disputes and provides a non-binding opinion. This was applied before 1970, reinstated for a short period in 1994 and then suspended for unknown reasons. *Id.* at 54-55.

³⁸ UNCITRAL Conciliation Guide, *supra* note 18, at ¶ 90.

³⁹ See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 154.071(a)(b) (West, Supp. 1997).

ments are almost always considered court judgments.⁴⁰ In contrast, the new Law on Mediation for Bosnia and Herzegovina appears to make all mediated settlements, whether private or court-annexed, enforceable like court orders.⁴¹

In some jurisdictions, such as Germany, India, Bermuda, Hong Kong and China, a private, mediated settlement can be converted into an arbitral award, thereby enjoying the same enforceability as a court judgment.⁴² It is likely that mediation in Cambodia will have similar enforcement rules as these states.

3. Mediation Conclusions

The Cambodian legal regime for mediation is helpful and encourages mediation in various ways. The CPP-KC provides some clarity on the judges' potential to mediate settlements, however, as with negotiation, there is anecdotal evidence that these rules are often ignored. Judges need administrative guidance on how and when to mediate, otherwise, they might not feel confident enough to mediate. In addition, mediation training would be helpful. The CPP-KC is an effective first step, but more is needed before mediation can begin to have an effect on the judicial culture.

A new, specific law on mediation would also represent a significant improvement. It would more effectively encourage mediation and provide enhanced protection in areas like confidentiality⁴³ and enforcement⁴⁴ that are currently lacking.

IV. Arbitration

Arbitration is the third major ADR method to be discussed. In arbitration, the parties submit their dispute to a neutral third party (usually called the "arbitrator" or if more than one, then called the "arbitration panel" or "tribunal"). This third party considers the evidence the disputing parties have submitted and renders a decision called an "award."

40 Patterson et al., *supra* note 2, at 108.

41 ZAKON O POSTUPKU MEDIJACIJE BOSNE I HERCEGOVINE [BIH LAW ON MEDIATION PROCEDURE], art. 25 (2004).

42 *See, e.g.*, ARBITRATION ACT (1986) (Bermuda); ARBITRATION AND CONCILIATION ORDINANCE, arts. 73 – 74 (1996) (India); ZIVILPROZESSORDNUNG [GERMAN CODE OF CIVIL PROCEDURE], Tenth Book, § 1053 (Germany); ARBITRATION ORDINANCE, § 2C, Cap. 341 (1997) (Hong Kong); ARBITRATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 51 (1995) (China).

43 Most mediation laws provide guarantees of confidentiality. *See* UNCITRAL Conciliation Law, *supra* note 18, at art. 9.

44 Under the current regime, mediated settlements must be resolved within the framework of an arbitration institution in order for them to be enforceable like a court order. Settlements mediated outside a recognized arbitration forum do not have this enforcement feature.

1. Cambodian Arbitration

In 2006, Cambodia passed its second ADR law, the Law on Commercial Arbitration (LCA).⁴⁵ Cambodia was obligated to enact the LCA when it joined the World Trade Organization (“WTO”) in 2004.⁴⁶ The LCA largely follows the UNCITRAL Model Law on International Commercial Arbitration⁴⁷ (“UNCITRAL Arbitration Law”), with a few interesting departures. As a result, Cambodia’s arbitration laws are now largely harmonized with over 60 nations, including important trading partners such as Japan, South Korea, Singapore, Thailand and Australia.⁴⁸

Under the LCA, a commercial dispute is subject to arbitration if the parties’ contract has a written arbitration clause or if they agreed to arbitration in a separate written arbitration agreement.⁴⁹ This agreement to submit to arbitration must be in writing, but this requirement can be fulfilled by a written exchange of communications that demonstrates

45 LCA, *supra* note 28. The LCA can be considered the second ADR law after the law creating the Arbitration Council. There are other laws with ADR components in them, but this is only the second Cambodian law specifically related to ADR.

46 Key commercial laws cited by the WTO that may be enacted in the future include, the Secured Transactions Law, Commercial Leasing Law, Law on the Issuance and Trade of Non-Government Securities, Insolvency Law, Commercial Contracts Law, Competition Law, and Law Establishing a Commercial Court.

47 UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (2006), UNCITRAL website, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (last visited September 28, 2011)[hereinafter UNCITRAL Arbitration Law]. According to UNCITRAL: the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration . . . It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. UNCITRAL website, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited September 28, 2011).

48 States that have adopted the UNCITRAL Arbitration Law include: Armenia (2006), Australia (1991), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Brunei (2010), Bulgaria (2002), Cambodia (2006), Canada (1986), Chile (2004), China (the Hong Kong Special Administrative Region (1996) and the Macao Special Administrative Region (1998)), Costa Rica (2011), Croatia (2001), Cyprus, Denmark (2005), Dominican Republic (2008), Egypt (1996), Estonia (2006), Germany (1998), Greece (1999), Guatemala (1995), Hungary (1994), India (1996), Iran (Islamic Republic of) (1997), Ireland (1998), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008), Mexico (1993), New Zealand (1996, 2007), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay (2002), Peru (1996, 2008), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Serbia (2006), Singapore (2010), Slovenia (2008), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda, an overseas territory of the United Kingdom), the United States of America (the States of California (1996), Connecticut (2000), Illinois (1998), Louisiana (2006), Oregon and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000) and Zimbabwe (1996). UNCITRAL website, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited September 28, 2011).

49 LCA, *supra* note 28, art. 7.

an agreement to arbitrate.⁵⁰ For instance, parties may send emails or letters to each other stating that they agree to arbitrate any disputes between them but fail to actually include such a clause in their agreement. Under LCA Article 7, this might suffice as an agreement to arbitrate.

The LCA covers the landscape of arbitration matters including: arbitration agreements, composition and jurisdiction of the tribunal, conduct of the proceedings, recognition and enforcement of the award and a section entitled “National Center of Commercial Arbitration.” The law governs only commercial disputes but that term is given the same wide interpretation in the definitions section as can be found in the UNCITRAL Arbitration Law.⁵¹

It is important to note that the LCA is an arbitration law that provides for arbitration standards. The parties can deviate from these standards, especially with regard to the specific arbitration rules of procedure. For example, if the parties chose the AAA (American Arbitration Association) or ICC (International Chamber of Commerce) as the arbitration administrator, they will likely also choose the AAA or ICC arbitration rules. Those rules are slightly different from the LCA rules, but the LCA allows for this deviation.

The LCA follows the UNCITRAL Arbitration Law in limiting court intervention in arbitration proceedings.⁵² However, there is some confusion regarding the supervisory role of the courts. Article 6 of the LCA indicates that a range of supervisory functions (such as arbitrator appointment, challenge, termination, failure to act and tribunal jurisdiction) is to be “performed by the Court (Commercial, or Appeal, or Supreme) or the National Arbitration Center.”⁵³ This language could be read to indicate that a party can appeal directly to *any* of these four bodies for supervisory assistance.⁵⁴ Or it could indicate that there are only two appeal choices: 1) the “Court,” which means the court system generally, or 2) the National Arbitration Center. Since the language is unclear, there may be some confusion and inconsistent practices. Given the current situation, the best practice may be to petition the Cambodian Court of Appeals⁵⁵ when seeking supervisory assistance from the courts. Future revisions to the LCA should perhaps address this matter.

While LCA rules governing arbitrator composition and jurisdiction are consistent with the UNCITRAL Arbitration Law, the ‘interim measures’ section follows the 1985 version of the UNCITRAL Arbitration Law and omits the extensive framework found in the new

⁵⁰ *Id.* art. 7 (2).

⁵¹ LCA Article 2(i) states “the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not, relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction of the supply or exchange of good [sic] or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passenger by air, sea, rail or road.” LCA, *supra* note 28, art. 2(i).

⁵² *Id.* art. 5.

⁵³ *Id.* arts. 6, 19(3), 19(4), 19(5), 21(3), 22 and 24(3).

⁵⁴ The Commercial Court referenced has not yet been established.

⁵⁵ The Court of Appeals is the lowest national court currently in operation that is listed in Article 6.

UNCITRAL Arbitration Law relating to preliminary orders and recognition and enforcement of interim measures.⁵⁶ Because of this, preliminary orders and interim measures may be an uncertain area in Cambodian arbitration.

The conduct of arbitral proceedings follows the Model Law without any significant deviation—freedom to design all aspects of procedure, including location and language but with reasonable default provisions in the absence of party agreement.⁵⁷

As with the UNCITRAL Arbitration Law, unless otherwise agreed, awards must be in writing and state the reasons.⁵⁸ Applications to set aside arbitral awards must be made within 30 days instead of UNCITRAL's more generous 90-day period.⁵⁹

The LCA's most significant departure from the UNCITRAL Arbitration Law is the inclusion of a chapter that establishes a National Arbitration Center (“NAC”) inside the Ministry of Commerce (MOC).⁶⁰ The NAC has potentially conflicting responsibilities as an arbitration forum and as a licensing and supervisory authority for all arbitrators in Cambodia, possibly even those who might serve at other forums.⁶¹ Competition is limited as only the Chamber of Commerce and other professional associations are allowed to establish arbitration forums.⁶²

Nonetheless, this chapter creates specific guidelines for the establishment of a quasi-official forum that may serve as the principal center for commercial arbitration and mediation in Cambodia. It may help jumpstart the use of arbitration in the local business community. If all relevant stakeholders are satisfied with its structure, the NAC could become a very successful alternative to the Cambodian courts. The Ministry of Commerce, with help from international organizations, completed a Sub-Decree that sets forth the governance rules for the NAC.⁶³ The first group of arbitrators has now been trained and have passed an entrance exam. NAC operations should begin in 2012.

56 *Id.* art. 25. *See also*, UNCITRAL Arbitration Law, *supra* note 47, arts. 17 – 17(j). “Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order.” Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, Para. 26 (2006), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited September 28, 2011).

57 *Id.* art. 26-35. Article 26 adds to the UNCITRAL Arbitration Law when it states that each party shall be given a full opportunity to present his case, “including representation by any party of his choice.” This seems to underscore the freedom to choose any legal counsel.

58 *Id.* art. 39.

59 *Id.* art. 44 (3). Otherwise, the LCA is consistent with the UNCITRAL Arbitration Law and the New York Convention (*infra*) in relation to recognition and challenges to enforcement.

60 *Id.* arts. 10 – 17.

61 *Id.* However, under Article 11, parties to arbitration outside of the NAC are still allowed to choose arbitrators outside the official NAC list.

62 *Id.* art. 13. These forums would only be available if one or more of the parties to the dispute were a member of that forum organization.

63 THE SUB-DECREE ON THE ORGANIZATION AND FUNCTIONING OF THE NATIONAL ARBITRATION CENTER [NAC Sub-Decree], Royal Government of Cambodia, #124, 62 Official Gazette of the Kingdom of Cambodia 6001 (2009). Those organizations involved in this effort include the Asian Development Bank (ADB), the United States Agency for International Development (USAID), which funds the American Bar

2. International Arbitration

The passage of the LCA has brought Cambodia into full compliance with the requirements of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”). The New York Convention provides the main international framework for the recognition and enforcement of foreign arbitral awards and awards of an international character. It was passed under the auspices of the United Nations, prior to the creation of UNCITRAL. Cambodia signed the New York Convention in 1960 and it entered into force in Cambodia in 2001.⁶⁴ Over 142 countries have ratified the agreement, including all of Cambodia’s main trading partners.⁶⁵

Under the New York Convention, Cambodia was required to enforce foreign arbitral awards. However, until the LCA was passed, there was no clear method of enforcement. Now that the LCA is entered into law, there is a clear Cambodian legal framework for this enforcement process. As LCA Article 45 states, “an arbitral award, *irrespective of the country in which it was made*, shall be recognized as binding and . . . shall be enforced . . .”⁶⁶ [emphasis added] Unless one of the limited grounds for refusal are present, the Cambodian Court must enforce the award. So, not only does the LCA provide for the enforcement of Cambodian arbitration awards, but it also provides for the enforcement of international arbitration awards.

3. Arbitration Conclusions

The LCA is very similar to the UNCITRAL Arbitration Law. This means that Cambodia has an arbitration law that, in most respects, meets international standards. The Cambodian courts’ supervisory roles and the manner in which supervision is invoked need to be clarified. In addition, this author hopes that the NAC, which represents an ambitious and potentially successful project, does not crowd out other potential arbitration forums.

The LCA also brings Cambodia into compliance with its New York Convention and WTO obligations, at least with regard to commercial arbitration. This is a welcome development. Now, arbitration awards from any New York Convention country can be en-

Association (ABA) and East West Management Institute (EWMI), the World Bank’s International Finance Corporation--Mekong Private Sector Development Facility (IFC-MPDF) and the United Nations Development Programme (UNDP). In addition, the Cambodia Chamber of Commerce was also involved in the process.

⁶⁴ See UNCITRAL website, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited September 28, 2011) In 2001, Cambodia passed the LAW ON THE IMPLEMENTATION OF THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRATION AWARDS, which essentially ratifies Cambodia’s participation in the worldwide enforcement regime. However, to date, there has been no reported case of a Cambodian court ruling on the enforceability of a foreign arbitration award. See United States Department of Commerce, *Country Commercial Guide for Cambodia*, 54 (2006).

⁶⁵ *Id.*

⁶⁶ LCA, *supra* note 28, art. 45.

forced in Cambodia. And, under the law, local arbitration awards are to be respected and enforced. The LCA is a much-needed step forward for Cambodia's commercial law framework. It provides new, additional options for the resolution of commercial and other disputes and will hopefully encourage foreign investment in its fast-growing economy. If the NAC is properly implemented, commercial arbitration will be off to an excellent start in Cambodia.

THE BASICS OF SUBSTANTIAL CAMBODIAN CRIMINAL LAW

PHANN Vanrath

CONTENTS

I. Introduction.....	199
1. What is Crime?	199
2. The Aims of the Criminal Law	200
3. The historical development of the criminal law	200
4. Sources of the Cambodian Criminal Law	201
II. General Principles of the Cambodian Criminal Law.....	202
1. General Principles of the application of the Cambodian Criminal Law	202
Application of Cambodian criminal law in time	202
Application of Cambodian criminal law in space	204
2. Criminal liabilities	205
Liabilities of criminal acts	205
Non Liabilities of criminal acts	209
III. Penalties	211
1. Categories of penalties	211
Penalties applicable to natural persons	211
Penalties applicable to legal entities	215
2. Determination of penalties.....	216
Aggravating and mitigating circumstances of penalties	216
Sentencing principles.....	219
IV. Conclusion	224
REFERENCES.....	225

THE BASICS OF SUBSTANTIAL CAMBODIAN CRIMINAL LAW

PHANN Vanrath*

I. Introduction

1. What is Crime?

The criminal law defines offences, determines those who may be found guilty of committing them, sets penalties, and determines how they shall be enforced.¹ It tells us what our rights and duties are in our dealings with other people. It declares what conduct is criminal and prescribes the punishment to be imposed for such conduct. To a large degree, it is concerned with the definitions of the various crimes. It states what conduct is necessary to make out a given criminal offense. In contrast, the criminal procedure law or adjective law defines the procedures and the process by which we may enforce the actual criminal law itself. These procedures include the manner in which an offence/crime is investigated by the police, the way in which an individual is arrested, the means by which we bring a case into court and the rules by which the trial is to be conducted.² In this regard, an offence is classified according to its seriousness as felonies, misdemeanors and petty offences.³

- A *felony* is an offence for which the maximum sentence of imprisonment incurred is (1) a life imprisonment and (2) an imprisonment for more than five years, but no more than thirty years. A fine may be imposed in addition to this imprisonment.⁴
- A *misdemeanor* is an offence for which the maximum sentence of imprisonment incurred is more than six days, but no more than five years. A fine may be imposed in addition to this imprisonment.⁵

* Mr. PHANN Vanrath is currently a Chief Prosecutor of the Prosecution Office to the Banteay Meanchey Provincial Court of First Instance (August 2011–Present). He is a former judge in the Battambang Provincial Court of First Instance (December 2005–August 2009) and a former prosecutor of the General Prosecution Office to the Supreme Court (August 2009–August 2011). After getting a Bachelor of Private Law from France and Master in Law from Paññāsāstra University of Cambodia, he is now continuing his LL.D. at Paññāsāstra University of Cambodia.

1 Article 1-1 of the Criminal Code of the Kingdom of Cambodia

2 Jonatha D. Schiffman: Fundamentals of the Criminal Justice Process, 1986, p. 3

3 Article 2-2 of the Criminal Code of the Kingdom of Cambodia

4 Article 46 of the Criminal Code of the Kingdom of Cambodia

5 Article 47 of the Criminal Code of the Kingdom of Cambodia

- A *petty offence* is an offence (1) for which the maximum sentence of imprisonment incurred is six days or less and a fine may be imposed in addition to this imprisonment and (2) is punishable solely by a fine.⁶

The criminal law is part of public law as it seeks to prevent harm to the society by declaring what conduct is criminal, prescribing punishment for such conduct, and setting out the procedures by which offences are investigated, prosecuted, adjudicated and punished.⁷

2. The Aims of the Criminal Law

The aims of the criminal law are retribution, deterrence and reformation.

- *Retribution*: it views an offence as a wrong which of its very nature justifies the infliction upon the criminal of a certain amount of punishment.⁸
- *Deterrence*: it is the act or process of discouraging actions or preventing occurrences by instilling fear or doubt or anxiety or deterring a person or others from committing similar acts in the future.⁹
- *Reformation/Rehabilitation/Integration*: it sees offences as a social disease, for the cure of which steps can and should be taken. The punishment, according to this, is inflicted for the purpose of reforming the criminal and inducing him or her to lead a non-criminal life in the future. While it is true that deterrent punishment has the same general object, the difference is that reformatory punishment is designed to change an evil person into a good person, while deterrent punishment is not intended to change the criminal's general outlook, but merely to stop him/her from pursuing his/her evil ways and putting his outlook into practice in the future.¹⁰

3. The historical development of the criminal law

The Cambodian criminal law existed even before the French protectorate began in 1863. Mr. Adhemard Leclerc compiled the various existing laws in two parts and published them in 1898.¹¹

During the period of a French protectorate, the criminal code of 1929 was created. It was mostly based on the French criminal code, so it had a strong influence on Cambodian society in the capital and larger provincial cities. This criminal code had been used until 1975, although there were few new changes in 1959 during the Sangkum Reasniyum

6 Article 48 of the Criminal Code of the Kingdom of Cambodia

7 Stuart Coghil, *The Resource Guide to the Criminal Law of Cambodia*, 2000, p. 47

8 See Brett, Waller and Williams: *Criminal Law (Text and Cases)*, 8th Edition, 1997, pp. 15-16

9 See Brett, Waller and Williams: *Criminal Law (Text and Cases)*, 8th Edition, 1997, pp. 16-17

10 See Brett, Waller and Williams: *Criminal Law (Text and Cases)*, 8th Edition, 1997, pp. 17-20

11 Mr. Adhemard Leclerc, *Research on "the Cambodian Criminal and Procedural Law"*, 1898

Regime (after Cambodia's independence from the French in 1953). During the Khmer Rouge Regime, all previous laws and all its institutions had been completely destroyed.

After this regime, many legal acts such as laws, decree laws, decrees and circulars had been implemented during the People's Republic of Kampuchea and the State of Cambodia, but not the old criminal code.

In 1992, the Supreme National Council (SNC) adopted the UNTAC Law (United Nations Transitional Authority of Cambodia) for the transnational period, and which would be subsequently replaced by a new criminal code. However, it was not until 2009 that the new criminal code was adopted, and now has fully come into effect. This new criminal code was drafted by the Cambodian experts (under the Cambodian Ministry of Justice) and by French experts (under the French Cooperation Project).

4. Sources of the Cambodian Criminal Law

- *The Constitution*: as it is the supreme law, all laws, decisions of judges and decisions of State institutions must be strictly conform to the Constitution.¹²
- *International Law*: the Constitution states that the King shall sign and ratify international treaties and conventions after a vote of approval by the National Assembly and Senate.¹³
- *Criminal Code*: this new code is one of the basic sources of the Cambodian criminal law.¹⁴
- *Criminal Law* adopted in 1992 (UNTAC Law) and Law on Criminal Procedure adopted in 1993 (SOC Law) and Law on Aggravating Circumstances for felonies adopted in 2001.¹⁵
- *Other special laws* which stipulate other criminal provisions shall be applicable.¹⁶
- *Statutory instruments* issued by the Executive branch are also a source of the Cambodian criminal law.¹⁷

The objective of this article is to provide a brief understanding of the basic of the Cambodian substantial criminal law. Its aims are to show the general principles of the Cambodian criminal law which will be described in Chapter I and the penalties which will be described in Chapter II.

12 Article 150 of the Constitution

13 Article 26 of the Constitution

14 Criminal Code of the Kingdom of Cambodia adopted on 30 November 2009 and fully implemented on 21 December 2010

15 These laws are now abrogated by the Criminal Code and the Code of Criminal Procedure

16 Article 668 of the Criminal Code

17 Article 1 paragraph 2 of the Criminal Code

II. General Principles of the Cambodian Criminal Law

1. General Principles of the application of the Cambodian Criminal Law

There are two main issues in the application of the criminal law in Cambodia which are the application of the criminal law in time (1) and in space (2).

Application of Cambodian criminal law in time

The criminal provisions have a legal affect since the law comes into force until it is abrogated. However, if two laws stating the same or similar provisions come into force at the different times, which one will be applied? According to the principle of legality, the conduct may give rise to criminal conviction only if it is constituted an offence at the time it occurred.¹⁸ This means that the criminal law is not retroactive. This principle of the non-retroactivity of the criminal law means that a law coming into effect after a conduct occurred, it is not applied.

In order to understand the principle of the non-retroactivity of the criminal law, it is necessary to study the application of this principle with the substantive law (a) and the procedural law (b).

Application of the substantive law

The substantive criminal law sets out what conduct constitutes a criminal offence (crime), including elements of offences, and defenses to crimes.¹⁹ The application of the criminal law in time has two important principles as the below:

1.) Principle of the non-retroactivity of the heavier criminal law:

The article 11 of the Universal Declaration of Human Rights and article 15 of the UN Covenant on Civil and Political Rights state that “no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”.

These principles of the international laws on human rights are now incorporated into the new criminal code of Cambodia which also similarly stipulates in the article 10-2 that “a new provision which prescribes a heavier penalty shall be applicable only to acts committed after the provision came into force”.

¹⁸ Article 3-1 of the Criminal Code

¹⁹ Article 1-1 of the Criminal Code also mentions what is the criminal law?

Example 1: The act of infringing on the integrity of a corpse is punishable by an imprisonment of between 1 (one) month and (one) year and a fine of between 100,000 (one hundred thousand) Riels and 2,000,000 (two million) Riels.²⁰ This act was not an offence before the criminal code comes into force. It is meant that if someone committed this act, this person could not be punished.

Example 2: According to the new criminal code, the murder preceded or followed by a torture, cruel act or a rape is punishable by a penalty of a life imprisonment.²¹ However, these acts were punishable by an imprisonment of between 15 years and 20 years or by a life imprisonment based on the Law on Aggravating Circumstances for Felonies adopted in 2002. In brief, if these acts are committed prior to the new criminal code coming into force and are still in ongoing process of the court or without final judgment, the later is still applicable. On the other hand, the new provisions which provide for more severe sentences can be applicable only to the acts committed after the effective date of these provisions.

2.) Principle of the retroactivity of the criminal law (offences and penalties):

The article 15 of the UN Covenant on Civil and Political Rights state that “If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby”. Of course, the principle of this international law on human rights is also incorporated into the new criminal code of Cambodia in the article 9 which states that “The new provisions which abolish an offence are immediately applicable. The acts committed before their effective date can no longer be prosecuted. The legal proceedings in progress must be terminated. If a final sentence has been imposed, the penalties resulting from this sentencing must not be carried out or cease to be executed”.

In addition, a new provision which prescribes a lighter penalty shall be applicable immediately. However, final judgments shall be enforced regardless of the severity of the relevant penalties.²²

Example: According to the article 63 of the UNTAC Law, the act of a defamation and insult could be punished by a fine and an imprisonment but according to the article 305 of the new criminal code this act is punishable by a fine only. This indicates that the new provision is lighter, even though the act of defamation or an insult was committed under the old law (UNTAC Law), the new criminal code that stipulates a lighter penalty must be applied.

²⁰ Article 261 of the Criminal Code

²¹ Article 205 of the Criminal Code

²² Article 10-1 of the Criminal Code

Application of the procedural law

The procedural law refers to the criminal procedure code, the law on the organizing and functioning of the courts, the law on judicial jurisdiction and the law on the implementation of penalty or statute of limitation for a criminal action and for a sentence.

This procedural law shall be immediately applicable. This immediate application of the new provisions has no effect on the validity of the proceedings performed according to the former provisions.²³

Application of Cambodian criminal law in space

The conflict of the application of the Cambodian criminal law is an issue when a crime is committed by different nationality of offenders or victims and in the different territories. In this regard, a provision of Cambodian criminal code is applicable when an offence committed or deemed to be committed within the territory of the Kingdom of Cambodia (a) and when an offence committed outside the territory of the Kingdom of Cambodia (b)

Offences committed or deemed to be committed within the territory of the Kingdom of Cambodia

In criminal matters, Cambodian law is applicable to all offences committed within the territory of the Kingdom of Cambodia which includes the airspaces and the seawater which are bound to the territory of the Kingdom of Cambodia.²⁴

Offences committed within the territory of the Kingdom of Cambodia: an offence is deemed to have been committed in the territory of the Kingdom of Cambodia from the moment that one of these constituent acts has taken place within this territory.²⁵

Offences deemed to be committed within the territory of the Kingdom of Cambodia are the following:

- Offences committed aboard the vessels carrying Cambodian flag regardless where it is located.²⁶
- Offences committed aboard a foreign vessel on which the Cambodian authorities are allowed to inspect or arrest by means of an international agreement.²⁷
- Offences committed aboard an aircraft registered in the Kingdom of Cambodia no matter where they are located.²⁸
- Every person who is an instigator or an accomplice in the Cambodian territory of a felony or a misdemeanor committed abroad, if the offence is punished by the Cambodian law and by the foreign law or the existence of offence has been verified by a final decision of the foreign court.²⁹

²³ Article 11 of the Criminal Code and article 612 of the Code of Criminal Procedure

²⁴ Article 12 of the Criminal Code and article 2 of the Constitution

²⁵ Article 12 of the Criminal Code

²⁶ Article 14 of the Criminal Code

²⁷ Article 15 of the Criminal Code

²⁸ Article 16 of the Criminal Code

²⁹ Article 17 of the Criminal Code

**Offences committed outside
the territory of the Kingdom of Cambodia**

The Cambodian Law is also applicable for any felony committed outside the territory of the Kingdom of Cambodia by Cambodian offenders or victims.³⁰ However, the Cambodian law is applicable to misdemeanors committed by the Cambodian nationals in a foreign country only if the acts are punishable under the law of such foreign country.³¹

On the other hand, in criminal matters, the Cambodian law is applicable to any offence committed outside the territory of the Kingdom of Cambodia and if it is qualified as:

- an offence against the safety of the Kingdom of Cambodia;
- counterfeiting the seal of the Kingdom of Cambodia;
- counterfeiting the national currency and the national bank notes having legal tender in the Kingdom of Cambodia;
- an offence against diplomatic or consular agents of the Kingdom of Cambodia;
- an offence against diplomatic or consular premises of the Kingdom of Cambodia.³²

2. Criminal liabilities

The criminal liabilities are the obligation in responding to its criminal acts according to the criminal sentences prescribed by the criminal code. However, some offenders are not liable to their acts. It aims here to show the liabilities of criminal actions (1) and in the case of the non-liabilities of criminal actions (2).

Liabilities of criminal acts

In criminal matters, the offenders shall be liable not only in complete crimes (a) but also in incomplete crimes (b).

Complete crimes

Complete crimes are the offences in which its final consequences or results are completed.

Example: Sok wants to kill Sao. Then he shoots Sao by a gun. Finally, Sao is dead.

There are many types of offenders who shall be criminally liable to their wrongful acts.

³⁰ Article 19-1 and 20 of the Criminal Code

³¹ Article 19-2 of the Criminal Code

³² Article 22 of the Criminal Code

1.) Liable persons

- *Perpetrator*: The perpetrator is a person who has committed the relevant criminally prohibited acts.³³
- *Co-perpetrator*: The co-perpetrators are any persons who, by mutual agreement, commit the relevant criminally prohibited acts.³⁴
- *Instigator*: The instigator is the person who encourages the commission of a felony or a misdemeanor by giving an instruction or order; or who provokes the commission of a felony or misdemeanor by means of a gift, a promise or a threat, incitement, lure or by abuse of his/her authority or his/her power.³⁵
- *Accomplice*: The accomplice is any person who intentionally facilitates the attempt or the realization of a felony or a misdemeanor by aiding or abetting.³⁶

2.) Criminal liability of minors and legal entities

- *Criminal liability of minors*: In principle, minors are not liable for any criminal acts. In this regards, the article 38 of the Criminal Code states that “*the legal age of criminal liability is set at 18 (eighteen) years old*”. Additionally, the minors who committed an offence are subject to the measures of supervision, education, protection and assistance.³⁷

These measures include:

- returning the minor to his/her parents, guardian, custodian or to another person who is trustworthy;
- returning the minor to a social service agency which is in charge of minors;
- returning the minor to a private organization who is qualified to receive them;
- returning the minor to a specialized hospital or institution;
- placing the minor under the judicial protection.³⁸

However, a minor over the age of 14 (fourteen) years can be convicted for criminal penalty according to the circumstances of the offence or the personality of the minor.³⁹ In this case, when the court decides to pronounce the criminal sentence against a minor over 14 (fourteen) years old, the principal penalties imposed for the offence prosecuted is reduced into a half or if the maximum of the penalty imposed is a life imprisonment, it is reduced to 20 (twenty) years of imprisonment or if the minimum of the penalty for imprisonment is reduced into a half if the minimum is more than 1 (one) day if the minimum and the maximum of the fine are reduced to a half.⁴⁰

33 Article 25-1 of the Criminal Code

34 Article 26-1 of the Criminal Code

35 Article 28-1 of the Criminal Code

36 Article 29-1 of the Criminal Code

37 Article 39-1 of the Criminal Code

38 Article 40 of the Criminal Code

39 Article 39-2 of the Criminal Code

40 Article 160 of the criminal Code

– *Criminal liability of legal entities*: Compared to the old Cambodian law, the new criminal code of Cambodia also states the criminal liability of the legal entities with the exception of the State. In this regards, the article 42-1 of the criminal code states that “*in case it is precisely provided for by a law and legal instruments, the legal entities, to the exclusion of the State, may be declared as being criminally liable for the offences committed, for their interests, by their organs or their representatives*”. The legal entities here refer to all legal entities having Cambodian or foreign citizens which are under the jurisdiction of Cambodian law as mentioned above. Moreover, both the private and public legal entities are liable for their criminal acts as mentioned by this article. In this context, the legal entities are liable in case of an offence committed by their organs or representatives and also for the interests of the legal entities. Therefore, if the representative commits an offence for his/her own benefits, the legal entity shall not be criminally liable. In addition, in case of the offence committed by the employee even for the interest of the legal entities, he/she shall be liable personally.

In another case, if the legal entities are liable for their criminal acts, the representative of those legal entities who committed an offence must also be liable as stated in the article 42-2 of the Criminal Code.

Example: Sok and Sao are the representative of the Pharmaceutical Company A. Sok is one of the representatives of the Company, who is in charge of buying pharmaceutical products for the Company. Sok wants the Company to get much more benefits, then he decided to buy counterfeited medicines and sold them to customers. Teth is a seller, who also knows about the counterfeited medicines, but he wants the Company to increase his salary, he ignores it. After that, one customer was dead because of taking the counterfeited medicines bought from the Company.

In this case, Sok must be criminally liable for his act by buying the counterfeited medicines for the benefits of his Company A and sold them to the customer and caused the customer dead according to the article 42-2 of the Criminal Code. Moreover, as Sok is a representative of the Company and committed this wrongful act for the interests of the Company A, the Company A must also be criminally responsible for that act according to the article 42-1 of the Criminal Code. On the other hand, Teth is a seller, not a representative of the Company A. If Teth lonely committed this wrongful act even for the benefit of the Company A, the Company A is still not criminally responsible because Teth is just an employee, not a representative. In the contrary, if Sok committed this wrongful act with Teth for their own benefits, the Company A is not responsible but Sok and Teth must be criminally responsible personally. In this case, it is clear that Sao did not commit any wrongful act, so he is not responsible with Sok.

Incomplete Crimes

An incomplete crime is the commission of an offence with intention but the act has not been completed because of the effect of circumstances beyond the perpetrator's control. In all incomplete crimes, the mental element is very important, because it is the criminal behavior of the accused accompanied by an intention to commit the offence that the criminal code wishes to prevent, before the commission of the offence itself.⁴¹ This incomplete crime constitutes an offence called an attempt. Therefore, what is an attempt and in what circumstances a perpetrator is liable for his/her act?

1.) Definition of attempt

Regarding to the article 27-1 of the Criminal Code, the attempt to commit a felony or, in the cases provided for by law, a misdemeanor is punishable when the following conditions are fulfilled:

- The perpetrator has started the initial steps in the commission of the offence which means that the perpetrator has carried out his/her intention directly to commit the offence;
- The perpetrator has not stopped his/her act voluntarily but it was disrupted or interrupted by the effect of the circumstances outside his/her will.

This above provision shows that there are two conditions: first are the initial steps in the commission of the offence (a) and second is the act of the perpetrator has not stopped voluntarily (b).

- The initial steps in the commission of the offence: To constitute an attempt, there must first be an observable act. That act must, in turn, form part of a series of acts that would have constituted the actual commission of the offence if it had not been interrupted. Finally, the act must be immediately connected to the offence and sufficiently close to its conclusion to be more than mere planning or preparation.⁴²
- The act of the perpetrator has not stopped voluntarily: This means that the perpetrator has the intent to commit an offence.

Example: Sok plans and decide to kill Sao (planning step). Then, Sok buys a gun and looks for a good place to kill Sao (preparation step). While Sao is walking, Sok wants to shoot at Sao's head but as Sok is not skillful, he shoots at the wrong direction or when Sok takes the gun in order to kill Sao, the police stop him (execution step).

In this case, the planning and the preparation step of Sok are not criminally responsible, but the execution step of Sok must be responsible for an attempt to kill Sao.

⁴¹ Stuart Coghil, The Resource Guide to the Criminal Law of Cambodia, 2000, see chapter 6, paras [6.20], page 259

⁴² Stuart Coghil, The Resource Guide to the Criminal Law of Cambodia, 2000, p. 260

2.) Liability

The attempt to commit a felony or, in the cases provided for by law, a misdemeanor is punishable according to the article 27-1 of the Criminal Code. With reference to this provision, a person who is convicted for an attempt to commit any felony must be responsible (even if this act is not completed) but for a misdemeanor if the law does not stipulate any acts which are the attempt to commit a misdemeanor, these acts are punishable.

In contrast, the attempt to commit a petty offence is not responsible according to the article 27-2 of the Criminal Code. This means that it does not have the attempt for a petty offence.

Non Liabilities of criminal acts

The criminal acts constitute an offence but some causes stated from the article 31 to 37 of the criminal code can be excluded or diminished criminal liability. In this regard, the subjective causes of criminal irresponsibility or lessening responsibility (a) and the objective causes of criminal irresponsibility (b) should be distinguished or discussed here as the following:

The subjective causes of criminal irresponsibility or lessening responsibility

There are two types of subjective causes of criminal irresponsibility as below:

1.) Causes of criminal irresponsibility or lessening responsibility due to mental disorders
The article 31-1 of the Criminal Code states that *“when a person commits an offence at the time he/she is suffered from mental disorder which suppresses his/her discernment, he/she is not criminal responsible”*. This is the principle of criminal irresponsibility when a person serves mental disorder while committing an offence.

On the other hand, according to the article 31-2 of the Criminal Code states that *“when a person commits an offence at the time he/she committed an offence, was suffering from a mental disorder which reduces his/her discernment, he/she still remains criminally responsible. However, the court must take into account that circumstance when it determines the penalty”*. It is meant when a person has the ability to reason while committing an offence; the penalty can be diminished or reduced by the court.

Furthermore, the final paragraph of the same article also mentions that *“when a person commits an offence at the time he/she was suffered from mental disorder resulting from using alcohol, addictive drugs or substances prohibited by laws cannot be exempted from criminal responsibility”*. This seems to be very strict for any person who used alcohols, addictive drugs or prohibited substances and then commit an offence. In this case, a person who commits an offence cannot avoid the criminal responsibility by raising the mental disorder resulting from the consumption of alcohol, addictive drugs or prohibited substances.

2.) Impact of force or constraint

A person who committed an offence under the impact of a force or of a constraint to which he/she cannot resist is not criminally responsible. This force or the constraint can only be the result of the event beyond human will and also must be unforeseeable and inevitable.⁴³ Therefore, the force or constraint is a cause of criminal irresponsibility because the perpetrator is in a circumstance that he/she has no any other options without committing that offence.

The objective causes of criminal irresponsibility

There are three types of objective causes of criminal irresponsibility as below:

1.) Authorization by law or authorities

This principle is stipulated by the article 32 of the Criminal Code as the following:

- A person who performed an act prescribed or authorized by the law, he/she does not commit an offence.

Taking an example that a policeman who detents an offender for flagrant offense of stealing a motorbike. The right of this policeman is allowed by the article 96 of the Code of Criminal Procedure.

- A person who performed an act compelled by legitimate authority, he/she does not commit an offence, except for the fact that this act is obviously illegal.

Another example of the judicial police officers who search some evidences at a suspected person's house in respect of the search warrant of the court, he/she is not responsible for the breaking into a residence as mentioned in the article 299 of the Criminal Code.

- However, the perpetrator, the co-perpetrator, the instigator or the accomplice of genocide, of a crime against humanity or war crime cannot be exempted from his/her criminal responsibility even with reasons as mentioned below:
 - he/she has performed an act prescribed, authorized or prohibited by the law in force;
 - he/she has so acted under the order of the legitimate authority.

Example of the case 001 at the Extraordinary Chambers in the Courts of Cambodia (ECCC) is the concrete example of this last paragraph. In this case, Duch is a perpetrator who was ordered by Khmer Rouge leaders to execute many prisoners during Khmer Rouge regime (1975-1979). At that time, Khmer Rouge leaders were legitimate authority but Duch cannot be exempted from criminal responsibility for his wrongful act even with reason that he committed the offence under the order of the former Khmer Rouge leaders.

⁴³ Article 36 of the Criminal Code

2.) Legitimate defense

This means that when a person committed an offence under a legitimate defense, he/she is not criminally responsible for his/her act.⁴⁴ So what are the conditions of the legitimate defense? Legitimate defense must fulfill the following conditions:

- The offence is justified by the necessity to defend oneself or others or to defend property against an unjustified aggression;
- The offence and the aggression must occur at the same time;
- There is no disproportion between the means used in defense and the severity of the aggression.⁴⁵

3.) Virtue of necessity

This means that when a person who is in a virtue of necessity of committing an offence is not criminal responsible.⁴⁶ So, what are the conditions of the state of a virtue of necessity must fulfill the following conditions:

- The offence is justified by the virtue of necessity for protection of oneself, to protect others or to protect a property against a present or imminent danger; and
- There is no disproportion between the means used in defense and the severity of the danger.⁴⁷

III. Penalties

A penalty can be defined as a sentence issued by the criminal court or judge. In this regard, penalties have three vital functions which are retribution, deterrence and reformation.⁴⁸

In order to understand the penalties, it is better to study the various categories of penalties (A) and the determination of penalties (B).

1. Categories of penalties

The various categories of penalties applicable to natural person, including minors, (1) and to legal entities (2) will be discussed below:

Penalties applicable to natural persons

General provisions of the application of penalties

There are three categories of penalties which are as the following:

⁴⁴ Article 33-1 of the Criminal Code

⁴⁵ Article 33-2 of the Criminal Code

⁴⁶ Article 35-1 of the Criminal Code

⁴⁷ Article 35-2 of the Criminal Code

⁴⁸ See the aims of criminal law

1.) Principal penalties

At least one principal penalty must be pronounced by the judge in one case. The judge can issue principal penalties without imposing other categories of penalties. The principal penalties shall include *imprisonment* and *finer*.⁴⁹

– *The imprisonment* is a kind of penalties which takes off the offender's liberties. In principle, the law shall set the maximum and the minimum sentences. The Cambodian Criminal Code sets the maximum and minimum sentences according to the classification of offenses such as:

– For the felony, the maximum sentence can be up to *life imprisonment* or *thirty years imprisonment* and the minimum sentence is over *five years imprisonment*.⁵⁰

– For the misdemeanor, the maximum sentence is *five years imprisonment* while the minimum sentence is over *six days imprisonment*.⁵¹

– For the petty offense, the maximum sentence is six days imprisonment.⁵²

It should be noted that the duration of pre-trial detention is fully included in the duration of the punishment for a prison term to be served.⁵³

– *The fine* is a kind of penalty which requires an offender to pay. The fines shall be expressed in Riels.⁵⁴ The proceeds from fines shall be paid to the State Treasury.⁵⁵

As the previous kind of penalty, the imprisonment, the law shall set the maximum and minimum amount of the fine incurred.⁵⁶

2.) Accessory penalties

The accessory penalty may only be pronounced if they are specifically provided for in respect of the felony, misdemeanor or petty offense under prosecution. The pronouncement of that kind of penalties is optional. This means that a judge may or may not pronounce this accessory penalty. However, it shall be mandatory if the law provides for expressly.⁵⁷

The 19 categories of the accessory penalties are clearly stipulated in the article 53 of the Criminal Code as the following:

- deprivation of some civil rights;
- prohibition from pursuing a profession when the offence was committed while carrying out this professional task;
- prohibition from the driving of all kinds of motor vehicle;
- confiscation of the driver's license;

49 Article 43-1 of the Criminal Code

50 Article 46 of the Criminal Code

51 Article 47 of the Criminal Code

52 Article 48 of the Criminal Code

53 Article 51 of the Criminal Code

54 Article 43-2 of the Criminal Code

55 Article 52 of the Criminal Code

56 Article 44-2 of the Criminal code

57 Article 54 of the Criminal Code

- prohibition from taking a residency;
- prohibition from leaving the territory of the Kingdom of Cambodia;
- for a convicted foreigner, the prohibition from entering and residing in the territory of the Kingdom of Cambodia;
- confiscation of any instruments, materials or objects which are used to commit the offence or are intended to commit the offence;
- seizure of the objects or funds which are intended to commit the offence;
- seizure of incomes or properties earned as a result from the offence;
- seizure of the utensils, materials and movable properties garnishing a premise in which the offence was committed;
- seizure of vehicles belonging to the convicted person;
- prohibition from having in possession of or carrying a weapon and ammunition;
- expelling from the public transactions or agreements;
- closure down of an establishment having served to prepare or to commit the offence;
- prohibition from the operation a business that is open to the public or used by the public;
- posting the decision of the sentence;
- publication in the newspapers of the decision of the sentence;
- broadcasting of the decision of the sentence by all means of audio-visual communications.

However, the separate provisions may constitute the accessory penalties as stated in the article 53-2 of the Criminal Code.

In principle, in order to enforce the accessory penalties, the sentence of imprisonment must be completed.⁵⁸

3.) Alternative penalties

The alternative penalty is different from the accessory penalty. This alternative penalty cannot be pronounced in addition to the principal penalty. However, it can be alternative to the principal penalty.

According to the Criminal Code, there are two types of alternative penalties as below:

- *Community service*: The community service is an obligation to be accomplished during a period made up of between 30 (thirty) and 200 (two hundred) hours, the unpaid works for the State's benefit, of the territorial community, of the legal entity subjected to public laws, of an association or a non-governmental organization.⁵⁹

The court can pronounce the penalty of community service when the accused receives a jail sentence the maximum of which is less than or equal to 3 (three) years.⁶⁰

⁵⁸ Article 71 of the Criminal Code

⁵⁹ Article 72-2 of the Criminal Code

⁶⁰ Article 72-1 of the Criminal Code

This community service may not, under any circumstances, be carried out for the profit of a natural person.⁶¹ It is subject to the provisions of the labor law, in particular, in relation to night shift, hygiene, security as well as the works for women.⁶²

During the performance of the community service of the convicted person, the State must compensate the damage caused to other individuals. The State is lawfully subrogated in the rights of the victims.⁶³

- *Reprimand*: When the accused receives a jail sentence the maximum of which is less than or equal to 3 (three) years, the court can pronounce the reprimand if the following three conditions are met:
 - disturb to the public order resulting from the offence has come to an end;
 - damage was repaired;
 - the offender shows his/her willingness for social reintegration.⁶⁴

Special provisions of the application of penalties to minors

The principal penalties, the accessory penalties and the alternative penalties can also be applicable to minors over the age of 14 (fourteen) years in accordance with the article 39-2 of the Criminal Code. However, the provisions on recidivism are not applicable to the minors in accordance with the article 163 of the Criminal Code. In addition, in accordance with the article 164 of the Criminal Code, the mitigating circumstances are applicable to the minors. When the court decides on mitigating circumstances, the minimum of principal penalties imposed on a minor for a felony or of a misdemeanor is reduced according to the following specific scales:

- if the minimum of the penalty for imprisonment imposed is equal to or more than 10 (ten) years, it is reduced to 1 (one) year;
- if the minimum of the penalty for imprisonment imposed is equal to or more than 5 (five) years and less than 10 (ten) years, it is reduced to 6 (six) months;
- if the minimum of the penalty for imprisonment imposed is equal to or more than 2 (two) years and less than 5 (five) years, it is reduced to 3 (three) months
- if the minimum of the penalty for imprisonment imposed is equal to or more than 6 (six) days and less than 2 (two) years, it is reduced to 1 (one) day;
- the minimum of fine imposed is reduced to a half.

4.) Principal penalties applicable to minors

When the court decides to pronounce the criminal sentence against a minor aged from 14 (fourteen) years old, the principal penalties imposed for the offence prosecuted are reduced according to the following conditions:

- the maximum of the penalty for imprisonment imposed is reduced into a half;

⁶¹ Article 73 of the Criminal Code

⁶² Article 74-1 of the Criminal Code

⁶³ Article 75 of the Criminal Code

⁶⁴ Article 76 of the Criminal Code

- if the maximum of the penalty imposed is a life imprisonment, it is reduced to 20 (twenty) years of imprisonment;
- the minimum of the penalty for imprisonment is reduced into a half if the minimum is more than 1 (one) day;
- the minimum and the maximum of the fine are reduced to a half.⁶⁵

It should be noted that in case of prosecution for a felony, if the provisions of this article result in reducing the maximum of the penalty of imprisonment imposed for a duration equal to or less than 5 (five) years, the offence imposed remains a felony.⁶⁶

5.) Accessory penalties

Only the following accessory penalties are applicable to the minors:

- the confiscation of any instruments, materials or objects which have been used to commit the offence or have been intended to commit the offence;
- the confiscation of the objects or funds with which the offence was carried out;
- the confiscation of the incomes or the properties earned by the offence;
- the confiscation of the utensils, materials and moveable objects at the place where offence was committed;
- the prohibition against possessing or carrying a weapon.⁶⁷

6.) Community service penalties

In accordance with the article 162 of the Criminal Code, the penalty for the community service is applicable to the minors of over than 16 (sixteen) years of age. However, the duration of the community work may not exceed 100 (one hundred) hours.

The community service must be adapted to the minors, presenting a rehabilitating character and facilitating social reintegration.

Penalties applicable to legal entities

According to the article 42-1 of the Criminal Code, the legal entities are criminally responsible for their wrongful criminal acts. In this regard, the legal entities are abstract and different from the natural persons, so they cannot be punished by imprisonment but by a fine only. In addition, the accessory penalties can also be imposed to the legal entities.⁶⁸

Principal penalties incurred by legal entities

The specific penalties imposed on a legal entity are fines as the principal penalty in accordance with the article 167 of the Criminal Code.

The provisions of criminal law, the criminal liabilities and the penalties of the Criminal Code relating to the natural persons are applicable to the legal entities.⁶⁹

⁶⁵ Article 160-1 of the Criminal Code

⁶⁶ Article 160-2 of the Criminal Code

⁶⁷ Article 161 of the Criminal Code

⁶⁸ Article 167 of the Criminal Code

⁶⁹ Article 182 of the Criminal Code

Accessory penalties applicable to legal entities

According to the article 168 of the Criminal Code, the accessory penalties applicable to legal entities are the following:

- dissolution;
- placement under the judicial surveillance;
- banning from pursuing one or several activities;
- expulsion from public market places;
- prohibition against a public campaign for saving funds;
- prohibition against issuing exchangeable instruments other than the exchangeable instruments certified by a bank;
- prohibition against using payable cards;
- closure of an establishment having served to prepare or to commit the offence;
- prohibition against operating an establishment opened to the public or utilized by the public;
- confiscation of instruments, materials or any objects which are used to commit the offence or were intended to commit the offence;
- confiscation of objects or funds with which the offence was carried out;
- confiscation of incomes or the properties earned by the offence;
- confiscation of utensils, materials and the moveable objects at the place where the offence was committed;
- publication of the decisions on the conviction in the newspapers or the broadcasting by all means of audio-visual communications.

Moreover, the specific provisions may also institute other accessory penalties.

2. Determination of penalties

Aggravating and mitigating circumstances of penalties

Aggravating circumstances

1.) Definition of certain aggravating circumstances

- *Organized gang*: An organized gang shall be any group or undertaking established with a view to prepare or commit one or more offences.⁷⁰
- *Premeditation*: Premeditation is the intent, formed prior to the act, to commit an offence.⁷¹
- *Breaking in*: Breaking in consists in forcing, damaging or destroying any closing device or fence of any kind.⁷² In addition, the following acts are included in the break-

70 Article 77 of the Criminal Code

71 Article 78 of the Criminal Code

72 Article 79-1 of the Criminal Code

ing in by the Criminal Code: the use of false keys, the use of unlawfully obtained keys, the use of any instrument which may be employed to operate a closing device without forcing, damaging or destroying.⁷³

- *Climbing in*: Climbing in is the act of entering any place, either by climbing over a fence, or by passing through any aperture not designed to be used as an entrance.⁷⁴
- *Weapons and items deemed to be weapons*: A weapon shall be any item designed to kill or wound. It includes any other item liable to be dangerous to persons if: (1) it was used to kill, wound or threaten; (2) it was intended to be used to kill, wound or threaten. The weapon includes an animal used to kill, wound or threaten.⁷⁵
- *Ambush*: An ambush is the act of lying in wait for the victim in any place with a view to committing an offense.⁷⁶

Recidivism

- *Impact of Recidivism*: Recidivism results in aggravating the maximum of the penalty imposed for imprisonment for a felony or for a misdemeanor, under the conditions as follow:⁷⁷
- When a person is already definitively convicted for a felony, he/she committed a felony again within a period of 10 (ten) years;
- When a person is already definitively convicted for a felony, he/she committed a misdemeanor within a period of 5 (five) years;
- When a person is already definitively convicted for a misdemeanor to a penalty of imprisonment equal to or more than 3 (three) years, he/she committed a felony within a period of 5 (five) years;
- When a person is already definitively convicted for a misdemeanor, he/she committed the same misdemeanor within a period of 5 (five) years.⁷⁸
- It should be noted that the time limits of 10 (ten) and 5 (five) years shall be computed from the day the conviction for the first offense becomes final.⁷⁹
- When there is recidivism, the penalty shall be aggravated as follow:
- Recidivism in a Felony: If the new penalty for imprisonment imposed upon for new felony does not exceed 20 (twenty) years, this maximum is doubled;
- If the maximum of the penalty for imprisonment imposed upon the new felony is 30 (thirty) years, the maximum becomes life imprisonment.⁸⁰

⁷³ Article 79-2 of the Criminal Code

⁷⁴ Article 80 of the Criminal Code

⁷⁵ Article 81 of the Criminal Code

⁷⁶ Article 82 of the Criminal Code

⁷⁷ Article 83 of the Criminal Code

⁷⁸ Article 84-1 of the Criminal Code

⁷⁹ Article 84-2 of the Criminal Code

⁸⁰ Article 85 of the Criminal Code

- Recidivism in Misdemeanor after a Felony Penalty: the maximum of an imprisonment imposed upon the misdemeanor is doubled.⁸¹
- Recidivism in a Felony after a Misdemeanor Penalty: If the maximum of the penalty for imprisonment imposed upon for the felony does not exceed 20 (twenty) years, this maximum is doubled;

If the maximum of the penalty for imprisonment imposed upon for the felony is 30 (thirty) years, the maximum punishment becomes life imprisonment.⁸²

- Recidivism in Misdemeanor after a Misdemeanor Penalty: the maximum of the penalty for imprisonment imposed upon the new misdemeanor is doubled.⁸³

To apply the provisions of the recidivism, the Criminal Code deems some offenses such as:

- the offences of theft, of breach of trust and fraud are considered as the same offences;
- the receiving of stolen goods is classified as the offence from which the stolen goods are derived;
- the money-laundering is classified as the offence relating to the opportunity during which the money-laundering was carried out.⁸⁴

The state of the recidivism may be retained by the judgment of the court and constitutes a cause of increasing of the penalty for imprisonment if it is expressly stated in the indictment.⁸⁵

- *Special Provisions*: Recidivism may be retained even the penalty arisen from sentencing already expired the statute of limitation.⁸⁶

Recidivism may not be retained when the penalty arisen from definitive sentence is granted amnesty according to Paragraph 4 of Article 90 of the Constitution of the Kingdom of Cambodia.⁸⁷

Mitigating circumstances

1.) Definition of mitigating circumstances

When the nature of the offences or the personality of the accused justifies, the court may provide the accused the benefit of mitigating circumstances.⁸⁸

The mitigating circumstances may also be granted to the convicted person even if he/she is declared as an individual who is in recidivism.⁸⁹

81 Article 86-1 of the Criminal Code

82 Article 87 of the Criminal Code

83 Article 88-1 of the Criminal code

84 Article 89 of the Criminal Code

85 Article 90 of the Criminal Code

86 Article 92-1 of the Criminal Code

87 Article 92-2 of the Criminal Code

88 Article 93-1 of the Criminal Code

89 Article 93-2 of the Criminal Code

2.) Effect of mitigating circumstances

When the court grants the accused the mitigating circumstances, the minimum of the principal penalties imposed upon for a felony or a misdemeanor is reduced according to the following scale:

- if the minimum of the penalty for imprisonment imposed upon is equal to or more than 10 (ten) years, it is reduced to 2 (two) years;
- if the minimum of the penalty for imprisonment imposed upon is equal to or more than 5 (five) years and less than 10 (ten) years, it is reduced to 1 (one) year;
- if the minimum of the penalty for imprisonment imposed upon is equal to or more than 2 (two) years and less than 5 (five) years, it is reduced to 6 (six) months;
- if the minimum of the penalty for imprisonment imposed upon is equal to or more than 6 (six) days, and less than 2 (two) years, it is reduced to 1 (one) day;
- the minimum of the fine imposed upon is reduced to a half.⁹⁰
- when an accused is sentenced to a life imprisonment, the judge who grants mitigating circumstances may pronounce the penalty of imprisonment of between 15 (fifteen) years and 30 (thirty) years.⁹¹

Sentencing principles

General principles

1.) Individual Principles of Penalty

The court pronounces penalties based on seriousness of the penalty and circumstances of the offence, on the personality of the accused, on his/her mental state of mind, resources, burdens and motives as well as his/her conduct after committing the offence, in particular towards the victim.⁹²

2.) Pronouncement of Principal Penalty

In all cases where an offence punished concurrently for a prison term and a fine, the court may pronounce a ruling:

- either a prison term and a fine concurrently;
- a penalty for a prison term only; or
- a fine only.⁹³

3.) Pronouncement of alternative penalties

The penalty for community service replaces the principal penalties. The court which pronounces the penalty for community service may neither pronounce imprisonment nor fine.⁹⁴

90 Article 94 of the Criminal Code

91 Article 95 of the Criminal Code

92 Article 96 of the Criminal Code

93 Article 97 of the Criminal Code

94 Article 98-1 of the Criminal Code

The penalty of reprimand replaces principal penalty. The court which pronounces the penalty of reprimand may neither pronounce imprisonment nor fine.⁹⁵

4.) Pronouncement of Accessory Penalty in addition to Principal Penalty

When an offence was punished with one or several penalties, they are added to the principal penalties.⁹⁶ Exceptionally, the court may decide to add one or several supplementary penalties to the principal penalties under the following conditions:

- when the accused is imposed with a fine as a single principal penalty;
- when the accused is imposed with a prison term whose maximum is equal to or is less than three (3) years.⁹⁷

When the court decides to replace the principal penalties by one or several supplementary penalties, such court may neither pronounce a prison term nor a fine.⁹⁸

- Exclusive Rules for the Pronouncement of Community Service Sentence

The penalty for community service may be pronounced provided that the accused is present at the hearing and accepts to perform the service. The court, prior to announcing the judgment shall notify the accused that he/she has the right of refusal to perform the service. The response of the accused shall be noted in the judgment.⁹⁹

- Duration and Timeline of Community Service

The court which pronounces the penalty for community service shall determine the timeline and duration for which the work shall be performed. This period shall not exceed one (1) year.¹⁰⁰

- Procedures for the Execution of Penalty for Community Service

The procedures for the execution of penalty for community service shall be set by the prosecutor. The prosecutor designates the legal entity that receives the benefits from the carrying out of the community service. This punishment shall be executed under the supervision of the prosecutor.¹⁰¹

Special principles

1.) Suspended sentence

- *Common provisions:* The court can order the suspension of the execution of the principal penalty.¹⁰² But only a definitive penalty of public actions will be taken into account.¹⁰³

95 Article 98-2 Of the Criminal Code
96 Article 99 of the Criminal Code
97 Article 100-1 of the Criminal Code
98 Article 100-2 of the Criminal Code
99 Article 101 of the Criminal Code
100 Article 102 of the Criminal Code
101 Article 103 of the Criminal Code
102 Article 104 of the Criminal Code
103 Article 105 of the Criminal Code

In case of prosecution for felony or misdemeanor, a simple suspended sentence may be granted if the accused has not yet been definitely sentenced to the term of imprisonment, during 5 (five) years before these offences.¹⁰⁴ In the other hand, in case of the prosecution for a petty crime, the simple suspended sentence may be granted if the accused has not yet been definitely sentenced for the prison term, within 1 (one) year before this offence.¹⁰⁵

The simple suspended sentence is applicable to the following penalties:

- a prison term when the imposed penalty is less than or equal to 5 (five) years;
- a fine.¹⁰⁶

The court may decide that the simple suspended sentence would apply to one part of the prison term that it has set the time limit, or to one part of the fine that it has set the amount.¹⁰⁷

If, during the period of 5 (five) years that follows the definitive sentencing for a felony or a misdemeanor accompanied by a simple suspended sentence, then a new definitive sentencing for a felony or misdemeanor occurred, the simple suspended sentence is lawfully revoked. The first penalty is carried out without being merged with the second one.¹⁰⁸

In contrast, the court can decide that the new sentencing does not entail the revocation of the previously granted simple suspended sentence. The court's decision shall be indicated in the special motives.¹⁰⁹

If, during the period of 5 (five) years that follows the definitive sentencing for a felony or a misdemeanor accompanied by a simple suspended sentence, and a new definitive sentencing for a felony or misdemeanor does not occur, the sentencing with a simple suspended sentence is considered as null and void. If the suspended sentence is pronounced with only one part of the penalty, the sentence will be considered as null and void completely.¹¹⁰

- *Probationary Suspended Sentence* : The court may decide to impose a probationary suspended sentence for a prison term of a duration ranging from between 6 (six) months and 5 (five) years. The probationary suspended sentence has a power to place the convicted person to measures of control and respect of one or several specific obligations during the probationary period.¹¹¹

The court sets the probationary period. The period can be neither less than 1 (one) year nor more than 3 (three) years.¹¹²

104 Article 106 of the Criminal Code

105 Article 112 of the Criminal Code

106 Article 107 of the Criminal Code

107 Article 108 of the Criminal Code

108 Article 109 of the Criminal Code

109 Article 110 of the Criminal Code

110 Article 11 of the Criminal Code

111 Article 117 of the Criminal Code

112 Article 118 of the Criminal Code

In case that the court sets probationary period, it should impose the measures of control which are the following:

- the convicted person should respect the summons of the prosecutor or of any person assigned by him/her;
- the convicted person welcomes the visits of any person assigned by the prosecutor;
- the convicted person provides the prosecutor or any person assigned by him/her with all documents for verification of his/her social-reintegration;
- the convicted person keeps the prosecutor informed of the changing of his/her address;
- the convicted person keeps the prosecutor informed of the changing of his/her occupation;
- the convicted person shall receive authorization from the prosecutor prior to his/her travelling abroad;¹¹³

Beside these measures of control, there are specific obligations which the judge can impose to the convicted persons. Specific obligations that may be imposed upon the convicted person are the following:

- pursue a professional activity;
- accept a schooling or a professional training;
- reside in a designated area;
- submit him/herself to medical check-up or medical treatment;
- prove that he/she has contributed to taking care of his/her family;
- indemnify in function of his/her resources the damage caused by the offence;
- justify that he/she has paid in function of his/her resources the amounts due to the State following his/her sentencing;
- not to pursue the professional or social activity which has permitted or facilitated the commission of the offence. In this case, the court must specify the prohibited activities;
- abstain from appearing in certain areas. In the case, the court must specify the prohibited areas;
- abstain from gambling;
- abstain from drinking alcohol;
- abstain from associating with certain persons, in particular, the perpetrator, co-perpetrators, the accomplices or the victims of the offence. In this case, the court must specify the persons with whom association is prohibited;
- abstain from neither possessing nor carrying a weapon.

In its decision, the court must indicate a specific obligation(s) imposed upon the convicted person.¹¹⁴ The court can at all times modify the specific obligations imposed upon the convicted person.¹¹⁵

113 Article 119 of the Criminal Code

114 Article 120 of the Criminal Code

115 Article 121-1 of the Criminal Code

The probationary suspended sentence may be revoked by the court in the following cases:

- if, during the probationary period, the convicted person does not comply with the measures of control or the specific obligations;
- if, during the probationary period, the convicted person is sentenced for a new felony or misdemeanor;

The court may order a whole or a partial revocation of the probationary suspended sentence. In this regard, the penalty is carried out in whole or in part.¹¹⁶

The sentence is considered as null and void if before the expiration of the probationary period there is no request for revocation for which a decision was made.¹¹⁷

2.) Deferment of sentence

In the case of prosecution for a misdemeanor, the court may, after having declared that the accused is guilty, postpone the pronouncement of the penalty if the following conditions are fulfilled:

- the disturbance to the public order resulting from the offence has come to an end;
- the convicted is guaranteed for social re-integration;
- the convicted requests the delay for indemnifying the damage.¹¹⁸

3.) Day release

When the court pronounces a penalty for imprisonment less than or equal to 6 (six) months, it can decide that the penalty shall be carried out under the regime of semi-liberty in order to allow the convicted person to pursue a professional activity, to take schooling or training, to receive medical treatment or to support the needs of his/her family.¹¹⁹

The convicted person placed under the regime of semi-liberty shall be allowed to leave the prison within the prescribed time periods.¹²⁰ The court sets in its decision the days and the times during which the convicted person is allowed to leave of absence from prison.¹²¹

The time period of the semi-liberty shall be imputed in the duration of the penalty under current execution.¹²²

The prosecutor may issue the order of arrest and detention of the convicted person who does not return to the prison at the expiration of the time period of the semi-liberty.¹²³

116 Article 122 of the Criminal Code

117 Article 123 of the Criminal Code

118 Article 124 of the Criminal Code

119 Article 127 of the Criminal Code

120 Article 128-1 of the Criminal Code

121 Article 128-2 of the Criminal Code

122 Article 129 of the Criminal Code

123 Article 131 of the Criminal Code

4.) Sentence served installments

When the court pronounces a prison term less than or equal to 1 (one) year, the court may decide, for a serious ground of family, medical, professional or social reason, that the penalty should be carried out by splits.¹²⁴

Each split is not less than 1 (one) month. The total duration of execution of the penalty, taking into account the interruptions, may not exceed 2 (two) years.¹²⁵

The prosecutor may issue the order of arrest and detention of the convicted person who does not return to the prison at the expiration of the time period of the interruptions of the penalty.¹²⁶

IV. Conclusion

After examining the general principles of the Cambodian criminal law and the penalties which are described above, it should be noted that the present Cambodian criminal law is primarily based on the important principles of the international laws and norms in conformity with the Constitution and the Cambodian customary laws. This present criminal law is responding to new forms of crimes occurring both inside and outside of Cambodia. In addition to punishing the wrongdoer upon his/her wrongful conduct, the Cambodian criminal law is also designed to rehabilitate the wrongdoer and successfully re-integrate him/her into society. Therefore the criminal law also includes alternative sentencing provisions, which also exist in the criminal laws of many other countries in the world. In brief, this new criminal law which is based on international principles and standards, is very helpful to all individuals and law enforcement personnel, such as judicial police, prosecutors and judges.

124 Article 132 of the Criminal Code

125 Article 133-1 of the Criminal Code

126 Article 135 of the Criminal Code

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THE CAMBODIAN CODE OF CRIMINAL PROCEDURE: SOME REMARKS

MEAS Bora

CONTENTS

I. Abstract.....	229
II. Introduction.....	229
III. Overall Observation on the CCPC.....	230
IV. Some Positive Developments.....	230
1. Judicial Police.....	230
2. Rights of Charged Person.....	232
3. Judicial Supervision.....	233
4. Provisional Detention.....	234
5. Conditional Release.....	235
6. Investigation Chamber.....	236
7. Prison Observation.....	237
8. The Relation between the CCPC and other Criminal Legislation.....	237
V. Discussion.....	238
1. Lack of Clear Penal Punishment in Case of Offense by Judicial Police.....	238
2. Right to Have Lawyer.....	239
3. Conditional Release.....	240
4. Provision Detention and Judicial Supervision.....	241
5. Prison Observation.....	242
VI. Conclusions and Recommendations.....	243
REFERENCES.....	244

THE CAMBODIAN CODE OF CRIMINAL PROCEDURE: SOME REMARKS

*MEAS Bora**

I. Abstract

Criminal justice in the Kingdom of Cambodia has been improved as reflected in the Cambodian Code of Criminal Procedure. There are remarkably positive developments in both substantive and procedural norms, and also uncertainty in a number of norms. Law itself does not make sense without effective enforcement compliance with both national and international law.

This study argues that although there are unclear or even missing provisions in the code, existing law, including the 1993 Constitution, can still allow competent authorities to be proactive or creative in ensuring its effective implementation.

II. Introduction

Between 1975 and 1979, Cambodia was engaged in a war that led to the destruction of almost everything in the entire state, including legal norms. After such experience, Cambodia is now putting efforts into rebuilding all sectors of society. This includes the legal sector, which is fundamental to managing and maintaining security and social order in society. A recent example of rebuilding is the adoption in 2007 of a new criminal procedure code (the “CCPC”).

There are several positive developments contained in the CCPC; however, there are still some vague points and unavoidable loopholes with regards to detention, the alternatives thereto and other relevant issues.

This study first tries to highlight some of those positive aspects and elaborate on vague points or loopholes mainly related to detention. The reason for this selection is that such an issue is part of the past, present and future as well as a structural one. Lawyers have roles

* Mr. MEAS Bora obtained both LLM and LLD from the Nagoya University, Graduate School of Law in 2007. He is vice-rector of the Cambodian University for Specialties in Charge of Research, and a part-time lecturer of international law. He currently serves as a legal officer of the Office of the Co- Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia (the ECCC).

in preventing abuse, helping accelerate court proceedings, and in seeking pre-trial release. Therefore, without involvement of lawyers, there would be high instances of detention. Prisons would be crowded, demanding both financial and human resources for effective administration; prison conditions might also lead to inhuman treatment. Finally, without an effective system of conditional release, situations in prison would gradually worsen.

Addressing this structural issue by looking into what the CCPC provides and what are unclear points, need to be clarified by way of an interpretative guide, which will help avoid many unwanted situations.

III. Overall Observation on the CCPC

The CCPC is the most detailed legislation on criminal procedure in the history of Cambodia. It establishes institutions involving criminal justice, such as judicial police; stipulates some substantive issues, namely a complaint challenging composition of trial judge, rights of charged person, criminal records, interrogations, trials, visit to prison; details of court structures and how they works.

The CCPC includes many new aspects, such as statutory limitation of crimes under international law, genocide, crimes against humanity and war crimes; creation of a criminal chamber and investigation chamber attached to the court of appeal; and provisions on extradition. Last but not least, the CCPC final provision on its relation with other previous laws reflects a significant move as regard's to the law making method.

IV. Some Positive Developments

1. Judicial Police

The CCPC sets out the roles and duties of judicial police¹ and provides details of the categories of officials who are judicial police.² The judicial police include judicial police officers, judicial police agents, and other governmental officials who are authorized by separate laws to examine offenses in the scope of their territorial jurisdiction.³ Judicial police have an important supportive role in criminal proceedings with a duty to examine offenses, identify and arrest offenders and to collect evidence in the scope of their territorial jurisdiction.⁴ The judicial police perform their duties under the supervision and

1 Article 56 of the CCPC.

2 Article 57 of the CCPC.

3 *Ibid.* Police officers are those who hold the grade of at least major lieutenant and at least two years of work experience in the service of national police, after obtaining a Higher Diploma of the Judicial Police, *see* Article 60 of the CCPC.

4 Articles 71 to 74 of the CCPC.

coordination of the Prosecutor in the scope of their territorial jurisdiction. When enforcing rogatory letters, judicial police officers are under the authority of the investigating judge.⁵ The General Prosecutor attached to the Court of Appeal is empowered to take disciplinary actions against judicial police.⁶

If during the performance of their duty a judicial officer has committed misconduct, the Prosecutor or the investigating judge shall report to the General Prosecutor attached to the Court of Appeal. The General Prosecutor shall notify the Ministry of Interior or the Minister of National Defense in order to take disciplinary action. The General Prosecutor shall be informed about the result of the disciplinary action.⁷

The General Prosecutor may decide on the seriousness of the misconduct⁸ by summoning the judicial police officer and recording his statement. In this case, the officer is entitled to have his own lawyer or counselor according to his own preference. If the seriousness of the misconduct warrants, the General Prosecutor is entitled to, by reasoned decision, prohibit the concerned officer from performing his duties for a limited period not exceeding five years, or to permanently prohibit him from performing duties as a judicial police officer, and shall notify the decision to the concerned minister to which the officer belongs. The concerned officer may appeal against decision within 15 days from the date on which he received notification of the decision to the Minister of Justice, shall take the decision on appeal within one month after receipt of the appeal. The Minister might reject the decision of the General Prosecutor or reduce the duration of prohibition determined by the General Prosecutor. The decision of the Minister of Justice shall be final and definitive. During the appeal period and the period pending a decision on the appeal by the Minister of Justice, the prohibited judicial police officer is not allowed to perform his duties as a judicial police officer. He may resume his duties if the Minister of Justice rejects the decision of the General Prosecutor to prohibit him or decides to reduce the duration of prohibition. Any acts performed by a prohibited judicial police officer in violation of the prohibition by the General Prosecutor shall be null.⁹

The disciplinary sanction shall not be an obstacle to criminal action, provided that a *criminal offense* has been committed by the respective officer. When a judicial police officer commits an offense during the performance of his duty, the Supreme Court may decide to withdraw the concerned case file from the investigating or trial jurisdiction in charge and delegate the investigation or trial to another jurisdiction in order to ensure the good administration of justice, and the concerned unit shall be immediately informed of the decision.¹⁰

5 Article 58 of the CCPC.

6 Article 59 of the CCPC.

7 Article 64 of the CCPC.

8 Article 66 of the CCPC.

9 Article 66 of the CCPC.

10 Article 65 of the CCPC.

2. Rights of Charged Person

In the CCPC the term “right” is often used, for example, the right to be interrogated. However, some term of “right” is not “right” in the sense of international human rights law demanding corresponding obligation. Most of the rights are ones that the charged person possesses in all stages of court proceedings.

With regards to arrest by the judicial police, the police shall immediately inform the arrestee of the decision and the reason for the arrest.¹¹ During the immediate appearance before any prosecutor, it is mandatory that the prosecutor shall inform a charged person of any charge and legal qualification; the individual is not forced to give a statement; thus, he enjoys the right to remain silent. The prosecutor shall advise the accused of his right to have a lawyer of his own choice, and his right to be entitled to a period of time for preparation of defense.¹² A charged person also has these three types of rights and shall be informed by the investigating judge during notification of placement under judicial investigation.¹³

A lawyer may freely communicate with his client and the CCPC requires that conversation between them shall not be listened and recorded.¹⁴ The judge shall summon the lawyer to attend interrogation except when a charged person expressly waives right to his lawyer’s presence.¹⁵ From four months from the first initial appearance, if a charged person has not been interrogated, he can exercise “the right to be interrogated” by request to the investigating judge who is obliged to interrogate within a month after receipt of the request; if not, the charged person may directly ask the investigation chamber to take his statement.¹⁶

The trial hearing shall in principle be conducted in public¹⁷; the presiding judge shall guarantee the free exercise right of defense, and the CCPC requires the court to allow the charged person and his lawyer to present a final statement in his defense.¹⁸ Accused have other rights, including, but not limited to, the right to file motion for review filed with the Supreme Court¹⁹, the right to request for annulment of act breaching substance rule or procedure.²⁰ In the case that a breach, such as one of article 123 of the CCPC on territorial jurisdiction, which affects the interest of the party, including the accused, the

11 Article 97 of the CCPC.

12 Article 304 of the CCPC; *see* also Article 48 of the CCPC.

13 Article 143 of the CCPC.

14 Article 149 of the CCPC; article 510 of the CCPC.

15 Article 145 of the CCPC: due to his health situation, accused can not appear before the court; the CCPC article 309 demands presence of his lawyer; however, he might expressly waive the presence of his lawyer.

16 Article 148 of the CCPC.

17 Article 316 of the CCPC.

18 Articles 318 and 335 of the CCPC.

19 Article 446 of the CCPC.

20 Article 254 of the CCPC.

procedure/act is null and void. Also as for the relation between breaching of rule and right of accused, rules of procedures aiming at guaranteeing the right of defense under provisions of other criminal procedures, the mandatory rule on nullity under those provisions are applicable.²¹

3. Judicial Supervision

Judicial supervision is a mechanism whereby at any time an investigating judge may place the charged person under judicial supervision for an offense punishable by imprisonment.²² Minors under 14 years old shall not be subjected to judicial supervision.²³

Those put under judicial supervision shall comply with one or more required obligations, such as not to go outside the territorial boundaries determined by the investigating judge, depositing bail in an amount and duration to be determined by investigating judge, and refraining from certain specific professional activities.²⁴

The investigating judge, either at his own initiative or after a request by the Prosecutor, may issue an order for judicial supervision. After receiving an order from a prosecutor to place, the charged person under judicial supervision, the investigating judge, if he does not approve the request, shall issue an order to reject the request within 5 days, and notify the prosecutor without delay.²⁵

The investigating judge may request the removal or a change to the content of obligations of judicial supervision at any time by a written decision. The prosecutor and the charged person shall be notified of such decision without delay.²⁶ Both the prosecutor and those put under judicial supervision may request a change or termination of judicial supervision.²⁷ The investigating judge shall within five days render a decision and notify to the accused and prosecutor. The requesting party may directly request the investigation chamber for the decision if the investigating judge did not take action within five days.²⁸

If the charged person intentionally evades the obligations mentioned in a judicial supervision order, the investigating judge may decide to provisionally detain the charged person regardless of the prescribed term of imprisonment for the offense, even though the charged person has already been provisionally detained for the maximum period. The investigating judge shall decide to provisionally detain the charged person by an order

21 Article 252 of the CCPC.

22 Article 223 of the CCPC.

23 Article 224 of the CCPC.

24 Refraining professional activities does not include union one, *see* article 223 of the CCPC.

25 Article 226 of the CCPC.

26 Article 227 of the CCPC.

27 Articles 228 and 229 of the CCPC.

28 Article 228 of the CCPC.

with a statement of reasons and shall immediately notify the prosecutor and the charged person. Provisional detention decided under these circumstances may not exceed four months for an adult and two months for a minor.²⁹

4. Provisional Detention

Provisional detention is a detention of a person authorized in an order made by the investigating judge.³⁰ Provisional detention is only applied in limited circumstances.³¹ Such a detention is only applied to a misdemeanor or felony with imprisonment of one year or more.³² Detention is necessary, for example, to stop the continuation or prevention of an offence.³³

Detention may be initiated by the investigating judge or proposed by the prosecutor. The investigating judge shall inform the charged person of his observation, render a reasoned order and shall inform both prosecutor and the charged person immediately.³⁴ In the case of a request of a provisional detention order by the prosecutor, the investigating judge shall decide within 5 days and might disagree with the request by order without giving a statement or reason.³⁵ The prosecutor is entitled to appeal against the decision to the Appellate Court.³⁶ Likewise, the charged person is entitled to challenge the order of provisional detention.³⁷

The charged person can be released by initiative of the investigating judge³⁸ or by request of the prosecutor³⁹ or by the accused.⁴⁰ The investigating judge shall respond to the request within five days after receipt of the request. If the request is denied, both the prosecutor and the charged person may ask the investigation chamber to decide in stead.⁴¹ The investigating judge shall inform the prosecutor and the charged person without delay of the order rejecting release. If the investigating judge agrees with the request, he shall immediately inform both prosecutor and the chief of prison where the charged person is

29 Article 230 of the CCPC.

30 Articles 219 and 220 of the CCPC.

31 Article 203 of the CCPC.

32 Article 204 of the CCPC.

33 To prevent any harassment of witness; to preserve evidence; to guarantee the presence of the accused during the proceedings against him; to protect the security of the accused and preserve public order from any trouble caused by offense, *see* Article 205 of the CCPC.

34 Article 206 of the CCPC.

35 Article 207 of the CCPC.

36 Article 266 of the CCPC.

37 Article 267 of the CCPC.

38 Article 215 of the CCPC.

39 Article 216 of the CCPC.

40 Article 217 of the CCPC.

41 Articles 216 and 217 of the CCPC.

detained and the release shall be made in accordance with article 276. The investigating judge may place the charged person under judicial supervision as provided in article 203.⁴²

The period allowed for detention varies. It is short for minors, longer for adults and much longer for crimes against humanity, war crimes and crimes of genocide. Minors below 14 shall not be provisionally detained⁴³; minors under 16 years old committing felony shall be detained for not more than 4 months, from 16 to under 18 years old (not more than six months).⁴⁴ Minors under 16 years old committing misdemeanors shall be detained for not more than 2 months, and not more than 4 months for minors from 16 to under 18 years old. The period of more than 2 or 4 months shall not exceed half of the minimum period of the sentence set by law for minors.⁴⁵

For three types of crimes and other crimes committed by adults, the provisional detention period is not more than one year⁴⁶ and six months⁴⁷ respectively. In both cases, the period can be extended for the same period by order of the investigating judges with a proper and express statement of reasons, and shall be made only twice.⁴⁸

5. Conditional Release

Unlike in the past, correction or prison policy now focuses on rehabilitation. Prisoners after or even during imprisonment are given the opportunity for social integration. One major reason is to relieve the State from the burden of financial or facilities support.

The CCPC also provides for a so called “conditional release”. Prisoners who demonstrate good behavior during their imprisonment and who appear to be able to integrate into society are entitled to apply for such a release.⁴⁹ In addition, they shall serve their sentence for a set period of time; for example, serving half or less than one year of their imposed imprisonment.⁵⁰

Application shall be filed with the Provincial Court where the prison is located. The President of the Court will submit it for opinion of the National Commission consisting of two officials from the Ministry of Justice, one of them serving as the chair, and the chief of the prison or his representative.⁵¹ The Commission convenes the meeting at the Ministry of Justice, and submits a written opinion without delay to the president of the court.

42 Article 218 of the CCPC.

43 Article 212 of the CCPC.

44 Article 213 of the CCPC.

45 Article 214 of the CCPC.

46 Article 210 of the CCPC.

47 Article 208 of the CCPC.

48 Articles 208 and 210 of the CCPC.

49 Article 512 of the CCPC.

50 Article 513 of the CCPC.

51 Article 514 of the CCPC.

The President shall decide immediately.⁵² The prosecutor may file an appeal within five days against the decision of the court to allow a release; during the appeal, the parole decision of the court shall be stayed until the decision of the Appellate Court, which is then final and can not be appealed.⁵³ Regulations on monitoring and observation of the integration into society shall be set forth by *prakas* of the Ministry of Justice.⁵⁴

6. Investigation Chamber

The CCPC creates an investigation chamber attached to the Court of the Appeal. It has jurisdiction to hear complaints against decisions of the investigating judge.⁵⁵ This chamber is the sole body that can annul letters of proceedings requested by the investigating judge, prosecutors, civil parties, the charged person or his lawyer. Orders subjected to appeal may not be subject for request for annulment.⁵⁶ Requests for annulment shall be made during the investigation phase, and shall not be raised during the trial phase since a closing order rendered after the closure of the investigation would legalize all nullities.⁵⁷ The investigation chamber shall consider complaints *in camera*, and provides a judgment with reasons and elements for the review by the Supreme Court.⁵⁸ A judgment issued shall contain annulment by own motion of the investigation chamber.⁵⁹ If the chamber finds that there are grounds for nullifying acts or letters of proceedings, the act or letter shall be removed from the case file.⁶⁰

The chamber may order an extension of judicial investigation to any offense provided that it appears in the case file⁶¹ or to other suspects.⁶² The investigation chamber has authority to take action if the investigating judge fails to take action within an allowed set period after any request. For example, regarding the request of the charged person to be interrogated, if within one month after request, the investigating judge does not interrogate the charged person, the chamber may take a statement of the charged person.⁶³ The investigation chamber may make its own decision if the investigating judge did not. For instance, if the investigating judge failed to decide on a request by the prosecutor to

⁵² Articles 514 and 515 of the CCPC.

⁵³ Article 516 of the CCPC.

⁵⁴ Article 522 of the CCPC.

⁵⁵ Article 55 of the CCPC. The orders of the investigating judge subject to be appealed to investigation chamber by charged person (provisional detention order), by civil party (order denying investigation request), *see* articles 266, 267 and 268 respectively.

⁵⁶ Article 253 of the CCPC.

⁵⁷ Article 256 of the CCPC.

⁵⁸ Article 260 of the CCPC.

⁵⁹ Article 261 of the CCPC.

⁶⁰ Article 280 of the CCPC.

⁶¹ Article 263 of the CCPC.

⁶² Article 264 of the CCPC.

⁶³ Article 148 of the CCPC.

release a charged person, the investigation chamber may decide on the request of release made by the prosecutor.⁶⁴ Finally, the chamber may order the investigating judge to take action, such as to decide on closure of the case file.⁶⁵

7. Prison Observation

The CCPC contains a few provisions on prison management, leaving issues of detention regime implementation of deprivation of liberty in prison to be set forth in detail by the ministry in charge of prison.⁶⁶ The list of detainees shall consist of date of detention and date of release, and shall be sent to the judge as requested and inspected frequently by the prosecutor.⁶⁷ Prison authorities shall not detain any person without court order; otherwise, such a detention is qualified as illegal confinement, and the offender is accordingly guilty.⁶⁸ All judges receiving complaints of illegal detention of any person shall immediately examine it.⁶⁹ Finally, the general prosecutor of Appellate Court, prosecutors, president of investigation chamber and investigating judge shall regularly inspect prisons.⁷⁰

8. The Relation between the CCPC and other Criminal Legislation

Most laws in their final provisions contain a stipulation “that any provision inconsistent with this law or prakas shall be abrogated.”⁷¹ Such a provision reflects an old habit of law drafters, and uncertain relation between laws. Legal scholars may understand that the abrogated provision shall not be a provision of constitution since law shall not repeal constitution. However, such a provision easily leads to confusion by other persons and creates inconsistencies or vagueness which causes different interpretation or conclusions.

The CCPC, considering its form, reflects a positive step compared to the old legislation. In other words, it is a welcoming development related to the legislation making method. Article 611 of the CCPC lists a number of legislation which is abrogated when the CCPC entered into force, such as every provision on criminal procedures before 1992. Furthermore, this article even mentions specific articles will be abrogated.⁷²

64 Article 216 of the CCPC.

65 Article 286 of the CCPC.

66 Article 504 of the CCPC.

67 Article 505 of the CCPC.

68 Article 506 of the CCPC.

69 Article 507 of the CCPC.

70 Article 509 of the CCPC.

71 Article 60 of the Law on Protection and Promotion of Rights of Disabled Persons; article 57 of the Law on Inter-Country Adoption.

72 Article 611 of the CCPC.

V. Discussion

The new CCPC represents a positive step in the legal history of the Kingdom of Cambodia. It provides detailed pronouncements on various aspects of criminal procedure, including, for example, the roles and types of judicial police and provisions relating to the detention of children. The CCPC also incorporates and recognizes several fair trial rights and rights to due process, reflecting the current development of human rights law and the commitment of the Kingdom of Cambodia to fulfill human rights obligations imposed by treaties to which the Kingdom is party. The Investigative Chamber is created and its mandate clearly set out.

The period of pre-trial detention is a bit longer than provided for in previous relevant laws and can be extended by a reasoned order of the investigating judge. This reflects a solution to the current situation in which the actual period of pre-trial detention in some cases exceeds the set time limit. The period of pre-trial detention for children is detailed and depends on his or her age.

However, there are also some loopholes and negative aspects to the CCPC. A few of these issues will be discussed below.

1. Lack of Clear Penal Punishment in Case of Offense by Judicial Police

As mentioned above, in cases where the judicial police are engaged in misconduct, they shall be fined. The relevant article does not define the level of misconduct; it only mentions misconduct and serious misconduct. The disciplinary sanction shall not be an obstacle to criminal action, provided that a criminal offense has been committed by the respective officer.⁷³ In this sense, like a prison official, if the judicial police detain any person without warrant order, he might be accused of illegal confinement, a crime with two or five years of imprisonment and fine.⁷⁴ This proscribing is a positive move; however, as CCPC is a procedural law, a detailed provision was not mentioned.

The judicial police officer is a public agent that must be trusted and respected by the public. The point here is in the case where he might be given a two year imprisonment by a judge in the case of illegal detention or confinement lasting several years (might be a serious case), which might trigger criticism. The question would be: is it legally possible for a judge to impose other accessory punishments in addition to principal one's.

Article 53 of the Criminal Code provides accessory punishment, such as deprivation of certain civil rights, prohibition of career conducting during which offence is committed. This article does not deny the possibility of particular provision/law providing acces-

⁷³ Article 65 of the CCPC.

⁷⁴ Article 506 of the CCPC; Article 590 of the Criminal Code.

sory punishment.⁷⁵ This might refer to administrative law which prescribes punishment, such as de-promotion. Article 55 of the same code details types of deprivation of certain civil rights, one of which is a deprivation of public act performance. According to these articles, the law implicitly allows for the imposition of accessory punishment, such as de-promotion. However, articles 53 and 55 shall be interpreted the light of article 54 of the same law. Article 54 is unclear; while the accessory punishment attached to the offence which is provided and shall be pronounced, the other part of this article seems to provide discretion for court in the pronouncement of such a punishment. This paper suggests that courts shall provide accessory punishments for offences committed by judicial police. In the course of their duties. Removal or de-promotion of judicial police officers as accessory punishments will help to deter judicial police from committing offences.

2. Right to have a Lawyer

The right to have a lawyer is one of the keyrights to fair trial; it is recognized as an absolute one which shall not be suspended even during the time of public emergency, such as war time.⁷⁶ The accused has this right during the interrogation by the police.

The CCPC, as shown in section 2.2 of this paper, provides rights to a lawyer in many stages of court proceedings. The accused has a right to a lawyer of his own choice and in case he does not have one, the court shall appoint one for him.⁷⁷ Article 97 requires the judicial police to tell the arrestee about the right to be assisted by a lawyer mentioned in article 98.⁷⁸ However, this article did not provide such a right. It provides the possibility of talking with a lawyer or with other persons. Textual reading of it reveals that only a person, *but not a lawyer*, is allowed to talk for 30 minutes after the lapse of 24 hours counting from time of the arrest.⁷⁹ It needs to be noted that 24 hours are included in 48 hours counting from the time that the suspect arrived at the police station; a 48 hour period can be extended to another 24 hours if exceptional measures are needed for ensuring an effective investigation by the police.⁸⁰ To make it clear, this period does not include the actual arrest time at any place before bringing the arrestee to the police station. Thus, supposing that article 98 allows the lawyer to meet with the detainee for 30 minutes, one can interpret that this communication between detainee and lawyer is

75 Article 53 of the Criminal Code.

76 The American Court of Human Rights, Advisory Opinion OC-8/87 on *Habeas Corpus* in Emergency Situations, January 30, 1987, para. 27; the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 49; Johann Blair, the International Covenant on Civil and Political Rights and Its First Optional Protocol (2005), p. 13.

77 Article 304 of the CCPC.

78 Article 97 of the CCPC.

79 Article 98 of the CCPC.

80 Police shall request the extension of time at police station to prosecutor for examining the request. The minor between 14 and under 16 years old shall not be kept in police place beyond 36 hours; see article 96 of the CCPC.

done after one or two days (if an arrest took place far away from the police station and there is transportation difficulty in bringing the arrestee to the station) after 24 hours or 72 hours of keeping the accused in the police station.

We know the intention behind framing the point of time when a lawyer is allowed to meet the charged person. This is because the lack of sufficient number of lawyers, especially in rural areas of the Kingdom of Cambodia; and the arrest might be done at a place far from the police office. This is a complicated and practical problem that shall not be overlooked.⁸¹

We are all aware of the importance of meeting with a lawyer during arrest by police since a lawyer can help to ensure proceedings to be conducted legally. In other words, a lawyer, considering his legal expertise, helps to prevent legal mistakes which cause future nullifying of impugned procedure or act.⁸² In order to achieve this and comply with required binding due process rules, police must allow the detainee to have a lawyer if the arrestee can afford to have immediately after the arrest at any place or waits, in the case that the arrestee has a lawyer, to start further proceeding in the presence of a lawyer. Article 98 does not spell out in mandatory manner as regards a meeting with a lawyer during 30 minutes. This means that if police, on a practical basis, allows the arrestee to meet his lawyer even before 24 hours, he does not violate any rule, but upholds the right to have a lawyer. Courts should not interpret article 98 strictly to say that article 98 does not allow police to do so. Unclear pronouncements of article 98 might be interpreted positively to grant the right to have a lawyer immediately after actual arrest. The Constitution is silent about this, and does not provide a negation to the right to have a lawyer. Finally, as understood, it is not that drafters did not agree that a detainee has the right to a lawyer, but it is due to practical reasons that authorities can not ensure the right to have a lawyer and appoint a lawyer if the detainee needs and can not afford to have one.

3. Conditional Release

The provision of the conditional release in the CCPC is a welcoming development. It is unclear whether conditional release is applicable in other cases rather than detention in prisons.

81 The Committee on the Rights of the Child, Concluding Observations, CRC/C/KHM/CO/2, 20 June 2011, para. 76.

82 In the case of *Duch* before the Extraordinary Chambers in the Courts of Cambodia (ECCC), his lawyer challenged legality of previous detention of *Duch* in military court facility before bringing him to the ECCC; illegality of detention found by the ECCC is not mandatory for his release. In accordance with settled international rule, if *Duch* was tortured during his previous detention (abuse of procedure), *Duch* would have been released by the ECCC, *see* Defense's Appeal Brief on Challenging the Order of the Provisional Detention dated 31 July 2007, No. 001/18-07-2007-ECCC-Defence, 5 September 2007, para. 8.

Conditional release will help to relieve crowding issues in the prison. It seems to be complicated and time consuming, considering the involvement of multiple institutions, such as the prison, the court or maybe the community. The courts do not only have consideration of conditional release, but many other things to decide provided in the CCPC. The process of the release might not be complicated, but how the release is effectively monitored is a crucial point.

Therefore, *prakas* of the Ministry of Justice should be more detailed, focusing on how the conditional release regime shall be proceeded effectively and efficiently, and particularly how the monitoring system is operated. Finally, there should be a special focus on juvenile offenders.

4. Provision Detention and Judicial Supervision

There are six grounds for justifying the provisional detention.⁸³ Textual reading reveals uncertainty as regards whether all grounds must be proved. Since such a detention shall be necessary or last resort, all grounds shall be established for detention.

The period for provisional detention allowed in the CPCC is long if compared with other criminal law provisions, regardless of extension.⁸⁴ The total period is 18 months for an ordinary crime committed by an adult and 3 years for serious crimes, such as genocide. It would be much longer in cases in which the accused is charged with multiple serious crimes one after the other.

We agree as a rule that detention is an exceptional measure. The rationale for this is to avoid, as much as the authorities might want to do, depriving the liberty of the person. Due to deprivation, the accused might lose income; prisons become crowded; detention conditions deteriorate, demanding more human and financial resources to address these problems. All this might trigger criticism irrespective of legal consequence, particularly if after detention, the accused is proved innocent.

It is understandable that some crimes are complicated, demanding much time for investigation. This complexity shall be balanced with the negative effects of long provisional detentions. Thus, while the possibility of extending detentions exists, relevant authorities shall resort to such possibilities in only exceptional cases. The CCPC obliges investigating judges to take serious consideration of deprivation of liberty, but it does not absolutely prohibit the investigating judge from releasing the accused from pre-trial detention. For example, article 215 allows the investigating judge to release the accused at any time, and in urgent cases, he can order release without waiting for submission of the prosecutor.⁸⁵

⁸³ Article 205 of the CCPC.

⁸⁴ The provisional detention period is four months and can be extended to 6 months, *see* Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, article 14, in the Compilation of the Existing Applicable Laws in the Kingdom of the Cambodia, the COHCHR, 2005, p. 2208. This law was repealed by the CCPC, *see* article 611.

⁸⁵ Article 215 of the CCPC.

After the release, the charged person may be put under judicial supervision.⁸⁶ Priority should be given to judicial supervision over pre-trial decision if it is warranted to do so. In other words, the investigating judge should consider judicial supervision first before considering the possibility of provisional detention.

The choice of judicial supervision is extremely important for juvenile offenders. Juveniles demand different treatment and consideration with regards to their age status for physical, emotional and spiritual development. In this connection, the best interests of the child shall be taken into account by the investigating judge.⁸⁷ Judicial supervision shall be applied to a juvenile unless there is a strong public safety interest to the contrary. The investigating judge may add other obligations not mentioned in article 223 suitable to a juvenile case. Article 223 does not use the term “and”; thus, the list of obligations is not exhaustive.

5. Prison Observation

The CCPC provides duties to both investigating judge and prosecutor to inspect prisons; however, the latter is required to conduct frequent inspections, while inspection by the investigating judge shall be regular. “Regular” inspection is different from a “frequent” one. The former might be once every month or yearly which can not be enough to monitor a prison properly. However, this might be remedied if the investigating judge wants to keep an eye over a prison by requesting the prison administration to send a list of detainees or by frequent visits by the prosecutor. The problem here is how both the investigating judge and the prosecutor who are both vested with power to inspect prisons may cooperate with each other. A prosecutor, as being the supervisor of prison management, might hide instances of ill-treatment of detainees by prison guards due to fear that he would be accountable for such acts as a superior. For this reason, the investigating judge shall employ due diligence as to what happens in the prison, especially in the legality of detention, since the CCPC requires the investigating judge to immediately examine complaints of illegal detention. The cooperation between investigating judges and prosecutors, and how often they shall inspect shall be further stipulated in future *prakas* as required in the CCPC, and shall be consistent with contents of the law on prison since this law is *lex specialis*.

⁸⁶ Article 203 of the CCPC.

⁸⁷ For detailed discussion on the principle of best interest of the child, see Sharon Detrick, a Commentary on the United Nations Convention on the Rights of the Child, 1999, p. 85.

VI. Conclusions and Recommendations

In conclusion, the CCPC provides detailed provisions, reflecting positive developments in criminal justice in the Kingdom of Cambodia. Based on the subject-matters covered by this paper, the CCPC seems to be pro-accused and chooses options of rehabilitation rather than deterrence. Many rights of the accused are provided. Judicial supervision and conditional release are allowed, and detention visits are required. The CCPC in many provisions sets time limits for acts by the judiciary to be done and to be reviewed by the investigation chamber.

Of course, there are still loopholes or vagueness and guarantees are not the same as ones of international norms of due process; however, in this stage of development of criminal justice, it is a positive development in the context of criminal justice in Cambodia.

The importance is how really a pronouncement in law on paper is brought into reality. Recommendations as part of the discussion of this paper will hopefully assist the judiciary and law enforcement to perform their acts with respect for the law, the constitution and relevant international norms recognized and accepted by Cambodia.

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ADMINISTRATIVE LAW AND DECENTRALIZATION

THENG Chan-Sangvar

CONTENTS

I. Overview	247
1. The Definition of administrative Law	247
2. The constitutional Grounds of Cambodian administrative Law	248
II. The Organization of the Administration	248
1. The central Administration	249
The Ministries and Institutions	249
The public Establishments	251
2. The sub-national Administration	251
The local administrative Organization	252
The means of the sub-national Administration	254
III. The activities of the Administration	255
1. The administrative policing Powers	255
Administrative policing Authority	256
The Exercise of administrative policing Power	257
2. The public Service	257
IV. Administrative Decisions	259
1. The unilateral Decision	259
2. The administrative Contract	260
V. Judicial Review	262
VI. Conclusion	264

ADMINISTRATIVE LAW AND DECENTRALIZATION

*THENG Chan-Sangvar**

I. Overview

1. The Definition of administrative Law

In most countries, administrative law is about challenging official power. It is concerned with defining the powers of the state, as well as protecting or limiting, the rights and liberties of citizens. It allows citizens to challenge whether a government or official agency has the legal authority to do what it has purported to do. Decision-making needs to be approached with a critical eye; but it has been hard to equip and encourage Cambodian people in this endeavour.

Administrative law is primarily an area of public law that regulates the relationship between the citizen and the state. Interpreting and applying administrative law, however, is about more than ensuring that an administrative body acts within the law. It involves understanding the way governments operate, the nature of the administrative power and process, the function of those who operate in a government, and the practices, procedures, manuals, guidelines and other internal policies or rules which may influence the way they behave. It also requires a keen sensitivity to various ways in which commercial, economic and political pressure impact on governments, administrators, tribunals and courts.

Over the past twenty years, administrative law has become, in many states, one of the most active, far-reaching areas of law, affecting the rights of individuals, the public as a whole, and businesses, vis-à-vis the government, the administrative bureaucracy and an array of official and semi-official agencies. Administrative law is at the cutting edge of the defence of democratic rights against the state. It can also play an important role in protecting basic rights and entitlements against the government.

* Dr. THENG Chan-Sangvar is Professor of Law, Chief of Staff of the Office of the Minister for Rural Development, Kingdom of Cambodia.

2. The constitutional Grounds of Cambodian administrative Law

Although there is generally a consensus about which laws are regarded as public law and which as private law, this division is still not clear in Cambodia in terms of legal grounds. This is due to the fact that there is no clear division of the court system as there is in some countries such as Thailand, Germany or France where the civil judges and the administrative judges sit in different houses and apply different sets of law. The dual court system allows a clear distinction between public law and private law, since the civil courts apply the private law and the administrative courts apply the public law.

In Cambodian law schools, it is generally accepted that the study of law ought to be separated between private and public law or specialized into private law or public law. But the difference in terms of concepts and their applications are rarely taught. This is also due to the fact that, in general, the courts do not fully fulfil their mission in construing rules and bringing credible solutions to administrative conflicts. Looking at the provisions of the 1993 Constitution of the Kingdom of Cambodia (the “Constitution”), the administrative law constitutes a truly distinct branch of law.

Article 39 of the Constitution stipulates that “*Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts*”. This provision provides the fundamental basis for rule of law in Cambodia in that it guarantees the submission of the state and administration to the law. It also provides a constitutional ground for judicial review.

Paragraph 3 of Article 128 new of the Constitution adds that “*the Judiciary shall cover all lawsuits including administrative ones*.” This means that the Constitution recognizes that there are administrative lawsuits that are different to private lawsuits; it provides that the same courts have the competence to deal with both. The Cambodian courts, then, have to apply two separate sets of law, the private law and the administrative law, according to nature of the lawsuits presented before them. However, one crucial issue is still unresolved: the imprecision of the substance and content of that administrative law. The court has to play a very important role.

II. The Organization of the Administration

The Cambodian administration is divided into two main categories, the central administration and the sub-national administrations. The central administration is enhanced by the ministerial agencies and autonomous bodies and the sub-national administrations are

the result of the implementation of the Royal Government of Cambodia's ("RGC") recent policy on decentralization.

1. The central Administration

The central administration consists of two main sub-categories. The ministries and institutions represent the core agencies empowered to implement the government policy and to execute the legislation. The second sub-categories are legally created by the first one, but they are given certain autonomy and are supposed to fulfil certain tasks. They are called "public establishment".

The Ministries and Institutions

The ministries are created by law. Their number is not limited by any legislation. They are led by a minister and a member of the Cabinet, and are assisted by several state secretaries¹ and under-secretaries.² There is no legislation setting out any unique or specific structure for the organization of the ministries. Each of them operates according to the sub-decree governing its functioning and its organization. In general, a ministry shall have several general departments, or directorates which are divided into several departments. These departments are subdivided into several offices. Some ministries have a central unit called a secretariat general led by a secretary general. As Cambodia inherited a French style of government administration, each ministry has at its disposal a control unit in charge of inspection. According to the size of the ministry, this unit can be a general inspection having the rank of the general department and led by a general inspector or a simple inspection department chaired by an inspector.

Beside the ministries, there are two other kinds of government agencies which are not named "ministries" and are not led by ministers. They are inter-ministerial bodies and the regulatory institutions. I will refer to both of them as "institutions" for convenience.

The inter-ministerial Bodies

Inter-ministerial bodies are established at will by the government. They can be created by law,³ a royal decree⁴ or a simple sub-decree.⁵ Their role is essentially to give advice to the government on specific issues. They are called "inter-ministerial bodies" because

1 The state secretaries are members of the Cabinet. They shall receive the same vote of confidence from the National Assembly as the ministers.

2 They are appointed by royal decree, but are not members of the Cabinet. They fulfill their functions for the same term as the government and shall leave if the government is dissolved by the National Assembly.

3 The National Committee for the Development of the Sub-National Democracy (NCDD).

4 The Tonle Sap National Committee.

5 The Inter-ministerial Commission for the Coordination, the Preparation and the Implementation of Development Projects along western and northern borders of the Kingdom of Cambodia.

representatives from different ministries are sent to join the bodies. They are usually attached to a ministry and under the chairmanship of the minister of that ministry and can take the form of a council, a committee, an authority, or even a task Force. They are mostly assisted by a secretariat or a general secretariat staffed by the civil servants from the attached ministry or sent from other agencies. There is normally no other supplementary salary provided to those staff. With very few exceptions, the inter-ministerial bodies have no proper budget for their functioning.

As a consultative body, decisions are made through a consensus, i.e. there is no vote. Normally, the secretariat drafts the decision and submits it to the inter-ministerial body, which convenes to discuss and decide whether to adopt the decision. In practice, the decision depends largely on the chairman of the body.

Most inter-ministerial bodies are established in the state reform sectors and most of the government reform programmes have been conducted by these bodies. They conduct studies and research, and propose key ideas to reform policy. They are not empowered to issue regulations, which must normally be made by the attached ministry. Only some inter-ministerial bodies have been empowered to make decisions affecting the people.⁶

The regulatory Institutions

Regulatory institutions are the most recent bodies created by Cambodian law. The purpose of their establishment is to respond to the advent of the market economy and the liberalization of the public sectors. It is understood that to ensure fair competition in a sector among economic actors, private as well as public, an independent body should be created to guarantee smooth implementation of the law.

The role of a regulatory institution is usually to issue a licence to operators performing a specific economic activity. Since the operator can be a public or a state entity, a body independent from the government is the most suitable to do the job.⁷ Once issued, the use of all licences is subject to control conducted by the regulatory bodies. Any violation of a licence can result in a sanction, administrative or criminal.

These bodies do not have their own legal personalities; they take actions and make decisions on behalf and under the responsibility of the state. Their functioning is organized so as to ensure their independence from the government. Members of regulatory institutions can be members of parliament, representatives from the private sector or civil servants, but once they are appointed to the body, they cannot be removed until the end of a term and they must not receive any instruction from government agencies. The members are usually specialized in relevant activities.

6 The Council for Administrative Reform, for example, is entitled to hold, together with the Secretariat of Civil Service, the civil servant management system that affects the civil servants. The Council for the Development of Cambodia (CDC) is also empowered to make decisions upon request from the investors.

7 The very few regulatory bodies are the Authority of Electricity of Cambodia, the National Authority for the Eradication of the Mines and Unexploded Weapons, and the National Election Committee.

The public Establishments

Public establishments are different from ministries and institutions because they enjoy a legal personality separate from the state. They are created by the government, but enjoy financial and administrative autonomy from the government. This autonomy does not mean independence; they are still attached to the ministry that initiated their creation. That ministry plays the role of the guardian of the public establishment.

The public establishments are placed under two types of control or guardianship: technical and financial. The technical guardianship is ensured by the attached ministry and the financial guardianship is handed to the Ministry of Economy and Finance. The two ministries can decide to audit, inspect or control as necessary. The public establishment shall communicate with the Council of Ministers, the guardian ministry and the Ministry of Economy and Finance through providing documents such as the meeting report of its board of directors, its development plan, its annual budget, as well as its annual management and financial account reports.

There are two kinds of public establishment: administrative public establishments and economic public establishments. Their difference lies in the fact that an economic public establishment is created in order to make profits, whereas administrative public establishments are non-profit. In addition to this fundamental difference, the status of administrative public establishments and of economic public establishments is set out in different legal texts.⁸

An administrative public establishment is organized as a normal public administration body. An economic public establishment operates as an ordinary business company. The common characteristic of the two categories of establishments is that they are managed by a board of directors appointed for a specific mandate. The board members are mostly civil servants sent by relevant ministries/institutions. There can also be representatives from the private sector or from the users' communities. The board of directors is the decision-making organ. It is assisted by an administration managed by an executive officer who is also a member of the board with full rights. This officer is sometimes called the director, the director general or even the rector. The staff of the public establishment can be civil servants or contractors.

2. The sub-national Administration

The Constitution of 1993 does not specify the form of the Cambodian territorial administrations, but contents itself with stipulating that Cambodian territory is divided into provinces, districts and communes⁹ and that the organization of these administrations is

⁸ The royal decree dated 31 December 1997 deals with the administrative public establishment and the law dated 17 June 1996 sets the status of the economic public establishment.

⁹ Article 145 new of the Constitution.

subject to organic laws.¹⁰ The provinces, the districts and the communes have been the three traditional levels of administration in Cambodia for centuries.

Before 1993, Cambodia was an extremely centralized country. The first step of decentralization was realized at the commune level, the lowest level of administration, with the law on commune administration adopted in 2001.¹¹ At that time, the provincial and district levels were still centralized. In 2008, a new and drastic change was introduced at these two levels of administration by the Law on the administrative management of the provinces, the capital, the districts, the krong and the khans.¹²

Today, all Cambodian territorial administrations are decentralized. These three levels of decentralized administrations are called officially and legally “the sub-national administrations”. They are organized in such a unified form of administration at all levels.

All sub-national administrations enjoy legal personality and are autonomous by law from the state. This autonomy consists in the power of decision-making given to them and in the existence of the sub-national civil service as well as a local finance system.

The local administrative Organization

Sub-national administration is the result of the combination of policies of administrative de-concentration and the decentralization. Decentralization results in local elections which allow people to choose their representatives. In a de-concentration system, the country is divided into different administrative territories, and each of them is administered by officials appointed directly by the central government.

The Council

The council represents the people in a specific territory. The provincial and the district councillors are elected for five years by the commune councillors.¹³ The number of the provincial and district councillors varies from seven to twenty-one. The commune councillors are elected for five years directly by the people living in the commune.¹⁴ Their number varies from five to eleven according to the size of the population of the commune.

Each council shall adopt internal regulations at its first session. The first candidate in the list presented by the winning political party shall be president of the council. The presidents of the provincial and the district councils enjoy only ceremonial duties. He/

10 Article 146 new of the Constitution.

11 Law n° NS/RKM/0301/05 dated 19 March 2001.

12 As stipulated by the law n° NS/RKM/0508/017 dated 24 May 2008, Cambodia is divided into the Capital and provinces. The Capital is divided into khans and the provinces are divided into districts and krong. Khans and krong are divided into sangkats and districts are divided into districts (called sroks). In term of administrative organization, there is a major difference between sroks and khans and between the provinces and the Capital.

13 The election of the provincial and the district councils is set in the Law n° NS/RKM/0508/018, dated 24 May 2008.

14 The election of the commune council is determined by the Law n° NS/RKM/0301/04, dated 19 March 2001.

she chairs the council sessions according to the internal regulations, but has no specific regulatory power. The president of the commune council, called the commune chief, plays the role of the chief of the commune administration, since there is no board of governors at this level of decentralized administration. He or she shall not only preside over the commune council session, but also fulfil some duties as personally delegated by the central government.¹⁵

The council is a decision-making body of the sub-national administration. Decisions are made by a majority vote. Decisions may be made on issues such as the budget, the development plan, the organization of the administration, or the use and management of the assets. The council is accountable both to the population, in relation to the decisions it makes, and to the central government, in relation to the implementation of all laws and regulations adopted at the national level. The council shall control the governor's action. Where considered necessary, the council can require the governor to provide an explanation as to his or her actions in its meeting.

At the capital, the province and the district levels, the law creates three committees to assist the council in making and implementing its decisions. They are the Committee for Technical Coordination, the Committee for the Consultation on Women's and Children's Affairs and the Committee for Procurement.¹⁶ The council is also authorized to create more committees to help fulfil its mission. The members of those committees are appointed by the council among the councillors, the members of the board of governors and staff of the council. The law only provides precision on the composition of the Committee for Technical Coordination.¹⁷

The Board of Governors

The board of governors represents the central government or the state. The board is composed of a governor and a number of deputy governors appointed by the central government.¹⁸ The composition of a board varies from three to seven members, including the governor. All members are civil servants from the Ministry of Interior and they cannot be members of the council. The council can propose a revocation of the governor or the deputy governor to the central government. The governor and deputy governors have no term for their function.

15 The commune chief is the civil record officer and charged by the government to ensure the implementation of law and regulation within the territory of the commune. In the commune, he is also the chief of the unified armed unit, which may comprise the police, the army and the military police.

16 Article 114 of the Law on the administration of the Capital, provinces, kongs, sroks, khans.

17 This committee is chaired by the governor and its members are all unit chiefs of the council, the Director of Finance and directors of all de-concentrated provincial departments of the ministries and institutions.

18 The provincial governor is appointed with a royal decree. The provincial deputy governor and the district governor are appointed with sub-decree. The district deputy governor is appointed by Prakas (decision) of the minister of interior.

The governor and deputy governors can be invited to attend all meetings of the council and shall have the right to speak, but not to vote. The board of governors gives advice, reports to the council and plays the role of executive of the council. The governor cannot make any decision within the responsibility of the council without the official consent of the latter.

The law gives the board of governors the right of proposal over a variety of matters concerning the local administration's life. This right of proposal seems to be exclusive to the board. It concerns, for example, the creation or dissolution of any administrative units, the organization of roles, duties and work conditions of the local staff, the nomination and promotion of staff, the three year investment rolling plan and the annual budget, the five-year development plan, and the council's annual activities report.¹⁹

The means of the sub-national Administration

The Administration and Staff

The council's staff and administrative units are a new creation of the Law on the administration of the capital, provinces, kongs, sroks, khans. The council can have a certain number of staff and administrative units as needed. This staff recruitment is decided by the council itself. A councillor cannot be a staff member of the council. These staff do not include the staff sent by the central government to work in the provincial or municipal departments, which are part of the de-concentration system. They enjoy a separate status to be determined by regulations from the central government.

The key person who directly manages the local staff is the administration director.²⁰ Strangely, this core person is not appointed by the council, but by the Minister of Interior. There is no regulation which determines whether the administration director is a member of staff of the central government or the sub-national administration, even though the role and responsibilities of this administrator are huge. His or her work includes, for example, the daily implementation of the decisions of the council and board of governors, providing advice and proposals to the council, and receiving administrative delegations from the board of governors.²¹ As the head of all administrative units belonging to the council, he also has to make sure that the Director of Finance regularly fulfils his work.²²

19 Articles 162 to 164 of the Law on the administration of the capital, provinces, kongs, sroks, khans.

20 This position has evolved undoubtedly from that of the Director of Cabinet of the province. Before the decentralization process, he was the core person in managing and coordinating the implementation of the governor.

21 Articles 185 to 187 of the Law on the administration of the capital, provinces, kongs, sroks, khans.

22 The Director of Finance of the council is also a new position. He is appointed by the council upon the recommendation of the Minister of Interior and after the approval of the Minister of Economy and Finance (article 179 of the Law on the administration of the capital, provinces, kongs, sroks, khans).

The local Finances

The new provisions of law and policy relating to local finances have not yet been fully implemented. The Law on the administration of the capital, provinces, krong, sroks, khans devoted one entire section, from Article 241 to Article 253, to describe the financial system of the sub-national administration. However, because a number of the regulations that are required by law to implement this policy have not yet been enacted, the local finance policy has not yet been implemented. Presently, the sub-national administrations depend entirely on the state's budget.

In some respects, the law can be considered very ambitious. It provides for a system that is supposed to provide the sub-national administration with effective and sufficient financial tools to bring about their development projects. On the other hand, the law contents itself to impose on the National Committee for Decentralization and Deconcentration the duty to consult the Ministry of Economy and Finance and other institutions while gradually conceptualizing and implementing all procedural and substantial aspects of the legal provisions and policy relating to local finance.²³

The law formally prohibits all sub-national administrations from taking out loans from any person or institution.²⁴ They also cannot issue any kind of bonds or negotiable instruments which lead to the creation of debt. The sources of local finance are limited to local taxation, rent fees and other non-fiscal income, or donation. But no complete set of laws and regulations on local finance has been enacted since the adoption of the Law on the administration of the capital, provinces, krong, sroks, khans in 2008, or even the Law on the commune administration in 2001.

III. The activities of the Administration

The majority of the work of the administration results from two main mandates or missions. The first of these consists of maintaining public order. It is called administrative policing. The second is to provide services to the general public.

1. The administrative policing Powers

Administrative policing consists of actions taken to prevent disturbances to public order. Public order can be defined as an absence of disorder in the realms of public security, tranquillity and sanitation. Once one of the three elements is affected, there is no public order. The mission of the administration is to ensure that there are no disturbances of public order. To do this, the administration is given decision-making powers that allow

²³ Article 253 of the Law on the administration of the capital, provinces, krong, sroks, khans.

²⁴ Article 252 of the Law on the administration of the capital, provinces, krong, sroks, khans and article 80 of the Law on the commune administration.

it to limit the rights of individuals. Activities of the administration which consist of making decisions in order to maintain public order are recognized as administrative policing.

Once there is a disturbance of public security, tranquillity or sanitation, the goal of administrative policing has failed. The focus will shift from preventive measures to responding with curative measures. This involves identifying the offender, and arresting and sending them to court if required. These powers are possessed by the judicial police under criminal law and procedure.

Administrative policing Authority

Authorities are empowered with administrative policing powers at two levels: national and sub-national. At the national level, the prime minister enjoys general administrative policing power and ministers enjoy special administrative policing power. At the sub-national level, the governor (of the capital, the provinces and the districts) and the commune chiefs are vested with the general administrative policing power.

General administrative policing power refers to the decision-making power wielded by an official in the absence of specific legislation granting such powers to another authority. Officials possessing general administrative policing powers can make decisions whenever they deem it opportune or whenever the situation requires it.

If there is a law or regulation providing decision-making power to a specific authority to maintain public order in a particular field of activities, we talk about *special* administrative policing. The Minister of Environment is an official holding special administrative policing power in relation to the environment, since he is entitled to make decisions to prevent any person from causing pollution.²⁵ Also, the Minister of Rural Development is in charge of building, renovating and maintaining rural roads. In this case, he can prohibit trucks that are overloaded from using these roads. In the same way, the Minister of Culture and Fine Arts is entitled to control the content of movies, songs and books. He can refuse to provide a licence allowing the commercialization of any content that may provoke disorder in Cambodian society.

The existence of special administrative policing powers does not constitute an obstacle to the exercise of general administrative policing powers by those with the authority to do so. For example, if those officials possessing special administrative powers fail to exercise these powers in response to a particular development, or are late in doing so, those possessing general administrative policing powers can make a decision.

²⁵ He is in charge of preventing, reducing and controlling the pollution to the air, to water, to the soil, and all pollutions caused by sound and vibration (law no 1296/36 dated 24 December 1996 on the protection of environment and the natural resource management). He is then in charge of controlling hard trash management in all territory (article 6 of the sub-decree no 36 ANK dated 27 April 1999 on management of hard trash).

The Exercise of administrative policing Power

Preventing disturbances to public order necessarily results in decisions that prevent people from doing anything that might lead to disorder. Those exercising administrative policing powers are therefore in a delicate position because their decisions may violate or infringe on people's rights.

The rights of citizens are described in the Constitution.²⁶ Other laws provide a detailed legal regime on how to exercise those rights. The administrative authorities have a duty to not only ensure that these rights are exercised lawfully, but also to ensure that they are exercised in a way that is not excessive and abusive, which could lead to disorder. In many cases, it is not simple to draw a line between the legitimate exercise of a right and the abuse of the right by taking excessive actions. There is so far no law, policy, or judicial precedent which provides exact guidance on how the authorities can reconcile their decision-making responsibilities and mission to maintain public order with the need to respect people's rights.

2. The public Service

The administrative authority not only prescribes the limits of the rights and actions of citizens, but also provides services to the public in general. The scale of this mission depends very much on the political system adopted by the state. The Cambodian Constitution has set up a constitutional monarchy with a welfare state. It devotes two entire chapters not only to provide for the establishment and development of a market economy,²⁷ but also to set out a series of responsibilities of the state in the fields of education, culture and social affairs.²⁸ The only way to fulfill this huge mission is for the administration to provide public services.

The French-inspired concept of public service was not well-known in Cambodia until the 5th of May 2006 when the Council of Ministers adopted a policy paper on public services, entitled “*servicing the people better*”. The paper defines a public service as “*an activity done by a competent institution and an institution receiving competence aiming at servicing the public interest.*” A competent institution refers to a state institution or the state's agent or authority at all levels. The institution receiving competence refers to a private sector or civil society organization that receives rights and duties from the state and enjoys them under the control of the state or its agency.

There is so far no official law or regulation to provide a legal distinction between different types of public services. The RGC's policy paper on public services does not provide any clear indication as to the difference in legal terms; it only tries to classify

²⁶ Article 31 to article 50.

²⁷ Chapter 5 from article 56 to article 64.

²⁸ Chapter 6 from article 65 to article 75.

various activities of the administration into seven groups.²⁹ The only categorization we can make comes from the legal texts on the legal regime of the administrative public establishment³⁰ and of the economic public establishment.³¹ According to these two texts, the activity of the administration, or its agents to which it delegates power, can be either administrative or economic. These activities are fulfilled by administrative public establishments and economic public establishments, respectively. Thus we can divide public services into activities that are either administrative or economic.

An *administrative* public service consists of activities related to the administration of various non-economic portfolios: social, health, cultural, scientific and technical affairs.³² These public services are normally provided to the general public freely. The relationship between the provider and the beneficiary shall be governed by public law, that is, under the regulatory system. The government or its agency produces rules according to which the services are organized and provided. In case there is a complaint against the provider or the quality of the service, public law shall be applied and the administrative court competent.

An *economic* public service consists of producing goods and providing services to the market.³³ These activities are no different from private activities conducted in the economy. This implies that the provision of economic public services shall be governed under the private law. The *economic* public service is not only provided by the administration, but in the era of globalization, the government also regularly delegates responsibility to deliver services to the private sector.³⁴ To ensure fair competition, conflicts between the provider and the beneficiary shall be governed under private law, and thus these disputes fall within the jurisdiction of the ordinary court.

29 They are 1) services related to the state's sovereignty, 2) services related to security, public order and social safety, 3) services related to justice and arbitration, 4) services related to the promotion of trade, SME, investment environment, and the participation of the private sector in developing and maintaining physical infrastructure, 5) services related to social, cultural and women's affairs, 6) services related to the development of physical infrastructure, and 7) services related to the state's income collection, expansion and cash flow.

30 Royal decree no 1297/91 dated 31 December 1997 on the legal status of the administrative public establishment.

31 Law no 0696/03 dated 17 June 1996 on the general status of the public enterprises.

32 Article 1 of the royal decree no 1297/91 dated 31 December 1997 on the legal status of the administrative public establishment.

33 Article 26 of the law no 0696/03 dated 17 June 1996 on the general status of the public enterprises.

34 That should be one of the reasons of the development of the regulator established to control specific economic activities which are offered jointly by the administration and the private sector.

IV. Administrative Decisions

Most administrative decisions are made unilaterally; however, the administration can also conclude contracts.

1. The unilateral Decision

There are five forms of regulatory acts that can be implemented by the Cambodian administration. The first four are issued by the central/national administration. The last is an act of the sub-national administration. These regulatory acts are explicitly provided for in law. They are examined in order of hierarchy below.

The royal decree is the top executive regulation. It is used either to implement a law, or to execute a sub-decree³⁵ or another royal decree when those acts specifically foresee such implementation. A royal decree is used to organize the functioning of a public institution, to create a new governmental body, or to appoint officials into a certain position or rank. It can also be used to offer distinction or honorific titles. A royal decree is an act of the government, even though it is signed by the King or the acting Head of State. The question logically arises as to when a royal decree can be used outside of those instances in which it is explicitly provided for and its use foreseen in law or regulations. In practice, the government makes a choice according to the degree of importance of the act to be undertaken. The procedure for its adoption is the same as that of a sub-decree, except that the draft of a royal decree is sent to the King for its signature.

A sub-decree is the most common government decision. It is signed by the Prime Minister or the acting Prime Minister and is used to implement a law and other regulatory acts. There is no official procedure as far as its adoption is concerned. In practice, the sub-decree can be adopted in four different procedures. First, it can be drafted by the Prime Minister's Cabinet who will immediately submit to the Prime Minister for signature. In the second procedure, the draft is proposed to the government by an involved government agency, most commonly a ministry or, on rare occasions, an authority. The Office of the Council of Ministers convenes a consultation meeting of the Council of Jurists³⁶ and the Economic, Social, and Cultural Council³⁷ before submitting to the Prime Minister for signature. This meeting is known as the First Meeting. In the third procedure, the Office of the Council of Ministers convenes not only the First Meeting, but an inter-ministerial

³⁵ For example, a sub-decree creating a public university may foresee that the rector (the president of a university) shall be appointed by a royal decree.

³⁶ The Council of Jurists is a consultative body attached to the Office of the Council of Ministers. It is competent to provide advices to the government on legal issues. It does not have any regulatory power.

³⁷ More commonly known as ECOSOCC, the Economic, Social, Cultural Council is another consultative body attached to the Office of the Prime Minister. It provides advice to the government on economic, social and cultural issues and does not have any regulatory power.

meeting is also organized to discuss the draft before submitting to the Prime Minister for signature.³⁸ The fourth procedure is the most commonly used to adopt the sub-decree. It consists not only of all steps of the third procedure, but also a Cabinet meeting before the Prime Minister signs the sub-decree.³⁹

A decision of the government is an act usually issued to implement a royal decree or a sub-decree. It is used for a temporary purpose, for example to create a commission to deal with some particular issue. The decision does not constitute a permanent regulation. Its force will disappear when its goal is achieved. Any ministry or institution can propose a draft decision to the government for its adoption. It is signed by the Prime Minister.⁴⁰

A ministerial regulation, known as a “*prakas*” (literally a declaration), is the top regulatory act issued by a government agency that has regulatory power. It is signed by the minister and must be in strict compliance with the royal decree and the sub-decree.

The local administration also issues regulatory decisions. They are called “*deka*”. It is normally proposed by the chief of commune and the district/province governor and adopted by the relevant council. There can be a *deka* that is solely adopted by the chief of the commune or the district/province governor when they fulfil their duties as representative or agent of the state.

2. The administrative Contract

The Cambodian administration concludes administrative contracts. These contracts are not governed under the civil code, but under specific laws and regulations. These contracts are unique because unlike civil contracts they are not based on the principle of equality. The administration enjoys some special privileges, usually specified explicitly in the contract.

The most informal administrative contract is the *public procurement*. It is concluded between the administration and a private provider. The provider is contracted to supply merchandise, services, construction work or consultancy services to the administration.⁴¹ The sub-decree on public procurement does not provide any legal definition of the con-

38 The inter-ministerial meeting is attended by representatives invited from different ministries and institutions of the government. It is co-chaired by the Secretary General of the government and a representative of the Minister in charge of the Office of the Council of Minister, usually a Secretary of State. In the meeting, representatives from relevant ministries and institution can provide comments and propose amendments to the draft. In case there is a strong contradiction between two or more different ministries, the Minister in charge of the Office of the Council of Ministers organize ad hoc meeting which is usually attended by the relevant ministers in person before submitting the draft to the Cabinet’s meeting or to the Prime Minister.

39 The Cabinet’s Meeting is chaired by the Prime Minister and attended by all the government’s members. The government’s advisers, the royal army chief of staff and the national police commissary general and the governor of Phnom Penh are also usually invited to attend this meeting.

40 Even though it is not foreseen in any law or government’s regulation, the ministry or institution adopt also “decisions”, and the same denomination is used as that of the government’s decision.

41 Sub-decree n° 105 dated 18 October 2006 on the public procurement, Official Gazette 2006, n° 77, p. 6996

tract, but provides a myriad of procedural rules in order to ensure the transparency, the regularity and the uniformity of the signing of the contract.

A *concession* is a contract through which the administration makes recourse to the services of the private sector, usually investors. There are at least three types of concession. The first type is created by the Land Law of 2001 under the denomination of *land concession*.⁴² The Land Law creates two subcategories of land concession: *social land concessions and economic land concessions*. A social land concession is a contract between the administration and an individual representing a poor family to whom the state offers a piece of land for the family's housing and cultivation.⁴³ The state shall give the land title definitively to the family if the latter fulfils the terms of the contract.⁴⁴ An economic land concession is a contract between the administration and a commercial enterprise to which the state rents a piece of land for the development of any agro-industrial plantation in order to create employment for the local population.⁴⁵

The second type of concession is the result of the Law on Forestry under the name of the *forest concession*.⁴⁶ The contract allows a private company to exploit wood from a particular forest area and, in return, fulfil some obligations imposed by the forest administration.

The third type of concession is the result of the Law on Concession.⁴⁷ The concession in this law refers to a contract between the administration and a commercial enterprise which is authorized to develop, on behalf of the administration, some infrastructure on state land for the use of the general public. If the law provides ten different forms of concession, the Build-Operate-Transfer (B.O.T.) concession appears to be the most commonly used contract.⁴⁸

Recently, there has been the development of a new type of contract between the government and developers. With this contract, the government rents an island to a private company so they can develop the island into a tourism site for a long period of time. This contract seems to fall outside the scope of the concessions we have examined so far since it is neither an economic land concession nor a B.O.T. It is rather a long lease with

42 Articles 48 and 49 of the Land Law dated 30 August 2001, Official Gazette 2001, n° 32, p. 2303. The land concession is the result of the fact that the Cambodian State owns most Cambodian land and it is crucial to give out some for social and economic proposes.

43 It is regulated by the sub-decree n° 19 dated 19 March 2003 on the social land concession, Official Gazette 2003, n° 11, p. 1162.

44 The most common obligation of the family is to settle their life on the actual land for the at least consecutive 5 years and for the period of at least 6 months per year.

45 The economic land concession is regulated by the sub-decree no 146 dated 27 December 2005 on the economic land concession, Official Gazette 2005, n° 48, p. 7799, modified by the sub-decree no 131 dated 15 August 2008.

46 Article 13 of the law n° 0802/016 dated 31 August 2002 on forestry, Official Gazette 2002, n° 34, p. 2537.

47 Law n° 1007/027 dated 19 October 2007 on the concession.

48 Article 6 of the Law on the concession.

obligations imposed on the private company to have a development programme, which must be approved by the RGC.

V. Judicial Review

All the concepts examined above suggest that Cambodia has at its disposal a myriad of rules regulating relations between public authorities and between public authorities and private individuals, guaranteeing the rights of citizens as enshrined in law. Unfortunately, this is not the reality. From the beginning of the reconstruction of Cambodian law in 1993, a vast majority of rules have been adopted to essentially organize the administrative institutions and to give them powers to enact regulations upon the people. However, there are only very few rules that help to protect the people against administrative abuse.

The goal of the current RGC is to improve public services so that the public can get the maximum benefit from the administrative activities of the government,⁴⁹ the purpose being to contribute to reducing the poverty of the population. Strangely, however, the RGC does not concentrate too much on how to maintain good discipline by the public authorities and ensure that they are punished if they illegally cause damage to private individuals. This is in fact what lawyers call “*to ensure the rule of law*”. The most efficient way to ensure adherence to the rule of law is to have tribunals that can pronounce sanctions against any state agency that commits a mistake. However, to have a court system that works properly, there must be a set of procedural rules according to which complaints can be filed in an open and smooth manner.

Under the Cambodia-French Treaty of 1863, the French protectorate conducted a series of legal reforms.⁵⁰ With this reform, the French administration created a dual judicial system with a set of judicial courts and a set of administrative courts. After Cambodia gained independence, the dual court system was maintained for a while, before being abolished in 1968. This dual court system reappeared in 1993 in a different form.

After gaining independence, Cambodia kept the existing court system left by the French authority. Only some minor changes were made. The administrative courts deal “*with any conflict related with the rights and obligations of the civil servant; with the administrative decision which obliges the debtor of the public person having Cambodian nationality; and with the prejudice caused by the administrative activities*”⁵¹. In Phnom Penh, Kromviveat is the administrative court of first instance consisting of a judge as the

49 In 2006, the Royal Government of Cambodia adopted a policy paper on public service in order “to serve better the people” by classifying administrative activities into several groups and identifying various mechanisms through which the public authorities could offer their best services to the population.

50 It was the occasion for the French administration to introduce the civil law tradition into the Cambodian legal system and to completely abolish the slavery.

51 See Royal Act No 399NS of 09 January 1948 and Royal Act No 825NS of 26 October 1953.

president and two administrative officials as assistants. A royal attorney plays the role of the public prosecutor.

In 1933, an appeal against the administrative courts' decision was lodged to the Council of Ministers (the government). In 1948, this function was transferred to a special section of the Council of the Kingdom, equivalent to the Senate. In 1953 the administrative Court of Appeal was created. The president of this court was nominated by royal decree thanks to his/her knowledge and experience in administrative law. There were four other judges in the court. Two were judges from the Supreme Court (*Salavinichbay*) and two judges were appointed by the Council of Ministers from amongst senior administrative officials. This administrative Court of Appeal also played the role of the conflict tribunal, deciding on competence between the judicial courts and the administrative courts.

The Constitution set up a new administrative court system. Article 128 new provides that the judicial power “*covers not only the private conflicts, but also the administrative litigations, to the Supreme Court and to all kind of courts of all levels.*” According to this provision, private as well as administrative litigation will be conducted in the “ordinary courts”, that is, the provincial/municipal courts, the Appeal Court, and the Supreme Court. There is thus no dual court system as Cambodia used in the past.

The provision in the Constitution providing for a single court system to deal with both private and administrative lawsuits was a result of circumstances and necessity after the peace negotiations of 1991. The court system in Cambodia has not been fully able to respond to the needs of Cambodia's quickly evolving society. Providing for administrative litigation to be conducted before the provincial/municipal court has seriously reduced the efficiency of administrative justice and the process of judicial review. There are two main reasons for this lack of efficiency.

Firstly, it is because of the loss of the people's confidence in the courts and the loss of the identity of administrative litigation because of the fact that the Constitution provides for such lawsuits to be heard by the ordinary courts. When the people have no confidence in the courts, they will not believe that the courts could help them with sanctioning the administration. They try to find other alternative ways. Secondly, the ordinary courts use the “*common*” law, i.e. the private law, in dealing with litigation. The administrative court, which deals with administrative actions, shall use the administrative procedure, or at least a special law which is composed from principals different from the private law. If we stick strictly to the Constitution, all judges in Cambodian courts ought to have specialized in both private and public law. The author believes that it would be very difficult for judges to have done so.

Article 39 of the Constitution stipulates that “*Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts*”. This article provides the fundamental rule of law which is the submission of the administration to the law. It also provides a constitutional ground for judicial review. Unfortunately, there is no law to provide clear rules on this process.

VI. Conclusion

Commitments to improve the legal and judicial system have been expressed since the adoption of the new constitution, but still today the general assessment is that the system is widely dysfunctional. Some researchers have for the time being qualified the current constitution as “*a head without a body*”. The problem is not simply a matter of “incompetence” and cannot therefore be solved by training and waiting for better educated personnel. The combination of incompetence, corruption and political interference makes it difficult to achieve effective reform. Some steps have been taken to address problems, for instance, with a significant increase in the official salaries of judges and the establishment of a *Royal School for Judges and Prosecutors*.

Several other ideas have also been discussed. One of the most promising, that can be realized without amending the Constitution, is to strengthen the administrative tribunal within the sole existing court system by creating chambers specialized in administrative law at all levels of the judiciary. The *Royal School for Judges and Prosecutors* should also include units in its curriculum relating to administrative law. The judges shall be specialized in either private law or public law. But the success of the administrative tribunals can be achieved only by producing qualified judges and prosecutors. There must be enough procedural rules governing legal actions taken against the public authorities. This can be achieved through the adoption of a code of administrative procedures. Once these rules are enacted, a publicity campaign should be conducted to encourage people to use courts to respond to abuses of their rights by public authorities. Change in the overall legal culture obviously needs time;⁵² however, for the time being the lack of independent academic research and debate remains one of the main obstacles in this process. At universities, law is starting to interest Cambodian students, and Cambodian law faculties are starting to become places of research, even though for the time being there is still no law library of quality, no legal journal or any alternative forum for academic discussion, and there are hardly any quality textbooks for the purpose of learning.

⁵² In Cambodia, there is still a belief that “the eggs must not knock against the rock”. Encouraging an “ordinary individual” to sue his/her leader is against the nature of the middle-class Cambodians.

ECONOMIC LAW: INTELLECTUAL PROPERTY RIGHTS

PHIN Sovath

CONTENTS

I. Introduction	267
II. Overview of Cambodian Economic Laws	268
III. TRIPS To Cambodia	270
IV. Intellectual Property Laws	271
1. Patent Law	271
An Overview	271
Patentable Subject Matter	271
Patentability Requirements	272
Patent Procedure	274
Patent Rights, Infringement, and Limitations	274
2. Copyright Law	275
An Overview	275
Copyrightable Subject Matter	276
Rights of the Author	277
Protection of Neighboring Rights	278
Infringement and Limitations	279
3. Trademark Law	280
An Overview	280
Subject Matter of Trademark Protection	280
Rights of a Trademark Holder and Their Limitations	281
Invalidation and Cancellation of Trademark	282
Acts of Unfair Competition	282
4. Other Intellectual Property	283
Utility Models	283
Industrial Designs	283
New Plant Varieties	284
V. Conclusion	284

ECONOMIC LAW: INTELLECTUAL PROPERTY RIGHTS

*PHIN Sovath**

I. Introduction

Cambodia began to open and liberalize its economy in 1989 and has continuously pursued its integration policy to become part of the world economy. As a result, Cambodia became a member of the Association of Southeast Asian Nations (“ASEAN”) in 1999 and a member of the World Trade Organization (“WTO”) in 2004. The Royal Government of Cambodia (the “RGC”) adopted and has committed to adopt dozens of economic and commercial laws in support of its bids to join ASEAN and the WTO. The adoption of these laws has ensured compliance with the requirements of the legal frameworks of these international bodies and the conditions and commitments agreed upon between Cambodia and other members. The enactment of these economic and commercial laws has been a huge and successful contribution to the reform, development, and modernization of the Cambodian legal system.

Part II of this chapter will provide an overview of a number of mostly related economic laws and regulations. Part III and IV will examine and explain in detail laws and regulations related to intellectual property rights. Due to space limitations Part IV will focus mainly on examining relevant provisions concerning the requirements and conditions for registration and protection of intellectual property rights, and their common characteristics, including subject matters, protected rights, infringements, and limitations. For the same reason, this chapter will not examine the enforcement of intellectual property rights or the international legal framework which Cambodia has an obligation to comply with. These topics are left for other works of the author. Concluding remarks will be made in Part V.

* Dr. PHIN Sovath is Assistant Dean and Law Professor of Faculty of Law and Public Affairs, Paññāsāstra University of Cambodia (PUC), Senior Legal Advisor at Bun & Associates, Phnom Penh, Cambodia.

II. Overview of Cambodian Economic Laws¹

In 1994, Cambodia adopted the Investment Law, the first law relating to foreign investment in Cambodia. Its aim is to encourage foreign investment by providing tax and other incentives and guarantees for foreign investors who are interested in investing in selected sectors of the Cambodian economy. The Investment Law was amended in 2003 for the purpose of expediting registration procedures, promoting transparency, introducing a new tax holiday formula, and waiving import duties on construction materials. The Investment Law is supplemented by a Sub-decree on the Implementation of the Law on Investment (2005). The RGC, through these investment laws and regulations, provides guarantees to foreign investors that they will receive equal and non-discriminatory treatment, that they will not lose their investments through nationalization, and that there will be no fixation of prices on products or fees for services.

Cambodia has opened its market for all sectors and most sectors have been 100% owned by foreign investors. The Cambodian Constitution, the Land Law (2001) and the Investment Law, however, do not allow foreigners to own land in Cambodia. In 2010, a new law was adopted to permit foreigners to own property located above the ground floor of a building² and recently the Council of Ministers decided that foreigners are permitted to own buildings located above the ground floor up to 70% of the total surface-size of all private units of the co-owned building.³ This authorization aims to promote investment in real estate and the construction sector as well as to create more jobs. In addition, foreign investors may also hold land through other means such as long-term lease⁴ and economic land concession.⁵

Another important law – the Law on Expropriation⁶ – was also adopted recently to define the principles, mechanism, procedures of, as well as fair and just compensation for, expropriation done in Cambodia for the purpose of construction, rehabilitation and expansion of public infrastructure that benefits the public interest, State interest and the development of Cambodia. The Law on Expropriation, however, cannot be fully implemented unless other implementing sub-decrees are adopted by the RGC.⁷

1 For a critical discussion of a number of commercial and economic laws, see USAID, Southeast Asia Commercial Law and Trade Diagnostics-Cambodia (2007), available at <<http://www.usaid.gov/kh/documents/SEACLIRReport-Cambodia-12-06-07%20FINAL.pdf>> (Last visited Aug. 10, 2010).

2 See Article 6 of the Law on Granting Property Rights to Foreigners over Private Units of Co-Owned Buildings (2010).

3 See Article 2 of the Sub-Decree on the Proportion and Calculation of Percentage of Private Units that can be Owned by Foreigners in a Co-owned Building (2010).

4 See Sub-Decree on the Mortgaging and Transfer of Rights Over a Long-Term Lease or an Economic Land Concession (2007).

5 See Sub-Decree on Economic Land Concession (2005).

6 See Law on Expropriation (2010).

7 They include Sub-Decree on Organization and Functioning of Expropriation Committee, Sub-Decree on Organization and Functioning of Expropriation Sub-Committee, Sub-Decree on Organiza-

In addition to these investment and land laws and regulations, there are also a number of other laws and regulations related to investment, trade and economy which have been so far adopted. They include the Law on Commercial Enterprises (2005), the Law on Negotiable Instruments and Payment Transactions (2005), the Law on Commercial Arbitration (2006), the Law on Government Bonds (2006), the Law on Secured Transactions (2007), the Law on Customs (2007), the Law on Concession (2007), the Law on Standards of Cambodia (2007), the Law on Insolvency (2007), the Law on Anti-Money Laundering and Combating the Financing of Terrorism (2007), the Law on Issuance and Trading of Non-Government Securities (2007), the Law on Financial Lease (2009) and laws concerning intellectual property. A law relating to commercial contracts has not yet been adopted but it is in the drafting process with assistance from the Asian Development Bank. When adopted, the new Law on Commercial Contracts will replace the present Decree 38 concerning contracts and other liabilities which was adopted in 1988 and is currently in effect. The new law, when adopted, will regulate various commercial contracts such as franchising contracts, licensing contracts, and distribution contracts.

Cambodia does not have a formal law or regulations relating to competition. A Working Group on Competition was established in 2005 by the Ministry of Commerce to oversee the drafting and adoption of a new law on competition. It is expected that a new Competition Law will be enacted shortly. When adopted, this law will create a regulatory framework to maintain and improve efficiency as well as to promote consumer welfare.⁸ While the draft law is being prepared, competition law in Cambodia is confined to a few provisions concerning unfair competition in other laws. Such provisions include a prohibition on acts of unfair competition under the Law on Marks, Trade Names and Acts of Unfair Competition (2002) and relevant provisions under the Law on Management of Quality and Safety of Products and Services (2000). These provisions do not provide sufficient solutions against unfair competitive acts such as cartels, monopolization or unreasonable restraints of business.

Courts in Cambodia have been criticized by the private sector, civil society organizations and donors for being unreliable, plagued by informal payment, lack of commercial sophistication, and a lack of political independence.⁹ Policies and strategies for legal and judicial reform have been developed and implemented to reform and modernize the present judicial system. For example, a number of courts have been selected to become model courts in which attention has been paid to three areas: case management, court administration and court management. In addition, four important codes (a civil code, a civil procedure code, a criminal code and a criminal procedure code) were adopted. This was

tion and Functioning of Dispute Resolution Committee, Sub-Decree on Formalities and Procedures of Compensation Payment, and Sub-Decree on Formalities and Procedures of Complaint.

⁸ See USAID, *Supra* Note 1, at 7.

⁹ *Id.*

considered a big achievement in the reform and modernization of the legal and judicial system to secure civil and criminal justice and to protect individual rights and freedoms.

Alternative dispute resolution procedures also exist in addition to the present court system. Labor arbitration mechanisms allow parties to solve their collective labor disputes through three-party labor arbitration. Since 2004, labor arbitration has gained the respect and support of both employers and employees. A National Arbitration Center (NAC) was also established to solve commercial disputes and is expected to begin operations in the very near future. At the time of writing, 54 commercial arbitrators had been selected and undertaken training in both commercial law and commercial arbitration. Both the private sector and donors are waiting to see this newly established independent institution which will provide an alternative to the present court system.

III. TRIPS To Cambodia

Cambodia has been a member of the WTO since September 2004 following a long process of negotiation and accession with other working parties. Under the WTO Legal Framework, Cambodia is bound to comply with the General Agreement on Tariff and Trade and other annex agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”). Under the TRIPS Agreement, Cambodia is obliged to ensure that its intellectual property (“IP”)-related laws and regulations comply with minimum substantive standards of IP rights protection such as protectable subject matters, protected rights, and minimum duration of protection.¹⁰

Accession to the WTO brought about a number of IP-related laws and regulations which include the Law on Trade Marks, Trade Names, and Acts of Unfair Competition (2002); the Law on Patents, Utility Model Certificates and Industrial Designs (2003); the Law on Copyright and Related Rights (2003); and the Law on Management of Seeds and Breeders’ Rights (2008). In addition to these laws, the RGC has also recently issued sub-decrees and regulations for implementing these laws such as the Sub-Decree on Implementation of the Law on Trade Marks, Trade Names, and Acts of Unfair Competition (2006), the Prakas on Procedures for Granting Patents and Utility Model Certificates (2006), and the Prakas on Procedures for Registration of Industrial Designs (2006). Part IV will explain and discuss the basic principles and procedures relating to each type of intellectual property.

¹⁰ As a Least Developed Country (LDC), Cambodia is granted an extension of the transition period up to July 1, 2013 to implement the TRIPS Agreement.

IV. Intellectual Property Laws¹¹

1. Patent Law

An Overview

In a bid to become a member of the WTO, Cambodia for the first time in 2003 adopted the Law on Patents, Utility Model Certificates, and Industrial Designs (the “Patent Law”). As suggested by the title, the Patent Law covers three types of industrial property: patents, utility models and industrial designs.¹² The main objectives of the Patent Law are to (1) encourage innovation and scientific and technological research and development; (2) stimulate and promote increased internal and external commerce and investment; (3) promote the transfer of technology; and (4) provide protection of industrial property rights and combat their infringement and illegal business practices.¹³ Cambodia, however, has not yet realized these objectives for a number of reasons, including a lack of human resources, in particular patent examiners; lack of budget; and lack of other legal instruments.

Nevertheless, in an attempt to fully implement the Patent Law, the Ministry of Industry, Mines and Energy (“MIME”) issued two important regulations concerning patents, utility models and industrial designs.¹⁴ The two regulations provide guidelines for the Patent Office of the MIME (the “Patent Office”) as well as for inventors as to how to grant and apply for patents and utility model certificates and to register industrial designs. The Patent Law and these two regulations are fundamental legal frameworks for the protection of patents, utility models and industrial designs in Cambodia.

Patentable Subject Matter

In order to obtain patent protection from the Patent Office, a subject matter must be patentable and satisfy basic patentability requirements under the Patent Law. The subject matter of the Patent Law is inventions, which are defined as “an idea of an inventor which permits in practice the solution to a specific problem in the field of technology.”¹⁵ Under this definition, three elements must exist: (1) it must be an idea of an inventor; (2) it must provide a solution to a specific problem; and (3) it must be in any field of tech-

11 This Chapter does not aim to make detailed discussion regarding these laws, but to provide general introduction and basic principles of these laws. For a critical examination and discussion, see Peter Ganea, *Cambodia, in* INTELLECTUAL PROPERTY IN ASIA: LAW, HISTORY AND POLITICS 1 (Paul Goldstein et al. eds., 2009). For a general explanations and examples, see MINISTRY OF COMMERCE, EXAMPLES AND EXPLANATIONS SERIES: INTELLECTUAL PROPERTY RIGHTS (2004). For a compilation of IP-related laws, see MINISTRY OF COMMERCE AND ADB, COMMERCIAL LAWS AND INTELLECTUAL PROPERTY RIGHTS LAWS, VOL. 1 (2006).

12 This part will mainly focus on patents while utility models and industrial designs will be explained later in Part IV (4).

13 See Article 2 of the Patent Law.

14 The two regulations include Prakas on Procedure for Granting of Patents and Utility Model Certificates (2006) and Prakas on Procedure for Registration of Industrial Designs (2006).

15 Article 3 of the Patent Law.

nology. Thus, an invention that does not provide a solution to a specific problem will not be considered protectable under the invention definition.

Under the present Patent Law, an invention may be, or may relate to, a product or a process.¹⁶ Product inventions may include machines, compositions of matter, equipment, an apparatus or a device. A process invention may include a solution consisting of a series of steps for producing products or a new use of a known process or a known product. All of these products and processes are patentable subject matters as long as they can satisfy the invention definition.

However, some product and process inventions have been excluded from the patentable subject matter for various reasons, in particular public policy. They include (i) discoveries, scientific theories and mathematical methods; (ii) schemes, rules or methods for doing business, performing purely mental acts or playing games; (iii) methods for treatment of the human or animal body by surgery or therapy, as well as diagnostic methods practiced on the human or animal body; (iv) pharmaceutical products; (v) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals; and (vi) plants varieties.¹⁷ In addition to these exclusions, certain inventions are also excluded from the patent protection if their exploitation would (1) be contrary to public order or morality; (2) not protect human, animal or plant life or health; (3) cause serious prejudice to the environment; or (4) be prohibited by law.¹⁸

The patent does not in itself grant the patent holder the right to exploit the invention, but the right to exclude others from exploiting the invention without her authorization. In order to exploit the invention, the patent holder must comply with other laws and regulations. For example, there are certain laws and regulations prohibiting acts such as killing human beings. Should an invention have no other possible purpose than to kill human beings it will not be granted a patent. In sum, even though an invention is considered a patentable subject matter, it may not be granted a patent if it falls into any exclusion category mentioned above or its exploitation is contrary to public order or morality or prohibited by law.

Patentability Requirements

When an invention is considered as a protectable subject matter, it must also satisfy three basic requirements before it can be granted a patent.¹⁹ First, the invention must be new and not anticipated by prior art.²⁰ Article 6 of the Patent Law defines prior art as “everything disclosed to the public, anywhere in the world, by publication in tangible form or by oral disclosure, by use or in any other ways, prior to the filing or, where appropriate, the

¹⁶ *Id.*

¹⁷ See Article 4 of the Patent Law.

¹⁸ See Article 9 of the Patent Law.

¹⁹ See Article 5 of the Patent Law.

²⁰ See Article 6 of the Patent Law.

priority date, of the application claiming the invention.”²¹ Thus, any disclosure regardless of place and means will become prior art which in turn will be used to determine the novelty of the invention. However, there is an exception for any disclosure which occurs within 12 months preceding the filing date of the application.²² In this case, the disclosure must be made by the applicant or her predecessor or by reason or in consequence of an abuse committed by a third party.²³ The provision of the grace period of 12 months is helpful and necessary for inventors to ensure that they have enough time to disclose and seek further improvement, if any, or to test their products on the market before they decide to apply for a patent protection.

The second patentability requirement is that the invention must involve an inventive step. This means that the invention must not be obvious to a person having ordinary skill in the relevant art.²⁴ In order to determine whether the invention is obvious or not, the prior art relevant to the application claiming the invention and used for determining the novelty requirement will be taken into consideration. A person having an ordinary skill in the art is a hypothetical person created under the Patent Law for determining whether or not the invention is obvious. This person is not necessarily the best expert in the field in question, but may be someone specialized and possessed of an “ordinary” skill in the field in Cambodia. Therefore, if the person having an ordinary skill in the art determines that the invention is obvious in light of the prior art, the invention cannot get a patent protection for reason of its obviousness.

Industrial applicability is the third requirement for patentability. The invention will be considered industrially applicable if it can be made or used in any kind of industry.²⁵ The term “industry” should be understood in a broad sense. It includes not only the application or use of the invention in manufacturing activities, but also in related activities such as handicraft, agriculture, fishery and services. In addition, the industrial applicability is not determined based on the field of use or the purpose of the product. Thus, the fact that an oven is used at home for cooking purposes, a pen is used in schools for writing, or a photocopier is used in offices for photocopying is irrelevant in this sense.

In sum, three requirements must be satisfied in order to obtain the patent protection. First, the invention must be new. Second, the invention must not be obvious to a person having an ordinary skill in the art. Third and last, the invention must be capable of being made or used in industry.

21 *Id.*

22 *Id.*

23 *Id.*

24 *See* Article 7 of the Patent Law.

25 *See* Article 8 of the Patent Law.

Patent Procedure

To obtain a patent for an invention, an applicant must file a patent application to the Patent Office of the Department of Industrial Property of the MIME. The application shall consist of the application form, description, claims, drawing (if applicable), abstract, information concerning any previous international registrations of the patent, and evidence of such registration.²⁶ At the date of writing this paper, no patent has been issued for any invention. In practice, it will take about 36 months before a patent can be issued by the Patent Office. The overall process to obtain a patent is detailed in a regulation regarding procedures for granting patents and utility model certificates issued by the MIME in 2006

In the patent prosecution process, the Patent Office will make two examinations: a formality examination and a substantive examination. The aim of the formality examination is to check whether or not the application for the patent satisfies the formality requirements under the Patent Law.²⁷ For the substantive examination, the patent examiner will check the substance of the application to ensure that all substantive requirements are satisfied.²⁸ In particular, the Patent Law requires, in addition to the three basic requirements previously mentioned, that the description must disclose the invention in a manner which is sufficiently clear and complete for the invention to be carried out by a person having ordinary skill in the art.²⁹ In addition, the description must indicate the best mode known to the applicant for carrying out the invention.³⁰ The best mode requirement is very important for further research and development in respect of the patented inventions. Thus, if there are many modes for practicing the invention, the applicant shall disclose the best mode in the application. Following the formality and the substantive examinations, the Patent Office will issue a patent for the invention once all conditions and requirements set out under the Patent Law are satisfied.

Patent Rights, Infringement, and Limitations

When a patent is granted to the inventor, the patent holder will be entitled to exclude others from exploiting the invention without her authorization³¹ within the protected period of twenty years.³² If the invention is a product, the patent holder has the right to exclude others from making, using, offering for sale, importing, using, and stocking the product without the patent holder's authorization.³³ If the invention is a process, the pat-

²⁶ See Article 16 of the Patent Law.

²⁷ See Article 16 & 17 of the Patent Law.

²⁸ See Article 36 of the Patent Law.

²⁹ See Article 18 of the Patent Law.

³⁰ *Id.*

³¹ See Article 41 of the Patent Law.

³² See Article 45 of the Patent Law.

³³ See Article 42 of the Patent Law.

ent holder has the right to exclude others from using the process and from carrying out any act related to products made from the patented process.³⁴

Any act carried out by any person without the authorization of the patent holder will constitute an act of infringement. In this case, the patent holder is authorized to commence a patent infringement suit at any court in order to prohibit such an illegal act. Remedies available for the patent holder include an injunction to prevent infringement or an imminent infringement, damages, and any other remedies provided for in the general law.³⁵

Not every act will be considered as an infringement of the patent rights, however. The Patent Law imposes some limitations to the patent rights, in particular for the public interest. For example, the patent rights granted under the Patent Law do not extend to acts done only for experimental purposes³⁶ or acts performed by any person in good faith before the filing date.³⁷ Furthermore, the patent rights do not extend to acts in respect of articles which have been put on the market in or outside Cambodia by the owner of the patent or with his consent.³⁸ This means that Cambodia adopted an international exhaustion doctrine where the patent right holder is not allowed to enforce the patent rights when the product has already been put on the market.³⁹ This is contrary to the Trademark Law which adopts a national exhaustion doctrine.⁴⁰

In addition, there are some situations in which a government agency or a designated third party can exploit the invention without the agreement of the patent holder,⁴¹ in particular when it is for the public interest or when the exploitation by an owner is anti-competitive.⁴² In such situations, however, adequate remuneration shall be paid to the patent owner.⁴³

2. Copyright Law

An Overview

The first Law on Copyright and Related Rights (the “Copyright Law”) in Cambodia was enacted in 2003 after technical assistance from the World Intellectual Property Organization (the “WIPO”) and other donor countries. Prior to this enactment, copyright enforcement was mainly based on Cambodian criminal law, which prohibits any reproduction,

34 *Id.*

35 *See* Article 126 of the Patent Law.

36 *See* Article 44 (iv) of the Patent Law.

37 *See* Article 44 (v) of the Patent Law.

38 *See* Article 44(i) of the Patent Law.

39 For a theoretical and practical discussion regarding this doctrine, see Phin Sovath, *Domestic Exhaustion of Patent Rights: A Theoretical and Practical Analysis*, 2010 Cambodian Yearbook of Comparative Legal Studies 99.

40 *See infra* Part IV(3)(3).

41 *See* Section 11 & 12 of the Patent Law.

42 *See* Article 47 of the Patent Law.

43 *See* Article 47 & 57 of the Patent Law.

distribution, importation or exportation of copyrighted works without the authorization of the copyright holder.⁴⁴ The present Copyright Law covers not only copyrighted works, but also related works such as performance, phonogram and broadcast programs. Thus, the present Copyright Law protects both copyright and related rights.

Copyrightable Subject Matter

Work protected under the Copyright Law is defined as “a product in which thoughts or sentiment are expressed in a creative way, and which falls within the literary, scientific, artistic or musical domain.”⁴⁵ In addition, the Copyright Law also requires that the work must be original⁴⁶ and created independently of all public disclosure.⁴⁷ Therefore, there are five requirements for work to be protected under the Copyright Law. First, the work must express thoughts or sentiments of an author. Therefore, works such as pictures drawn by an animal or products automatically created by a computer will be excluded from protection as they do not represent the thoughts or sentiments of a creator.

Second and third, the work must be expressed in a creative way. This means that a mere idea is not subject to protection – the work must be an expression of those ideas, which is made in a creative way. Fourth, the work must be original to be protected under the Copyright Law. In other words, the work must be the true intellectual creations of their authors and created independently of all public disclosure. The originality requirement, however, does not mean that the work must be new. Thus, two similar works may be protected under the Copyright Law as long as they are original and created independently of each other.

The last requirement for the work is that it must fall within the literary, scientific, artistic or musical domain. The Copyright Law lists the following as copyrightable subject matters: (i) all kinds of reading books; (ii) lectures, speeches, sermons, oral or written pleadings and other works of the same characteristics; (iii) dramatic works or musical dramas; (iv) choreographic works, either modern or adapted from traditional works or folklore; (v) circus performances and pantomimes; (vi) musical compositions, with or without words; (vii) Audio-visual works; (viii) works of painting, engraving, sculpture or other works of collages, or applied arts; (ix) photographic works, or those realized with the aid of techniques similar to photography; (x) architectural works; (xi) maps, plans, sketches or works pertaining to geography, topography, or other sciences; (xii) computer program and the design encyclopedia documentation relevant to those programs; and (xiii) products of collage work in handicraft, hand-made textile products or other clothing fashions.⁴⁸ As the Copyright Law makes this list exhaustive, however, it can be assumed

⁴⁴ See Article 48 of the Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (1992).

⁴⁵ Article 2(a) of the Copyright Law.

⁴⁶ See Article 4 of the Copyright Law.

⁴⁷ See Article 5 of the Copyright Law.

⁴⁸ See Article 7 of the Copyright Law.

that other subject matters which do not fall into this list will not be protected under the present Copyright Law.⁴⁹

There are certain works which are excluded from the copyright protection due to public policy reasons. They include (1) Constitution, Law, Royal Decree, Sub-Decree, and other Regulations; (2) Proclamation (Prakas), decisions, certificates, and other instructive circulars issued by state organizations; (3) court decision or other court warrants; (4) translation of those materials; and (5) idea, formality, method of operation, concept, principle, discovery or mere data, even if expressed, described, explained or embodied in any work.⁵⁰

Rights of the Author

The Copyright Law grants a copyright holder both moral rights and economic rights.⁵¹ Moral rights are defined as rights of authors that are perpetual, inalienable, undistrainable and imprescriptible.⁵² These moral rights include a right of first publication, a right of attribution and against misattribution, and a right of integrity against distortion, mutilation or destruction which is prejudicial to the honor or the reputation of the author.⁵³ Thus, the author has the right to decide the manner and the time of the disclosure, to be identified as an author, and to object to any distortion or mutilation that harms his or her reputation.

In addition to the moral rights, the copyright holder is also entitled to economic rights which are defined as “the exclusive right of the author to exploit his/her own work through the authorization of reproduction, communication to the public, and creation of derivative work.”⁵⁴ The Copyright Law also lists a number of exclusive rights considered as economic rights such as a right of public distribution through sale, rental or transfer and a right of public performance.⁵⁵ In other words, the copyright holder is entitled to five categories of exclusive rights: (1) right of reproduction; (2) right of public distribution; (3) right of preparing derivative works; (4) right of public performance; and (5) right of public communication. Thus, any person is prohibited from performing any act mentioned above if there is no authorization or consent from the copyright holder.

The author of the work is the first creator and holder of the work. However, where a piece of work is created by an author for the benefit of a natural or legal person who is an employer under the framework of an employment contract and a contract to utilize that work, the economic rights associated with that work are considered to be owned

49 See Peter Ganea, *Supra* Note 11, at 6.

50 See Article 10 of the Copyright Law.

51 See Article 18 of the Copyright Law.

52 See Article 19 of the Copyright Law.

53 See Article 20 of the Copyright Law.

54 Article 21 of the Copyright Law

55 *Id.*

by the employer.⁵⁶ This does not apply when there is a contrary agreement between the author and the employer. In addition, only economic rights are transferred, the moral rights shall always stay with the original author.

Every work is protected automatically when it is created without a registration requirement.⁵⁷ This is the main difference between copyright and trademark or patent. Registration is voluntary and if the author wishes to do so, she can file an application for registration with the Ministry of Culture and Fine Arts by providing the record of the author's real name, the date of the first publication of the work, and the date of the creation of work, as well as the record of the author's right.⁵⁸ The Ministry will then issue a Certificate of Registration for the work subject to payment of a registration fee.

In general, the copyright protection of a work will last for the life of the author, plus fifty years following the author's death. Different periods of protection, however, are also applicable depending on different types of works protected under the Copyright Law. For example, the economic rights associated with a work published in an anonymous manner or under a pseudonym are protected for seventyfive years beginning from the end of the calendar year in which the work was first published.⁵⁹ The Copyright Law does not mention how long protection for work created under an employment contract lasts. Further clarity will be required on this point in the future, especially when more and more economic rights associated with works created by employees are transferred to employers under the scope of employment contracts.

Protection of Neighboring Rights

In addition to copyrighted works, the Copyright Law also covers works created by performers, phonogram or video producers, or TV or radio broadcasters. The subject matter protected under the Copyright Law includes performances, phonograms, and TV or radio programs. In respect of the performance, the performer has the right to authorize others to broadcast and communicate to the public his/her performance; to fix in a phonogram his/her unfixed performance, to reproduce the fixation in phonogram, to distribute the original fixation in phonogram, and to rent or lend to the public the original fixation.⁶⁰ In addition, the performer is also entitled to moral rights such as the right of attribution and the right of integrity.⁶¹

⁵⁶ See Article 16 of the Copyright Law. Under this Article, it is not clear whether the employment contract and the utilization contract are a single or different document. A question arises as to who owns a piece of work created by an employee under a general employment contract which has no clause concerning its utilization or ownership. Its answer is subject to further clarification or interpretation which is out of the scope of this work.

⁵⁷ See Article 30 and 38 of the Copyright Law.

⁵⁸ See Article 39 of the Copyright Law.

⁵⁹ See Article 31 of the Copyright Law.

⁶⁰ See Article 41 of the Copyright Law.

⁶¹ See Article 42 of the Copyright Law.

With regard to phonograms, its producer has an exclusive right to record, to reproduce, or to communicate to the public his/her phonogram.⁶² In addition, all reproductions, sales, exchanges, leases, and communication to the public of the phonogram must require the authorization of the phonogram producer.⁶³ For TV or radio programs, the broadcasting organization has an exclusive right to undertake or authorize the fixation of its broadcast, communication to the public, re-broadcasting, reproduction, distribution or first lease of the copy of its broadcast.⁶⁴ No one is authorized to carry out any of these acts if there is no consent or authorization of the performers, phonogram or video producers, or broadcasting organizations.

Infringement and Limitations

The Copyright Law grants the copyright holder the exclusive right to prohibit others from reproducing, preparing a derivative work based on the original work, distributing to the public, or publicly performing the work without his/her authorization. Any person who carries out any of these acts without authorization will be considered in copyright infringement. In this case, the copyright holder is authorized to bring a legal suit against those infringers. Remedies available for the copyright holder include the compensation of damages, the redress of moral injury, the return of the disputed materials or equipment, and the return of any benefit deriving from that illegal act.⁶⁵

Although the copyright holder has the exclusive right to prohibit others from exploiting the work, there are some exceptions to the copyright infringement.⁶⁶ These exceptions or limitations are very important to achieve the overall purposes of the Copyright Law as they aim to balance the interests of the copyright holder and the interests of the general public. For example, one can reproduce a single copy of a copyrighted work if it is for personal purposes.⁶⁷ This exception, however, is not applicable to certain works such as a works of architecture or a computer program.⁶⁸ Allowing a reproduction of these works, even a single copy, will be prejudicial to the rights of the copyright holder.⁶⁹

Similarly, the Copyright Law also stipulates certain limitations to the related rights.⁷⁰ In general, for example, it is not an infringement when reporting news events if only short fragments are extracted from a performance, from the substance of a phonogram or from a broadcast.⁷¹ Likewise, it is not an unlawful act for reproduction merely for the

62 See Article 44 of the Copyright Law.

63 See Article 45 of the Copyright Law.

64 See Article 47 of the Copyright Law.

65 See Article 57 of the Copyright Law.

66 See Article 23, 24, 25, 27, 28, 29 of the Copyright Law.

67 See Article 24 of the Copyright Law.

68 *Id.*

69 See also Peter Ganea, *Supra* Note 11, at 6.

70 See Article 49, 50, 51, and 52 of the Copyright Law.

71 See Article 50 (a) of the Copyright Law.

purpose of scientific research.⁷² In addition, there are also limitations specific to the rights of performers such as copying or reproduction of a performance by a broadcasting organization for the purpose of broadcasting in a commercial advertisement.⁷³ A compulsory license is also permitted if a phonogram has been produced for commercial purpose; a reproduction of such phonogram is used directly for broadcasting or other communication to the public; or a phonogram is publicly performed.⁷⁴ In this case, the single equitable remuneration is required and must be paid to a collective organization.⁷⁵

3. Trademark Law

An Overview

Cambodia enacted a Law on Marks, Trade Names, and Acts of Unfair Competition (the “Trademark Law”) in 2002 and subsequently a Sub-Decree for implementing the Trademark Law in 2006. Prior to the enactment of the Trademark Law, trademarks were registered under a regulation issued in 1997 by the Ministry of Commerce regarding the procedure of the Intellectual Property Department (the “1997 Prakas”). Under the 1997 Prakas, the Intellectual Property Department was granted the right to register and grant trademark and service mark certificates to local and foreign clients and to solve all registration-related problems. The 1997 Prakas also stipulated the protection period, conditions and requirements for registration. It served as a basic legal framework for the development of the trademark law in Cambodia. However, it was repealed following the enactment of the Trademark Law and the subsequent Sub-Decree.

Subject Matter of Trademark Protection

A mark is defined under the Trademark Law as “any visible sign capable of distinguishing the goods (trademark) or service (service mark) of an enterprise.”⁷⁶ Thus, a mark must be distinctive, serving to distinguish the goods or services of one or more enterprises from those of the other enterprises. In the case of goods, a mark will be called “trademark” and in case of service, it will be called “service mark.” Both trademarks and service marks are classified as marks. In addition to this, the Trademark Law also registers and protects “collective marks” as well as “trade name.”⁷⁷ While trade name refers to the name and/or designation indentifying and distinguishing an enterprise, the term collective mark refers to any visible sign “capable of distinguishing the origin or any other common characteristic, including the quality, of goods or services of different enterprises.” An application for registering a collective mark shall be accompanied with a copy of the regulation gov-

⁷² See Article 50 (b) of the Copyright Law.

⁷³ See Article 52 of the Copyright Law.

⁷⁴ See Article 49 of the Copyright Law.

⁷⁵ *Id.*

⁷⁶ Article 2 of the Trademark Law.

⁷⁷ *Id.*

erning its use,⁷⁸ and the use of the collective mark will be subject to the control of the registered owner of that collective mark.

It seems clear that the definitions of “mark” and “collective mark” in Article 2 of the Trademark do not include audible, olfactory, and other non-visual signs because both definitions use the term “visible.” This raises the question, for example, of whether the audible slogan of one Television Station – “CTN – Your Community, Your TV” – can be registered under the present Trademark Law. If not protected, will there be any infringement if another local television station uses a similar slogan to this one? In the future, debates should focus on whether Cambodia should protect other modern marks such as sounds, smell and other non-visual marks by modifying these definitions or whether Cambodia should keep the same provisions.

An application for a trademark registration and protection shall be filed with the Intellectual Property Department of the Ministry of Commerce. A mark will be registered and protected under the Trademark Law if it is distinctive and does not fall into any category set out under Article 4 of the Trademark Law. For example, it must not be contrary to public order or morality or good custom. Thus, a mark with a pornographic picture would not be registered for morality reason. Another instance is when a mark is “likely to mislead the public or trade circles.” For example, a product X was made in Cambodia, but it bares a mark “Japan X.” Such a mark would not be registered if it is found that it is likely to mislead consumers or users in respect of its place of production.

In sum, two requirements must be satisfied before a mark can be registered. First, it must be distinctive, capable of distinguishing the products or the services of one enterprise from those of the other enterprises. Second, it must not fall into the categories excluded under Article 4 of the Trademark Law. When these two requirements are satisfied, the Intellectual Property Department will register the trademark.

Rights of a Trademark Holder and Their Limitations

After registration, the trademark holder will be entitled to prohibit others from using the registered marks without their authorization.⁷⁹ The first period of registration and protection will be ten years and subject to renewal for consecutive periods of ten years.⁸⁰ During the protection period, the registered owner of the mark can institute court proceedings against any person who infringes the mark by using it without the owner’s authorization.⁸¹ In addition to this right, provisional measures and border measures as set out under Chapters 9 and 10 of the Trademark Law are also available for the trademark owner.

⁷⁸ See Article 17 of the Trademark Law.

⁷⁹ See Article 11 of the Trademark Law.

⁸⁰ See Article 12 of the Trademark Law.

⁸¹ *Id.*

However, rights over the trademark shall not extend to acts in respect of articles which have been put on the market in the Kingdom of Cambodia by the registered owner or with his consent. This means that Cambodia adopts the national exhaustion of trademark rights where the trademark holder cannot prohibit the flow of the product or consumers from using the product when it was first sold on the market by the trademark owner or any third party authorized by him. This limitation, however, does not extend to acts in relation to infringing products which were put on the market without consent or authorization from the trademark owner.

Invalidation and Cancellation of Trademark

Although a trademark has been registered, it does not mean that the trademark will be valid forever without any protest. Any person interested may request the Ministry of Commerce to invalidate the registration of a mark if it can be proved that requirements under the Trademark Law are not fulfilled.⁸² Such invalidation shall be deemed to have been effective as of the date of the registration.⁸³ In addition, the Ministry of Commerce also has the right to cancel registered marks in a number of circumstances, such as when there is no application for renewal or when the owner of the trademark is not the legitimate owner.⁸⁴

Acts of Unfair Competition

The Cambodian Trademark Law not only addresses trademark issues, it also sets out provisions relating to acts of unfair competition. The Trademark Law defines any act which is contrary to honest practices in industrial, commercial and service matters an act of unfair competition.⁸⁵ Article 23 of the Trademark Law lists the following acts as acts of unfair competition: (1) all acts of such a nature as to create confusion; (2) false allegations to discredit the establishment, the goods, or the industrial, commercial or service activities of a competitor; and (3) indications or allegations which are used to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods. Therefore, any dishonest practice which creates confusion, misleads the public or discredits a competing establishment will be prohibited as long as it falls into any of the three aforesaid categories.

⁸² See Article 13 of the Trademark Law.

⁸³ *Id.*

⁸⁴ See Article 14 of the Trademark Law.

⁸⁵ See Article 22 of the Trademark Law.

4. Other Intellectual Property

Utility Models

Utility models are also protected in Cambodia in addition to patented inventions. The main law regulating this type of industrial property is the Patent Law, which defines “utility model” as “any invention which is new and industrially applicable and may be, or may relate to, a product or process.”⁸⁶ Thus, utility model is also an invention, but it is usually considered a “petit invention.” A person who makes a petit invention may register it if it can be proved that the petit invention is new and industrially applicable. A utility model need not have involved an inventive step for its registration. This is the main difference between the patent and the utility model.

An application for the utility model registration and protection shall be filed with the Patent Office of the General Department of Industrial Property of the MIME. The process for registration is similar to that of the patent registration and various provisions related to the patent are also applicable to the utility model.⁸⁷ The duration of the utility model protection is seven years without any possibility of renewal.⁸⁸

The Patent Law also permits conversion from a patent application into an application for a utility model certificate, and vice versa, at any time before the grant or refusal of a patent.⁸⁹ This conversion shall be permitted only once and is subject to some requirements under the Patent Law.⁹⁰

Industrial Designs

Industrial design protection is also covered by the Patent Law. An industrial design is defined as “any composition of lines or colors or any three-dimensional form, or any material, whether or not associated with lines or colors” which “gives a special appearance to a product of industry or handicraft and can serve as a pattern for a product of industry or handicraft, and appeals to and is judged by the eye.”⁹¹

To register an industrial design, the Patent Law requires that the industrial design must be new.⁹² This novelty requirement is similar to that of the invention in which it must not be anticipated by prior arts. An application for an industrial design shall consist of a request, drawings, photographs or other adequate graphic representations of the article, and an indication of the kind of products for which the industrial design is to be used.⁹³ The application must be filed with the Industrial Design Office of the MIME and

86 Article 69 of the Patent Law.

87 See Article 70 of the Patent Law.

88 See Article 73 of the Patent Law.

89 See Article 75 of the Patent Law.

90 See Article 76 of the Patent Law.

91 Article 89 of the Patent Law.

92 See Article 91 of the Patent Law.

93 See Article 95 of the Patent Law.

the application process shall follow conditions and requirements set out under a Prakas for Registration of Industrial Designs. When the industrial design is registered, the right holder will be entitled to prohibit others from making, selling or importing articles incorporating the industrial design without his authorization⁹⁴ for a period of five years with renewal possibility for two further consecutive periods of five years.⁹⁵

New Plant Varieties

In 2008, a new Law on Management of Seeds and Rights of Plant Breeders was enacted to provide protection for new plant varieties (the “Plant Variety Law”).⁹⁶ The purpose of the Plant Variety Law is to encourage and secure the management, encouragement, and sustainable development of plant varieties in Cambodia.⁹⁷ To be registered and protected, the plant variety must be novel, distinctive, uniform and stable.⁹⁸ An application for registration and protection must be filed with the MIME, which is responsible for registration, and then forwarded to the Ministry of Agriculture, Forestry and Fishery, which is responsible for technical assessment.⁹⁹ If registered, the plant variety will be protected for a period of 20 years with an exception for special plants such as trees and vines for which the protection period shall be 25 years from the date of the grant of the breeder’s right.¹⁰⁰

V. Conclusion

Although there have been many laws and regulations enacted to support and promote economic development, their implementation and enforcement are not yet satisfactory or effective and huge efforts are still needed to enforce these laws and regulations and to achieve their specified goals. In the area of intellectual property, future efforts may include dissemination and enhancement of awareness of all the laws and regulations to all stakeholders as well as the effective enforcement of the existing laws and regulations. In addition, the adoption of other related laws such as a law on protection of geographical indications, a law on the protection of trade secrets, and a law on layout designs of integrated circuits should be expedited in response to the needs of foreign and domestic investors. This will encourage investment in research and development as well as the transfer of technologies and technical knowledge and capacity to Cambodia.

94 See Article 106 of the Patent Law.

95 See Article 109 of the Patent Law.

96 See Law on Management of Seeds and Rights of Plant Breeders (May 13, 2008).

97 See Article 2 of the Plant Variety Law.

98 See Article 6 of the Plant Variety Law.

99 See Article 11 & 12 of the Plant Variety Law.

100 See Article 19 of the Plant Variety Law.

CAMBODIAN LABOR AND EMPLOYMENT LAW

KONG Phallack

CONTENTS

I. Introduction.....	287
II. Historical Background of Cambodian Law.....	287
III. General Sources of Labor Law.....	288
IV. Labor Administration.....	289
V. Labor Dispute Resolution System.....	290
VI. Individual Employment.....	291
VII. Collective bargaining.....	298
VIII. Representation by Entities Other Than Unions.....	302
IX. Redundancy and Transfers of Undertakings.....	303
X. Wages, Hours, and Leave.....	305
XI. Antidiscrimination.....	309
XII. Occupational Safety and Health and Workers' Compensation.....	309
XIII. Pensions and benefits.....	310
XIV. Foreign Workers.....	310
XV. Conclusion.....	310

CAMBODIAN LABOR AND EMPLOYMENT LAW

*KONG Phallack**

I. Introduction

This article will give an overview and understanding of Cambodian labor law; including its sources and historical development. It will also discuss issues related to labor discrimination and dispute resolution systems; individual employment; collective bargaining; representation by entities other than trade unions; redundancy and transfers of undertakings; wages, hours and leaves; anti-discrimination; occupational safety and health, worker's compensation, pensions and benefits, and employment of foreign workers.

II. Historical Background of Cambodian Law

Cambodian Labor law has evolved through five main stages, namely the pre-independence era, the post-independence eras of 1953 to 1970, 1970 to 1975, 1979 to 1992, and 1993 to the present.¹ The pre-independence era includes the periods before and during the French colonization, from the First Century A.D. to 1953. During this period, there was no written labor law. Legal measures governing the relationship between employers and workers were first established under the 1920 Civil Code, then by a 1927 Sub-decree which set forth a 10 hour workday and other labor regulations established during the French colonial period.² The Ministry of Labor and Social Affairs was first established in 1951 by Royal Decree No 651 NS of December 1951.³ During the post independence era to 1970, the

* Dr. KONG Phallack is Dean and Professor of Law of Faculty of Law and Public Affairs, Paññāsāstra University of Cambodia (PUC); Managing Director and Attorney at Law of KhmerLex Legal Solutions, a locally established law firm; Chief arbitrator of the Arbitration Council. He has handled 380 cases among 900 cases registered at the Arbitration Council. Dr. KONG Phallack has been selected to serve as a chairman of the Board of Director of the Arbitration Council Foundation; a member of Arbitration Panel of Kuala Lumpur Regional Centre for Arbitration (KLRCA), and a member of Inter Pacific Bar Association (IPBA).

1 According to the statement of October 25, 1998 written by H.E SUY Sem, then Secretary of State, Ministry of Social Affairs, Labor and Veteran Affairs (See Labor Law Publication by World Bank, IBRD-IDF No.TF 2411, Rule of Law Development, Labor Law Education of Women and Children), p.1

2 *Id.* p.1

3 *Id.* p.2

significant events were the transfer of French administration to the Cambodian government and the establishment of various other laws to broaden the scope of the existing labor law.⁴ From 1970 to 1975, the Khmer Republic amended the existing Cambodian Labor law, drafted a new labor law, and joined the International Labor Organization⁵. From 1979 to 1992, the Ministry of Social Affairs and Disable Veterans was established by Decree No. 19 Kr. Ch of March 5, 1985 and the new labor law was promulgated by Decree No.99 Kr of October 13, 1992.⁶ From 1993 to the present, a number of labor laws and regulations such as the 1997 Labor Law⁷, and the 2002 Law on Social Security have been created, and conventions of the International Labor Organization have been ratified to meet the demands of Cambodia's market economy.

III. General Sources of Labor Law

The main source of labor and employment law in Cambodia is the 1997 Labor Law and its first amendment in 2007, and the 2002 Law on Social Security. Furthermore, there are also a number of governmental regulations such as royal decrees, sub-decrees, prakas, decisions, circulars, and notice⁸ issued by the Royal Government of Cambodia, and particularly by the Ministry of Labor and Vocational Training. Additionally, there are labor arbitral awards and other related laws in force such as Decree 38 on Contract and Other Liabilities which provides general rules of contract.

The Labor Law regulates the labor relationship between employees and employers and the socio-legal rights and obligations resulting from a labor relationship. All Cambodian citizens and foreign nationals working in Cambodia are subject to the regulations of the Labor Code. The Labor Law specifically provides regulations on enterprise establishment, apprenticeships, labor contracts, collective labor agreements, general working conditions, specific working conditions for agricultural work, health and safety of workers, work related accidents, placement and recruitment of workers, trade union freedom and worker representation in the enterprise, settlement of labor disputes, strikes and lockouts, labor administration, and the labor advisory committee. The Law on Social Security provides a system of protection regarding work related accidents for workers under the scope of the labor law. Labor arbitral awards of the Arbitration Council are considered a source of

⁴ *Id.* p.2

⁵ *Id.* p.3 Cambodia ratified its membership of the ILO through Decree No. 467/71CE of April, 1971

⁶ *Id.* p.3

⁷ *Id.* p.4 The 1997 Labor Law promulgated by Decree No. CS/RKM/0397/01 of March 1997 with the kind assistance of the ILO, the French Ministry of Labor, and AAFLI, the labor law was made based on the 1992 Labor Law, and 1993 constitution

⁸ See, Dr. KONG Phallack, Overview Of Cambodian Legal And Judicial System And Recent Effort For Legal And Judicial Reform, 2. Sources of Laws in Cambodia, pp.2-5

the labor law because the council has developed a consistent jurisprudence to fill in the gaps and ambiguities of the labor law⁹.

In the realm of international legal standards of employment and labor, Cambodia has ratified 13 ILO conventions, which have legal effect within Cambodia, including 8 fundamental ILO conventions¹⁰.

IV. Labor Administration

According to the Labor Law, the Ministry of Labor and Vocational Training and its Labor Departments at the capital, provincial and municipal levels bear the primary responsibility for the administration of labor.¹¹ Labor inspections are assumed by the Labor Inspectors and Labor Controllers.¹² Labor medical inspection is under the labor medical inspectors and they work closely with the labor inspectors.¹³ Under the Labor Law, the Ministry of Labor and Vocational Training is required to establish a Labor Advisory Committee whose primary mission is to study problems related to labor, the employment of workers, wages, vocational training, the mobility of the labor force in the country, migrations, the improvement of the material and moral conditions of workers and matters of labor health and safety. The Labor Advisory Committee consists of the Minister in Charge of Labor, or his representative, who is the Chairperson; representatives from relevant ministries; and an equal number of representatives from the workers' unions that are the most representative at the national level, and of representatives from the employers' organizations that are the most representative at the national level¹⁴. Participation of the Kingdom of Cambodia in activities of the International Labor Organization shall be in consultation with representatives of employers and workers who are members of the Labor Advisory Committee¹⁵.

9 Source, Arbitration Council: <http://www.arbitrationcouncil.org>

10 Source, International Labor Organization: <http://www.ilo.org/ilolex/english/> The 13 conventions are: 1. C4 Night Work (Women) Convention, 1919 (1969); 2. C6 Night Work of Young Persons (Industry) Convention, 1919 (1969); 3. C13 White Lead (Painting) Convention, 1921 (1969); 4. C29 Forced Labour Convention, 1930 (1969); 5. C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 (1999); 6. C98 Right to Organise and Collective Bargaining Convention, 1949 (1999); 7. C100 Equal Remuneration Convention, 1951 (1999); 8. C105 Abolition of Forced Labour Convention, 1957 (1999); 9. C111 Discrimination (Employment and Occupation) Convention, 1958 (1999); 10. C122 Employment Policy Convention, 1964 (1971); 11. C138 Minimum Age Convention, 1973 (1999); 12. C150 Labour Administration Convention, 1978 (1999); and 13. C182 Worst Forms of Child Labour Convention, 1999 (2006)

11 Labor Law and Sub-decree on the Organization and Functioning of the Ministry of Labor Vocational Training and Prakas on the Establishment of Labor Department.

12 Labor Law, Art 343

13 Labor Law, Art 349

14 Labor Law, Art 351 – Art 358

15 Labor Law, Art 358

V. Labor Dispute Resolution System

The Labor Law provides for the basic structure of labor dispute resolution in Chapter XII and Chapter XVII. Labor disputes are classified into individual labor disputes and collective labor disputes. The Labor Law does not call for both collective and individual labor disputes to be resolved initially through direct negotiation between the disputing parties before submission of the disputes to a third party. However the Law does provide for several different third-party dispute resolution mechanisms.¹⁶

In an individual labor dispute, prior to any judicial action, either party can refer the case to the Labor Inspector of his province or municipality or capital for a preliminary conciliation. On receipt of the complaint, the Labor Inspector shall inquire of both parties to elicit the subject of the dispute and then shall attempt to conciliate the parties on the basis of relevant laws, regulations, collective agreements, or the individual labor contract. To this effect, the Labor Inspector shall set a hearing that is to take place within three weeks at the latest upon receipt of the complaint. The parties can be assisted or represented at the hearing. The results of the conciliation shall be contained in an official report written by the Labor Inspector, stating whether there was agreement or non-conciliation. The report shall be signed by the Labor Inspector and by the parties, who receive a certified copy. An agreement made before the Labor Inspector is enforceable by law. In case of non-conciliation, the interested party can file a complaint in a court of competent jurisdiction within two months; otherwise the litigation will lapse.¹⁷

In a collective labor dispute, if there is no planned settlement procedure in a collective agreement, the parties are required to communicate the collective labor dispute to the Labor Inspector of their province or municipality. However, the Labor Inspector can take legal conciliation proceedings upon learning of the collective labor dispute even though he has not been officially notified.¹⁸ The Labor Law requires the Minister in Charge of Labor to designate a conciliator within forty-eight hours from the moment he is apprised or himself learns of the dispute¹⁹ and conciliation must be carried out within fifteen days from the designation by the Minister in Charge of Labor. It can be renewed only by joint request of the parties to the dispute²⁰. During the period of conciliation, the parties to the dispute must abstain from taking any measure of conflict. They must attend all meetings to which the conciliator calls them. Unjustified absence from any such meeting is punishable by a fine set in the rules of Chapter XVI.²¹ A conciliatory agreement, signed by the parties and endorsed by the conciliator, has the same force and effect of a collective agreement between the parties and the persons they represent. However, when the

¹⁶ Labor Law, Ch. 12: Art 300–Art 317

¹⁷ Labor Law, Art 301

¹⁸ Labor Law, Art 303

¹⁹ Labor Law, Art 304

²⁰ Labor Law, Art 305

²¹ Labor Law, Art 306

party representing workers is not a trade union, the agreement is neither binding on such union nor on the workers it represents.²² In the absence of an agreement, the conciliator must record and indicate the key points where the conciliation failed and shall prepare a report on the dispute. The conciliator must send such record and report to the Minister in Charge of Labor within forty-eight hours at the latest after the conclusion of conciliation.²³ If conciliation fails, the labor dispute shall be referred to settle by arbitration at the Arbitration Council²⁴. The Arbitration Council must hear the dispute within fifteen working days of the Arbitration Panel's formation date.²⁵

VI. Individual Employment

1. Employment Relationship

Summary of Main Legal Instruments

The main legal instrument regulating individual contract employment in Cambodia is the Labor Law. The Labor Law provides the basic legal form and scope of a labor contract in Cambodia and details the rights and obligations of the employer and workers in a labor relationship²⁶. Providing further guidance are Decree 38 on Contract and Other Liabilities of October 28, 1988 and the Civil Code²⁷. These two laws set out the basic rules of contract such as formation of contract, forms of contract, effect of contract, execution of contract, interpretation of contract, and statute of limitation²⁸. Furthermore, the Civil Code provides a guideline for implementing a labor contract according to provisions of the Labor Law²⁹.

Forms of Employment

Under the Labor Law, an employment relationship between an employer and a worker can be governed by either an oral or a written contract.³⁰ The Labor Law provides two types of contracts, namely Fixed Duration Contract (FDC) or Specific Duration Contract

22 Labor Law, Art 307

23 Labor Law, Art 308

24 Labor Law, Art 309

25 KONG Phallack, *Labor Arbitration in Cambodia: Law and Practice*, Cambodian Society of Comparative Law, Volume 1, 2010, pp.163-171

26 Labor Law, Ch4, Art 65- Art 95

27 Civil Code, Book 5, Ch 9, Art 664- Art 668, The Civil Code was promulgated by Royal Kram No. NS/RKM/1207/030 of December 8, 2007. However, until today, the Civil Code is not yet implemented because article 1305 states the code will be implemented from the date determined by other laws. The Law on Implementation of Civil Code is in the drafting stage

28 Civil Code, Book 4, Ch 1- Ch9, Art 308- Art 514 and Decree 38 on Contract and Other Liabilities of October 28, 1988, art 1- Art 120

29 Civil Code, Book 5, Ch 9, Art 668

30 Labor Law, Art 65

(SDC) and Undetermined or Unfixed Duration Contract (UDC). Under the Labor Law FDC must be made in writing. If not, it becomes a UDC. Furthermore, the Labor Law provides that the labor contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years. Any violation of this rule leads the contract to become a labor contract of undetermined duration. When a contract is signed for a fixed period of or less than two years, but the work tacitly and quietly continues after the end of the fixed period, the contract becomes a labor contract of undetermined duration.³¹ According to the Labor Law, there are two ways to create a UDC. One is an intention creation by parties while entering into a contract without specifying the date and the other is an unintentional creation whereby FDC is transformed into a UDC either at the time of contracting or at a later time.³²

2. Statutory Regulation of Employment

Employment Listings

Generally, the Labor Law allows employers to directly or indirectly recruit workers but they are required to notify the Placement Office of the Ministry in Charge of Labor or the provincial or municipal Employment Office of any vacancies in his enterprise or any new need for personnel³³. However, as a matter of practice, employers usually directly recruit workers. Therefore, in practice, employers often skip the announcement requirement.

Labor Supply Organizations or Labor Contractors

The Labor Law defines a labor contractor as a sub-contractor who contracts with an entrepreneur and who himself recruits the necessary work force or workmen for the execution of certain work or the provision of certain services for an all-inclusive price. Such a contract must be in writing. The labor contractor is required to observe the provisions of the Labor Law in the same manner as an ordinary employer and assumes the same responsibilities as the latter. In case of insolvency or default by the labor contractor, the entrepreneur or the manager of an enterprise shall substitute for the contractor to fulfill his obligations to the workers and the harmed workers. In such case, the workers may file a case directly against the entrepreneur or manager. Furthermore, the Labor Law requires the entrepreneur to constantly keep available a list of labor contractors and send the list to the Labor Inspector's Office within seven whole days following the date of signing the labor contract or fifteen days for agricultural enterprises or businesses. This

³¹ Labor Law, Art 67(2) and (7); Art 73 (5); and Case 10/03- Jacqsintex Industrial Cambodia

³² Edward (kees) De Bouter, Daniel Adler, Lee U Meng, and Patricia Bar (Authors) & Sussie Brown, and Megan Reeve (Contributing Authors and Editors), *Cambodian Employment and Labor Law*, Community Legal Education Center, Third Edition, pp.79-80; Labor Law, Art 67(2) and (7); Art 73 (5); and Case 10/03- Jacqsintex Industrial Cambodia

³³ Labor Law, Art 21 and Art 258

list must indicate the name, address, and status of the labor contractor and the situation of each workplace.³⁴

In practice, there are two types of labor contractors, one who provides labor domestically and the other who exports labor overseas. The latter is governed by specific governmental regulations such as Sub-decree No.57 ANK/PK Of July 20, 1995 on Exporting Cambodian Workers Overseas and a complementary Sub-decree No.70 ANK/PK Of July 25, 1996 on creating a Manpower Training and Overseas Sending Board to act as a public agency for recruiting, training, sending and managing Cambodian workers to work overseas. Sub-decree No.57 ANK/PK Of July 20, 1995 is the most important law regulating labor migration management from Cambodia, and gives the Ministry of Labour and Vocational training (MOLVT) authority to license any company to send Cambodian workers abroad. The sub-decree establishes a joint cooperation between the MOLVT and the Ministry of Interior (MOI) for issuing passports and the Ministry of Foreign Affairs (MFA) in monitoring workers at destination countries, and also provides processes and procedures of cooperation between the MOLVT and private recruitment agencies, including the obligation for the recruitment agencies to sign a written contract with the worker and to organize pre-departure training as well as criteria for licensing such the deposit of a guarantee fund within the MOLVT. However, Cambodia has not yet signed the 1990 UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Convention No. 97 on Migration for Employment (Revised), 1949, Convention No. 143 on Migrant Workers (Supplementary Provisions), 1975 and Convention No. 181 on Private Employment Agencies, 1997.³⁵

3. Substance of the Individual Contract of Employment

Mandatory Terms in a Contract

The Labor Law provides that a labor contract establishes working relations between the worker and the employer and is subject to common law and can be made in a form that is agreed upon by the contracting parties. The contract can be written or verbal. It can be drawn up and signed according to local custom. If it needs registering, this shall be done at no cost. The verbal contract is considered to be a tacit agreement between the employer and the worker under the conditions laid down by the labor regulations, even if it is not expressly defined. The Civil Code provides that a labor contract must contain a description of the following: wages, working hours, and other working conditions.³⁶ The word “Working Conditions” includes general working conditions specified in Chapter VI and specific working conditions stated in Chapter VII of the Labor Law. The General Working Conditions include wage, hours or work, night work, weekly time off, paid

³⁴ Labor Law, Art 45- Art 50

³⁵ <http://www.ilo.org/ilolex/english/newcountryframeE.htm>

³⁶ Civil Code, Art 665

holidays, paid annual leave, special leave, child labor, women labor and also workers recruited outside the workplace.³⁷ The Specific Working Conditions refer to conditions set specifically for agricultural work such as plantations, farms (the growing of crops and raising of animals), forestry exploitation and fisheries. In addition to the general requirements, the law requires employers to provide partial payment in kind, family benefit, housing, housing allowance, water, supplies, latrines, funeral services (in case of death), day nursery, and school for kids.³⁸

Notice Period

The notice period required when one party unilaterally terminates a labor contract depends on the duration of the contract and the reason for termination. The Labor Law provides notice periods for FDC and UDC. For FDC, the Labor Law states that if the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified.³⁹ For UDC, the Labor Law provides a notice period as follows: i) Seven days, if the worker's length of continuous service is less than six months; ii) Fifteen days, if the worker's length of continuous service is from six months to two years; iii) One month, if the worker's length of continuous service is longer than two years and up to five years; iv) Two months, if the worker's length of continuous service is longer than five years and up to ten years, and v) Three months, if the worker's length of continuous service is longer than ten years.⁴⁰ For UDC, an employee does not have to give a reason for termination, but the Labor Law requires an employer to have valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group.⁴¹

Presumption of Term

The Labor Law provides for three basic term lengths for labor contracts: indefinite term for UDC, definite-term of 1 to 24 months (FDC), and probationary term of 1 to 3 months ("probationary contract").⁴²

37 Labor Law, Art 102-Art 190

38 Labor Law, Art 190-Art 227

39 Labor Law, Art 73(5)

40 Labor Law, Art 75

41 Labor Law, Art 74 (2)

42 Labor Law, Ch 4, Art 65, Art 67, Art 68, Art

Incorporation of Terms in a Collective Agreement

Terms and conditions between individual employment contracts and collective labor agreements may be at variance with one another. The Labor Law provides that where rights and interests of the employees stipulated in individual employment contracts are less favorable to the employees than provided for in the collective agreement, the collective agreement will trump the individual employment contracts.⁴³

4. Contract Termination and Dismissal

General

The Labor Law details very specific circumstances under which a labor contract may be terminated: when the contract expires or is otherwise completed; with the consent of both parties; in the event of the serious misconduct or force majeure; and at the will of each party.⁴⁴

A labor contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in form of writing in the presence of a Labor Inspector and signed by the two parties to the contract. If both parties do not agree, a contract of specified duration can be canceled before its termination date only in the event of the serious misconduct or acts of God.⁴⁵ The premature termination of the contract by the will of either the employer or the worker alone for reasons other than those mentioned in this section entitles the other party to damages in an amount at least equal to the remuneration he would have received until the termination of the contract (in case of termination at the will of the employer), and damages in an amount that corresponds to the damage sustained (in case of termination at the will of worker)⁴⁶.

The labor contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party. However, no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group.⁴⁷

⁴³ Labor Law, Art 98(2)

⁴⁴ Labor Law, Art 73 and Art 74

⁴⁵ Labor Law, Art 73(1-2)

⁴⁶ Labor Law, Art 73(3-4)

⁴⁷ Labor Law, Art 74

Dismissal for Cause

The employer can dismiss an employee for serious misconduct mentioned in the Labor Law⁴⁸. This is the only situation in which an employer is legally allowed to unilaterally terminate an employee's contract without giving notice or being liable for any type of severance or compensation pay. In the following circumstances, dismissal is permissible: i) Stealing, misappropriation, embezzlement; ii) Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality); iii) Serious infractions of disciplinary, safety, and health regulations; iv) Threat, abusive language or assault against the employer or other workers; v) Inciting other workers to commit serious offenses; and political propaganda, activities or demonstrations in the establishment. Besides these circumstances, the Labor Law allows for discretionary expansion of the circumstances under which the employer may dismiss a labor contract through its "other conduct" provision. This allows the employer to categorize many other activities aside from the ones listed above as cause for an employee's dismissal. However, in order for the provisions to be enforceable against the employee, the prohibited conduct must be specified in the labor contract, the collective labor agreement, or the company's internal regulations. The internal regulations must be approved by the Labor Inspectors in order to survive a legal challenge. Furthermore, the Labor Law empowers the competent court to determine the magnitude of offenses besides what are mentioned in the Labor Law⁴⁹, and the disciplinary sanction must be proportional to the seriousness of the misconduct⁵⁰. The employer is considered to renounce his right to dismiss a worker for serious misconduct if this action is not taken within a period of seven days from the date on which he has learned about the serious misconduct in question.⁵¹

The Role of the Union and Labor Authority in Termination/Dismissal

Cambodia is unique because it generally does not have an industry-wide or trade-specific concept of "union," as in other countries. Unions in Cambodia are not united, and multiple unions may exist in an enterprise. The union represents the employees in negotiating the collective labor agreement with the employer.⁵² The union also plays an important role in case of mass layoff. Under the Labor Law the employer must inform the workers' representatives in writing in order to solicit their suggestions, primarily, on the measures for a prior announcement of the reduction in staff and the measures taken to minimize the effects of the reduction on the affected workers.⁵³

48 Labor Law, Art 83, and Art 84

49 Labor Law, Art 84

50 Labor Law, Art 27

51 Labor Law, Art 26

52 *Labor Law*, Art 96

53 Labor Law, Art 95. The Workers' representatives are elected from the candidates nominated by the representative union organizations within each establishment (See also art 288)

The dismissal of a workers' representative or a candidate for workers' representative/trade union can take place only after authorization from the Labor Inspector. The same protective measures apply to former workers' representative three months following the end of their terms and to unelected candidates during three months following the proclamation of the results of the ballot. Any reassignment or transfer that would end the workers' representative's term is subject to the same procedure.⁵⁴

5. Privacy

There are no employment-specific privacy laws in Cambodia. However, the Civil Code of Cambodia contains a concept of personal rights. Personal rights under the civil code include the rights to life, personal safety, health, freedom, identity, dignity, privacy, and other personal benefits or interests. Nevertheless, "privacy," "personal secrets," and "personal life" are not specifically defined. This absence of definition could have potentially important ramifications in an employment context (e.g., company email, background checks) unless these terms are addressed in the company's relevant labor regulations and agreed to by the employee.

6. Employee Duty of Loyalty, Trade Secrets, Covenants Not to Compete

Duty of Loyalty

Cambodian Labor Law provides a duty of loyalty. Worker's loyalty and confidentiality towards the enterprise continues to be in effect during the execution and suspension of the employment contract.⁵⁵

Trade Secrets

A law on trade secrets is not yet in place in Cambodia. Labor Inspectors and Controllers must solemnly swear allegiance to fulfilling their duties and to not revealing, even after having left their post, any manufacturing or trade secrets or operating methods that they learned of during the course of their work.⁵⁶ Due to the absence of law, trade secret provisions are normally included in the employment contract and internal regulations of the companies.

⁵⁴ Labor Law, Art 293 and Prakas 305 dated 21 November, 2001

⁵⁵ Labor Law, Art 72 (See also article 60)

⁵⁶ Labor Law, Art 343

VII. Collective bargaining

1. Union Recognition

The Law on Trade Union is in the drafting stage. However, the 1993 Cambodian Constitution recognizes the right to form a trade union and to be members of the trade unions. The 1997 Labor Law (LL) also established provisions related to freedom of association and also the collective bargaining agreement, namely trade union freedom and worker representatives in the enterprise⁵⁷, the collective bargaining⁵⁸, strikes and lockouts⁵⁹, and non-discrimination.⁶⁰ Furthermore, Cambodia has ratified eight fundamental ILO Conventions,⁶¹ among them are two conventions related to trade unions, namely Freedom of Association and Protection of the Right to Organize Convention, 1948 (C.87) and Right to Organize and Collective Bargaining Convention, 1949 (C.98).⁶²

Under the Labor Law, all workers, regardless of sex, age, and nationality are free to be a member of the trade union of their choice⁶³. Both workers and employers have, without distinction whatsoever and prior authorization, the right to form professional organizations of their own choice for the exclusive purpose of studying, promoting the interests, and protecting the rights, as well as the moral and material interests, both collectively and individually, of the persons covered by the organization's statutes. Professional organizations of workers are called "workers' unions". Professional organizations of employers are called "employers' associations". However, trade unions or associations that include both employers and workers are forbidden⁶⁴.

Employers are required to cooperate with the trade unions and create favorable operating conditions such as discussion on internal regulations and negotiation of collective bargaining. They are also prohibited from discriminating against an employee on the basis of trade union membership and may not exert economic or other pressures to interfere with organizational operations.⁶⁵

57 Cambodian Labor Law (1997), Chapter 11 (Art 266- Art 299)

58 Cambodian Labor Law (1997), Chapter 5 (Art 96- Art 101)

59 Cambodian Labor Law (1997), Chapter 13 (Art 318- Art 337)

60 Cambodian Labor Law (1997), Art 12

61 Convention on Freedom of Association and Protection of the Right to Organise (C.87); Convention on the Right to Organise and Collective Bargaining (C.98); Convention on Forced Labour (C. 29); Convention on Abolition of Forced Labour (C.105); Convention on Minimum Age (C. 138); Convention on the Worst Forms of Child Labour (C. 182); Convention on Equal Remuneration (C. 100); and Convention on Discrimination (Employment and Occupation) (C. 111).

62 Cambodia ratified C.87 and C.98 on August 23, 1999

63 Labor Law, Art 271

64 Labor Law, Art 266

65 Labor Law, art. 12 and Art 280

2. Level of Bargaining

The collective agreement is a written agreement signed between an employer or a group of employers, or one or more organizations representative of employers; and one or more trade union organizations or representatives of workers. The collective agreements shall specify their scope of application. This can be an enterprise, a group of enterprises, an industry or branch of industry, or one or several sectors of economic activities⁶⁶.

3. Effect of the Agreement

The Cambodian Labor Law does not provide the date that a collective agreement can take an effect. In practice, it takes effect on the date agreed upon by both parties.

Under the Labor Law, the provisions of collective agreements can be more favorable toward workers than those of laws and regulations in effect. However, the collective agreements cannot be contrary to the provisions on the public order of these laws and regulations. Any provisions of labor contracts between employers and workers, already covered by a collective agreement, that are less favorable than the provisions provided for in this collective labor agreement shall be nullified and must be replaced automatically by the relevant provisions of the collective agreement.⁶⁷

The provisions of a collective agreement apply to employers concerned and all categories of workers employed in the establishments as specified by the collective agreement⁶⁸. At request of a professional organization of workers or employers that is representative in the relevant scope of application, or on its own initiative, the Minister in Charge of Labor, after consultation with the Labor Advisory Committee, may extend all or some of the provisions of a collective agreement to all employers and all workers included in the occupational area and scope of this agreement.⁶⁹

4. Duration of the Collective Agreement

The collective agreement is concluded for a definite term or for an indefinite term. When it is for a definite term, this term may not exceed three years. At its expiration, it shall remain in effect unless it has been cancelled, on the condition of keeping a three months' notice, by either party. When the collective agreement is concluded by shop stewards or worker's representative in case there is no a trade union in the enterprise, the term of such agreement is not to exceed one year. When the collective agreement is concluded for an indefinite term, it can be cancelled, but it continues to be in effect for a period

⁶⁶ Labor Law, Art 96

⁶⁷ Labor Law, Art 98

⁶⁸ Labor Law, Art 97

⁶⁹ Labor Law, Art 99

of one year to the party that forwarded a complaint to cancel it. The notice of cancellation does not prevent the agreement from being implemented by the other signatories⁷⁰.

5. Strikes

A strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work⁷¹. The right to strike is guaranteed. It can be exercised by workers after the rejection of an arbitral decision⁷². The right to strike can also be exercised when the Council of Arbitration has not rendered or informed of its arbitration decision within the time periods prescribed in Chapter XII of the Labor law, when the union representing the workers deems that it has to exert this right to enforce compliance with a collective agreement or with the law and to defend the economic and socio-occupational interests of workers. However, the right to strike can be exercised only when all peaceful methods for settling the dispute with the employer have already been tried out⁷³ and it cannot be exercised when the collective dispute results from the interpretation of a juridical rule originating from the existing law, or the collective agreement, or the rule relating to an arbitral decision accepted by the concerned parties; and for the purpose of revising a collective agreement or reversing an arbitral decision accepted by the parties, when the agreement or the decision has not yet expired⁷⁴.

Procedures of strikes must be set out in the union's statutes, which must state that the decision to strike is adopted by secret ballot⁷⁵, and the strike must be preceded by prior notice of at least seven working days and be filed with the enterprise or establishment. If the strike affects an industry or a sector of activity, the prior notice must be filed with the corresponding employer's association, if any. The prior notice must precisely specify the demands which constitute the reasons for the strike. The prior notice must also be sent to the Ministry in Charge of Labor⁷⁶. During the period of prior notice, the Minister in Charge of Labor must actively seek all means to conciliate between the parties to dispute, including soliciting the collaboration of other relevant ministries. The parties are required to be present at the summons of the Minister in Charge of Labor⁷⁷.

During a strike, the employer is prohibited from recruiting new workers for a replacement for the strikers except to maintain minimum service if the workers who are required to provide such service do not appear for work. Any violation of this rule obligates the

⁷⁰ *Labor Law*, Art 96

⁷¹ *Labor Law*, Art 318

⁷² *Labor Law*, Art 319

⁷³ *Labor Law*, Art 320

⁷⁴ *Labor Law*, Art 321

⁷⁵ *Labor Law*, Art 323

⁷⁶ *Labor Law*, Art 324

⁷⁷ *Labor Law*, Art 325

employer to pay the salaries of the striking workers for the duration of the strike⁷⁸. In addition, the employer is prohibited from imposing any sanction on a worker because of his participation in a strike. Such sanction is nullified and the employer can be punishable by a fine under the Labor law⁷⁹.

6. Third-Party Resolution of Disputes

Cambodian labor law provides for the following labor dispute resolutions, which are dependent on whether the dispute is an individual dispute or collective dispute.

Individual Labor Disputes

An individual dispute is one that arises between the employer and one or more workers or apprentices individually, and relates to the interpretation or enforcement of the terms of a labor contract or apprenticeship contract, or the provisions of a collective agreement as well as regulations or laws in effect. Prior to any judicial action, an individual dispute can be referred for a preliminary conciliation, at the initiative of one of the parties, to the Labor Inspector of his province or municipality. An agreement made before the Labor Inspector is enforceable by law.

In case of non-conciliation, the interested party can file a complaint in a court of competent jurisdiction within two months, otherwise the litigation will be lapsed⁸⁰.

Collective Labor Disputes

A collective labor dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness⁸¹. If there is no planned settlement procedure in a collective agreement, the parties shall communicate the collective labor dispute to the Labor Inspector of their province or municipality. However, the Labor Inspector can take legal conciliation proceedings upon learning of the collective labor dispute even though he has not been officially notified⁸². If conciliation fails, the labor dispute shall be referred to settle: a) by any arbitration procedure set out in the collective agreement, if there is such a procedure; or b) by any other procedure agreed on by all the parties to the dispute; or c) by the arbitration procedure provided for in this Section⁸³.

⁷⁸ Labor Law, Art 334

⁷⁹ Labor Law, Art 333

⁸⁰ Labor Law, Art 300- 301

⁸¹ Labor Law, Art 302

⁸² Labor Law, Art 303

⁸³ Labor Law, Art 309

VIII. Representation by Entities Other Than Unions

In every enterprise or establishment where at least eight workers are normally employed, the workers shall elect a shop steward or a worker's representative to be the sole representative of all workers who are eligible to vote in the enterprise or establishment⁸⁴. The missions of the shop steward⁸⁵ are as follows:

- to present to the employer any individual or collective grievances relating to wages and to the enforcement of labor legislation and general labor regulations as well as collective agreements applicable to the establishment;
- to refer to the Labor Inspector all complaints and criticism relating to the enforcement of the labor legislation and labor regulations that the Labor Inspector is responsible for monitoring;
- to make sure the provisions relating to the health and safety of work are enforced;
- to suggest measures that would be beneficial to contribution towards protecting and improving the health, safety and working conditions of the workers in the establishment, particularly in case of work-related accidents or illnesses

The shop steward must be consulted and put forward a written opinion on the draft of internal regulations, or on draft of modification to these regulations. The shop steward must also be consulted and put forward a written opinion on the measure for redundancy due to a reduction in activity or an internal reorganization of the enterprise or establishment. The number of shop stewards⁸⁶ is set in proportion to the number of workers in the establishment as follows:

- from 8 to 50 workers: one official shop steward and one assistant shop steward;
- from 51 to 100 workers: two official shop stewards and two assistant shop stewards;
- more than 100 workers: one extra shop official steward and one extra assistant shop steward for each group of one hundred workers.

⁸⁴ Labor Law, Art 283

⁸⁵ Labor Law, Art 284

⁸⁶ Labor Law, Art 285

IX. Redundancy and Transfers of Undertakings

1. Redundancy

Legal Basis

The Cambodian Labor Law provides provision of a layoff or redundancy resulting from a reduction in an establishment's activity or an internal reorganization that is foreseen.⁸⁷

Procedures and Formalities

In case of mass layoff, the employer is subject to the following procedures:

- The employer establishes the order of the layoffs in light of professional qualifications, seniority within the establishment, and family burdens of the workers.
- The employer must inform the workers' representatives in writing in order to solicit their suggestions, primarily, on the measures for a prior announcement of the reduction in staff and the measures taken to minimize the effects of the reduction on the affected workers.
- The first workers to be laid off will be those with the least professional ability, then the workers with the least seniority. The seniority has to be increased by one year for a married worker and by an additional year for each dependent child.

The dismissed workers have, for two years, priority to be re-hired for the same position in the enterprise. Workers who have priority for re-hire are required to inform their employer of any change in address occurring after the layoff. If there is a vacancy, the employer must inform the concerned worker by sending a recorded delivery or registered letter to his last address. The worker must appear at the establishment within one week after receiving the letter.

The Labor Inspector is kept informed of the procedure covered in this article. At the request of the workers' representatives, the Labor Inspector can call the concerned parties together one or more times to examine the impact of the proposed layoffs and measures to be taken to minimize their effects. In exceptional cases, the Minister in Charge of Labor can issue a Prakas (ministerial order) to suspend the layoff for a period not exceeding thirty days in order to help the concerned parties find a solution. This suspension may be repeated only one time by a Prakas of the Ministry.

⁸⁷ Labor Law, Art 95

Compensation

The Cambodian labor law provides that if the labor contract is terminated by the employer alone, except in the case of a serious offense by the worker, the employer is required to give the dismissed worker, in addition to the prior notice the indemnity for dismissal of seven days of wage and fringe benefits if the worker's length of continuous service at the enterprise is between six and twelve months; and fifteen days of wage and fringe benefits for each year of service if the worker has more than twelve months of service, an indemnity for dismissal will be equal to. The maximum of indemnity cannot exceed six months of wage and fringe benefits. If the worker's length of service is longer than one year, time fractions of service of six months or more shall be counted as an entire year. The worker is also entitled to this indemnity if he is laid off for reasons of health⁸⁸.

In businesses of a seasonal nature, the layoff of workers at the end of a work period cannot be considered as dismissal, and does not result in any compensation. However, the lay-off shall be announced at least eight days in advance by a written notice conspicuously posted at the main entry of each work site, and if applicable, on each boat on which there is a work site⁸⁹.

2. Transfers of Undertakings

The Labor Law provides that if a change occurs in the legal status of the employer, particularly by succession or inheritance, sale, merger or transference of fund to form a company, all labor contracts in effect on the day of the change remain binding between the new employer and the workers of the former enterprise. The contracts cannot be terminated except under the conditions laid down in the present Section. The closing of an enterprise, except for acts of God, does not release the employer from his obligations. Bankruptcy and judicial liquidation are not considered as acts of God under the Cambodian Labor Law⁹⁰.

⁸⁸ Labor Law, Art 89

⁸⁹ Labor Law, Art 88

⁹⁰ Labor Law, Art 87

X. Wages, Hours, and Leave

1. Wages

The term “wage” under Cambodian labor law means the remuneration for the employment or service that is convertible in cash or set by agreement or by the national legislation, and that shall be given to a worker by an employer, by virtue of a written or verbal contract of employment or service, either for work already done or to be done or for services already rendered or to be rendered⁹¹. Wage may include actual wage or remuneration; overtime payments; commissions; bonuses and indemnities; profit sharing; gratuities; the value of benefits in kind; family allowance in excess of the legally prescribed amount; holiday pay or compensatory holiday pay; and amount of money paid by the employer to the workers during disability and maternity leave. However, wage does not include health care; legal family allowance; travel expenses; benefits granted exclusively to help the worker do his or her job⁹².

Minimum Wage

The Labor Law guarantees the minimum wage and states that wage must be at least equal to the guaranteed minimum wage; that is, it must ensure every worker of a decent standard of living compatible with human dignity⁹³. Any written or verbal agreement that would remunerate the worker at a rate less than the guaranteed minimum wage shall be null and void.⁹⁴ However, there is no minimum wage law in the Cambodia yet at the time being, except a Notice No. 041/11 dated in March 2011 provides a minimum wage for workers who work in a garment industry is 61 USD per month.

Under the labor law the guaranteed minimum wage is established without distinction among professions or jobs. It may vary according to region based on economic factors that determine the standard of living, and the wage is adjusted from time to time in accordance with the evolution of economic conditions and the cost of living. Elements to take into consideration for determining the minimum wage shall include a) the needs of workers and their families in relation to the general level of salary in the country, the cost of living, social security allowances, and the comparative standard of living of other social groups; and b) economic factors, including the requirements of economic development, productivity, and the advantages of achieving and maintaining a high level of employment⁹⁵.

91 Labor Law, Art 102

92 Labor Law, Art 103

93 Labor Law, Art 104

94 Labor Law, Art 105

95 Labor Law, Art 107

Overtime Pay

An employee who works overtime at the request of the employer must be paid at the following rates:

- working overtime on normal working days: 150 percent of the current wage rate for overtime hours; and
- working at night and public holiday: 200 percent of the current wage rate for overtime hours⁹⁶.

Taxes (including Social Security)

Personal Income Tax

The 1997 Law on Taxation requires employees to pay tax on salary at the following rates⁹⁷:

Taxable Parts of the Monthly Salary	Tax Rate
0 to 500,000 Riels*	0%
500,001 to 1,250,000 Riels	5%
1,250,001 to 8,500,000 Riels	10%
8,500,001 to 12,500,000 Riels	15%
12,500,000 <	20%

* Riel is Cambodian Currency. 1USD = 4100 Riels

Exemption

Under Article 44 of Law on Taxation, employees' income is tax exempted as follows:

1. Real refunds on professional expenses made by the employee under the assignment and for the benefit of the employer and which satisfy the 3 following conditions:
 - a. made for the direct and exclusive interest of the enterprise;
 - b. not exaggerated nor extravagant;
 - c. supported by detailed invoices already paid and made in the name of the recipient of the real expense refund.
2. Indemnity for the layoff within the limit as provided in Labor Law.
3. Additional remuneration with social characteristics where there is provision in Labor Law.
4. Supply gratis or below acquisition cost of special uniforms or professional equipment.
5. Flat allowance for mission and travel expenses. This allowance should not overlap the real expense refund provided in this article.

⁹⁶ Labor Law, Art 139 and Prakas No. 80/99 on Overtime Payment and Working Overtime on Normal Working Hours

⁹⁷ Law on Taxation, Art 47 (see details on salary tax from Art 40-54)

Health Insurance

Health insurance is not compulsory for employee under the labor law. However, the employer is responsible for a worker's work related accidents⁹⁸ and is required to join the National Social Security Fund under the 2002 Law on Social Security.

Social Insurance

The Law on Social Security states employers and workers covered by this law shall have be required to pay contribution to the National Social Security Fund. The National Social Security Fund is the public establishment. All matters other than technical are under the supervision of the Ministry of Labor and Vocational Training (MoLVT), while the Ministry of Economy and Finance (MEF) administers all finance related issues. The Cambodian National Security Fund is broken into three components such as occupational risk work injury or occupational disease, health care; and pension scheme. However, for the first phase of the implementation of the Law on Social Security only the occupational risks component is applied and the employer is required to pay the contribution for work injury scheme is determined by 0.8% of the assumed wage based on the employee's monthly wage⁹⁹.

2. Hours

Normal working hours may not exceed eight hours a day or 48 hours in a week.¹⁰⁰ "Night work" under the Cambodian Labor law represents a period of at least eleven consecutive hours that includes the interval between 2200 and 0500 hour. Besides continuous work that is performed by rotating teams who sometimes work during the day and sometimes at night, the work at the enterprise can always include a portion of night work.¹⁰¹

Overtime may not exceed 2 hours a day and employers are required to get permission from the Ministry in charge of labor.¹⁰² The limit is at 200 hours in a year. Under special circumstances, this limit may be increased to 300 hours of overtime per year. Businesses in the textiles, garments, sportswear, and fishery production fields automatically operate on this increased basis. Employees who work eight consecutive hours are entitled to 1 hour lunch break according a general practice of private sector employee in Cambodia and it is normally stated in an internal regulation of each enterprise of establishment. The Labor Law prohibits employers from using the same worker for more than six days

98 Labor Law, Art 249

99 See Law on Social Security (2002) and Sub-decree No 16 concerning on establishment of the National Social Security Fund (NSSF) dated 06 March 2007.

100 Labor Law art. 137

101 Labor Law art. 144

102 Labor Law, Art 137-140, Prakas 80/99, Notice 014/99 and Arbitral Award Case 10/04

per week and grant employees to have weekly time off for a minimum of twenty-four consecutive hours¹⁰³.

3. Leave

Annual Leave and Public Holidays

An employee is entitled to at least 18 days of annual leave with pay or at the rate of one and a half work days of paid leave per month of continuous service¹⁰⁴. In addition, Employees are given paid leave for public holidays based on Prakas issued annually by the Ministry in charge of Labor such as International New Year (January 1), Victory Day (January 7), Women's Day (March 8), Khmer New Year (3 days in mid April), International Labor Day (1 May), King's Birthday (3 days in May), Visaka Bochea Festival (1 day), King's Mother Birthday (1 day in June), King's father Birthday (1 day in October), Constitution Day (24 September), Phchum Ben day (1 day in September), National Water Festival (3 days in November) etc. In case the public holiday coincides with a Sunday, workers will have the following day off. Time off for holidays cannot be the reason for reducing monthly, bi-monthly, or weekly wages¹⁰⁵.

Leave for Pregnancy, Maternity, and Adoption

Maternity Leave

Female workers in Cambodia are entitled to a maternity leave of ninety days and half of their wage, including their perquisites, paid by the employer during the maternity leave¹⁰⁶.

Pre-natal Check-ups, Miscarriages, Abortions, or Stillbirth

The Cambodian Labor Law does not provide any provisions related to pre-natal check-ups, miscarriages, abortions, or stillbirth, but in practice, some companies allow workers to have a monthly medical check-up by using their annual leave, the employee is entitled to paid leave for the purpose of five pre-natal check-ups. The use of annual leave is also allowed for cases of miscarriages, abortions, or stillbirth as well.

Military Service and Trainings

The Cambodian labor law provides that all employment contracts are suspended during the mandate time for military services and Trainings¹⁰⁷.

103 Labor Law, Art 146-Art 147

104 Labor Law, Art 166

105 Labor Law, Art 161- Art 162

106 Labor Law, Art 182- Art 183

107 Labor law, Art 71(2)

XI. Antidiscrimination

1. Introduction

Cambodian Labor law strictly prohibits discriminations against race, color, sex, creed, religion, political opinion, birth, social origin, membership of workers' union or the exercise of union activities in employment. A revocation in order to make a decision on hiring, defining and assigning of work, vocational training, advancement, promotion, remuneration, granting of social benefits, discipline or termination of employment contract is considered null and void. However distinctions, rejections, or acceptances based on qualifications required for a specific job shall not be considered as discrimination¹⁰⁸.

XII. Occupational Safety and Health and Workers' Compensation

1. Occupational Safety and Health

According to the Labor Law, an employer is responsible for providing adequate means of protection for employees, ensuring occupational safety and hygiene, and improving working conditions.¹⁰⁹ Labor Inspectors and Labor Controllers are authorized by Labor law to pay visits to and inspect establishments regarding health, working conditions and safety¹¹⁰. Employers are required to pay for employee medical check-up at the commencement of employment contract and periodic medical check-up during the employment.¹¹¹

The employer is responsible for work accidents or occupational diseases. An accident is considered to be work related, regardless of the cause. If it happens to a worker working or during the working hours, whether or not the worker was at fault; it is the accident inflicted on the body of the worker or on an apprentice with or without wage, who is working in whatever capacity or whatever place for an employer or a manager of an enterprise. Equally, accidents happening to the worker during the direct commute from his residence to the work place and home are also considered to be work-related accidents as long as the trip was not interrupted nor a detour made for a personal or non-work-related reason. All occupational illness, as defined by law, shall be considered a work-related accident and shall be remedied in the same manner¹¹².

108 Labor Law, Art 12

109 Labor law, Art 23, Art 228- Art 230

110 Labor Law, Art 233 and Law on Social Security (2002)

111 Labor Law, Art 247

112 Labor Law, Art 248- Art 249

2. Workers' Compensation

Compensation for fatal accidents or for accidents causing permanent disability is paid to the victim or his beneficiaries as an annuity. A supplementary compensation is granted to a victim who requires constant care from another person. In the event of incapacitation, compensation shall be paid no later than the fifth day after the accident¹¹³.

XIII. Pensions and benefits

Pensions and benefits for employees are not yet implemented in Cambodia at the moment. In practice, pensions and benefits are regulated in an internal regulation of some companies.

XIV. Foreign Workers

Cambodia has agreements with many countries, especially within the Association of Southeast Asian Nations (ASEAN), on short-term tourist visa exemption. Other citizens and individuals coming to work in Cambodia must secure the proper visa before entering the country.

The Ministry of Interior is responsible for visa approval for entry of most foreigners and overseas Cambodian residents who wish to enter Cambodia. No foreigner can work in Cambodia unless he possesses a work permit and an employment card issued by the Ministry in Charge of Labor and meets the following conditions: i) His or her employers must beforehand have a legal work permit to work in the Kingdom of Cambodia; and ii) He or she must have legally entered the Kingdom of Cambodia; possess a valid passport; possess a valid residency permit; be fit for their job and have no contagious diseases. The work permit is valid for one year and may be extended as long as the validity of extension does not exceed the fixed period in the residency permit of the person in question¹¹⁴.

XV. Conclusion

In conclusion, Cambodian labor law provides a comprehensive legal framework governing an employment relation between employers and workers regardless of sex, as long as an employment contract is executed in Cambodia. The Cambodian Labor Law provides a protection for trade unions and shop stewards and prohibits all forms of discrimination in

¹¹³ Labor Law, Art 253

¹¹⁴ Labor Law, Art 261- Art 265

an employment. Labor Law is one of the fascinating areas of law that is highly developed in Cambodia since the establishment of the Arbitration Council, a quasi-judicial body that has jurisdiction over a collective labor disputes. Since its establishment, this council has rendered hundreds of decisions regarding ambiguities of the terms in the law, and ensures the proper enforcement of the Cambodian Labor Law, especially in the garment sectors, as a result of the Cambodia-US Bilateral Trade Relationship.

INTRODUCTION TO THE LAND LAW OF CAMBODIA

HEL Chamroeun

CONTENTS

I. Introduction.....	315
II. Land Rights.....	318
1. Introduction to Land Rights.....	318
Introduction to proprietorship	319
2. Individual Ownership and Collective Ownership.....	322
3. Undivided Ownership	322
4. Co-Ownership.....	323
5. Joint-Ownership.....	324
“Divided Rights” of Ownership.....	324
6. Implementation of Land Rights.....	327
Transfer of Rights.....	327
Implementation of the Right of Ownership	328
III. Land Institutions.....	330
1. The Cadastral Administration Institution	330
2. Land Dispute Resolution Institutions.....	332
Case-by-Case Resolution Mechanism	332
Cadastral Commission and National Authority for Land Disputes Resolution	332
Judicial Body.....	334
IV. Conclusion	334
REFERENCES	335

INTRODUCTION TO THE LAND LAW OF CAMBODIA*

*HEL Chamroeun***

I. Introduction

Cambodia is one of the oldest countries in South East Asia, rich in tradition, custom, and culture across the country. Over the centuries, these traditions, customs and cultures have formed the conceptual foundations for Cambodian laws. Although the Cambodian legal system has been influenced by the French legal system since the late 19th century, fundamental Khmer legal concepts survived. Insofar as land is concerned, Cambodian people have believed for many centuries that their residences, farms, plantations, villages, communes, districts, provinces and country are owned by the “Land Protector” or “Machas Tek Machas Dey”, who is both the owner and protector of the land the Cambodian people possess and rely on for their livelihood.¹ Since the 9th century and the Angkor Empire,² the Cambodian people also used to follow the doctrine of God King by respecting their king as “the world emperor” or “Prah Komdeng Ptey Krom”.³

Although Khmer people hold the belief that their farms, plantations and houses are maintained by “the Land Protector” or “Machas Tek Machas Dey” or by the king known as “world emperor” who controls the entire Khmer empire, these customs exist alongside the private land ownership regime. The private land ownership regime dates back to the early period of the Angkor Empire⁴. Stone scripts dating back to the Angkor period cite the punishments for infringing on the ownership rights of others, the punishments ranged from physical ones including whipping, mutilation, and/or cutting open the chest of the accused and the spiritual punishment of being cursed to live an eternity in hell.⁵

In the Angkor era, the rights to private land ownership were guaranteed in the provisions of a code composed sometime between 1847 and 1853 under the reign of “Prah

* This article was written before the Law on the Implementation of Civil Code. The Cambodian Civil Code came into force on December 21, 2011 and number of articles and chapters in the 2001 Land Law are abrogated and revised. Due to time constraint, this article is not revised to reflect the Law on the Implementation of Civil Code.

** Dr. HEL Chamroeun is Private Law Professor and Senior Advisor to the Sithisak Law Office.

1 Hel Chamroeun, “*Land conflicts in Cambodia*”, Doctoral Thesis at the University of Paris 1 Panthéon-Sorbonne, 2008, note 34.

2 Hel Chamroeun, “*Land conflicts in Cambodia*”, see above, note 50.

3 Hel Chamroeun, “*Land conflicts in Cambodia*”, see above, note 11.

4 Hel Chamroeun, “*Land conflicts in Cambodia*”, see above, note 57.

5 Hel Chamroeun, “*Land conflicts in Cambodia*”, see above, note 66.

Harirak Reamea Eysarapadey His Majesty Ang Duong” and published in 1891 at the French Protectorate publishing house at the request of His Majesty Prah Norodom⁶. Although that code did not define “ownership” of farms, plantation and houses, the “ownership was the right recognized by the king and specifically guaranteed by the laws and government agencies opposing all forms of rights abuses such as breaking into the farms and plantations of others, taking away farming outputs of others, grabbing others’ plantation and houses or insulting the owners.⁷ In addition to the right, ownership also carried certain obligations, primarily obligations on the part of the owner of land to fence and maintain his property. A failure to carry out one’s obligations, such as by abandoning a residence for years, could result in the loss of ownership rights.⁸

During the years of the French Protectorate, ownership rights were re-introduced within the conceptual framework of the French legal system through the adoption of the Civil Code by the Royal declaration of the His Majesty King Prah Sisovath and Mr. Boudoin, the French Resident Superior, on February 25, 1920. That code generally defined ownership in Article 644 as follows: “ownership is the law that permits the use of properties of one’s own without any prohibitions by the law.” In 1967 ownership was redefined as “the right in utilizing and managing properties exclusively and absolutely with the only prohibition that the property was used in contradiction to any laws”. The Civil Code remained in force until ownership rights were abandoned by the Khmer Rouge regime in 1975.

During the Democratic Kampuchea regime from 1975 to 1979, private ownership of land was totally abolished and all land was collective property owned by “the organization”, ie the State. Only certain personal accessories could be privately owned as provided for in Article 2 of the 1976 constitution which stated that “key means of production are generally under the collective ownership of the state and community”.

After January 7, 1979, land ownership was not immediately recognized by the People’s Republic of Kampuchea (PRK), which came into existence after the downfall of the Democratic Republic of Kampuchea. All the land belonged to the state⁹ although ordinary people had rights of use and rights to succession over each piece of land which the state allowed each family to build their homes upon and which they could use for farming¹⁰. The law prohibited the sale and purchase of land, loans for the purpose of purchasing land as well as share cropping contracts.¹¹ Rights of private land ownership

6 Hel Chamroeun, *Khmer Justice Legacy*, Phnom Penh Publishing House, 2009-2010, note 440.

7 Hel Chamroeun, *Khmer Justice Legacy*, see above, notes 441 to 449.

8 Hel Chamroeun, *Khmer Justice Legacy*, see above, notes 446 and 447.

9 Article 14 of the 1981 Constitution states: “properties that are owned by the state include land, forest, sea, river, pond, national resources, economic and cultural centers, national defense bases and other constructions of the state.”

10 Article 15 of the 1981 Constitution states: “citizens have full rights of use and rights of land succession of which the government gave to each family as governed by the law in order to build residence and gardens and plantation”.

11 Article 17 of the 1981 Constitution states: “no one is allowed to purchase, buy, put on loan, or share cropping. No one could use the agricultural lands, forestry land by their own will for other purposes

were provided for in sub-decree number 06 ANKR dated May 6, 1985 on Management and Use of Agricultural Land.

Decree number 29 KR dated April 30, 1989 brought an end to the People's Republic of Kampuchea and established the State of Cambodia. However, under the latter regime private land ownership regime was not recognized immediately as amendments to the constitution made the state the sole owner of all land.¹² However, on April 22, 1989 the Council of Ministers promulgated sub-decree number 25 ANKR which provided for the right of home ownership of Cambodian citizens. This sub-decree is seen by many as the rebirth of land proprietorship rights in Cambodia after 1979, although the country still lacked a specific legal regime for the ownership. The existence of ownership and possession rights was underlined with directive No. 03 SNN dated on March 03, 1989 on Land Use and Management Policies. With a constitution which did not yet permit private land ownership, the presence of "private ownership of houses" could only be seen as an indication of political will on the part of the government of the State of Cambodia which was advancing into full realization of private land ownership. Real implementation of private ownership of houses was still at stake as ownership was not yet fully protected under the law.

In order to strengthen the legal foundations for the ownership of land, the Land Law (Chbab Pumibal)¹³ was first promulgated by Decree No. 100 KR dated on October 13, 1992. However, this law did not provide a precise definition of and full guarantee for private land ownership since its scope was still narrow and vague. The ownership provided for under the law only extended to land for housing and construction purposes, but to land for production, such as farms and plantations, which according to the law could only be possessed temporarily.¹⁴ In addition, the right of ownership would be withdrawn if the owner failed to pay tax on the land for 5 consecutive years.¹⁵ Therefore, the ownership rights provided for under this law were akin to the right of temporary possession as it could cease in these specific cases as stipulated by the law. Therefore, the scope and content of proprietorship rights as provided for in the 1992 Land Law was still limited and vague.

On September 24, 1993, the State of Cambodia was succeeded by the Kingdom of Cambodia. The new state's constitution recognized and ensured the right of private ownership of all Khmer citizens to private land ownership in Article 44 in the following terms:

if not yet allowed by the competent authority".

12 Article 14 of the 1989 Constitution: "properties that are owned by the state include land, forest, sea, river, pond, national resources, economic and cultural centers, national defense bases and other constructions of the state."

13 According to the 1967 Buddhist Institution Khmer dictionary, the word "Pumibal" means "name of a group in a ministry which has a role of keeping village and farming land register of the people". In this sense, the root of this word refers to the land management.

14 Article 19 paragraph 2 of the 1992 Land Law: Ownership is of residential land.

15 Article 18 of the 1992 last paragraph Land Law states: "registered estate which the owner fails to file tax and rent on time and at the rate determined by the state within 5 consecutive years and no one claims for it shall become the private property of the state".

“All persons, individually or collectively, shall have the right to ownership. Only Khmer legal entities and citizens of Khmer nationality shall have the right to own land. Legal private ownership shall be protected by law. The right to confiscate properties from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance.”

Since the fall of the Democratic Republic of Kampuchea, the development of land policies in Cambodia had shown the political will to protect private land ownership but had lacked the formal legal regime under which such ownership could be effected and protected. On August 30, 2001, Royal Krom No. NS/RKM/0801/14 promulgated another Land Law which remains in force today. In addition, the Civil Code promulgated by Royal Kram No. NS/RKM/1207/030 dated on December 8, 2007 also includes provisions related to land ownership although this law is yet to come into force.

In addition to the creation of the legal framework for land management, the institutional structures which are required to implement management of land have also been reformed or re-built. The reestablishment of these institutions aimed to protect private land ownership and other related rights and to ensure the mechanisms for the resolution of all land disputes which continue to arise as a result of the recent history of uncertainty in Cambodia’s land sector.

This study will now examine, in Chapter II, the right of private land ownership and other related rights before considering, in Chapter III, institutions mandated by law to govern and manage land.

II. Land Rights

In legal terminology, a right which an individual has over any property whether movable or immovable is called a “right in rem”. Land right are “rights in rem” over immovable property. Land rights come in various categories. Each category has specific characteristics and scopes. In the following sections, each category will be precisely defined (part 1) and their scope in practice explained according to their legal differences (part 2).

1. Introduction to Land Rights

Among all land rights, ownership is the “absolute right”, meaning that it is the full or complete right to which no other land right can be equal (see paragraph 1 below) as other rights over land are just “divided rights” of ownership meaning that they are partial rights of ownership that can be grouped together but which are inferior to the absolute right of ownership (see paragraph 2 below).

Introduction to proprietorship

Ownership is generally defined by law divided into three different types and used in three different forms.

Definitions

In order to define ownership or proprietorship, the 2001 Land Law sets out the elements of rights of a proprietor which include the right of use, the right of enjoyment and the right of disposition.

Proprietorship is the absolute right over land including the right of use, the right of enjoyment and the right of disposition. However, there are no legal standards which determine the content or scope of each right, all that is known is that these definitions are derived from the French legal system. By exploring the root of the Khmer words used, these rights could be ascribed general definitions: right of use could be deemed the right to use property in a simple and legitimate way at the choice of the right holder;¹⁶ the right of enjoyment could be deemed the right to use one's property for production and to obtain the benefit of that production;¹⁷ and the right of disposition could be deemed the right to dispose of the property, to transfer full ownership to another as well as the right to change or transform the structure of the property.¹⁸

Under the right of use, the proprietor is free to carry out whatever farming, planting, organizing and building as he/she wishes so long as such activity is not prohibited by the law.

Insofar as the right of enjoyment is concerned, the proprietor has title to all produce from the property including natural produce, ie that grown on the land, or produce which derives from acts of people such as rent or other income generated from the property. The proprietor also has rights over the increase of produce as a result of natural or artificial forces such as by construction, plantation and farming. The proprietor is free to lease or exchange his/her right to produce enjoyment, to sign usufruct agreements, provide easements over the land in question and to use the right as collateral.

In the case of right of management, the proprietor may organize or change the type and natural form of the property in line with his/her desired use so long as any activity to this effect is in compliance with the law. This right extends to digging on the land, cutting forest, planting crops, filling land, mining, extracting soils, minerals or rocks, as well as using agricultural land to create industrial zones or building factories upon the land. The only limitation on the proprietor's freedom to carry out these activities is that the

¹⁶ According to the 1967 Buddhist Institution Khmer dictionary, the word "use" means "use everything, use whatever available".

¹⁷ According to the 1967 Buddhist Institution Khmer dictionary, the word "enjoyment" means "depending on, under shelter or act due to, residing in or pausing at, resting in or eating and so on".

¹⁸ According to the 1967 Buddhist Institution Khmer dictionary, the word "management" means "organizing, classifying, organizing by group with great endeavor".

activity in question must be permitted by law. The proprietor can sell, exchange, transfer and bestow the right of disposition.

The owner of the land's surface shall be the owner of the underground and of anything that may be extracted therefrom except statues, bas-reliefs and antiquities of any type that he/she found thereon. Such works form part of the national heritage. The owner of the land's surface is also the owner of the space situated directly above his/her property and of the objects that are permanently fixed to his/her property. He may, in particular, cut the branches of neighbor's trees extending onto his property or collect fruit from those branches. The proprietor may not interfere with electrical and telecommunication wires that cross his/her property nor may he/she prohibit aircraft from flying over his/her property.

However, title over land shall be implemented in compliance with the law and in legitimate ways. Proprietors must avoid property use in bad faith and should not use it in such a manner as to disturb third parties, especially neighbors. Each type of ownership carries different rights and responsibilities and is governed according to a specific legal regime.

Types of ownership

The 2001 Land Law stipulates 3 types of ownership of land: private, public, and collective ownership.

Private ownership refers to ownership by a private person, whether a natural or legal entity. Only natural persons or legal entities of Khmer nationality have the right to ownership of land in the Kingdom of Cambodia¹⁹. Insofar as legal entities are concerned, an enterprise registered in Cambodia, in respect of which 51% or more of the shares are held by natural persons of Cambodian nationality or by Cambodian legal entities recognized pursuant to the laws of Cambodia, may own land in Cambodia.²⁰

Furthermore, primarily due to the destruction of almost all the document and cadastral registers during the Democratic Kampuchea era (1975-1979), the law nullifies the regime of immovable property ownership before 1979.²¹ Therefore, no one can claim title to land, houses and other immovable properties as a result of having owned the property in question before 1979.

Public properties refers to the ownership of land by the State as stipulated in article 58 of the 1993 Constitution which provides that "state property notably comprises land, mineral resources, mountains, sea, underwater, continental shelf, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and other facilities determined as State property. Moreover,

¹⁹ Article 44 of the 1993 Cambodian Constitution.

²⁰ Article 9 of the 2001 Land Law.

²¹ Article 7 of the 2001 Land Law states: "Any regime of ownership of immovable property prior to 1979 shall not be recognized".

public properties include inherited property, or that are voluntarily given to the State by their owners, or that are not legally possessed by possessors”.

Public ownership is divided into private property and public property of the state. These categories of state land are enforced under two different legal regimes. The private property of the State is governed by a legal regime similar to that which prevails over private ownership which permits the trade, purchase and sale of land whereas public property may not be subject to sale or purchase, statutes of limitation or title acquisitions by possessions. The public properties can only be subject to temporary and alienable possession and uses without title or properties rights for the possessor.

The following property falls within the public property of the State:

- Any property that has a natural origin, such as forests, courses of navigable or floatable water, natural lakes, banks of navigable and floatable rivers and seashores;
- Any property that is specially developed for general use, such as quays or harbors, railways, railway stations and airports;
- Any property that is made available, either in its natural state or after development for public use, such as roads, tracks, oxcart ways, pathways, gardens and public parks and reserved land;
- Any property that is allocated to render a public service, such as public schools or educational institutions, administrative buildings and all public hospitals;
- Any property that constitutes a natural reserve protected by the law;
- Archeological, cultural and historical patrimonies;
- Immovable properties being royal properties that are not the private properties of the royal family.

When State public properties lose their public interest use, they can be listed as private properties of the State on transferring of the property in question from state public property to state private property.

In addition to the above public property of State, other properties of public ownership shall be considered private property of the State or of public legal entities in which the implementation of rights over the property in question falls under a legal regime similar to that which regulates private ownership.

The third type of ownership is collective ownership which refers to the ownership of estates used by the Buddhist monasteries and of land owned by indigenous peoples.

Ownership of estates belonging to the Buddhist monasteries shall be governed by legal rules similar to those which prevail over ownership of public properties of the State or legal public entities. Such land cannot be subject to sale-purchase or statutes of limitation and can only be alienable and temporarily possessed.

Immovable properties of indigenous communities belong to and are granted by the State to individual indigenous communities who own the land collectively. The lands of

indigenous communities are those lands where the said communities have established their residences and upon which they carry out traditional agriculture. The lands of indigenous communities include not only lands actually cultivated but also that which is reserved for the shifting of cultivation as required by the agricultural methods practiced by the indigenous communities and recognized by the administrative authorities. Ownership of the immovable properties granted to the indigenous communities is collective and excludes the right of disposition of the portions of land classified as State public property. In addition to the fact that ownership is governed by different legal regimes according to types, the Land Law also sets out different forms of ownership according to how land is used.

Forms

The 2001 Land Law states the five forms of ownership: individual ownership, collective ownership, undivided ownership, co-ownership, and joint-ownership.

2. Individual Ownership and Collective Ownership

Ownership by a person, whether natural or legal, is individual ownership whereas ownership by a group of persons exercising their prerogatives in a legal way as regulated for such ownership is collective ownership. An example of collective ownership is the ownership of land by an indigenous community in which rights of the community members and the community as a whole are recognized by law and ownership is subject to the responsibility of the traditional authorities and the customary decision-making mechanisms of the community as well as to the governing laws.

3. Undivided Ownership

By law, undivided ownership is the ownership of one specific property by several persons. Each of the owners has a share of the property but this property cannot be divided between them. Those persons are called undivided owners and each of them holds equal rights and obligations over the land in question. In the case where the division of the property is unequal, each of the owners has rights and liabilities in proportion to his/her share of the division. Therefore, the use and enjoyment of the property is the right while the expenses associated with management fees, taxes and other liabilities on the undivided property are the responsibilities of each undivided owner in proportion to his/her shares of the property. Any significant acts affecting the property, such as a change in the use of the land or major repairs, may be decided by the majority of the undivided owners, representing more than one-half of the ownership of the entire property. However, the consent of all undivided owners is necessary for the alienation, constitution of rights in rem or changes to the intended purpose of the property.

However each owner may sell or enter into any kind of contract relating to his/her share of the land and his/her share may be subject to a seizure by his/her creditors. Furthermore, as the law stipulates that no person can be forced to remain in an undivided ownership, a division of property may be demanded at any time by any of the undivided owners. Indeed, unless otherwise provided for by agreement, an undivided ownership may exist for no longer than five years.

4. Co-Ownership

Co-ownership is the ownership of immovable property belonging to several persons divided by lots, of which each person has one part that is a private part and another part that is a share of common property. The co-owners may prepare internal regulations that define, in accordance with the provisions of the law, the methods of management and the rules for maintenance as well as the obligations of the co-owners, in particular for the common part. Moreover, the co-owners may establish a management entity that can be a management board or an executive committee. This management entity shall be appointed at a general meeting attended by all co-owners according to the proportional value of their respective lots.

For private portion, each co-owner has full right to use and exclusively organize the land but is precluded from granting easements over the private portion because doing so shall be considered as creating additional liabilities over common part which therefore affects other co-owners' rights.

Common properties refers to the proportion that shall be kept for common uses and includes yards, parks, gardens, roads, exits, entrances, walls, pillars, water, electricity, fire, gases, etc. Common parts are under the undivided joint ownership of the co-owners. Co-owners shall ensure the maintenance of the common parts and properties. The responsibility for such maintenance shall be divided in proportion to the value of each lot. Thus the responsibility for maintenance and expenses relating to the common parts and properties shall be divided in proportion, not to the size of each lot, but to the value of each lot. The wall separating neighboring private parts for example shall be considered a jointly-owned wall.

The management and use of co-ownership buildings is precisely defined by sub decree No 126 ANKR.BK dated August 12, 2009.

As foreign nationals are not allowed to own land in the Kingdom of Cambodia, foreign co-ownership is governed by a special legal regime created under the Law on Foreign Ownership Property promulgated by Royal Kram No NS/RKM/0510/006 dated May 24, 2010. According to this law, foreign nationals can own only the private part of co-ownership buildings from the first floor up and are precluded from owning any part of ground floor and underground floor. While foreign nationals can own only that private part of co-ownership buildings, the common part is available for their use and enjoy-

ment. Moreover foreign nationals are not allowed to own the private part of co-ownership buildings which are located less than 30 kilometers from a border and in certain other areas as determined by the government except co-ownership buildings located in special economic zones, key downtown areas and other areas as set out by the government. Foreign nationals can own up to 70% of the total portion of a co-ownership building.²²

5. Joint-Ownership

The last form of ownership is joint-ownership which refers to walls and ramparts dividing two adjoining and individually owned properties. For these purposes walls and ramparts include ditches, fences, and dykes.

A joint owner of a jointly-owned wall may not make any deep hole into the jointly-owned wall or carry out any work likely to cause damage to the jointly owned wall without the prior consent of the other joint owners. Each owner may build against a jointly-owned wall and may place thereon beams and joists up to 5 cm from the other side.

Any owner of immovable property adjacent to the wall of other owners has the right to make it in whole or in part a jointly owned wall by reimbursing the owner of the wall half of the value of the part that he wishes to make jointly-owned, plus half of the value of the ground on which the wall is constructed.

The repair and reconstruction of a jointly-owned wall is the responsibility of those who have rights over it, in proportion to the rights of each owner. A concerned joint owner can avoid contributing to such repairs or reconstruction by abandoning his right of joint ownership, unless the jointly owned wall supports his own building.

The jointly owned ramparts formed either by ditches, fences or dykes shall be maintained by common expense. However, one of the owners may exempt himself from such obligation by waiving his entitlement to the joint-ownership. But, if the ditches or dykes usually serve the flow of water, the co-owners cannot waive their joint-ownership.

In addition to the ownership rights described above, there are other rights in rem that form part of the ownership rights known as “divided rights” which do not carry exclusive rights of ownership.

“Divided Rights” of Ownership

“Divided Rights”²³ or part ownership rights include usufruct, bare ownership, right of use, stay and easement.

²² Sub decree No 82 ANKR.BK dated July 29, 2010 sets out the proportion of a co-ownership property that can be owned by a foreign national.

²³ The 2001 Land Law uses the expressions “dismemberment of ownership” instead of “divided rights or parts of titles”.

Usufruct and Bare Ownership

Titles are the rights incorporating the right of use, the right of property enjoyment and the right of disposition. If the right of use and enjoyment is given to other people besides the owner, the titles will be split into usufruct which consists of the right of use and the right of property enjoyment, and the bare ownership which is the right of disposition.

The usufructuary is the holder of the usufruct right to enjoy all the fruits, either natural fruits or civil fruits, generated by the immovable property including rent, or other income derived from the property. The usufructuary shall be responsible for the maintenance of the property as well as the annual property tax and insurance fee, and is vested with the responsibility of informing the owner without usufruct about title infringement.

The owner without usufruct, or the bare owner, has the right of disposition only; therefore, if the owner sells an estate, such sale would not affect the rights of the usufructuary who is exercising his/her rights over the estates. At the same time, the bare owner without usufruct bears some obligations for major repairs; the repair of support walls, doorways, the replacement of roof beams and roof covering, repairing dykes, retaining walls and the entire fencing. The bare owner may not impede the rights of the usufructuary in any form whatsoever.

Usufruct is created by law or by agreement. It may be created with or without time restrictions. If there is no provision on time restriction the usufruct is deemed to last for the lifetime of the usufructuary.

The usufruct contract is valid if it is made in writing or in another authentic form. The usufruct contract can be contested against third parties upon its registration with the Land Registry.

The usufruct shall end:

- upon the death of the usufructuary;
- upon the expiration of the time limitation or time specified in the contract;
- by agreement that the usufructuary waive his/her right;
- upon the complete destruction of the immovable property under usufruct; or
- by decision of the Court.

Right of Use and Habitation

Right of use is the right to obtain the necessary proportion of land for the needs of the beneficiary and families. The right of habitation refers to the right to occupy a portion of a house necessary for him/her self and his/her family. Therefore, these two rights are strictly personal rights of the beneficiary, meaning that the beneficiaries of the rights to use and habitation may not transfer, or lease out their right to others. Meanwhile, the beneficiary bears some obligations such as wages for planting or maintaining services, paying taxes and insurance fees proportionate to the piece of land or portion of the house which are the subject of his/her rights.

These two rights mentioned above can be created and removed according to a legal regime similar to the one outlined above in relation to usufruct.

Easement

A land easement is a burden on land, referred to as servant or lower land for the use and benefit of another land, referred to as the dominant or upper land, belonging to another owner.

Easements may be created by nature, by law or by contract depending on the state of the premises, as determined by law or by agreement between the owners. Easements shall be regulated by different legal rules depending on the source of each easement.

Lower land shall receive waters flowing naturally from upper land. The owner of the lower land may not build dams, dykes, barriers, or other works to impede the water flow. The owner of the upper land may not do anything that would aggravate the easement of the lower land.

The owner of the upper land has the right to use and dispose of rainwater that falls on his land as well as waters from sources that are found thereon.

The owners of lands situated along running waters shall allow the waters to flow to the neighboring lands and the owners of neighboring land, in turn, are subject to the same obligation with respect to lands that are further away, depending on their agricultural need.

An easement by law aims to be used for public or private interests. An easement by law for the public interest shall be determined by law or by specific regulations that bind the owners ensuring the land demarcation of boundaries situated along public roads to be in line with building rows as planned and public road enlargements which may affect the land along the road.

Easements by law for the benefit of private interests shall determine the limits within which an owner may perform certain acts on his own land, provided that he does not infringe the rights of owners of neighboring lands. An owner may not make a hole being a door or window or balcony or porch facing his neighbor's land at a distance less than two meters. An owner may not plant big or small trees taller than two meters near the boundary of the neighboring lands at a distance less than two meters from the boundary and the owner whose land is enclosed and lacks access to a public road or whose access is insufficient for the industrial agricultural exploitation of his ownership, is entitled to ask for a passage through the neighboring land, provided that he pays an indemnity proportional to the damage caused due to opening the passage.

The last easement is easement by contract. Owners are allowed to establish on their own land, in favor of owners of other land, any easements as long as the easements are not contrary to public order. The use and scope of the easements shall be regulated by the contract that created them. Easements created by contract must be in the form of authentic deed. They are effective against third parties only after inscription with the Cadastral Register.

Easements can end by the termination of agreement that created them; when the dominant and servant land become owned by the same owner; or by the total destruction of the land on which the easement was created.

6. Implementation of Land Rights

Land rights can be exercised by transferring rights over the property or through the enjoyment of that property.

Transfer of Rights

Generally, rights over land can be transferred through contracts and succession.

Contracts for the Transfer of Rights

The important contracts which could effectively transfer ownership of immovable properties between private persons are purchase, exchange or gift.

According to the land law, sale of immovable property is a contract that allows the transfer of the right of ownership of an immovable property from the seller to the purchaser in consideration of payment of a purchase price for the immovable property by the purchaser to the seller.

Any sale between spouses is null and void.

The sale contract shall be in writing and in authentic form by the competent authority and shall be registered at the Cadastral Registry Unit. Therefore, a sale contract alone cannot be legally considered as the transfer of the ownership of immovable property. This means that the transfer of ownership shall be considered valid upon the registration of the contract of sale with the Cadastral Registry Unit. The selling price shall be stated in the contract and, if not, the contract shall be considered null and void. A contract of sale of immovable property shall be registered only when all parties have proven by evidence that all taxes on the subject property have been paid.

Unlike a sale contract, an exchange of immovable properties is a contract in which the parties agree to exchange immovable properties with each other. An exchange shall be conducted under the same conditions as a sale.

A gift is a contract by which a person called a giver or donor, transfers his property ownership to another person called a receiver or donee, who accepts it. Gifts of immovable property are irrevocable once they are accepted. The ownership right of such gifts can be transferred rapidly. A gift of immovable property is only effective against third parties if it is made in writing in the form of an authentic deed and registered with the Cadastral Registry Unit.

Succession

Succession is the transfer of the titles and other rights of a deceased person in profit of one or several people called heirs or successors.

When an inherited immovable property is used as a dwelling for the deceased's family or where the land is used to support the family's life, the successors may not demand a partition or a sale without the unanimous express consent of all co-successors. A partial transfer by any co-successor of his rights shall be considered null and void without the express consent of all co-successors.

The property of a person who dies without any successors or legatees shall revert to the State and shall be incorporated in its private property.

In addition to the transfer of the above titles, the titles can be transferred in compliance with special regulations relating to capital investment, special acquisition by temporary possession before the 2001 Land Law came into effect, provision of social land concession to people to build houses or plant crops for a living and expropriation – confiscating titles of private persons for the public interest.

Implementation of the Right of Ownership

The owner may exercise the right of ownership through certain contracts which do not carry the effect of transferring ownership rights. These include lease and sharecropping agreements and using immovable property as surety.

Lease and Sharecropping Agreements

The 2001 Land Law refers to sharecropping agreements, but does not clarify the detailed conditions for such agreements nor does it provide for the legal regime under which such agreements can be made. These omissions may be due to the fact that sharecropping agreements tend to vary widely from case to case in terms of contents and conditions.

A lease agreement is a contract by which the owner of immovable property makes such property temporarily available to another party in consideration for regular payment of rent, proportionate to the time of possession. The contract to lease an immovable property is referred to as a lease agreement.

There are two types of leases: leases for an indefinite period of time and leases for a definite period of time. A lease for a definite period of time includes a short-term lease with an option to renew and a long-term lease for fifteen years or more.

A lease for an indefinite period of time or a renewable short-term lease establishes a personal relationship between the lessor and the lessee. A sub-lease of the property to any third party can be made provided that there is an express agreement permitting such a sub-lease or the authorization of the owner who is the lessor.

A long-term lease constitutes a right in rem over immovable property. Such right may be assigned for valuable consideration or transferred by succession. Property leased under

a long-term lease may be the subject of development and alterations provided that these works do not destroy or fundamentally alter its original nature.

Lease contracts shall be in writing. An oral lease shall be considered as a temporary lease and can be terminated at any time by providing a prior notice period equal to the period of rental payment.

Immovable Properties Used as Surety

The immovable property owner can exercise his/her rights of ownership by having immovable property put up as surety to secure the payment of a debt.

The immovable properties used as surety have three kinds: mortgage, *antichrèse* or *gage*.

A mortgage is a surety in rem which, without dispossessing the owner of such immovable property allows the creditor to claim the sale of such immovable in court on the due date of the debt, irrespective of whose hands through which such immovable property passes, so that him/her self and other creditors having such privilege and preference may be paid from the purchase price. The creditor cannot become the owner of the mortgaged property itself by way of payment.

A contract of mortgage must be in authentic formula entered into before the competent authority or a duly authorized lawyer. The mortgage contract must be registered with a cadastral administrative body. Only immovable property registered with the Land Registry may be the subject of a mortgage.

Antichrèse is a contract pursuant to which the debtor delivers an immovable property to his creditor as a guarantee for the payment of his debt. The creditor has the right to cause the sale of the property to be reimbursed by privilege and in preference to other creditors who are not as secured as he is. If the contract of *antichrèse* so authorizes, the creditor may use the charged property in lieu of the payment of the debt, either in payment of interest only or in payment of principal and interest. Whatever the case, the creditor cannot become the owner of the property.

A contract of *antichrèse* shall be made in writing in authentic form before the competent authority and then be registered with a cadastral administrative body. Any failure to register an *antichrèse* contract with a cadastral administrative body will cause the creditor to lose his secured collateral rights in rem and the creditor only has the right to bring an action for reimbursement in the position of a normal creditor without privilege or preference.

Once the debts are completely paid off by the debtor, the creditor may not retain the property subject to the *antichrèse* on the ground that the debtor is liable under another debt, although such other debt is due and payable, unless a new contract of *antichrèse* relating to the same property is drawn up according to the form determined by law.

The last immovable property used as surety is *gage* which is a contract concluded in order to guarantee the payment of a debt, pursuant to which the debtor remits to his or her creditor not the property itself but the ownership title of the property that was

recorded in the Cadastral Register. The contract of *gage* must be made in writing in an authentic form and it must be recorded in the Cadastral Register. In no case may the creditor become the owner of the property subject to a contract of *gage*. The contract of *gage* only authorizes the creditor to have the right to claim for a foreclosure of the immovable property in court in order to be paid in priority by preference and privilege prior to other creditors.

When the debtor discharges the debt, on the due date or prior to the due date, the creditor shall return the ownership title to the debtor by a release of an inscription about this encumbrance in the Cadastral Register.

III. Land Institutions

The land rights which are described in chapter 1 above shall be guaranteed by land institutions.

Land institutions in charge of handling land issues in Cambodia may be divided into two categories: the Cadastral Administration Institution and the land conflict resolution institutions.

1. The Cadastral Administration Institution

Over the last three decades, the competent bodies which have recognized and guaranteed land rights have changed regularly.

Sub-decree N° 25 ANKR dated April 22, 1989, vested the authority to recognize house ownership in the commune/sangkat in which a house was located, and established the Provincial Municipal People Revolutionary Committee as the competent unit which issued the title deed to people for official uses. According to the regulations, house ownership attached closely to residential certificates and family certificates as official documents recognized by commune/sangkat. In practice, those certificates were almost considered similar to legal documents as a proof of ownership rights within the context that the title deeds were slowly issued and the communes/sangkats were regarded as the competent bodies to recognize and certify land titles and land sale-purchase agreements over the country.

According to directive N° 03 SNN dated March 3, 1989, there are three kinds of land rights have depending on the type of land, each type requires a specific type of title issued by different authorities as follows:

- For residential land, the ownership title shall be issued by the head of Provincial Municipal People Revolutionary Committee;
- For farming land for production purposes, the possession title shall be issued by the head of the District People Revolutionary Committee;

- For farming land used to boost national economy, the title shall be issued by Ministry of Agriculture.

The directive assigned the Ministry of Agriculture immediately to prepare to create the Department of Cadastre and Land to manage and utilize lands all over the country. Thus, the sub-decree N° 31 ANKR dated March 14, 1989 was adopted to change the Department of Agricultural Economy Policies Management into the Department of Cadastre which, under the Ministry of Agriculture, was vested with authority to manage land ownership in the country. The roles and duties of the Department of Cadastre were defined by Prakas of Ministry of Agriculture N° 111 PRK.KSK.CHT dated October 31, 1989 on Assignments and Actions of Department of Cadastre.

Until 1994, the Department of Cadastre was independent of the Ministry of Agriculture and became subordinated to Council of Ministers by sub-decree N° 58 ANKR dated October 3, 1989.

Finally, the Ministry of Land Management, Urban Planning and Construction was established by Royal Kram N° NS/RKM/0699/09 dated March 23, 1999 and its organizational structure was put into effect by Sub-decree N° 62 ANKR.BK dated July 20, 1999. The Sub-decree created the General Department of Cadastre and Geography playing supporting roles to the ministry in issuing land titles all over the country and organizing provincial/municipal structures for Offices of Land Management, Urban Planning, Construction and Cadastre as well as Land Management, Urban Planning and Construction and Land offices at capital, district and sub-district levels.

The 2001 Land Law specifically determines that the management of cadastral administration and issuance of land titles all over the country are under the authority of the Ministry of Land Management, Urban Planning and Construction²⁴ and only the Cadastral Administration has the right to determine ownership, the nature and measurement of land²⁵.

Under the supervision of the Ministry of Land Management, Urban Planning and Construction, the General Department of Cadastre and Geography acting as a Central Cadastral Administration is the only competent institution to establish the Land Register to issue owners certificates acknowledging natural and legal persons as owners of immovable property and possession titles of all land parcels in the Kingdom of Cambodia.

Determining the institutions which issue owners certificates acknowledging people as owners of an immovable property is truly an indispensable requirement in effectively guaranteeing land ownership rights to the owners but the loopholes in land management have left some issues unresolved such that land conflicts continue throughout the Kingdom.

The land crisis that exists in Cambodia strongly requires separate institutions to protect owners against abuses and fill the loopholes that exist under the land management of the Cadastral Administration.

²⁴ Article 3 of 2001 Land Law.

²⁵ Article 235 of 2001 Land Law.

2. Land Dispute Resolution Institutions

Land dispute resolution institutions in Cambodia can be divided into three categories; firstly there are Case-by-Case resolution mechanisms; secondly are the Cadastral Commission and the National Authority for Land Disputes Resolution, and thirdly are the courts.

Case-by-Case Resolution Mechanism

This mechanism allows the establishment of a commission to resolve a large scale and complicated land dispute that affects many families. Such a commission will be dissolved when the dispute is resolved. The dispute shall be resolved amicably. Where it is not resolved, the case is forwarded to the executive leadership of the country, such as Minister level or even to the Prime Minister.

By way of example, the inter-ministries commission established by Decision No. 68 SSR dated November 5, 2003 to examine and study land disputes in Prey Sleouk Commune, Traing District, Takeo Province, was vested with duties to examine and study the impugned area. The commission was mandated to report its findings, set out its conclusions and make a request for a resolution to the Prime Minister through the Council of Ministers.

Cadastral Commission and National Authority for Land Disputes Resolution

Before the establishment of the Cadastral Commission, provincial, municipal land dispute settlement commissions throughout the country were created under Decision No.47 SSR dated June 10, 1999. Under the leadership of the Minister of Land Management, Urban Planning and Construction these commissions were mandated with important duties to research land disputes and propose settlement measures in municipalities and provinces throughout the country, to report on the measures taken and results achieved to the government and to send officers to hold dialogue with parties to the land dispute, including those who held demonstrations at public places such as the Royal Palace, the National Assembly, the Senate and so on.

The Land Dispute Settlement Commission has no authority to directly and independently resolve land disputes. The failure of the judiciary to resolve land disputes is the main reason for the government to form a strong legal framework for non-judicial land dispute settlement.

With these objective and necessity, the 2001 Land Law authorizes the Cadastral Commission, established within the Ministry of Land Management, Urban Planning and Construction, to resolve estates disputes between possessors. Article 47 of the law clearly determines that “the estates disputes between possessors shall be investigated and resolved in compliance with the determined procedure. The result of investigation shall be submitted to the Cadastral Commission at the Ministry of Land Management, Urban Planning and Construction. This Commission shall make decisions on these disputes.

In case of dissatisfaction with the result, the disputants may complain to the court. The organization and functioning of the Commission shall be determined by Sub-Decree.”

Sub-Decree No. 47 ANKR.BK dated May 31, 2002 divided the Cadastral Commission into three levels; district/sub-district, provincial/municipal and national. The Cadastral Commission at district/sub-district, provincial/municipal level became the Cadastral Commission at city/district/sub-district and capital/provincial level²⁶ and are mandated to help conciliate the disputes which occur outside the areas bookmarked for systematic registration. The compromise offered by these institutions must comply with tradition, customs and cadastral techniques. Only the National Cadastral Commission has the authority to decide on possessed land disputes where the compromise fails to reach satisfaction.

Since early 2010, the Ministry of Land Management, Urban Planning and Construction delegated the decision-making on land disputes in the mechanism of Cadastral Commission to the Head of the City/Provincial Cadastral Commission.²⁷ If the disputants are not satisfied with the decision of the City/Provincial Cadastral Commission, they have right to appeal to the National Cadastral Commission within 30 days after receiving the decision²⁸. The decision shall be final if no appeal is filed.

Because land disputes are so widespread, and due to the complications that arise from the reality that such conflicts invariably involve wealthy and well connected people, there was a need to provide ordinary people with access to justice insofar as their land was concerned. To this end, the National Authority of Land Dispute Resolution was established by Royal Kret No. NS/RKT/0206/097 dated February 26, 2006. Upon initiation by the head of the Government, the authority would be mandated to resolve land disputes outside the jurisdiction of the National Cadastral Commission's and in the name of the head of Government.

Judicial Body

The differences in the respective jurisdictions of the Cadastral Commission and the courts are set out by inter-ministries Prakas N°. 02 BRKR/03 dated November 26, 2003 from the Ministry of Justice and the Ministry of Land Management, Urban Planning and Construction. This prakas sets out the duties of the courts and the Cadastral Commission insofar as land disputes are concerned.

26 As per the amendments set out in Royal Kram No. NS/RKM/0208/008 dated February 15, 2008 and promulgating the law on Capital, Province, Municipality, District, Commune Administrative Management by Royal KramNo. NS/RKM/0508/017 dated May 22, 2008.

27 Prakas No. 032 P.DNS/KSC dated January 21, 2010 on delegation of position to Governor of Capital, Provincial Board of Governor and Chief of Capital, Provincial Cadastral Commission to decide on land dispute of Cadastral Commission Mechanism.

28 Circular No. 01 DNS/SRNN dated January 21, 2010 on implementing procedure of making a decision on land dispute of Capital, Provincial Cadastral Commission of Cadastral Commission Mechanism.

According to the inter-minister Prakas, the Courts and the Cadastral Commission shall have the following duties:

- Disputes over registered lands involving land titles issued by the Administrative Cadastre shall be under the court's jurisdiction. The court also has jurisdiction over contractual disputes related to unregistered lands involving inheritance, purchase, sale, lease, mortgage, *gage*, and so on.
- Disputes of unregistered lands not involving land titles issued by Administrative Cadastre shall be under the jurisdiction of the Cadastral Commission.

Additionally, disputants who are not satisfied with the decision of the National Cadastral Commission can appeal to the court for resettlements.

IV. Conclusion

Within the last three decades, there has been broad reform of land rights and institutions in Cambodia. During this period, Cambodia has come a great distance in putting content to the rights that were previously only acknowledged in principle by successive governments in the '80s and '90s. Ownership rights recognized by the Constitution and guaranteed by the Land Law can assure full efficiency to citizens if those rights are supported by strong and clear institutions.

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5. The Constitution of People's Republic of Cambodia promulgated by Provision No.19/72-BSK dated May 10, 1972.
6. The Constitution of Cambodia promulgated on May 6, 1947.

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8. Law on Management of Capital, Provincial, Municipal, District, Commune Administration promulgated by Royal Kram No. NS/RKM/0508/ 017 dated May 22, 2008.
9. Civil Code promulgated by Royal Kram No. NS/RKM/1207/030 dated December 8, 2007.
10. Land Law promulgated by Royal Kram No. NS/RKM/0801/14 dated August 30, 2001.
11. Land Law promulgated by Kret No. 100 KR dated October 13, 1992.
12. Civil Code promulgated by Royal Prakas dated February 25, 1920.

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INTRODUCTION TO CAMBODIAN ENVIRONMENTAL LAW

CHHIN Nith
SOTH Sang-Bonn

CONTENTS

I. Development of environmental law in Cambodia.....	339
II. Introduction and environment related issues.....	340
III. Environment and environmental issues in Cambodia	341
1. What is environmental law?	341
IV. Tools for environmental protection at global, regional and local level.....	342
1. Tools for environmental protection	342
2. Efforts made by the Cambodian government to protect the environment	343
3. Legal instruments for environmental protection at national level.....	345
4. Global multilateral treaties and conventions.....	345
5. Regional treaties and conventions	346
V. Analysis and comparison of the structure and content of environmental protection in Cambodia	346
1. The National Environmental Action Plan (1998-2002).....	346
2. The development of the Protected Areas Law (2002-2008)	348
3. What is the structure of this law?.....	348
4. What is the content of this law?.....	350
5. What are the practical aspects of the Protected Areas Law?	351
VI. Challenges	353
VII. Recommendations.....	354

INTRODUCTION TO CAMBODIAN ENVIRONMENTAL LAW

*CHHIN Nith**
*SOTH Sang-Bonn***

I. Development of environmental law in Cambodia

In the last few decades, the world community has gradually increased its understanding of the important role of the environment in sustaining growth and development. Awareness has increased about the detrimental effects of unpredicted natural disasters, and the environmental degradation of the Earth. In the global environmental debate, rapid population growth and over-consumption are viewed as the root causes of these environmental issues, which include climate change, acid rain, biodiversity loss, soil erosion, water pollution, air pollution, and loss of tropical rain forests, among others. Currently, the debate on whether the human population is reaching the Earth's carrying capacity remains open.¹ However, there is clear evidence that the human population will grow beyond the Earth's carrying capacity if effective measures are not taken. For instance, the World Health Organization estimates that 25% of the world population does not have access to safe drinking water.²

In order to cope with these issues a large number of states are convinced that environmental law can play an increasingly important role in the solution to global, regional, national, and local environmental problems, particularly through the concept of sustainable development. States also agree that contemporary environmental degradation issues are complex and more challenging to resolve than other global problems because of differences in society, culture, economics, ethics, and the scale of the issues in different countries. It is true that there is no single country that can solve these problems without collaboration with other nations in the region or the world as a whole. In this sense, it

* Mr. CHHIN Nith is a technical official of Department General of Nature Conservation and Protection, Ministry of Environment, Cambodia. He is a master-degree holder from Victoria University of Technology, Melbourne, Australia, majoring in Science in Environmental Management.

** Mr. SOTH Sang-Bonn is Chief Cabinet of Deputy-Secretary General of the Senate, Cambodia, LL.M (National University of Singapore), LL.B (Royal University of Law and Economics)

1 Enger, ED & Smith, BF 2006, Environmental Science: a study of interrelation, McGraw – Hill International Edition, 10th Edition, New York.

2 Enger, ED & Smith, BF 2006, Environmental Science: a study of interrelation, McGraw – Hill International Edition, 10th Edition, New York.

is essential that all states, regardless of their level of economic development, collaborate with one another in solving these confronting issues.

Despite recognition and realization of the important role environmental law can play in addressing environmental degradation, as far as the research is concerned, most states have thus far failed to agree on a normative standard and system for the protection of the environment. What amazes the author the most is that states seem to understand and define the core term “environment” in a number of different ways. This could be the result of the development of a number of distinct and specialized areas of law that each contribute to environmental protection in a different area, thereby requiring multiple definitions of the word “environment”.

This paper is based on research of secondary, data-based sources in combination with a wide range of the author’s experiences and observations. It aims to examine the progress of environmental protection in Cambodia by taking a closer look at legal developments in the field of environmental protection in recent decades. In the first part of this paper, the author presents a general introduction to environment related issues. This will be followed in the next section by identification of environmental issues in Cambodia, analysis of dangers to the environment and recognition of rights to a clean environment. In the third part, the author reflects on the efforts made by the government for the sake of environmental protection, including the establishment of legal and institutional protection. In the fourth part, an analysis of the legal structure and content of environmental protection in Cambodia is provided along. Lastly, the paper summarizes findings and sets out concluding recommendations.

II. Introduction and environment related issues

Cambodia is located in Southeast Asia and is bordered on the Northeast by Laos, on the East and Southeast by Vietnam, on the West and Northwest by Thailand, and on the Southwest by the Gulf of Thailand. The total area of the country is 181,035 square kilometers comprising a land area of 176,520 square kilometers, and a coastline of 443 kilometers in length.³ Geographically, Cambodia is divided by mountain ranges and is made up of a number of regions, namely the central plain, the lowlands and the highest upland regions. The country retains the highest proportion of land as natural habitat in the world in term of forest and wetlands. These natural habitats are a significant asset for international conservation efforts, attracting the attention of the international community.⁴

3 Ministry of Agriculture, Forestry and Fisheries: The National report on the conservation to combat desertification, 23 April 2002; See also, Magnus Torell; Albert M. Salamanca; Blake D. Ratner: Wetlands Management in Cambodia: Socioeconomic, Ecological, and Policy Perspectives, 2004, p. 1, printed by Jutaprint, Penang, Malaysia.

4 ICEM, 2003. Cambodia National Report on Protected Areas and Development. Review of Protected Area and Development in the Lower Mekong River Region, Indooroopilly, Queensland, Australia, p. 148.

The population of Cambodia was approximately 13,388,910 in 2008, predominantly found in the rural areas and largely engaged in agriculture.⁵ Although Cambodia has an abundance of natural resources like metal and minerals, hydroelectric power, petroleum and forestry, the country has experienced a relatively slow development process due to civil war and political crisis in the last few decades.⁶ The civil war and political crisis caused not only the destruction of infrastructure and human resources, but also hindered the environmental protection process. This could be the reason that environmental destruction has continued to soar in recent decades.

III. Environment and environmental issues in Cambodia

1. What is environmental law?

“Environment” is a term that is controversial and can be defined in many different ways. Defining and understanding the term has been subject to careful consideration during the development of legal frameworks for protection of the environment. Despite the fact that different states use different definitions of the term “environment:” a compromise has been made via the adoption of the International Convention on Environmental Protection. According to the Convention, “environment” comprises living and non-living things, for example, land, water, air, fauna, flora, and others.⁷ However, it is questionable if man-made nature parks can be classified as part of the “environment” and whether they are subject to protection.

In Cambodia, the definition of the term “environment” may differ even in the same field of law. For instance, the definition of “environment” in a law on natural heritage may be different from the definition of “environment” in a law on environmental impact assessments or on emission controls. The environment is what the law says it is. Therefore, in this article the author will look at the development of the law relevant to the protection of the environment, incorporating the various definitions of “environment” in Cambodian law.

5 National Institute of Statistics (NIS) 2008, *Population census of Cambodia 2008* and see also: 2010 CIA WORLD FACTBOOK AND OTHER SOURCES at <http://www.theodora.com/wfbcurrent/cambodia/index.html> (Last accessed 24 Oct 2010)

6 Alan K.J. Tan, Faculty of Law, National University of Singapore: Preliminary Assessment of Cambodia’s Environmental Law, 2003. See also; Joerg Menzel, National and International Legal Framework for Environmental Protection in Southeast Asia, 2008, p. 99 (Unpublished Paper).

7 United Nations Environment Programme (UNEP) 2000, Environmental information: knowledge management of supply and demand, viewed on the 18th November 2010. < www.unep.org/infoterra/infoterra2000/WCMC1-rev.pdf >

IV. Tools for environmental protection at global, regional and local level

1. Tools for environmental protection

Environmental protection is complex and increasingly challenging. A number of different measures can be taken to promote environmental protection. In the past, command and control was one of the most popular strategies applied by a number of countries. Command and control is a traditional method utilized by the government to manage environmental resources. This tool is commonly applied by the establishment of legal and institutional protections. Legal protection refers to the enactment of both national and international laws to protect the environment. Most often, the countries that are the signatory members of the international and/or regional conventions enact laws that aim to achieve sustainable management of their national environment, and at the same time contribute towards international commitments and efforts at environmental protection. These laws can be enacted through the Constitution, administrative law, private law and criminal law.

Institutional procedures are generally considered to include the establishment of specialized institutions or agencies to handle environmental issues, for example, the Ministry of Environment (“MoE”); Ministry of Agriculture, Forestry, and Fisheries; Ministry of Meteorology; and the National Committee for Disaster Management, among others. Other institutions, for example courts and NGOs, also form a part of an institutional protection system to protect the environment. The courts are key partners in enforcing the laws when people are found guilty or abuse resources, while NGOs are customarily the representatives of society and provide checks and balances on the government’s actions towards the achievement of environmental protection, nationally and internationally.

In the last few decades, the popularity of the command and control approach to environmental protection has gradually deteriorated because of ineffective arrangements including corruption, rent-seeking behavior, weak institutional capacity, lack of funds, lack of transparency and accountability, and others. This has resulted in the employment of a number of new approaches to complement or substitute for the command and control approach. These tools include community based natural resources management (“CBNRM”) and market-based instruments. CBNRM is considered an approach capable of promoting both social justice and environmental protection.⁸

The CBNRM Learning Institute, a research institute in Cambodia, describes CBNRM as “a diversity of co-management approaches which strive to empower local communities to actively participate in the conservation and sustainable management of natural

8 Gruber, JS 2008, ‘Key principles of community-based natural resource management: a synthesis and interpretation of identified effective approaches for managing the commons’, *Environmental Management*, vol. 45, pp. 52-66.

resources through different strategies.”⁹ Based on this approach, in cases where communities are inaccessible or difficult to access, the government would delegate rights and authority for the management of local resources to local communities who could then manage resources using their traditional practices. The government could still provide intervention upon request.¹⁰

CBNRM seeks to integrate a bottom-up approach with market based instruments – which include carbon trading, payment for environmental services, pollution cost, pollution prevention cost, and quotas – aiming to encourage consumers and suppliers – locally, nationally, and at the international level – to negotiate social responsibility for environmental protection, and the costs incurred.¹¹

2. Efforts made by the Cambodian government to protect the environment

Cambodia has acknowledged the “right to a healthy environment” and the importance of the environment because the country has been known as a country that is enriched with natural resources like metals, minerals, hydroelectric power, petroleum and forestry. To maintain and protect the resources and to protect biological diversity, Cambodia was the first country in Southeast Asia to establish protected areas. This began in 1925¹² by declaring the forests surrounding the Angkor temples as national parks and consequently another six national parks and wildlife sanctuaries covering 12 percent of Cambodia were established under the monarchic leadership from 1950 to 1970.¹³ However, destruction of Cambodia’s forest environment undoubtedly occurred in the 1970s and it was not until 1993 that measures to protect the natural environment in Cambodia were renewed.

The history of environmental protection in Cambodia shows that Cambodian governments made efforts to provide legal protection to protect the environment prior to the existence of the Cambodian Constitution of 1993. For instance, in 1991 the government signed the United Nations Educational, Scientific and Cultural Organization World Heritage Convention in order to preserve the cultural and natural heritage of the country for future generations.

9 CBNRM Learning Initiative (CBNRM LI) 2005, *The development of community based natural resource management (CBNRM)*, Phnom Penh, Cambodia.

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12 ICEM, 2003. Cambodia National Report on Protected Areas and Development. Reviews of Protected Areas and Development in the Lower Mekong River Region. Inoooropilly, Queensland, Australia, p.. 54.

13 Arnold Dunail, *The Protected Area Law of Cambodia*, May 2007, (A legal evaluation paper 17 pages).

In 1993, an election was held with the support of the United Nations and a new Constitution based on the principles of constitutional monarchy, liberalism and pluralistic democracy¹⁴ was enacted as the supreme law of the land.¹⁵ The Constitution declares in Article 58 that the state owns natural resources including land, minerals, mountains, rivers, forests, and other resources. To reflect the commitment to the protection of the environment at the national level, the Constitution imposes an obligation on the state as provided in Article 59 below:

“The State shall protect the environment and the balance of natural resources and establish a precise plan for the management of land, water, airspace, wind, geology, ecological systems, mines, oil and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources.”

In the same year, soon after this guideline had been provided, His Majesty Norodom Sihanouk, the former King of Cambodia, introduced a royal decree designating 23 protected areas,¹⁶ which covered about 3.3 million hectares or equivalent to 21 percent¹⁷ of the total land area of Cambodia. In addition to these areas, the Ministry of Agriculture, Forestry, and Fisheries, later designated a further number of protected areas, which increased the percentage of land designated as protected areas from 21 percent to approximately 26.3 percent, or 47,845 square kilometers of the national territory.¹⁸

For Cambodia, 1993 was an historical year not only because it marked the emergence of the second constitutional monarchy and a catalogue of human rights protection. It was also a historical year because Cambodia became the only country in the region to express its commitment to protect the environment through the establishment of an institution, namely the MoE,¹⁹ to be responsible for the supervision and management of the environment throughout Cambodia. The MoE was established in the aftermath of the Rio Summit in 1992. It is bestowed with the authority to develop, coordinate and implement relevant policies for environmental protection, including the Legal Framework on Environmental Protection and Natural Resources Management, which was enacted in 1996²⁰ in close collaboration with other concerned ministries. These ministries include the Ministry of Agriculture, Forestry, and Fisheries; the Ministry of Mines and Energy; the Ministry of Meteorology and Water Resources; the Ministry of Land Management and

14 Article 1 of the Cambodian Constitution of 1993.

15 Article 150 of the Cambodian Constitution of 1993.

16 Preah Reach Kram, dated 1 November 1993.

17 The Cambodia, National Report on Protected Areas and Development, 2003, Kimdo Design Hanoi, p. 12.

18 Cambodian Ministry of Mine and Energy 2010, ‘Invest in Cambodia’, viewed on 19th November, 2010, <<http://www.investincambodia.com/minerals.htm>>

19 Anukret No. 57/ANK-BK, dated 25 September 1997.

20 Preah Reach Kram No. NS.RKM 36, dated 24 December 1996

Construction; the Cambodian Mekong River Committee; and the Tonle Sap Authority. To achieve its mission the MoE has proposed to the Council of Ministers a number of policies, which create an important legal backup for environmental protection. Most of these were adopted and they are as follows:

3. Legal instruments for environmental protection at national level

- Preah Reach Kram/NS-RKM-1296/36, on Environmental Protection and Natural Resource Management;
- NS.RKM.0208.007 dated 15 February 2008 on;
- Preah Reach Kret (Royal Decree)/1Nov1993, on the Law on the Protected Areas;
- Royal Decree on the Establishment and Management of Tonle Sap Biosphere Reserve dated 10 April 2001;
- Anukret/57ANK-BK/25Sep97, on the Organization and Functioning of the Ministry of Environment;
- Anukret/27ANK-BK/6Apr99 on Water Pollution Control;
- Anukret/36ANK-BK/27Apr99 on Solid Waste Management;
- Anukret/72ANK-BK/11Aug99 on Environmental Impact Assessment Process;
- Anukret/42ANK-BK/01Jul00 on Air Pollution and Noise Disturbance Control;
- Prakas/49MOE/09Mar00 on Guideline for Conducting Environmental Impact Assessment Report

In addition to legal instruments proposed by the MoE, numerous policies of other concerned ministries also contribute to environmental protection, including, for example, the Land Law,²¹ the Water Resources Law, the Forestry Law,²² and the Fisheries Law.²³

4. Global multilateral treaties and conventions

The existence of the above legal frameworks is the result of national and international inspiration and the fact that in recent decades Cambodia has joined several international treaties aimed at protecting the environment. For instance, Cambodia is a state party to the following international conventions:

- Cartagena Protocol on Bio-Safety, ratified in 2003;
- Kyoto Protocol, ratified in 2002;
- Montreal Protocol, ratified in 2001;

21 Preah Reach Kram No. NS.RKM 14, dated 30 August 2001.

22 Preah Reach Kram No. RKM 16, dated 31 August 2002.

23 Preah Reach Kram No. NS.RKM/0506/011, dated 30 March 2006.

- Convention to Combat Desertification, ratified in Paris in 2000;
- The Ramsar Convention on Wetlands of International Importance, ratified in 1999;
- Convention on International Trade of Endangered Species, ratified in 1997;
- Basel Convention, ratified in 1997;
- Convention on Wetlands of International Importance Especially as Waterfowl Habitat, ratified 1996;
- International Convention on Civil Liability for Oil Pollution Damage, ratified 1996;
- Convention on Biological Diversity (“CBD”), ratified in 1995;
- United Nations Convention on Climate Change, ratified 1992;
- Convention Concerning the Protection of the World Cultural and Natural Heritage, ratified in 1972.

5. Regional treaties and conventions

- Agreement on the Cooperation for the sustainable development of Mekong River Basin, ratified in 1995;
- Association of Southeast Asian Nations Agreement on Trans-boundary Haze Pollution, ratified in 2006

In short, in order to protect the environment, Cambodia applies systematic approaches like legal protection, which includes reliance on international laws, constitutional law and substantive national laws. In addition, Cambodia also established institutions, including the establishment of ministries and departments in charge of environmental protection.

V. Analysis and comparison of the structure and content of environmental protection in Cambodia

Regional and international legal instruments provide principles and guidelines to provide state parties with guidance on how to comply with these instruments through the enactment of domestic laws. Below is an analysis of environment-related legal frameworks in Cambodia, including plans, policies and laws, along with reflections on the application of these frameworks and compliance with them.

1. The National Environmental Action Plan (1998-2002)

The National Environmental Action Plan (“NEAP”) for 1998-2002 and the National Biodiversity Strategy and Action Plan of 2002 identified and emphasized the need to prepare and implement management plans for protected areas and to integrate them into the government’s broader policy framework for environmental management.

According to the plan, a significant development had been made in the field of protected areas from 2001 to 2008. In this period, the MoE was assigned to manage protected areas throughout Cambodia by the Royal Decree on the Establishment of Protected Areas. Under this decree, the MoE is obliged to:

- Undertake dialogue with concerned ministries and stakeholder groups to clarify and gain consensus on a national framework for integrating development and environmental conservation. In response to this, we also noted that a task force for the development of the Protected Areas Law was set up with representatives from five ministries and four non-governmental organizations (“NGO”) related to protected area management. These NGOs included the World Wide Fund for Nature, Wildlife Conservation Society, United Nations Development Program, and the NGO Forum of Cambodia.
- Develop a strategic plan for protected areas management that provides adequate legal, institutional, financial and technical resources for undertaking the task; that will focus on policies and practices for forest, wetland and coastal management; and that will consider the issues of military security and integrity of the area from encroachment, illegal loggers and poachers.
- Develop guidelines for integrating biodiversity conservation and socioeconomic development within buffer zones around protected areas, and develop land use plans that combine multiple compatible uses, including eco-tourism.
- Devise inter-agency working agreements where forestry or fishing interests come into conflict with protected areas management.
- Determine financial requirements and reasonable means for funding local operations associated with the management of specific areas.

To achieve these assigned duties the MoE, with the support of key donors, has implemented a number of activities ranging from formulating to implementing plans and policies. One of the core activities is law enforcement in protected areas. Park rangers are responsible for patrolling and suppressing illegal extraction of forest resources, for example land encroachment, illegal cutting of forests and illegal hunting, among others. Illegal practitioners are fined and punished depending on the size of the damage.

Although this plan may not be precise, at least certain principles and techniques of protection are embedded. For instance, the principle of prevention is reflected through the form of arranging protected areas. The precautionary principle is reflected through imposing criminal liability in certain circumstances. To be more effective, the above stated principles and techniques are incorporated more precisely in the Law on Protected Areas, discussed below.

2. The development of the Protected Areas Law (2002-2008)

The Protected Areas Law was enacted to allow Cambodia to implement the CBD and the United Nations Framework Convention on Climate Change in national legislation. In 2002, provincial consultation workshops and extensive reviews of the Law on Protected Areas resulted in the draft law becoming a hot agenda item for the plenary meeting of the Council of Ministers. This resulted in the amendment of 10 articles in 2005. The draft was submitted to the 3rd Commission of the National Assembly and was discussed with the participation of NGO representatives on November 6, 2007. It was then approved with minor changes on December 27, 2007 and promulgated²⁴ on February 15, 2008.

3. What is the structure of this law?

The Law on Protected Areas contains 11 chapters and 66 articles. The general provisions in Chapter 1 of this law define the objective of the law, which is to ensure the management and conservation of biodiversity, and the sustainable use of natural resources in protected areas.

Chapter 2 of this law establishes the institutions responsible for implementing the law, bestowing power on the Natural Protection and Conservation Administration (“NPCA”). The role and duty of the NPCA and its staff is to respect the rights of local communities and indigenous ethnic minorities as well as the rights of the public when making decisions related to sustainable development.

Chapter 3 categorizes protected areas into eight categories²⁵ and it also determines the criteria and the proceedings for establishing and modifying a protected area.

Chapter 4, the core chapter of this law, not only describes the zoning systems for all protected areas²⁶ but also provides exceptional conditions to restrict or permit the use or access and modification of zone boundaries.²⁷

Chapter 5 imposes an obligation on the MoE to develop a standard and coherent strategic management plan that shall be implemented by the NPCA²⁸ to ensure participatory conservation and protection of protected areas and promote eco-tourism. Chapter 6 provides exceptional rights to local communities and ethnic minorities to allow them to benefit from the restricted areas on a family scale on the grounds of traditional or

²⁴ The Law on Protected Areas was approved during the 7th session of its 3rd legislature and promulgated by Preah Reach Kram No. NS.RKM.0208.007, dated 15 February 2008.

²⁵ Art. 7 of the Protected Areas Law categorizes eight categories namely (National Park, Wildlife Sanctuary, Protected landscape, Multiple use area, Ramsar site, Biosphere reserve, Natural heritage site and Marine Park).

²⁶ Art. 11 of the Protected Areas Law, 2008.

²⁷ Art. 12 and 13 of the Protected Areas Law, 2008.

²⁸ Art. 17, 18 and 19 of the Protected Areas Law, 2008.

customary use.²⁹ This chapter also allows for the management of “community protected areas”³⁰ with the agreement of NPCA as long as the management strictly conforms to the principles set out in Chapter 5 and the sustainability of natural resources in the area is ensured. The most important feature of this chapter is that it obliges the local community to cooperate with authorities and national and international NGOs to support the establishment and implementation³¹ of the community protected areas.

Chapter 7 extends the responsibility for environmental protection to relevant groups and demands extensive programs to attract the participation and involvement of the public. The aim of the programs is to raise awareness, provide education and disseminate information on the value of the protected areas.³²

Chapter 8 sets out the core activities that are prohibited in protected areas. These activities range from clearing open land or forestland for construction work, to fishing, catching animals, and processing natural resource products.³³ Development activities within protected areas require approval by the MoE and the carrying out of an environmental and social impact assessment.³⁴

Chapter 9 defines natural resource destruction as a criminal act and authorizes officials of the NPCA to act as judicial police officers³⁵ with the power to investigate and prevent offences in accordance with the Criminal Procedure Code and procedures detailed in Articles 46 to 51 of the Protected Areas Law.

Chapter 10 defines activities that constitute environmental offences. These offences are graded in terms of seriousness on a four point scale.³⁶ It also sets out prohibitions on certain activities, and penalties for breaches of regulations for the protection of the natural habitat and protected areas. This chapter also designates the NPCA as the responsible agency for imposing transaction fines or ordering the payment of restoration damages against environmental offenders. If necessary, the NPCA may also initiate court proceedings to seek to have offenders held criminally liable for their acts,³⁷ or to subject them to administrative punishment.³⁸

Lastly, Chapter 11 imposes an obligation on the government to put the law into immediate effect soon after its promulgation.

29 Art. 21 and 22 of the Protected Areas Law, 2008.

30 Art. 23 to 28 of the Protected Areas Law, 2008.

31 Art. 26 and 27 of the Protected Areas Law, 2008.

32 Art. 29 and 30 of the Protected Areas Law, 2008.

33 Art. 36 to 41 of the Protected Areas Law, 2008.

34 Art. 42 of the Protected Areas Law, 2008.

35 Art. 45 of the Protected Areas Law, 2008.

36 Art. 56 to 63 of the Protected Areas Law, 2008.

37 Art. 53 and 54 of the Protected Areas Law, 2008.

38 Art. 64 of the Protected Areas Law, 2008.

4. What is the content of this law?

The Protected Areas Law helps Cambodia comply with the CBD and the content of the law is embedded with environmental protection principles including punishment in the form of “imprisonment, fines by court procedures, transaction fines, and confiscation of evidence, payment of restoration damages, warning, termination or suspension of agreements or permits”.

The provisions of the CBD provide for the protection and conservation of the environment and biodiversity. However, Article 8 in particular is a key article, requiring contracting states to:

- Establish a system of protected areas where special measures need to be taken to conserve biological diversity;
- Develop guidelines for the selection, establishment and management of protected areas or areas where the mentioned special measures need to be taken;
- Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
- Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas.

Although the above stated principles and techniques of protection are not all included in the Protected Areas Law, at least some of the main principles and techniques are embedded and reflected in the articles discussed below.

Beyond compliance with the CBD, Article 1 of the Protected Areas Law also clearly provides that it is necessary to manage the existing protected areas while conserving biodiversity. This provision corresponds to the general prevention and precautionary principles. Paragraph 4 of Article 4 reflects the purpose of promoting the sustainable development principle. It promotes sustainable development by ensuring the rights of local communities, indigenous peoples, ethnic minorities and the general public to participate in decision-making. Additionally, paragraph 5 of Article 5 promotes further important techniques for protection and conservation by requiring the NPCA to promote education and the dissemination of information to the public in order to facilitate participation in conservation and the protection of natural resources.

Most importantly, in compliance with point (b) of the CBD, Articles 8 and 9 of the Protected Areas Law provide guidelines for the selection and establishment of protected areas, while Articles 11, 12 and 13 classify protected zones, prescribe procedures for their maintenance, and outline the possibilities for modifying the boundaries of protected zones, respectively.

As a reflection of technical protection, Articles 29 and 40 oblige different stakeholders, such as citizens, Buddhist monks, school children, civil servants, members of the armed forces and local authorities to participate actively in the protection and conservation of the environment. Article 30 provides for extensive programs for education and dissemination. The imposition of obligations is a suitable technique to attract participation and provide education that can help create awareness amongst Cambodian people about the importance of environmental protection and conservation. Chapter IX sets out the procedure for law enforcement and the procedure to resolve offences and Chapter X criminalizes the act of destroying natural resources. These provisions reflect the concepts of administrative command and control and criminal liability.

5. What are the practical aspects of the Protected Areas Law?

To ensure effective enforcement of this law in practice, the park rangers are empowered with the authority to work as local resources for environmental research and to provide environmental education to outsiders. Evidently, the rangers in Peam Krasoap Wildlife Sanctuary have become local guides for sea grass and mangrove visits.

In addition to law enforcement by the park rangers, the MoE in the last decade has mainstreamed the CBNRM approach or co-management approach in its management regime. CBNRM, which is recognized in the literature in this field as a tool for the empowerment of local people in natural resource management, allows many Cambodian communities to voice their opinions to the responsible government agencies, policy makers, NGOs, and other relevant stakeholders regarding local resource management. The key strength of this approach is that it builds relationships among local people and relevant stakeholders so that they can come up with one voice and bring it to the decision makers. At the beginning, the employment of this approach was challenging because this local initiative concept was introduced by outsiders and also the government agencies are reluctant to transfer their management power to the local community. However, because of the chance to work together through community meetings, study tours, trainings, and workshops, people now have more understanding and willingness to work together.

Land-use planning for protected areas is another key element for protected areas management. Currently, the MoE's officials are working with some concerned authorities and local people to develop land-use planning of the protected areas so as to solve some environmental concerns. For instance, in the last few years, the zones of protected areas have been defined and some parts of the original protected areas were cut off and title given to the community for development. At the same time, there has been a growing concern over land grabbing of protected areas for private ownership, private investment for agricultural practices, and the issue of immigrants.

In addition to the inclusion of principles for the protection of the environment in legal regulations and laws, the MoE has also considered capacity building of its staff in biodiversity research as well as environmental management in general as one of its core elements for protected area management. A significant number of officials have been sent to pursue their education abroad. The return of these officials definitely contributes to the improvement of protected area management through effective management plans, monitoring and evaluations, high standard of research development, and others. At the same time, these people can also share knowledge with others through short trainings, workshops, ministerial meetings, and so on. Furthermore, the MoE also provides opportunities for its staff to work as counterparts with various projects, which is an important part of its institutional capacity building through learning by doing.

Moreover, the MoE utilizes the soft approach, which is known as public awareness raising, as a key strategy for promoting public self-consciousness in environmental protection. In the last decade, there is a growing level of public awareness about the importance of the environment for community well-being and livelihoods, particularly for people who directly gain benefits from natural resources. This achievement is partly a result of an environmental campaign, which is called environmental debate, on national television. Similarly, environmental dissemination campaigns are mainstreamed through various television and radio programs, formal and informal education, as well as social activities including environmental days, forest re-plantation, waste management activities, and others.

The above activities contribute not only to the success of national environmental action plans, but they also help achieve the government's commitments towards such regional and international conventions as the CBD, the Convention on Wetlands of International Importance, and the ASEAN Agreement on Trans-boundary Haze Pollution, among others.

Adding to the efforts for protected areas management, the MoE has also worked on the commitments towards the United Nations Framework Convention on Climate Change ratified in 1995 and the Kyoto Protocol Convention on Climate Change ratified in 2002. Ratification of these conventions led to the creation of the Cambodian Climate Change Office, which was recently transferred to the Department of Climate Change. This agency has implemented a number of projects including the Clean Development Mechanism, Green House Gas Inventory, and a survey on vulnerability and adaptation to climate hazards and to climate change. In 2005-2006, this institution, with the support of the United Nations Development Program, the Global Environment Fund, and other potential donors, developed a National Adaptation Program of Action for Climate Change ("NAPA"), which was approved by the Prime Minister as a national action plan. The aim of the Cambodian NAPA is to "provide a framework to guide the coordination and implementation of adaptation initiatives through a participatory approach, and to build synergies with other relevant environment and development programmes. Cambodia's NAPA presents 39 priority projects to address the urgent and immediate needs and concerns of people

at the grassroots level for adaptation to the adverse effects of climate change in key sectors such as agriculture, water resources, coastal zone and human health” (MoE 2006). Some of the projects currently being implemented include adaptation to climate change in coastal zones, agriculture improvement, and others.

The duty to achieve the goals set out in this plan is assigned to the MoE, which is the leading agency working with concerned ministries to develop action plans, policies, and projects that respond to the global commitments and implement the National Strategic Development Plan 2006-2010 (“NSDP”), adopted in May 2006, and the Rectangular Strategy.

Currently, there is an urgent need for human resources from the MoE in order to develop actions, plans, and projects that meet the requirements of international standards. Some trainings have been provided for local and national staff. At the same time, the staff also gain knowledge from learning by doing during the project implementation stage. Additionally, having opportunities to attend workshops, conferences, and symposiums is valuable for capacity building of the staff in this sector.

In addition to above-mentioned duties, the MoE has actively worked with concerned ministries, especially the municipality and provincial departments, in solid waste management and air pollution controls. The MoE staff have regularly examined various factories and small businesses concerning the environment monitoring and management plans. At the same time the MoE has issued numerous decisions related to the standard for waste management and air pollution controls at various levels ranging from households to hotels. Specifically, the MoE has also worked with Phnom Penh municipality in issuing an order related to waste management in public places.

Finally, the MoE has actively worked on environmental impact assessments. The MoE has worked with national and international experts on the assessment of development projects in the areas under the jurisdiction of MoE. MoE staff visit projects for field checking and monitoring. The MoE also organizes meetings with relevant stakeholders on the proposed projects so as to avoid serious environmental and social harms. If environmental and social harm occurs, stringent environmental mitigation strategies are employed.

VI. Challenges

Despite making progress towards the achievement of its mission, the MoE is also faced with a large number of challenges, which are outlined below:

- Funds for environmental protection are mostly donor dependent, which raises the concerns of long term sustainability.³⁹

³⁹ Participatory Management of Coastal Resource (PMCR) 2010, *United we stand: the rise of community participation*, Phnom Penh.

- Limited funds allocated for necessary facilities, salary, transportation and other environmental work lead to ineffective management of environment.
- Limited capacity of staff at the national and local levels regarding policy formulation and implementation, and scientific research mean that environmental management work is more challenging.⁴⁰
- A change in social and economic development patterns is an emerging issue for environmental management, especially protected areas management. For instance, industrial agricultural practices are growing and converting thousands of hectares of forests into agricultural lands. Growth in this type of development leads to land grabbing and encroachment in some protected areas.
- Overlapping roles and responsibilities and limited collaboration among government agencies are chronic problems hindering sustainable environmental management.
- Limited capacity of local communities to participate with park rangers, provincial environmental departments, and concerned institutions is constraining the MoE in the achievement of the CBNRM approach in protected areas management.

VII. Recommendations

- Clear roles and responsibilities in environmental management should be clarified through the amendment of some legal instruments.
 - Enough funds should be provided, from government and donors, for environmental management.
 - Land-use planning for all protected areas should be in place.
 - More capacity building programs in policy development as well as natural science research should be provided. At the same time, incentives for officials should be available in order to ensure that those staff are enthusiastically working for the achievement of the MoE's mission.
- Environmental campaigns should be widely promoted from the national to the local level through television channels, radios, formal and informal education, and public environmental days, among others.
- The community-based management concept should be widely implemented in the protected areas throughout Cambodia.

⁴⁰ Participatory Management of Coastal Resource (PMCR) 2010, *United we stand: the rise of community participation*, Phnom Penh.

INTRODUCTION TO EDUCATIONAL LAW

Legal Norms, Legal Education and Research Development at higher Education Institutions in Cambodia

HEM Bonarin

CONTENTS

I. Abstract.....	357
II. Introduction	357
III. Law on Cambodian higher education	359
IV. Institutions for regulating higher education	362
1. The Supreme National Council of Education.....	362
2. The Council of Ministers, Royal Government of Cambodia	362
3. Parental ministries	363
4. Ministry of Education, Youth and Sports	364
5. Accreditation Committee of Cambodia	366
V. Legal education at higher education institutions	367
VI. Research development at higher education institutions	370
VII. Conclusion	372
REFERENCES	374

INTRODUCTION TO EDUCATIONAL LAW

Legal Norms, Legal Education and Research Development at higher Education Institutions in Cambodia

*HEM Bonarin**

I. Abstract

This article, which is based on secondary data and the author's exclusive experiences and observations, examines the regulation and control of higher education in Cambodia through legal norms, as well as legal education and research development at Cambodian higher education institutions between 1995 and 2010. The author of this article believes that over the last fifteen years, tremendous efforts have been made to develop higher education in terms of legal norms, legal education and research development in order to respond to the increasing needs of society. In spite of this progress, the author argues that more legal norms might be needed to ensure the sustainability, development and quality of higher education institutions in Cambodia. Legal education remains limited and research activities are only just beginning.

II. Introduction

Education is crucial for every country – developing or developed all over the world – because education is a powerful weapon that we can use to change the world (Nelson Mandela's words quoted from www.brainyquote.com/quotes/authors/n/nelson). Higher education in particular is a vital form of investment in human capital, which is considered the engine of development in the new world economy. Higher education makes a major contribution to social development. First, it assists a country in industrializing its economy rapidly by producing and supplying manpower with professional, technical and managerial skills. Second, higher education produces both educated and knowledgeable workers. Third, higher education helps shape and influence the opinions of the individuals receiving education. Fourth, through teaching and research, higher education can help create, absorb and disseminate knowledge. Lastly, higher education gives people a

* Mr. HEM Bonarin is Lecturer, Faculty of Education, Paññāsāstra University of Cambodia (PUC), Senior external Assessor, Accreditation Committee of Cambodia (ACC)

chance to enjoy an enhanced intellectual life, giving the wider society both cultural and political benefits (Tilka, 2003).

In the 21st century, there is a great demand for and diversification in higher education. There is also awareness of its importance for socio-cultural and economic development, and for building the future through equipping the younger generations with the skills, knowledge and ideas they will need to be successful (World Declaration on Higher Education, Paris 1998).

For Cambodia, the vital role of higher education dates back to the time of the ancient Khmer Empire when the first higher education institution (“HEI”) was created in the 12th century, before the first European university was established in Sorbonne (Kol, 2008). Higher education in Cambodia, which remains a core requirement to achieve social development, is expressly referred to in the Constitution of the Kingdom of Cambodia (the “Constitution”) and is prioritized in the Royal Government of Cambodia’s (“RGC”) Rectangular Strategy for Growth, Employment, Equity and Efficiency (“Rectangular Strategy”). According to the United Nations Educational, Scientific, and Cultural Organization statistic yearbook 1999, amongst Asia-Pacific countries Cambodia and Nepal have the lowest percentage of their adult population (aged 25+) with higher education at 1% and 0.6%, respectively (Tilak, 2003). In the academic year 2003-2004, about 57,828 students enrolled in all levels of higher education in Cambodia, but in the academic year 2007-08, the enrollment has more than doubled to 135,671 students (Mak, 2009).

Noting the incremental increase in the significance of the role of higher education in social development, the RGC has set up a policy to permit the private sector to invest in higher education with the aim of meeting the increased demand for enrollment at HEIs and contributing to the promotion of higher education. As a result, over the last fifteen years Cambodian higher education has been in a state of growth while also struggling to improve the quality of education provided. For instance, during that period of time, the HEIs have been mushrooming. There is now a total of 76 HEIs, 33 of which are public and 43 of which are private (MoEYS, 2010). The privatization of HEIs first took place when the RGC licensed Norton University, the first private HEI in Cambodia, in 1997 (Hirosato and Kitamura, 2009). According to the RGC’s Rectangular Strategy, higher education is a prioritized activity. One hundred and eleven HEIs have been licensed - including the campuses in the provinces across Cambodia - and those institutions offer training to students in about 156 skills and majors (ACC, 2010).

The dramatic growth in the number of HEIs in Cambodia has to some extent fermented worries over quality control and the sustainability of HEIs. The Ministry of Education, Youth and Sports (“MoEYS”) has undertaken concerted efforts to ensure that Cambodian higher education is on the right track to achieve better quality that is recognized both locally and globally (Kam, 2005). Emphasis has been placed on improvements in quality in order to promote Cambodia’s competitiveness in the regional and global economic

system. In this sense, special attention has been paid to improving education quality in public and private and other educational institutions (Hun, 2009).

In cooperation with the RGC, the World Bank in 2001 started to support projects that helped to ensure higher education quality. The World Bank mission was to establish a legal framework in higher education (Innes-Brown, 2006). The World Bank also assisted in the establishment and the emergence of the Accreditation Committee of Cambodia (the “ACC”).

III. Law on Cambodian higher education

Higher education is regulated under numerous legal norms of competent institutions, including the MoEYS and the ACC. In addition, some HEIs are also under direct supervision from institutions such as the Council of Ministers, the MoEYS and parent ministries. Unlike other countries, Cambodia does not have a single comprehensive law on higher education. However, legal norms are issued by the government, the MoEYS and the ACC.

According to Chapter VI of the Constitution, *Education, Culture, and Social Affairs*, higher education is expressly referred to as follows:

Article 65: *“The State shall protect and upgrade citizens’ rights to quality education at all levels and shall take necessary steps for quality education to reach all citizens.*

Article 66: *“The State shall establish a comprehensive and standardized education system throughout the country that shall guarantee the principles of educational freedom and equality to ensure that all citizens have equal opportunity to earn a living.”*

Article 67: *“The State shall adopt an educational program according to the principle of modern pedagogy including technology and foreign languages. The State shall control public and private schools and classrooms at all levels.”*

Moreover, Cambodian higher education is also covered in the Law on Education. Higher education is referred to in Chapter Six, Article 18 of the Law on Education, passed on 19 October 2007 at the National Assembly’s 7th meeting in its 3rd mandate, and approved by the National Senate on 21 November 2007, as follows:

Higher Education or the tertiary of education is the post-secondary education at higher education institutions. Higher Education shall train in complete personality and characteristics and promote scientific, technical, cultural and social researches in order for high capacity, knowledge, skills, morality, innovation and entrepreneurship for developing the country. The framework and requirements of the level of degree and certificate shall be established by the Ministry in charge of education. There are two

types of higher education institutions namely university and institute. The criteria for each type of higher education institution and the admission requirements to a higher education institution shall be determined by the Ministry in charge of education.

In some countries, for example in Montenegro, a law on higher education has been passed by the National Assembly and this law describes details of the management, control, policies, regulations and procedures for HEIs in the country. In Cambodia, the policies, regulations, decisions or other legal norms for higher education are not solely elaborated in a law on higher education but in a hierarchy of legal norms such as *Kret* (decree), *Anukret* (sub-decree), *Prakas* (declaration), *Sekdei Samrech* (decision), *Sarachor* (circular), and *Panbat* (regulation).

The following are those legal norms for regulating higher education institutions, both private and public.

Royal Decree on:

- Recognition of Higher Education
- The Appointment of Members of Accreditation Committee of Cambodia

Sub-decree (issued by the RGC) on:

- The Organization and Functioning of the Secretariat of Accreditation Committee of Cambodia
- Criteria of the Establishment of a University
- Payment of Administrative Charge on Evaluation Procedures for Higher Education
- Training in Health
- The Limitation of Teaching Load, Over-time Teaching, and Over-time Payment for the Public Institutions
- Scholarship and Stipend

Declaration (issued by the MoEYS) on:

- Conditions and Detailed Criteria for Establishing a Higher Education Institution
- The Establishment of Commission to Check Contents and Pictures of Adverts on Education
- Training of Master Program
- Additional Prakas on Training of Master Program
- Regulation of Selecting Students for Higher Education Institutions
- Regulation of Student Enrollment at Public and Private Higher Education Institutions

Decision

- Requirements for Higher Education Institutions to Issue Foundation Year Studies Certificate (issued by the ACC)

- Credit Transfer for the Pay-fee Students among Higher Education Institutions (issued by the MoEYS) The Establishment of a Committee to Evaluate Degrees and Certificates (issued by the RGC)
- The Minimum Standards on Institution Accreditation of Higher Education Institutions (issued by the ACC)

Circular on:

- Advertisement of Higher Education Institutions (issued by the Royal Government)
- Guidelines on the Lexical Use of “Institute” in Education (issued by the MoEYS)
- Guidelines on Advertisement of Education and Admission for Unlicensed Higher Education Institutions (issued by the MoEYS)
- Guidelines on the Non-recognition of Combined Classes between Bachelor and Associate Programs (issued by the MoEYS)
- Guidelines on the Launching of a New Specialty, Department, Faculty, Course, and Branch at Higher Education Institutions (issued by the MoEYS)
- Conditions of the Recognition of Lists of Students Taking Specialist or Technical Secondary Education or Undergraduate Programs at Higher Education Institutions (issued by the MoEYS)

Announcement on:

- The Establishment of Department of Foundation Year Studies (issued by the MoEYS)
- The Implementation of Foundation Year Studies Program (One issued by the MoEYS dated 5 April 2005, and another one issued dated 30 March 2005 by the ACC)
- The Request in Principle of Taking High School Grade for HEIs Entrance Policy (issued by the Council of Ministers)

Regulation and Guideline (issued by the MoEYS)

- The Format and Content in Foundation Year Studies Certificate
- The Arrangement of Members of the Entrance Examination Committee or Comprehensive Examination Committee at the Higher Education Institutions under the Ministry of Education, Youth, and Sports
- Regulations for the Students Taking Entrance Examination or Comprehensive Examination at the Higher Education Institutions under the Ministry of Education, Youth, and Sports
- Policy on Implementation of the Master Program Training

(Sources: A Collection of Legal Norms Compiled by MoEYS and ACC)

IV. Institutions for regulating higher education

At present, HEIs are regulated and governed under the regulations of various competent institutions, namely the Council of Ministers, the MoEYS, the ACC, and parent ministries. In addition to this, a commission for evaluating thesis and dissertation writing has recently been established. More noticeably, a new top body, the Supreme National Council of Education (the “SNCE”), was established under the Law on Education in order to work on education policies in Cambodia.

1. The Supreme National Council of Education

As stipulated in the Law on Education, the SNCE was created to propose long-term policies and strategies to the RGC in response to the needs of social and economic development, to evaluate work of education, technical and professional training set by the RGC, and to gather all resources for the causes of education (according to the Royal Decree No.0309/349, 2009). In this context, the MoEYS takes the roles and responsibilities for helping the SNCE and those roles and duties need to be clearly defined and properly located in the management structure of the next cycle of the Education Strategic Plan (MoEYS, 2006). The SNCE includes the Prime Minister as the chairperson, the Deputy Prime Minister in charge of education as the vice-chairperson, another dignitary as the vice-chairperson, the Minister of Education, Youth and Sports as the permanent vice-chairperson, and other dignitaries as the members. Samdech Akak Moha Sena Padei Techo Hun Sen, the Prime Minister, is now chairperson of the SNCE (according to the Royal Decree No.0110/080, 2010).

2. The Council of Ministers, Royal Government of Cambodia

As stated earlier, the RGC sometimes makes certain legal norms, known as sub-decrees, circulars and announcements (*Prakas*), on some issues of higher education despite having the MoEYS as its agency in education.

The management and supervision of the Royal Academy of Cambodia (the “RAC”), a public higher education institution, is directly handled by the RGC via the Council of Ministers. For instance, degrees conferred to the students are co-signed by the Minister of the Council of Ministers and the President of the RAC (according to a copy of degree of a RAC graduate).

Historically, the RAC was originally founded by a royal decree of 25 August 1965 under the Office of the Council of Ministers. Nevertheless, after its long term closure due to civil war, the RAC was reopened in 1999 and the official inauguration ceremony took place on 19 January 2000 (Cambodian Cultural Profile, 2010).

Moreover, the Council of Ministers has issued a Prakas on Request in Principle of Taking High School Grade for HEIs Entrance Policy which is supposed to be implemented entirely by HEIs in the country. In this policy, the Council of Ministers advises using the adoption of certain principles to set the criteria for high school students to enroll at HEIs (Announcement No.824).

In its competency, the RGC has also issued some sub-decrees on the cessation of recognition of certain HEIs (according to the sub-decrees No. 99, No.100, and No.101 dated July, 2009).

3. Parental ministries

Many public HEIs have their own parent ministers for funding and financing, staffing management, and other functions. HEIs which work with both their parent ministers on staffing and financing and with the MoEYS on academic issues are listed below. About 10% of student enrollment is at HEIs supervised by nine parent ministries other than the MoEYS; 90% of enrollment is at HEIs that are supervised by the MoEYS (Pak, 2009).

The rector/director of a public HEI is appointed through a royal decree at the request of the Prime Minister. Those HEIs are funded by their respective ministries according to their different criteria (Pak, 2009). The degrees conferred to the graduates from these public HEIs are usually co-signed by the ministry concerned and the university rector. For example, the degree of a graduate from the Royal University of Agriculture are co-signed by the Minister of Agriculture, Forestry and Fisheries and the rector of the university (According to a copy of degree from a graduate, RUA).

The following illustrates the public HEIs under different parent ministries.

- **Ministry of Health**
University of Health Sciences (UHS)
Technical School of Medical Care (TSMC)
- **Ministry of Agriculture, Forestry and Fisheries**
Royal University of Agriculture (RUA)
Prek Leap National School of Agriculture (PNSA)
Kampong Cham National School of Agriculture (KNSA)
- **Ministry of Culture and Fine Arts**
Royal University of Fine Arts (RUFA)
- **Ministry of Cults and Religions**
Preah Sihanouk Raja Buddhist University (PSRBU)
Preah Sihanouk Raja Buddhist University (PSBU)
- **Ministry of Economics and Finance**
Institute of Economics and Finance (IEF)
Institute of Banking Studies (IBS)

- **Ministry of Labor and Vocational Training**
 - National Institute of Business (NIB)
 - Preah Kossamak Polytechnics Institute (PKPI)
 - National Technical Training Institute (NTTI)
- **National Cambodian Institute of Polytechnics (NCIP)**
- Battambang Institute of Technology (BIT)
 - Battambang Institute of Polytechnics (BIP)
 - Institute of Industry Technology (IIT)
- **Ministry of National Defense**
- National Defense University (NDU)
 - School of Active Military “Thmart Pong” (SAM)
 - Royal Cambodian Armed Forces Institute of Health Science (RCAF IHS)
 - Institute of Army (IA)
- **Ministry of Interior**
 - Police Academy of Cambodia (PAC)
- **Ministry of Public Work and Transport**
 - Cambodian Institute of Marine (CIM)

(Source: www.moeys.gov.kh/higher_education.pfp).

4. Ministry of Education, Youth and Sports

The RGC has the central role in overseeing the provision of higher education through the MoEYS, which regulates and supervises public and private HEIs in relation to academic affairs (Innes-Brown, 2006). For some public HEIs, listed below, the rector/director is appointed through a royal decree for the university at the request of the Prime Minister. A decision on the financing of a public university is made by the MoEYS, whereas for private HEIs, the MoEYS has duties relating to technical supervision and academic regulation. Hence, the MoEYS usually issues other legal norms on higher education.

The MoEYS has the authority to close HEIs that do not meet the requirements set out by the Ministry in relation to quality assurance (according to Prakas No.1904).

- **Public Higher Education Institutions**
 - Royal University of Phnom Penh (RUPP)
 - Royal University of Law and Economics (RULE) *
 - National University of Management (NUM) *
 - Chea Sim Kamchay Mea University (CSKU)
 - Svay Rieng University (SRU)
 - Meanchey University (MCU)
 - University of Battambang (UBB)
 - Institute of Technology of Cambodia (ITC)

- **Private Higher Education Institutions**

Norton University (NU)
 Paññāsāstra University of Cambodia (PUC) Build Bright University (BBU)
 Phnom Penh International University (PPIU)
 Chamroeun University of Poly-Technology (CUP)
 Cambodian University for Specialties (CUS)
 International University (IU)
 Mekong University of Cambodia (MUC)
 University of Cambodia (UC)
 Western University (WU)
 ICS University
 Khemerak University (KU)
 Angkor University (AU)
 Asia Euro University (AEU)
 Human Resources University (HRU)
 University of Puthisastra (UP)
 University of Management and Economics (UME)
 City University (CU)
 University of Southeast Asia (USEA)
 LIFE University (LU)
 Chenla University (C.L.U)
 Lim Kokwing University (L.K.U)
 IIC University of Technology (IICUT)
 Khmer University of Technology and Management (KUTM)
 Angkor Khemera University (AKU)
 Panha Chiet University (PU)
 Zaman University
 Vanda Institute (VI)
 Angkor City Institute (ACI)
 SETEC Institute (SI)
 Management Institute of Cambodia (MIC)
 Sachak Asia Development Institute (SADI)
 Belti International Institute (BII)
 Rawlings Institute (R.I)
 Future Bright Institute (FBI)
 Institute of Management and Development (IMD)
 Institute of Cambodian Education (ICE)
 Institute of Business Education (IBE)
 Institute of Social Sciences and Technology (IST)
 Bright Hope Institute (BHI)

American Intercon Institute (AI)
Bethel Institute (BI)
Khemara Sastra Institute (KSI)

(Source: www.moeys.gov.kh/higher_education.pfp)

*Note: * Public Administrative Higher Education Institutions*

5. Accreditation Committee of Cambodia

The ACC was established in 2003 through the Royal Decree No. 0303/129 with the aim of creating a legal mechanism to accredit the quality of higher education and ensure the arrangement of accreditation relating to the structure, roles, and duties and functions of HEIs providing undergraduate and graduate programs in Cambodia (ACC Bulletin, 2010). As recommended by the World Bank in 2001, the ACC should have been established as an independent accreditation body, with ASEAN membership, and representatives from government, commerce and industry, and from the rectorate, and teaching and student bodies. However, the appointments to the ACC were made by the RGC and the ACC works under the government's executive office, the Council of Ministers (Innes-Brown, 2006). According to the Royal Decree No.0205/097, new Article 10, Point A: Permanent Members, the permanent members include the Minister in charge of the Council of Ministers and the Minister of Education, Youth and Sports. Both members can become the chairperson or the vice-chairperson of the ACC. Among them, if a member has a higher position in the RGC, he/she will become the chairperson, while the member who has a lower position in the RGC will become the vice-chairperson of the ACC. Therefore, H.E. Mr. Sok An, Deputy Prime Minister, Minister in charge of Council of Ministers, is the chairman and H.E. Mr. Im Sothy, Minister of Education, Youth and Sports, is the vice-chairman of the ACC (ACC, 2010).

The roles of the ACC are to create accreditation standards, to review the progress of HEIs in achieving those standards, and to provide information to the government, HEIs and the public on which HEIs meet standards (World Bank, 2004).

For the first phase, the ACC started to implement the policy to assess only the foundation year studies program, the first year academic program for undergraduate students. In order to receive the privilege to issue the foundation year course certificate for their students, the HEIs shall undergo an assessment by the ACC external assessors based on six criteria (Guideline on Foundation Year Course Assessment Processes for Assessors, 2010). Dr. Tech Samnang, ACC Secretary General, was quoted in an October 2008 issue of the Cambodia Daily saying that the ACC is working independently of the Ministry of Education to see that the ministry's standards are being met. Higher education institutions that fail to meet the standards will not be allowed any new intake of first year students until they have fulfilled the ministry's requirements (Neou, 2008).

In the academic year 2006-07, thirty-three HEIs were granted three-year full accreditation, whereas thirty-one other HEIs were granted one-year provisional accreditation, and two HEIs were not granted accreditation. In the academic year 2007-08, five other HEIs received full accreditation, thirty-two HEIs received provisional accreditation, and three other HEIs were not granted accreditation at all. In the academic year 2008-2009, nineteen other HEIs were fully accredited, while sixteen other HEIs were provisionally accredited (ACC, 2010).

For the second phase in the near future, the HEIs will go through the accreditation minimum standards which cover nine standards: (1) mission and goal; (2) structure, management and planning; (3) academic programs; (4) teaching staff; (5) students and student services; (6) learning resources and services; (7) physical facilities; (8) financial plan and management; and (9) dissemination of information (<http://acc2.gov.kh/index>). Mr. Tech Samang, ACC Secretary General, 2008, was quoted in the 28-29 December 2008 issue of the Reaksmei Kampuchea newspaper saying that HEIs are entitled to issue degrees from undergraduate and graduate programs only if they are granted full accreditation after meeting the ACC standards (Tararith, 2008).

In 2009, a decision on the minimum standards for accreditation was approved and signed by H.E. Mr. Sok An, the chairman of the ACC and the Deputy Prime Minister in charge of the Council of Ministers (according to the Decision No.02/09).

V. Legal education at higher education institutions

In the 21st century, the globalization of law and justice is an inevitable reality, although legal education in public and private law schools focuses mostly on domestic law, especially in the ASEAN region (Rajeswaran, 2010). Legal education in Cambodia has been significantly developing over the last fifteen years.

Historically, legal education in Cambodia dates back to the 1940s when the first law school was established in 1948 at the National Institute of Law, Politics and Economics in Phnom Penh (www.rule.edu.kh/Brief-His.htm). After the collapse of the Khmer Rouge regime, about 2,500 persons were trained in short courses at the Faculty of Law and Economic Sciences (sometimes referred to as the “Law School”) from 1982-87. A two-year program of law, introduced in 1986, was closed in 1993 after some 700 persons had been trained. After 1993, the Law School, supported by France and the University of Lyons, France, started a five-year program in law (according to the International Legal Service Advisory Council, Australia, January, 1998).

Legal education in Cambodia is reaching a turning point, having survived wrenching political changes since its reintroduction in 1993 (www.rule.edu.kh/Dep-Law.htm).

At present, the following HEIs in Cambodia offer law programs ranging from undergraduate to graduate programs:

- Paññāsāstra University of Cambodia (PUC)
- Royal University of Law and Economics (RULE)
- National University of Management (NUM)
- Norton University (NU)
- Build Bright University (BBU)
- Cambodian Mekong University (CMU)
- University of Puthisastra (UP)
- University of Cambodia (UC)
- Cambodia University for Specialties (CUS)
- Chamroeun University of Poly-Technology (CUP)

Legal education is included in the curriculum, and extra-curricular and clinical legal education activities in these law schools.

Some universities include legal subject matter in some of their non-law majors, equipping their students with knowledge of certain laws and legal principles through subjects such as *Cambodian constitution*, *introduction to law*, *introduction to international law*, and *business law* (PUC, 2010). Moreover, guided by the ACC, all Cambodian HEIs have to introduce the concepts of traffic awareness—to some extent related to the traffic law in Cambodia—in their foundation year studies program, the first year studies of the undergraduate program (ACC Announcement No. 193/09).

Encouraging HEIs in Cambodia to include legal education in the curriculum is another effect of efforts by the international community. In 2010, a European Union delegation met with the MoEYS and representatives from private and public HEIs to discuss the structured expansion of intellectual property law education, training, and research institutions and programs within a common ASEAN-wide regional network (MoEYS's meeting agenda with EU Delegation, 2010).

The annual mock trial competition, well-known in the law schools in this country as a useful extra-curricular learning activity, is an opportunity for law students to learn to play the roles of prosecutors, defense attorneys, and witnesses and enact a particular case. The mock trial has so far been conducted four times, with wide participation from several law schools in Cambodia. The first ever mock trial competition, supported by the United States Agency for International Development (“USAID”), was held in 2007 at the Royal University of Law and Economics (<http://cambodia.usembassy.gov/usaid-mock-trial.html>). Hosted by the American Bar Association Rule of Law Initiative, the second mock trial competition took place at the University of Cambodia in 2008. The third mock trial competition, which was sponsored by USAID, was held in 2009 at Paññāsāstra University of Cambodia and the competitions final was held at the Royal University of Law

and Economics. The fourth national mock trial competition in May 2010 was organized at the Royal University of Law and Economics (<http://cambodia.usembassy.gov/usaids-mock-trial-2010.html>).

NATIONAL ANNUAL MOCK TRIAL COMPETITIONS

Year	Championship
2007	Royal University of Law and Economics (RULE)
2008	Paññāsāstra University of Cambodia (PUC)
2009	Paññāsāstra University of Cambodia (PUC)
2010	Royal University of Law and Economics (RULE)

Another legal education activity offered is legal clinics. Paññāsāstra University of Cambodia has established the *PUC Legal Clinic*, the first to operate at the tertiary education level in Cambodia. It is aimed at providing a progressive method of education which focuses on student learning, improving the skills students will use as lawyers and in other professions, applying experience-based learning with the students and helping them learn and practice what they study in class, and providing supportive legal services for poor community members who might not have alternative access to the legal system. The legal clinic has two programs: the Community Legal Education Program and the Juvenile Justice Program (<http://pucl.wordpress.com/>).

Supported by various international organizations, legal education is introduced in many additional activities. The PUC Legal Clinic mentioned above was established in cooperation with the Open Society Justice Initiative (www.sea.sea-clinictalk.org/events). Another example is the establishment of the Center for Lawyers Training and Legal Professional Improvement at the Royal University of Law and Economics funded by the Japan International Cooperation Agency under the coordination of Japan Federation of Bar Associations.

Funded by USAID, the University of San Francisco (“USF”) had a relationship with the National Institute of Management in 1993. Over the years, about twenty-five Cambodian students have received Master of Law degrees through this cooperation. Additionally, USF students, faculty and alumni came to the National Institute of Management to work on projects involving curriculum and textbook development, and they established the Community Legal Education Center (“CLEC”) in Phnom Penh. CLEC trains individuals in both the public and private sectors in basic legal principles in order to help them with their daily work (Brand, 2003).

The Women’s Media Center of Cambodia – a non-governmental organization not a law school contributing to legal education – has, with USAID sponsorship, produced the first television drama about Cambodia’s legal system. This nationally televised drama is intended to educate viewers about the court system in an entertaining and engaging way (www.usaid.gov/kh/documents/USAID_More_headlines_Aug_08_08.pdf).

Recognition of the reality that legal rights education needs to go beyond disseminating educational material has inspired the Asia Foundation to provide support for alternative approaches to education through its Global Women in Politics program. This program has provided support to the Project against Domestic Violence and the Women’s Media Center of Cambodia to enable the production of street theater to raise awareness about violence against women and women’s legal rights in five provinces across the country (www.asiafoundation.org/pdf/CB-streettheater.pdf).

VI. Research development at higher education institutions

Article 66 of the Cambodian Constitution states: *“The State shall establish a comprehensive and standardized education system throughout the country that shall guarantee the principles of educational freedom and equality to ensure that all citizens have equal opportunity to earn a living.”*

Section II of the World Declaration on Higher Education for the 21st Century, *Priority Actions at the level of Systems and Institutions*, stresses the promotion and development of research, which is a necessary feature of higher education in all disciplines. As one of the core activities of HEIs, research activities are therefore emphasized in Article 3 of the Law on Education, which states: *“This law covers all educational programs, research studies, technical and vocational education and training at all public and private levels of the education system although these educational programs are offered by the educational institutions or by education personnel...”*

To promote research as a key part of Cambodian higher education, Decision No.04/04 of the ACC on Credit System and Credit Transfer, states that all HEIs are to introduce three teaching methodologies: (1) theory lectures; (2) practice in the lab; and (3) internships. Some HEIs have also created research output centers and set up exchange programs with local and international research partners (Innes-Brown, 2006).

Within the MoEYS, the Department of Scientific Research has been established to supervise graduate studies programs, especially research affairs. According to the policy on master’s degree programs, students have two options to obtain their degree: (1) taking the comprehensive examination; or (2) writing a thesis. Students who undertake the writing of a thesis must give an oral presentation in front of a school panel recognized by the MoEYS after completing their research studies (Prakas No. 706 on the Master’s degree studies programs). Furthermore, the MoEYS has founded the Cambodia Research Journal

(“CRJ”) in an attempt to enhance research development in all fields. The CRJ is overseen by an editorial board; Dr. Neth Barom is the chief editor. There is also an advisory board; Dr. Phoeurng Sackona, the secretary of state of the MoEYS, is the chief advisor (MoEYS Announcement No.3213, 2009).

The Department of Scientific Research has also recently drafted a research development policy for the education sector, one of the main tasks of the Directorate General of Higher Education (MoEYS, 2010). One of the main purposes of the policy is to establish a research culture in all HEIs by transforming them into research centers for developing and creating new knowledge. The policy on developing research in higher education is also intended to lead to the commencement of a new phase of advancement and improvement in the quality of higher education in Cambodia (Draft of Research Development Policy in Education Sector, 2010).

Meanwhile, to strengthen the quality of research in graduate programs, the RGC has established a National Commission for developing guidelines and procedures, and providing supervision on thesis and dissertation writing. The Commission has three main duties: (1) to develop regulations and procedures to govern the supervision of thesis and dissertation writing at the graduate level; (2) to submit their work to the government for review and approval; and (3) to do some more tasks assigned by the government. The Commission uses the secretariat of the ACC as its headquarters (Sub-decree No. 79, dated 27 May, 2009).

The Cambodian Higher Education Association is a non-governmental association consisting of 31 HEIs (Uy, 2006). It was established in 2004 through the approval announcement No.490 by the Ministry of Interior to help to strengthen the education services, especially developing learning, scientific research and technology among its members (CHEA Magazine, 2009).

Another task for the RGC to undertake in order to promote research in Cambodia is the introduction and reinforcement of intellectual property laws. Such laws concern three ministries: the Ministry of Culture and Fine Arts is in charge of the Law of Authors’ Rights and Related Rights, the Ministry of Commerce in charge of the Law on Marks, Trade Names and Acts of Unfair Competition, and the Ministry of Industry, Mines and Energy is in charge of the Law on Patents, Utility Model Certificates, and Industrial Designs (Bulletin of Works, Year I, Volume I, p.5, issued July 2010 by the Ministry of Culture and Fine Arts). With these laws, research at HEIs can be pushed forward because intellectual property rights relating to new works, innovations, and discoveries are protected by law. However, for the effective implementation of intellectual property rights, these three ministries should combine their different duties into one institution (An, 2008). According to the International Intellectual Property Alliance’s 2007 report on Cambodia, despite concerted efforts to enforce intellectual property-related laws, most people are not willing to or able to abide by the law, especially the copyright law. From an academic prospective, the copyright law in its current state does not help students who have financial problems because it would not allow them to access educational publications at a low cost (when comparing prices to

those in the Philippines and India for example). In recognition of this reality, Mr. Var Roth San, director of the Intellectual Property Department at the Ministry of Industry, Mines and Energy, said that the law is not perfect, but will work more smoothly in the future (An, 2008). Historically, Cambodian intellectual property laws and regulations first came into existence on June 10, 1997 when the Ministry of Industry, Mines, and Energy issued a Prakas on the Establishment of a Bureau for Industrial Project Ownership. After that, the Ministry of Commerce issued on 28 November 1997 a Prakas on the Organization and Functioning of Intellectual Property Department. Finally, the RGC decided to establish the Intellectual Property Department on 15 December 1997 (Kong, 2006).

VII. Conclusion

The RGC has exerted tremendous efforts to establish a national policy and legal framework to guide the future development of higher education in Cambodia (Mook, 2002). This legal and regulatory framework is essential to provide HEIs with structures and systems needed for strong and transparent institutional self-governance (Pok, 2002).

Nevertheless, the government has quite a long way to go and further duties and commitments to fulfill in order to develop the legal norms for improving higher education. The funding for developing higher education in Cambodia seems to be limited to only about 3.4% of total government expenditures on education (Pak, 2009).

Ngoy Mak (2009) listed the key tasks which the MoEYS will have to fulfill in the future: (1) to develop new legal norms and make amendments related to accreditation regulations in compliance with the Law on Education; and (2) to develop a strategic policy to guide improvement in the quality of higher education. One of the new regulations which will be made in the future is about the ranking and status of HEI instructors. In the future, the 2020 Higher Education Strategic Plan will be reviewed and completed. Moreover, to provide guidelines for local students who wish to take a local HEI-based international program, the MoEYS and the ACC should make public announcements about unaccredited foreign schools and unapproved accrediting bodies. This will ensure safe cooperation between local HEIs and foreign universities and that local students receive genuine advantages from their study. The announcement could help local schools and students to avoid confusion and doubts about the accreditation and quality of study programs. For instance, in 2008, an international university offered its programs in cooperation with a local university before it had been verified as an accredited school and doubts over its credentials and degrees were raised (Quinn, 2008).

In terms of legal education, only ten universities – or approximately 12 percent – of the seventy-six HEIs in Cambodia provide law education programs. Seven or eight of these HEIs have sent their law students to join the annual mock trial (Saray, 2010). Extra

activities on legal education seem to be financially dependent on the assistance of the international community. This assistance needs to be locally targeted.

Research activities at Cambodian HEIs seem to be limited; that is why the Department of Scientific Research will have to develop a research policy for all HEIs and revise the procedures for thesis presentations and defense to ensure that they are more comprehensive (MoEYS, 2010). Research capacity at Cambodian private and public HEIs is generally an underdeveloped area. This problem might be linked with both the lack of budget and infrastructure, for example, the copyright regulations, research facilities, and laboratories (Hirosato and Kitamura, 2009). In this context, the MoEYS has set the strategies and targets, one of which is to upgrade computer equipment and the learning environment at libraries and laboratories (MoEYS, 2004).

Raymond Zepp (2005) also highlighted the causes of low levels of research activity associated with higher education in Cambodia. First, few graduates are fascinated and encouraged to take research-oriented graduate programs. Second, there is a lack of emphasis on research in the graduate programs and lack of local demand for research information. Third, there are insufficient numbers of qualified trainers in research methodology. Last, there is lack of commitment from universities to promote research by their faculty members. In contrast, in Europe, extension in the number of researchers and improvements in research quality are necessary to cope with the challenges in the knowledge society and knowledge economy. The percentage of young scholars embarking on research activities after graduation exceeds the percentage of scholars still alive in research before retirement (Teichler and Schomburg, 2008).

Likewise, Dr. Pheng Kol (2008) has raised twin challenges facing higher education: (1) the support of world-class research; and (2) the delivery of economic and social benefits, both locally and internationally. The MoEYS should promote and support research at all HEIs, promote exchange programs such as research programs with other countries, and recognize the capacity of research and innovation to drive growth in a knowledge-based society (Pak, 2009). Furthermore, the future targets and strategies for higher education should be to expand science, technology, and mathematics programs in all public and private HEIs (Pak, 2006).

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87. ACC Announcement No.193/09 on *the Inclusion of Additional Contents of Khmer Culture, and Customs, Traffic, Drug, AIDS, Khmer Rouge History and other Recent Challenges into the Foundation Year Study Program.*
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92. Rule No.1402 for the Final Examination or Entrance Examination at the Higher Education Institutions under the Ministry of Education, youth and Sports.

WOMEN AND THE LAW IN CAMBODIA

Milana PLISCHUK

CONTENTS

I. Introduction.....	383
II. CEDAW	384
III. Constitution of the Kingdom of Cambodia	386
IV. Penal Law	387
1. Women as a victim of crime.....	388
Rape.....	388
Intentional violence	388
Trafficking	388
Facilitation of Prostitution	389
Crimes against humanity.....	390
Pornography.....	390
Acts of Immodest.....	390
Bigamy.....	390
Regulations targeting protection of minors.....	390
Aggravating circumstances due to the pregnancy of the victim.....	391
Penal Laws targeting discrimination of women.....	391
2. Women as an offender of crime	391
Soliciting prostitution.....	391
Abortion	391
Right to defend oneself	392
Regulations targeting protection of minors.....	392
V. Law on the Prevention of Domestic Violence.....	392
VI. Family Law	393
VII. Labor Law	393
VIII. Land Law	394
IX. Conclusion	395

WOMEN AND THE LAW IN CAMBODIA

*Milana PLISCHUK**

I. Introduction

The Equality of Men and Women has been a major topic for constitutional and legal reform in countries around the world for more than a hundred years. In most states and societies women were traditionally not having same rights and reform had to be achieved through legal reform as well as a change in general attitudes. International human rights law has promoted gender equality from its early times after World War II.

The Constitution of the Kingdom of Cambodia emphasizes gender equality as an important principle. By doing so it addresses the traditional gender disparities in Cambodian society. Due to traditional gender roles and conducts (Chbap Srey and Chbap Pros) women have long been perceived as having a lower status than men in the society, with an expectation of women to be faithful, modest and obedient¹. For that reason women in Cambodia have been put at disadvantage in the social, economic and political life.

For instance, Cambodia has gender disparities in employment based on the perception of “appropriate” occupations for women in the Cambodian society². In Cambodia, as in other countries, women are still underrepresented in the senior positions of civil services as much as in the private sector³. Women undertaking the same work as men are also often paid less for the same work⁴.

Furthermore, traditionally there have been fewer girls than boys in all levels of education, particularly the enrollment of girls drops at each higher level of education⁵.

* Ms. Milana Plischuk is Attorney at law in Hamburg, Germany. In 2010, she worked for two months with the German legal advisor to the Ministry of Women's Affairs in Phnom Penh. Opinions presented are her own only.

1 A Fair Share for Women, Cambodia Gender Assessment, Ministry of Women's Affairs, 2008, page 5; Katrin Merhof, Women's Rights in Southeast Asia's Constitutions and their implementation: The start of a long process, page 181 in Clauspeter, Hill/Jörg Menzel, Constitutionalism in Southeast Asia, 2009.

2 A Fair Share for Women, Cambodia Gender Assessment, Ministry of Women's Affairs, 2008, page ii.

3 A Fair Share for Women, Cambodia Gender Assessment, Ministry of Women's Affairs, 2008, pages 25; 173 etc.

4 Cambodian Employment and Labour Law, International Labour Organization, Community Legal Education Center, Eduard de Bouter, Daniel Adler, Lee I Meng, Patricia Baars, 3rd Edition, 2005, page 117.

5 A Fair Share for Women, Cambodia Gender Assessment, Ministry of Women's Affairs, 2008, pages 74.

Violence against women and societal attitudes to it are considered a concern by the Cambodian government⁶. Rape⁷, human trafficking and sexual exploitation are problems, which have particularly been addressed by legislation and government policies.

Domestic violence is still a problem and people sometimes still consider it to be the result of the behavior of the wives⁸. There is still a lack in prosecution of the offenders of gender based violence stated⁹.

For all those reasons the Royal Government of Cambodia has participated in International Conventions and adopted a broad legal framework to empower women, particularly ensuring individual non-discrimination, targeting equality of women in society in general, envisaging support for women in need and protecting women from specific dangers. This article enlightens the provisions targeting the mainstreaming of gender and empowerment of women. Although, the implementation of some provisions faces obstacles in the Cambodian reality, the legal framework adopted in Cambodia provides a certain basis for the elimination of discrimination of women as much as their protection.

II. CEDAW

The Convention for Elimination of all forms of Discrimination Against Women (CEDAW) is an international Convention adopted by the United Nations General Assembly in 1979 and entered into force on the 3rd of September 1981.

Cambodia signed the CEDAW in October 1980 and ratified it in October 1992 with no reservations.

The Cambodian Constitution recognizes the CEDAW, the United Nations Charter and the Universal Declaration of Human Rights in the first Paragraph of the Article 31, which makes the CEDAW directly applicable in Cambodia¹⁰ as much as to a basic document constituting the state obligations necessary to eliminate discrimination against women.

CEDAW regulations complement and integrate the existing Conventions which aim to protect women's rights, such as the Universal Declaration of Human Rights from December 1948, which declares equality of men and women and entitles them to equal protection of the law¹¹. Cambodia has also signed the Covenant on Civil and Political

6 A Fair Share for Women, Cambodia Gender Assessment, Ministry of Women's Affairs, 2008, page 132.

7 Breaking the Silence – Sexual Violence in Cambodia, Amnesty International Publications, 2010, page 5.

8 A Fair Share for Women, Cambodia Gender Assessment, Ministry of Women's Affairs, 2008, page 132.

9 Breaking the Silence – Sexual Violence in Cambodia, Amnesty International Publications, 2010, page 22 etc.; Katrin Merhof, Women's Rights in Southeast Asia's Constitutions and their implementation: The start of a long process, page 187 in Clauspeter, Hill/Jörg Menzel, Constitutionalism in Southeast Asia, 2009.

10 Katrin Merhof, Women's Rights in Southeast Asia's Constitutions and their implementation: The start of a long process, page 185 in Clauspeter, Hill/Jörg Menzel, Constitutionalism in Southeast Asia, 2009.

11 Art. 7 of the Universal Declaration of Human rights.

Rights and on Economic, Social and Cultural Rights. However, for the first time CEDAW combined civil and political rights with the economic, social and cultural rights in order to systematically address the needs of women¹².

The first part of the Convention provides a comprehensive definition of discrimination against women (Art.1) as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. The term of discrimination of the CEDAW is very broad. It includes direct and indirect discrimination, which is intended or unintended, in law and in practice, in private and public spheres.

Furthermore it sets general state obligations to fulfill in order to eliminate the discrimination of women, such as the embodiment of the principle of equity of men and women in the national Constitutions, adoption of legislative and other measures prohibiting and sanctioning discrimination, particularly related to trafficking of women and any kind of sexual exploitation, but also abolishing discriminative regulations and seizing measures to eliminate discrimination against women exercised by any person, organization or enterprise (Art.2). States shall also seize all measures to ensure the full development and advancement of women concerning exercising of human rights and freedoms, as much as appropriate measures to eliminate prejudices in the society and other measures to eliminate discrimination, but also to seize appropriate measures, including legislation in the political, social, economic and cultural fields (Art.3).

The second part of the Convention contains specific non-discrimination principles related to discrimination in political and public life (Art.7) as much as nationality regulations (Art.9) and furthermore includes related state obligations.

The third part deals with the elimination of discrimination in the areas of education, employment, health care and in other economic and social areas, particularly family benefit, right to financial credits or any kind of participation in cultural life.

Equity of men and women before law (Art.15) and elimination of discrimination of women in all matters related to marriage and family relations (Art.16) are envisaged in the fourth part of the Convention.

In the fifth part the Committee on the Elimination of Discrimination against women is introduced, responsible for monitoring on the progress done in the implementation of the Convention (Art.17). To give effect to the provisions of the present Convention and on the progress made in this respect, States Parties undertake to submit a report on the legislative, judicial, administrative or other measures which they have adopted to the Secretary-General of the United Nations, for consideration by the Committee (Art.18). The Committee examines the reports and makes suggestions and recommendations to

¹² Forster, Christine/Vedna, Jivan, *Gender Equality Laws*, 2009, P.25; Koerner, *Zeitschrift für Rechtspolitik*, 2005, 223.

the General Assembly of the United Nations, based on the information received by the States, (Art.21).

To ensure the integrity of the reports delivered by the State Parties, the NGOs have established a practice of delivering shadow reports to the Committee containing critical analysis of the State Reports¹³.

The obligation of delivering a regular report on the seized measures ensures Member States to fulfill their obligation stated in Art.2–16 of the Convention.

Cambodia has already submitted several reports recording considerable progress in approaching the aims of the Convention, such as the adoption of a gender sensitive Constitution or the adoption of laws protecting women against violence¹⁴.

The Optional Protocol to CEDAW regulates a procedure for complaints by individuals which entered into force in December 2000. In an important step, the Optional Protocol has been recently ratified by Cambodia, allowing Cambodian women to present their cases to the committee.

The great significance of CEDAW is not only to set the human right standards for women, but also to impose the Member States to adopt the appropriate legislation and ensure the practical realization of substantive gender equality (Art.2). The regulations of CEDAW are not only source of laws and standards in Cambodia, but also an interpretative mean due to the understanding of Cambodian legislative acts “in the light” of international guarantees.

III. Constitution of the Kingdom of Cambodia

The Constitution of the Kingdom of Cambodia is the Supreme Law, which means that all Laws and Decisions made by the State institutions must be in strict conformity with the Constitution (Art.150 of the Constitution of Cambodia).

The Constitution contains several regulations targeting gender equality. According to Art.31 Paragraph 2 of the Constitution of Cambodia every Khmer citizen shall be equal before the law, enjoying the same rights, freedoms and fulfilling the same obligations regardless of race, color, sex etc.

Art.34 of the Constitution mentions the right of Khmer citizens of either sex to vote and to stand as candidates for elections. Furthermore, Art.35 of the Constitution contains the right of Khmer citizens of either sex to participate actively in the political, economic, social and cultural life of the nation.

According to Art.36 of the Constitution Khmer Citizens of either sex shall enjoy the rights to choose any employment according to their ability and the needs of society, to obtain social security and other social benefits as determined by law, to form and to

13 Koerner, *Zeitschrift für Rechtspolitik*, 2005, 223, 224.

14 http://cncw.gov.kh/userfiles/file/left%20folder/Initial2nd3rdreport_03_Eng.pdf

be members of trade unions. Paragraph 2 of the Article requires equal payment for the same work done by men and women. Furthermore, Paragraph 3 of the Article states that housework shall have the same value as work outside the home, thereby increasing the value of the housework traditionally exercised by women.

Art.45, Paragraph 1 of the Constitution expressly declares the state obligation of abolishment of all forms of discrimination against women. According to Paragraph 2 of the Article the exploitation of women in employment is prohibited. Paragraph 3 attacks the inequity of men and women in all fields, particularly with respect to marriage and family matters and declares the equality of men and women. Paragraph 4 of the Article requires marriages to be conducted according to law and based on the principle of mutual consent of men and women between one husband and one wife only.

Furthermore, Art. 46 of the Constitution prohibits in its first Paragraph trading of human beings, the exploitation of prostitution and obscenity, which affect the reputation of women.

The second Paragraph of the Article pays attention to the vulnerability of women during the pregnancy. According to this article the termination of woman's employment because of her pregnancy is prohibited. Women shall have the rights to take maternity leave with full pay and with no loss of seniority or other social benefits.

The third Paragraph takes into account the special needs of women. The State and society shall provide opportunities to women, especially for those living in rural areas without adequate social support, so that they can obtain employment and medical care, send their children to school and have decent living conditions, which can only be understood as a state obligation.

It can be stated, that the Constitution not only contains basic rights for women, as rights against the state, but also state obligations to work towards the completion of gender equality¹⁵.

IV. Penal Law

The New Penal Code of Cambodia came into force in December 2010. It provides numerous gender related regulations. Though, the criminal laws apply to both, men and women, there are certain offenses, which are regularly committed by women and those where women are typically displaying the role of the victim.

¹⁵ Katrin Merhof, Women's Rights in Southeast Asia's Constitutions and their implementation: The start of a long process, page 185 in Clauspeter, Hill/Jörg Menzel, Constitutionalism in Southeast Asia, 2009.

1. Women as a victim of crime

Rape

According to Art.239 of the new Penal Code all acts of sexual penetration, by violence, coercion, threat or surprise constitute a rape, punishable with imprisonment of 5 to 10 years. In general, sexual penetration without consent of the victim is seen as a crime with no regard to the marital status between the offender and the victim.

The punishment rises when aggravating circumstances are fulfilled, which can be based on means used when crime was committed, such as weapons or related to the connection of the offender to the victim, for instance when the offender has legal authority over the victim, or when the victim is particularly vulnerable, for instance due to its pregnancy (Art.240–241). Aggravating circumstances can also be based with regard to inflicting harm to the victim, such as torture, disability or the death of the victim (Art.242–244).

Intentional violence

The punishment of intentional violence is foreseen in the Art.217 of the Penal Code. This criminal offense of intentional violence is regularly, but not only, committed, when a rape has been fulfilled. As mentioned above, aggravating circumstances appear, when the violence has been used with premeditation, or by several offenders, or by utilization or threatening with weapons (Art.218), or if the victim is a pregnant women, which is apparent or known to the offender (Art.219).

Art.222 clarifies that domestic violence used by spouses or concubines is a criminal offense and imposes a higher punishment on its commitment.

Trafficking

The Law on Suppression of Human Trafficking and Sexual Exploitation (TSE), enacted in 2008, is a special penal law which remains effective after the New Penal Code comes into force.

It contains a range of criminal offenses targeting the abolishment of trafficking and any kind of sexual exploitation in Cambodia. Furthermore, it extends Cambodian jurisdiction to criminal cases, when the victim is Cambodian citizen at the time of the commission of the offense in order to combat human trafficking appropriately. However, Art.21 of the Penal Code restricts this extension of the extraterritorial application of Cambodian jurisdiction to felonies only, while Art.51 of the TSE declares the applicability of the Penal Code in this regards.

In particular, the TSE Law contains the following provisions: According to Art.8 of the TSE Law, unlawful removal from the place of residence to the actor's or a third person's control by the means of force, threat and deception is considered a crime. The punishment rises if the unlawful removal is committed in the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adop-

tion or any form of exploitation, which is the exploitation of the prostitution of others, pornography, commercial sex act, forced labor or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labor or the removal of organs (Art.10 of TSE Law) or for the purpose of Cross-border Transfer (Art.11 of TSE Law).

Art.12 of TSE Law criminalizes unlawful recruitment for exploitation, which means to induce, hire or employ a person to engage in any form of exploitation with the use of deception, abuse of power, confinement, force, threat or any coercive means.

Any act of selling, buying or exchanging a human being, or its procuring or acting as an intermediary is penalized by Art.13–14 of TSE law, while Art.15 of TSE law imposes a higher punishment in case of the purpose of sexual exploitation and Art. 16 of TSE law in case of purpose of Cross-border Transfer.

Art.17 and 18 of TSE law penalize any kind of transportation and Cross-border transportation knowing that the victim is being unlawfully removed, recruited, sold, bought, exchanged or transported for the purpose of any kind of exploitation.

Any kind of assisting by receiving, harboring or concealing of victims of the previously stated criminal offences is considered as a crime by Art.19 and 20 of TSE Law.

To approach the trafficking elimination effectively, Art.21 and 22 of TSE and Art.253–255 of the Penal Code furthermore penalize any kind of illegal abduction, detention and confinement of other persons.

Facilitation of Prostitution

Art.23 of the TSE Law defines prostitution as having sexual intercourse with an unspecified person or other sexual conduct of all kinds in exchange for anything of value and child prostitution as a corresponding act with a minor, a person under the age of eighteen years (Art.7 TSE Law).

Neither the TSE Law, nor the Penal Code criminalizes the person of the prostitute or the child prostitute. The TSE Law only considers the facilitation of prostitution, such as procuring prostitutes, direct or indirect management of prostitution establishments through an intermediary, or its exploitation, financing or operating as a criminal offence as much as rendering place to prostitution (Art.25–31 TSE Law and Art.284–293 of the Penal Code). Procurement must be understood in a broad way. It always requires the offender to draw financial profit from the prostitution of others. Procurement is nevertheless considered committed by assisting or protecting the prostitution of others; recruiting, inducing or training a person with a view to practice prostitution or by exercising pressure upon a person to become a prostitute. Anyhow, serving as an intermediary between the prostitute and a person who exploits or remunerates the prostitution, facilitating or covering up resources knowing that such resources were obtained from a procurement and hindering the act of prevention, assistance or re-education for the benefit of persons engaging in prostitution as much as being in danger of prostitution are being considered equivalent to the criminal act of procuring prostitution, Art.25 TSE Law.

The TSE Law enumerates a range of aggravating circumstances, such as procuring by an organized group or by use of violence or torture, Art.27, 29 TSE Law.

The TSE Law stipulates punishments on further acts related to child prostitution, such as any kind of purchase of child prostitution, making related contracts or providing a conditional money loan in connection with child prostitution, Art.33–37.

Crimes against humanity

According to Art.188 of the Penal Code when committed within the framework of a generalized or systematic attack carried out against civilian population, rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and all other forms of sexual violence of the same seriousness constitute a crime against the humanity punished to a life imprisonment. It requires the knowledge of the offender of the generalized and systematic attack.

Pornography

Art.38–41 of TSE law criminalize the distribution, selling, leasing, displaying, projecting or presenting of pornography and child pornography in public places. Possession, transport, import, export and production of pornography and child pornography for the purposes stated above are considered as a criminal offence. The TSE Law lacks regulations about displaying and projecting child pornography in a private place and those related to possession, production and transport of child pornography without any specific purpose.

Acts of Immodesty

According to Art.246 of the Penal Code all acts of immodesty of any kind whatsoever, committed on any person by violence, coercion, threat or by surprise are considered a crime. Among other aspects, the punishment rises, if the victim is apparently a pregnant woman, Art.248 of the Penal Code.

Sexual harassment is penalized in Art.250 of the Penal Code, when the offender abuses the power, which was vested to him in his functions in order to put pressure on other persons in exchange for sexual favor.

Exposure of sex organs within the sight of another person in a place which is accessible to the public eyes is considered a criminal offence in Art.249 of the Penal Code.

Bigamy

Art.353 of the New Penal Code penalizes the registration of a second marriage prior to the dissolution of the first marriage.

Regulations targeting protection of minors

The Penal Code has introduced a range of criminal offences targeting the protection of minors, which regularly involve women. For instance the following offences are consid-

ered as a crime: failure of paying alimony (Art.324), taking away or failure of handing over a minor to the person with legitimate rights of claim (Art.326, 327), incitement to abandon a child (Art.330), intermediation in order to provide an adoption or abandoning of a child or acceptance to bear pregnancy for the child for profit making purpose (Art.331).

Aggravating circumstances due to the pregnancy of the victim

The Penal Code furthermore considers pregnancy of the victim, known by the offender as an aggravating circumstance to crimes against property, for instance in cases of fraud, Art.382 of the Penal Code or extortion Art.386 of the Penal Code.

Penal Laws targeting discrimination of women

According to Art.265 and Art.266 of the Penal Code is any act refusing to supply goods or services to a person based on the person's sex, or putting supply on condition of the person's sex is considered to be a criminal offence.

The Art.267 etc. of the Penal Code penalize discrimination related to employment. Refusing to hire a person, offering employment is in the same way stipulated as a crime as dismissal or discharge based on a person's sex.

Furthermore, the Art.270 of the Penal Code criminalizes any acts of refusing the benefit of any rights to a person by a government official, civilian or military during his official functions or during the course of the performance of his functions.

According to Art.271 of the Penal Code the acts of discrimination are not considered a crime, if they are authorized by law. The provisions related to discrimination of women are also not applicable when sex is the requisite condition for any work or professional activities.

2. Women as an offender of crime

Soliciting prostitution

As mentioned above, prostitution itself is not a crime. Willingly soliciting prostitution in public is considered a petty crime according to Art.24 of the TSE Law and to the Art.298 of the Penal Code. This provision is faced with great criticism due to its unclear meaning of soliciting, causing the imprisonment of regular sex workers¹⁶. Generally a specific intended communication in public which leads to a public disorder is required. Victims of trafficking are excluded of this provision, lacking the will to solicit prostitution.

Abortion

According to the Law on Abortion dated to November 1997 women carrying out an abortion do not commit a criminal offence.

¹⁶ Breaking the silence – Sexual violence in Cambodia, Amnesty International Report, 2010, p.25.

Right to defend oneself

The Penal Code codified the legitimate defense in its Art.33. Women who make use of their right to defend themselves, when being object to unjustified aggression are not criminally responsible, if the offence is necessary to engage in defense against an unjustified aggression, the offence and the aggression happen at the same time and the means of defense are proportionate to the severity of the aggression.

Regulations targeting protection of minors

The Penal Code contains several provisions which are regularly committed by women due to their traditional parental role in the society. The following offences are considered a crime according to the Penal Code: abandonment of minors less than 15 years of age by a person who has the authority to take care of a minor (Art.321), acts of depriving foods or cares for minors less than 15 years of age (Art.337), placing a minor to working conditions, which endanger his health (Art.339), failure to send a minor to school (Art.343), incitement of minors to beg (Art.347) or to commit felonies and misdemeanors (Art.348), abuse of parental authorities (Art.350) or failure to inform the court or administrative authorities about mistreatment or sexual abuse of a minor less than 15 years of age (Art.542).

V. Law on the Prevention of Domestic Violence

The Law on the Prevention of Domestic Violence and the Protection of the Victims (DV Law), entered in force in October 2005, is a civil and administrative law¹⁷ empowering authorities to make use of measures to protect the victims of domestic violence. It does not impose a criminal punishment to the offender and does not contain any provisions related to the compensation of the victims. Hence, the provisions of the Penal-, Civil- and Procedure Codes are applicable alongside the DV Law¹⁸.

According to Art.9 of the DV Law the nearest authorities in charge have the duty to urgently intervene in case domestic violence occurs or is likely to occur. Art.13 of the DV law provides the authorities in charge for instance the right to move the perpetrator from the scene, to move the victims regularly on their request or to offer appropriate assistance to the victims in accordance with their circumstances. The authorities have the right to access the scene in case of a *Flagrante delicto*, Art.15 DV Law.

Furthermore, the authorities in charge can issue a temporary administrative decision, for instance prohibiting the offender to destroy the properties or prohibiting to ap-

17 Explanatory Notes on the Law on the protection of Domestic Violence and the Protection of the Victims, Ministry of Women's Affairs, 2007, page 29 ff.

18 Explanatory Notes on the Law on the protection of Domestic Violence and the Protection of the Victims, Ministry of Women's Affairs, 2007, page 29 ff.

proach or to enter the house shared together or the places where the victims stay or work (Art.14 DV Law)¹⁹.

The DV Law also contains the possibility on issuing a protection order by the court, which is a temporary civil measure with the power to impose orders on the perpetrators, authorities in charge and persons involved, Art.20 DV Law. To prevent domestic violence the protection order aims to influence the private relationship between household members. It can contain the orders listed in Art.25 DV Law, for instance: prohibiting from committing domestic violence by themselves or by others; prohibiting the perpetrators from contacting the victims through any means; making a decision on the custody of the children and the rights to visit the children; halting the victims' duty of financial support towards the perpetrators, and so on.

VI. Family Law

The Law on Marriage and the Family is now comprehensively regulated in the new Civil Code. It is based on the principle of equality of men and women, as Article 2 of the Civil Code generally stipulates (“equality of sexes”). There are still certain inequalities. For example, there still is a provision regarding a “period of Prohibition of marriage” (120 days) after divorce, which only applies to women (Article 950 Civil Code), but it is less strict than the previous regulation on this issue. “Family Law” is discussed elsewhere in a separate chapter in this book, it does not need to be addressed in detail here.

VII. Labor Law

According to the Labor Code, adopted in March 1997, no employer shall consider on account of sex to be the invocation in order to make a decision on:

- hiring,
- defining and assigning of work,
- vocational training,
- advancement,
- promotion,
- remuneration,
- granting of social benefits,
- discipline or termination of employment contract,
- distinctions, rejections, or acceptances based on qualifications required for a specific job shall not be considered as discrimination.

¹⁹ Explanatory Notes on the Law on the protection of Domestic Violence and the Protection of the Victims, Ministry of Women's Affairs, 2007, page 120

The Art.12 of the Labor Code admits only an exception in this regards for the provisions fully expressing under the Labor Code, or in any other legislative text or regulation protecting women and children.

According to Art.172 of the Labor Code, all forms of sexual violation and harassment are strictly forbidden.

Furthermore, the Labor Code strengthens women's rights guaranteeing a maternity leave of ninety days, Art.182. During the first two months after they return to work, they are only expected to perform light work. The employer is also not allowed to fire a woman during her maternity leave or when the end of notice period would fall into the maternity leave.

According to Art.183 of the Labor Code, women are entitled only to half of their wage including their perquisites, paid by the employer, however, only if they already served in the enterprise for one year without interruption. This article is contrary to the Cambodian Constitution. As mentioned above, Art.46 Paragraph 2 of the Constitution requires women to receive their full pay during the maternity leave with no restrictions. Due to its Supremacy, the provision of the Constitution overrules the Labor Code regulation. During the maternity leave women fully reserve other benefits, such as seniority or other social benefits²⁰.

Moreover, Art.184 of the Labor Code grants mothers who breastfeed their children one additional hour of break to feed their children for a period of one year after child delivery. According to Art.186 managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a daycare center. If the company is not able to install these services for children over 18 months old, female workers can place their children in any daycare center. The employer has to cover the costs hereby occurred.

VIII. Land Law

The Land Law, adopted in July 2001, for the first time introduced the co-ownership on land in its Articles 168 etc., according to which husbands and wives can equally share land property, empowering women to maintain control over the land. The land title bears both names if the spouses decide to register joint land ownership²¹.

20 Cambodian Employment and Labour Law, International Labour Organization, Community Legal Education Center, Eduard de Bouter, Daniel Adler, Lee I Meng, Patricia Baars, 3rd Edition, 2005, page 118.

21 Women's Perspectives: A Case Study of Systematic Land Registration, Cambodia; Mehrak Mehrvar, Chhay Kim Sore, My Sambath, Heinrich Böll Stiftung Cambodia, 2008, page 3.

IX. Conclusion

A comprehensive legal framework to strengthen women's rights in Cambodia has been adopted. Although there is still place for improvement, not only in law adoption, but also implementation and enforcement, Cambodian gender related Laws build a favorable basis to approach gender disparities.

However, in practice women still face discrimination issues. For instance, the implementation of the Law on the Prevention of Domestic Violence and Protection of Women still constitutes a problem due its vagueness concerning the authorities in charge to intervene. Apart from it, victims as much as the state authorities often regard domestic violence as a private matter and hesitate any involvement²². According to reports the Articles criminalizing the soliciting of prostitution continue to contribute to inappropriate treatment of regular sex workers by state authorities.

Generally, the traditional perception of women based on Chpab Srey hinders further success in achieving gender equity in the further fields such as in employment, family or land issues. Although progressive laws need to be accompanied by changed attitudes in society, the laws adopted by the Cambodian legislature to empower women in the Cambodian Society have to be appreciated as a great step towards achieving gender equity and equality. They are part of the fulfillment of the constitutional promises and can contribute to the achievement of better equality of men and women.

22 Katrin Merhof, Women's Rights in Southeast Asia's Constitutions and their implementation: The start of a long process, page 187 in Clauspeter, Hill / Jörg Menzel, Constitutionalism in Southeast Asia, 2009.

RIGHTS OF INDIGENOUS PEOPLES IN CAMBODIA

SOTH Sang-Bonn

CONTENTS

I. Abstract.....	399
II. Introduction.....	399
III. The difference between ethnic minority groups and indigenous peoples..	400
1. Who are ethnic minority groups?.....	400
2. Who are indigenous peoples?.....	400
IV. What does “indigenous peoples” mean to international institutions?	401
1. International Labor Organization convention	401
2. The charter of the United Nations	401
3. The Asian Development Bank	402
4. The term “indigenous people” in the Cambodian context.....	403
5. The status of indigenous peoples in the Cambodian context.....	403
V. Why protection is required for indigenous peoples’ rights?.....	404
VI. What protection systems are there for indigenous people in Cambodia? ..	406
1. The legal protection.....	406
2. Institutional protection	410
3. What are the gaps in the protection of indigenous peoples’ rights?	411
4. Key findings	412
VII. Conclusion	414
1. Social aspect.....	416
2. Legal aspect.....	416
3. Practical aspect	416

RIGHTS OF INDIGENOUS PEOPLES IN CAMBODIA

*SOTH Sang-Bonn**

I. Abstract

There has been very little research¹ and literature on the updated status and legal protection of the rights of indigenous peoples in Cambodia, and it appears that there are not many Cambodian scholars who are interested in this field as yet. To respond to this gap in the literature, this paper, which the author bases on secondary data and personal observations, attempts to examine the status and legal protection of indigenous peoples in Cambodia, and the practical relevance in the Cambodian context.

In the first part of this paper, the author reflects on general aspects of the status of indigenous peoples in Cambodia. The second part highlights different understandings about indigenous peoples and their rights from global, regional and local perspectives. The third part provides comparative reasons for the protection of the rights of indigenous peoples. The fourth part examines the protection systems for indigenous peoples rights, which include protections at the global, regional and domestic level. Most importantly, in the fifth part, the author presents some key findings along with analysis on the subject matter. Lastly, this paper finishes with some concluding remarks and suggestions.

II. Introduction

Cambodia covers a land area of 181,035 km. It is situated in Southeast Asia and bordered on the Northeast by Laos, on the East and Southeast by Vietnam, on the West and Northeast by Thailand, and on the Southwest by the Gulf of Thailand. According to the population census of 2008, the population is between 13.8 to 14.8 million people with roughly 90 percent of the population made up of ethnic Khmer.² The remaining 10 percent is made up of a number of different groups, namely Cham, Chinese, Lao, Thai, Vietnamese and indigenous peoples.

* Mr. SOTH Sang-Bonn is Chief Cabinet of Deputy-Secretary General of the Senate, Cambodia, LL.M (National University of Singapore), LL.B (Royal University of Law and Economics)

1 Alexandra Xanthaki, *Land Rights of Indigenous Peoples in South-East Asia*, 2003, (Melbourne Journal of International Law [Vol 4]).

2 Population census 1998; see also the Statistical Year Book, 2005 and the National Institute of Statistic, 2008.

The different groups include ethnic minorities and indigenous people that have different ways of livings. For instance, the traditional livelihoods of the indigenous peoples are primarily dependent on shifting cultivations, which requires them to move from one place to another and clear land for their cultivations. Indigenous peoples are also dependent on forest sub-products, hunting and natural resources. Indigenous peoples, both in Cambodia and regionally and internationally, have generally had a lower standard of living than the majority of the population, making them a vulnerable group. Indigenous peoples have been subject to discrimination and have suffered from inadequate access to resource development for generations. They have been in a weak position to properly protect themselves due to language barriers, lack of understanding about laws and lack of political representation. In contrast to the indigenous people, the livelihood of ethnic minorities are voluntarily integrated with the majority.

III. The difference between ethnic minority groups and indigenous peoples

1. Who are ethnic minority groups?

Ethnic minorities can be referred to as polyethnic national groups.³ These groups are mainly migrants from different countries who have a different ethnicity, religion, language or culture to that of the majority of people in the place where they live. In Cambodia, for instance, these groups include Cham, Chinese, Lao, Thai and Vietnamese. Unlike the indigenous minority, the ethnic minorities voluntarily incorporate themselves into the state's system with no coercion.⁴ They often later form ethnic communities in order to maintain an identity different from the mainstream society and yet are linguistically and institutionally integrated into the institutions of the majority culture.

2. Who are indigenous peoples?

In the absence of a normative agreement on the definition⁵ of the term “indigenous peoples” at the international level, academics, scholars and researchers define the term differently. For instance, Franke Wilmer, one of the prominent researchers and scientists in the field of social science broadly defined the term in the book called, “The Indigenous Voice in World Politics”. He stated that indigenous peoples are those with tradition-based

3 Heinz Kleger, *The theory of multiculturalism and cultural diversity in Cambodia*, 2004, p. 42.

4 *Ibid.*, see para. 2.

5 Jeff J. Cortassel, *Who is indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity*, 2003. p. 51 See also Heinz Kleger, *The theory of multiculturalism and cultural diversity in Cambodia*, 2004, p. 14.

cultures who were politically autonomous before colonization and who, in the aftermath of colonization and/or de-colonization, continue to struggle for the preservation of their cultural integrity, economic self-reliance, and political independence by resisting the assimilation policies of nation-states.⁶ Similarly, Heinz Kleger defined indigenous peoples as mainly those peoples whose homelands have been overrun by settlers, colonists, or conquerors and who have been involuntarily incorporated into states run by people whom they regard as foreigners.⁷

IV. What does “indigenous peoples” mean to international institutions?

1. International Labor Organization convention

International communities at the regional and global level have different perceptions of what sort of groups constitute indigenous peoples, and therefore define the term in different ways. The International Labor Organization (“ILO”) is a specialized agency of the United Nations, which was established in 1919 (the end of World War I) by the Treaty of Versailles, which brought the League of Nations into being. The ILO defined the term “indigenous people” in the 1957 ILO Indigenous and Tribal Populations Convention (No. 107) (“ILO Convention 107”) including tribal populations that “are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization” and who remain socially, economically, and culturally distinct.⁸ In addition to this definition, ILO Convention 107 also attached importance to self-identification, the so-called ‘subjective element’ in every definition of indigenous peoples: “Self-identification as indigenous... shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”⁹

2. The charter of the United Nations

Whilst ILO Convention 107 introduced self-identification as an important subjective element, the charter of the United Nations (“UN”) contains nothing to help reconcile different uses of the term “indigenous peoples” in international law. Instead, Article 73 of the charter refers simply to “territories whose peoples have not yet attained a full measure

⁶ Franke Wilmer, *The Indigenous Voice in the World Politics*, 1993, p. 97.

⁷ Heinz Kleger, *The theory of multiculturalism and cultural diversity in Cambodia*, 2004, p. 15.

⁸ Article 1(1)(b) of the ILO.

⁹ Article 2(3) of the ILO.

of self-government.” However, this article also creates an obligation for state members to promote the well-being of the inhabitants of people in those territories.

Due to this vagueness, in 1987 the UN published the ‘Study of the Problem of Discrimination against Indigenous Populations’ by Jose Martinez Cobo, a UN Special Rapporteur¹⁰ appointed to work on the subject matter. He offered the following definition for the term indigenous:

*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*¹¹

This definition combines the element of distinctiveness, which characterizes both indigenous and tribal peoples, with the element of colonialism. In addition, the definition contains the following other essential elements: (1) “non-dominance at present”, implying that some forms of discrimination or marginalization exists; (2) the relationship with “ancestral land” or territories; (3) culture in general, or in specific manifestations (such as religion, living under a tribal system, or membership in an indigenous community); (4) language (whether used as the only language, the mother tongue, the habitual means of communication at home or in the family, or the main, preferred, habitual, general, or normal language); and (5) residence in certain parts of the country. This is the definition that has prevailed and is applied by the UN.

3. The Asian Development Bank

The Asian Development Bank (“ADB”) has defined the term “indigenous peoples” to include “those with specific social or cultural identity distinct from the dominant or mainstream society, which makes them vulnerable among the poorest to being disadvantaged in the process of development.”¹² The ADB definition also requires that indigenous peoples are those who descend from pre-state population groups, maintain their cultural and social identity, and retain separate social, economic, culture and political institutions.¹³

10 See Lejo Sibbel, *Good Governance and Indigenous Peoples in Asia*, 2005, p. 13

11 *Ibid* p. 379.

12 Asian Development Bank, *Indigenous Peoples/ethnic minorities and poverty reduction*, 2002, p. 3. See also: Anne Deruyttere, *Indigenous people and sustainable development: the role of the Inter-American Development Bank*, 1997.

13 Lejo Sibbel, *Good Governance and Indigenous Peoples in Asia*, Minority Rights Group International, 2005, p.16.

4. The term “indigenous people” in the Cambodian context

Research in the area indicates that there have not been any clear elements or criteria set out to characterize what groups constitute indigenous peoples in Cambodia. However, the term “indigenous people” is understood and officially used by the government in Khmer to refer to *chuncheat daoem pheak tech*, which literally means “minority original ethnicity”. Otherwise, the following terms are used interchangeably to refer to indigenous peoples, depending on the context: “hill tribes”, “*Kol sampoan phnum*”, “highlanders” or “highland people” “Khmer leu”, people within the region *Chun antao kream* and northeastern people, “*Neak eysan*”. Although the term *Chuncheat* has been commonly used, there is no standard definition of this term in either the law or the dictionary.¹⁴ During the development of the 2001 Land Law, the word *Chuncheat daoem pheak tech*¹⁵ was introduced and generally accepted to refer to indigenous people, with the exclusion of Cham, Chinese, Laos, Thais and Vietnamese, who are ethnic minorities but not indigenous people.

5. The status of indigenous peoples in the Cambodian context

In Cambodia, indigenous communities live in remote areas and the highlands of the country, particularly in the northeast provinces, which are rich in natural resources. The communities are relatively small in population. Compared to its neighbors in Southeast Asia, Cambodia may have the smallest number of indigenous people. They are traditionally held together by institutions governed by a strong common identity, language and culture; the leadership of elders; and adherence to customary laws. Although they are relatively small in number, it is difficult to quantify the exact number of indigenous peoples in Cambodia due to the lack of a regular, systematic scientific population study. However, the quantification so far has been made based on various research, literature and sporadic population censuses.

Despite controversial quantification, Stefan Ehrentraut claimed that there were at least 17 different groups of indigenous people identified by their distinct languages, with significant numbers living in at least ten of Cambodia’s twenty four provinces. However, in the introduction of the draft on “National Policy on Minority People Development”, which was produced in 1997 by the Ministry of Rural Development, it was affirmed that there were at least 24 groups of indigenous peoples living in Cambodia. Most research suggests that the total population of indigenous peoples in Cambodia ranged between 120,000 to 190,000, or between 1 to 1.4 per cent of the total population,¹⁶ mostly living

14 Christian Erni, *The Concept of Indigenous Peoples in Asia* 2008, p. 350.

15 Article 23 of the Land Law of Cambodia, 2001.

16 Stefan Ehrentraut, *Decentralization and the Promise of Indigenous Peoples’ Empowerment: The Case of the World Bank in Cambodia*, 2009, p. 2 and See also (ADB, 2002, IWGIA, 2007).

in the mountainous northeast and north of the country and in the provinces around the Cardamom Mountains.

The livelihood, traditional land security and natural resource management of indigenous peoples in Cambodia have been impacted due to economic development and increased migration from Cambodian lowlands.¹⁷

V. Why protection is required for indigenous peoples' rights?

There are various reasons to explain why protection of indigenous peoples' rights is required. Firstly, indigenous peoples are human beings among the poor and vulnerable.¹⁸ They are incapable of protecting themselves due to the lack of proportional representation and other reasons. This means that indigenous peoples in Cambodia, as well as up to approximately 15 percent of the world's 350 million indigenous peoples, are living in poverty, particularly those who live in developing countries.¹⁹

Secondly, the historical development of the state and nation-building shows that the rights of indigenous peoples have been neglected and thus indigenous peoples suffer injustice,²⁰ attitudes and acts of racial discrimination, and other conditions of severe disadvantage relative to others within the state. These acts of discrimination further affect the rights and abilities of indigenous peoples to participate in political and cultural institutions. As a result, indigenous peoples face a lack of proper representation in all fields, leading to them being crippled socially and economically.²¹

Thirdly, indigenous peoples are a constituent group within states that are subject to legal instruments protecting vulnerable groups. Indigenous peoples play important roles within these countries as they are significant groups with specific identities to reflect the historical development of nations. Their way of life can be used as a base to compare and to reflect the extent of development and modernization of a nation. An assessment of the extent of development within a country shall take into consideration all relevant aspects of development, without discrimination and ignorance of the welfare of certain groups. For this reason, the Universal Declaration of Human Rights ("UDHR") and other legal instruments assuring the rights of indigenous peoples have come into existence.

17 UNDP Cambodia in collaboration with the Ministry of Justice and the Ministry of Interior, *Phnong Ethnicity: Documentation of Customary Rules*, 2010. p.i.

18 William D. Sunderlin, *Community Forest and Poverty Alleviation in Cambodia, Lao-PDR, and Vietnam: An Agenda for Research*, 2004, p. 3.

19 World Bank (2003). *Implementation of Operational Directive 4.20 on Indigenous People: An Independent Desk Review*. Washington, DC., World Bank, p. 6.

20 United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007 recognizes that Indigenous Peoples suffered from injustices, para. 6.

21 See Burger, "Life at the bottom" for Indigenous Peoples worldwide in terms of employment, health, discrimination, and social marginalization, at 17-31.

Fourthly, protection of indigenous peoples' rights often corresponds to protection of nature and the environment. The livelihoods of indigenous peoples in Cambodia and elsewhere have traditionally been linked to and dependent on the natural environment.²² Thus, preservation of their livelihood and provision of other protections would mean a contribution to both the preservation of the environment and the protection of indigenous peoples' rights. This proposition has also been supported by many scholars and researchers around the globe. For instance, Benjamin J. Richardson claimed that threats and dangers to the environment could be partly reduced by promoting a peaceful collaboration and respecting the rights of indigenous peoples.²³ The crisis could be solved with consideration to preserving the customary law of indigenous cultures and their livelihoods to ensure they live by the law of nature and that we could learn traditional skills in sustainably managing complex ecological systems.²⁴

Additional reasons and evidence can be seen in the Rio Declaration on Environment and Development and Agenda 21. In these two instruments the international community recognized the important role of indigenous peoples in environmental management and development because of their traditional knowledge and practices.²⁵ A similar recognition of the importance of indigenous peoples can be found in the Convention on Biological Diversity, which calls upon the state parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider applications with approval involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."²⁶

Lastly, indigenous peoples are primarily victims, but not perpetrators of environmental harm. For instance, indigenous resources have to some extent been reduced and mismanaged in order to make quick profits and promote economic development through the construction of dams, mines and other projects that have had ruinous consequences for native lands and communities. For these reasons it is noted that indigenous peoples in most states have been deprived of vast landholding rights and access to life sustaining resources.²⁷ Some projects have undermined the economic foundations of indigenous

22 William D. Sunderlin, *Community Forest and Poverty Alleviation in Cambodia, Lao-PDR, and Vietnam: An Agenda for Research*, 2004, p. 3.

23 Benjamin J. Richardson, *The Ties That Bind: Indigenous Peoples and Environmental Governance*, CLPE RESEARCH PAPER 26/2008, p.5; see also, *UNEP's New Way Forward: Environmental Law and Sustainable Development (UNEP, 1995)*.

24 World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) 114-15.

25 Rio Declaration, principle 22 and Agenda 21, Chapter 26.4.

26 Article 8 (j) of Convention on Biological Diversity, 1992.

27 S. James Anaya, *Indigenous People in International Law*, 2004, p. 4.

communities, spawned various public health problems, and caused great impact to indigenous cultures.²⁸

The above reasons make it clear that protection of the rights of indigenous peoples is required because they are vulnerable groups that are incapable of properly protecting themselves, they are champions of environmental protection, victims of environmental degradation and disasters, sufferers of discrimination, and actors of the state that play an important role in reflecting the development and modernization of a country.

VI. What protection systems are there for indigenous people in Cambodia?

Although the quantity of the indigenous peoples in Cambodia is unclear, it is at least clear in principle that they are not excluded and thus enjoy the same protection systems, that is legal protection and institutional protection. However, it is questionable whether the same protection is appropriate or acceptable for indigenous peoples.

1. The legal protection

International legal protections

Protection of the rights of indigenous peoples and protection of the rights of ordinary citizens of each state can be achieved in different forms. However, the forms are mostly categorized into two, namely legal protections and institutional protections. Legal protections can occur at both the international and national level. Since indigenous peoples possess certain characteristics, the international community takes into consideration their specific interests and is concerned for the protection of the rights of indigenous peoples. There are a number of international conventions and declarations for the protection of the rights of indigenous peoples, both regionally and globally. These conventions and declarations of the international community provide broad frameworks and statements regarding protection of indigenous peoples' rights, interests, culture, ways of life, and development. Regrettably, some international instruments intended to uphold the rights of indigenous peoples have not yet been normatively agreed and ratified by a large majority of the international community.

For instance, the Universal Declaration on Human Rights (UDHR) adopted by the General Assembly in 1945 has been a soft law with no legal binding force against States.

In addition to the above declarations, ILO Convention 107 was the first attempt to codify international obligations of states in respect to indigenous and tribal populations.

²⁸ LA Lambert, *Keepers of the Central Fire: Issues in Ecology for Indigenous Peoples* (Jones and Bartlett Publishers, 1999). See also, D Brook, 'Environmental Genocide: Native Americans and Toxic Waste' (1998) 57 *American Journal of Economics and Sociology* 105.

Although this convention covered a broad range of issues relating to the protection of indigenous peoples' rights, including land rights; recruitment; conditions of employment; vocational training; social security; health and education aspects, the Convention was ratified by less than 30 state members. The reluctance to support ILO Convention 107 was largely because of its position that indigenous peoples should be integrated into wider society, a view that subsequently came to be seen by many as inappropriate. For this reason, ILO Convention 107 was revised in 1989 by the adoption of ILO Convention 169. ILO Convention 169 is now being enforced by less than twenty states in the Asia-Pacific region, where it remains useful for significant populations of indigenous peoples.²⁹

Convention No. 169 presents the fundamental concept that the way of life of indigenous and tribal peoples should and will survive, as well as the view that indigenous and tribal peoples and their traditional organizations should be closely involved in the planning and implementation of development projects that affect them. As the most comprehensive international legal instrument to address issues vital to indigenous and tribal peoples, Convention No. 169 includes articles that deal with consultation and participation, social security and health, human development, and the environment.

Agenda 21 was adopted by the UN Conference on Environment and Development in 1992 and recognizes the actual and potential contribution of indigenous and tribal peoples to sustainable development. The 1992 Convention on Biodiversity calls on contracting parties to respect traditional indigenous knowledge with regard to the preservation of biodiversity and its sustainable use. The Vienna Declaration and Program of Action emerging from the 1993 World Conference on Human Rights recognizes the dignity and unique cultural contributions of indigenous peoples, and strongly reaffirms the commitment of the international community to the economic, social, and cultural well-being of indigenous peoples and their enjoyment of the fruits of sustainable development.

In 1993, a Draft Declaration on the Rights of Indigenous Peoples, was developed with the direct participation of representatives of indigenous peoples. It addressed issues such as the right to participation, the right of indigenous peoples to direct their own development, the right of indigenous peoples to determine and develop priorities and strategies for the development or use of ancestral territories and resources, and the right to self-determination. It was adopted by the UN General Assembly on September 13, 2007. Unlike the above international instruments, this declaration³⁰ received significant support among members of the UN. One hundred and forty four States voted in favor of the declaration. Remarkably, during the Durban Review Conference in April 2009, 182 states from all regions of the world normatively agreed on an outcome document in which

29 ILO, Monitoring Indigenous and Tribal Peoples' Rights through ILO Convention: A compilation of ILO supervisory bodies' comments 2009-2010; See also: <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm> (as of July 7, 2010).

30 United Nations Declaration on the Rights of Indigenous Peoples, adopted by general Assembly Resolution 61/295 on 13 September 2007.

they “welcomed the adoption of the declaration”, noting that it would have a positive impact on the protection of victims. All states were urged to take all necessary measures to implement the declaration and recognize and protect the rights of indigenous peoples, without discrimination, in accordance with international human rights instruments.³¹ To date, ILO Convention No.169 and the UN Declaration on the Rights of Indigenous Peoples are the most current international legal instruments for the promotion and protection of indigenous and tribal peoples’ rights throughout the world.

National legal protections

Nationally, there are numbers of legal instruments for the protection of the rights of indigenous peoples. The relevant laws and legal regulations are discussed in turn as follow:

1. The modern 1993 Constitution of the Kingdom of Cambodia (the “Constitution”) is the supreme law of Cambodia and provides not only the main principles of the state, guidelines for policy making and procedures for the establishment of government, but also for equal protection and promotion of the rights of all citizens. The Constitution guarantees all citizens the same rights, regardless of race, color, language or religious belief. This means that indigenous people are entitled to equal protection like all Khmers. For instance, Article 32 of the Constitution provides that:

“Khmer citizens shall be equal before the law and shall enjoy the same rights, freedom and duties, regardless of their race, color, sex, language, belief, religion, political tendencies, birth origin, social status, resources and any position.”

According to the historical debate of the National Assembly with regard to the definition of the term “Khmer citizens”, an undisputed agreement was reached that the term included some Cambodian ethnic minorities, namely the Khmer loe and the Khmer Islam.

Although the concept of non-discrimination has been embedded in the Constitution, real protection of the rights of indigenous peoples has proved difficult to achieve. Some researchers suggest that the idea of protecting the rights of indigenous peoples in Cambodia is relatively new and that it is a donor-driven concept.³² For this reason, we note ongoing efforts made by the government to comply with the concept of indigenous peoples’ rights as evidenced by the many debates that have been un-

31 UN Office of the High Commissioner for Human Rights, Outcome document of the Durban Review Conferences, April 2009, para. 73.

32 Indira Simbolon, Access to land of highland indigenous: The case of plural property rights in Cambodia, working paper No 42, 2002, p. 2.

dertaken since 1993, when the Constitution was enacted. The debates have mainly focused on how best to pursue development while benefiting indigenous peoples.³³

2. Similarly, there is no sign of discrimination or distinction between indigenous and ordinary Cambodian people in the Law on Khmer nationality/citizenship. For instance, Article 2 says ***“Any person who has Khmer nationality/citizenship, is a Khmer citizen. Khmer citizen shall not be deprived of nationality, exiled or extradited to any foreign country, unless upon there is mutual agreement.”***
3. In 1994, an inter-ministerial committee was created by the Royal Government of Cambodia (“RGC”) to develop policies for the protection of indigenous peoples’ rights. As a result, after working collaboratively with relevant stakeholders, the committee drafted general policy guidelines for development of indigenous peoples. The aim of this policy was to maintain a sustainable development for indigenous peoples with a consideration to uphold their rights, culture and their natural resources. To comply with the concept of non-discrimination enshrined in the Cambodian Constitution, the draft policy of 1997 provided that all highlanders/indigenous peoples have the right to practice and adhere to their own cultures and practice their own languages. The draft policy required the government to support local organizations or associations established by indigenous peoples.
4. In addition to the above provisions, the Land Law of 2001 came into existence and has served as a domestic instrument to provide protection for indigenous people in Cambodia. Many statements have been set out in general policies relating to the promotion of the rights of indigenous peoples with regard to the use of traditional land and forests. However, there are only six relevant articles in the Land Law of 2001 that grant special rights to indigenous communities with collective land ownership and other immovable properties.³⁴ Article 23 of the law provides that:

“An indigenous community is a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use. Prior to their legal status being determined under a law on communities, the groups actually existing at present shall continue to manage their community and immovable property according to their traditional customs and shall be subject to the provisions of this law.”

³³ ADB, Indigenous Peoples/Ethnic Minorities and Poverty Reduction: Cambodia, 2002, pp 9-14.

³⁴ The Cambodian Land Law 2001, Articles 23-28.

Although this law includes only some aspects of protection of indigenous peoples' rights, the law lays the foundation for the registration of communal property rights of indigenous peoples and it marks a significant advancement for the protection of indigenous peoples in the Cambodian context. However, there remain challenges ahead because the Land Law still requires several legal measures to be taken to allow full recognition of indigenous communities as legal entities.

5. In 2002, the Forestry Law came into existence. The enactment of this law is another significant development in the legal protection of indigenous peoples in Cambodia. Article 37 of this law obliges the state to ensure the customary user rights of forest products and sub-products for registered indigenous communities. It also obliges relevant authorities to recognize shifting cultivation areas by reserving permanent forest for them and thus calls for a specific sub-decree to be drafted³⁵ to identify the areas referred by both this law and the Land Law of 2001.
6. Consequently, a Sub-Decree on Community Forests was enacted in 2003 detailing the community forestry arrangements, followed in 2006 by the Prakas on Guidelines on Community Forestry, which entailed a number of procedures. This sub-decree aims to determine rules for the establishment, management and use of community forests for indigenous communities and for other community forests nationwide. The sub-decree also helps the RGC promote poverty alleviation and decentralization. It provides for a basic means by which communities can participate in the reforestation, rehabilitation and conservation of natural resources, forest and wildlife. Finally, it enables citizens to understand the importance of forest resources via their direct involvement in forest resources management and protection. There are additional mechanisms to support community forests in Cambodia like building up networks at the provincial and national levels.
7. The long-awaited Policy for Indigenous Peoples' Development was adopted in April 2009 recognizing the rights of indigenous peoples to their cultures, to universal education standards, to vocational skills, health, environment, land, agriculture and other resources.

2. Institutional protection

The existence of laws alone is obviously not enough to ensure the protection of indigenous peoples' rights. To ensure the full realization and protection of the rights of indigenous peoples in practice there also needs to be institutional protections alongside the exist-

³⁵ The Forestry Law of Cambodia, 2002.

ing legal protection. In Cambodia there is not yet any specific institutional protection to uphold indigenous peoples' rights. Instead, they enjoy the same institutional protection systems as ordinary Cambodians. Although indigenous peoples possess specific characteristics and thus require specific protection, to date, there has not yet been any specific court, national commission for indigenous peoples³⁶ or mediation body established to provide institutional protection for indigenous peoples.

Language barriers and a lack of understanding about the remedies available through the state justice system are seen as the main reasons that indigenous peoples continue to resolve conflict – ranging from domestic violence, land and farming disputes, physical abuse and injury, and accusations of sorcery and curses – based on their own traditional mechanisms, rules and practices. However, these customary rules and practices have not yet been formally recognized. At present, there are some non-governmental organizations supporting alternative dispute resolution mechanism pilot projects exploring this area.³⁷

3. What are the gaps in the protection of indigenous peoples' rights?

Cambodia recognizes international obligations to promote and protect the rights of ordinary citizens as well as the rights of indigenous peoples. This recognition is enshrined in Article 31 of the Constitution of 1993. In addition to this provision, ongoing efforts have been made to promote and protect the rights of indigenous peoples by ratifying relevant international conventions and declarations, and adopting local legal frameworks like the Land Law of 2001 and the Forestry Law of 2002. Furthermore, there are also efforts to develop indirect and direct political policies like the Policy for Indigenous Peoples' Development adopted in April 2009 recognizing the rights of indigenous peoples to their culture, to universal education standards, to vocational skills, health, environment, land, agriculture and other resources.

Despite the existence of these political policies and legal frameworks, full recognition and protection of the rights of indigenous peoples is realistically not yet achievable. Gaps exist and have been recognized³⁸ at both the international and domestic levels. Internationally, states agree on declarations that mainly serve as political guidelines rather than binding treaties. Domestically, the principle of non-discrimination in Article 31 of

36 In the Philippines, there is the National Commission for Indigenous People; See: Asia Regional Preparatory Meeting on the theme of the EMRIP study, Indigenous Peoples and the right to participate in decision making, compiled by the Asia Indigenous People Pact (AIPP), March, 2010.

37 UNDP Cambodia in collaboration with the Ministry of Justice and the Ministry of Interior; Kreung Ethnicity Documentation of Customary Rules, 2010.

38 Secretary-General Ban Ki-Moon's message in International Day of the World's Indigenous Peoples: "Indigenous Peoples still experience racism, poor health and disproportionate poverty", 9 August 2010; See also statements of Navi Pillay, the UN High Commissioner for Human Rights and James Anaya, the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples at: <http://un.org/apps/news> as of 16 August 2010.

the Cambodian Constitution of 1993 has no specific reference to indigenous peoples. The recognition of indigenous peoples' dependency on shifting cultivation³⁹ in the Land Law of 2001 and the recognition of community forests in the Forestry Law 2002 represent efforts by the government to recognize the land rights of indigenous peoples as provided for in ILO Convention No.169 and the UN Declaration on the Rights of Indigenous Peoples. To date, however, only some community forests have been formally registered while many others are struggling with the ambiguity of the laws.

4. Key findings

On a global level, during the last three decades, the demands for recognition of the rights of indigenous peoples across the world have led to the gradual emergence of a common body of opinion regarding the content of the rights of these peoples on the basis of long-standing principles of international human rights law and policy. This common understanding has been promoted by international and regional standard-setting processes; by the practice of international human rights bodies, mechanisms and specialized agencies; and by a significant number of international conferences and expert meetings.

The Declaration on the Rights of Indigenous Peoples, on one hand, is a milestone development globally, encapsulating as it does the widely shared understanding about the rights of indigenous peoples that has been building over decades on a foundation of previously existing sources of international human rights law. However, this declaration is simply a soft instrument. It is not subject to ratification and does not have a legally-binding status yet. On the other hand, despite its non-binding effect, the declaration creates new legal relevance. Due to its widespread support, the declaration could be used as evidence of the development of international customary law in this area – general principles of law that might later be regarded as creating obligations on states to respect and comply with its provisions.

At the national level, due to the abovementioned gaps, the rights of indigenous peoples in Cambodia have not yet been fully realized and protected. For example, Article 44 of the Constitution provides that “all persons” are entitled to land ownership, regardless of whether they are individuals or a collective, natural persons or legal entities, all Khmer nationals are entitled to land ownership. Article 26 of the Land Law of 2001, following the spirit of ILO Convention 169, allows indigenous peoples to have collective instead of individual ownership. Furthermore, the right to own the land as provided for in the Land Law encompasses the rights to inherit, transfer, rent or sell that land to those within their communities, but not to outsiders.⁴⁰

³⁹ Land Law, Royal Decree No NS/RKM/0801/14, Article 25.

⁴⁰ Land Law, Royal Decree No. NS/RKM/0801/14, Article 26.

Despite the existence of the Forestry Law of 2002, the safeguarding of the environment for indigenous peoples as required by the ICCPR has yet to be fully achieved.⁴¹ In the absence of formal representative institutions with legal personality for indigenous peoples, land and resource concessions remain the sole prerogative of the government, with limited participation of indigenous peoples. Until now, there has not been any formal representative to enter into contracts with forest management or mining companies or pursue legal actions in court in the name of community members. This results in the potential destruction of forests and natural resources that indigenous peoples in Cambodia may be dependent on.

Although significant attention has been paid to protecting the rights of indigenous peoples in Cambodia, they do not seem to enjoy proper protection yet.⁴² Many researchers have shown that indigenous peoples in Cambodia are vulnerable and have relatively limited access to resources and development.

There are a number of legal instruments relevant for the protection of the rights of indigenous peoples in Cambodia. These include: the 1993 Constitution; the Land Law, 2001; the Forestry Law, 2002; the Interim Paper on Strategy of Land Policy Framework, 2002; the Sub-decree on Community Forest, 2003; the Sub-decree on Procedure, Establishment, Classification and Registration of Permanent Forest Estate, 2005; the Sub-decree on State Land Management, October 2005; the Prakas on Guidelines for Community Forestry, December 2006; the Prakas on Identification and Mapping of State Land and State Land Classification, March 2006; and the Policy for Indigenous Peoples' Development, April 2009. However, the above legal instruments have not been enforced consistently due to issues of inconsistency and conflict among the relevant rules.

The protection of the rights of indigenous peoples in Cambodia in recent decades had been largely donor-driven and inspired by the international community. The ideas behind the legal protections described above are new to Cambodia and are not yet fully understood and accepted. For this reason, despite the existence of the above legal instruments, there is not yet any real special protection system for indigenous peoples in Cambodia. For example, if an indigenous person commits a crime, he or she could be subject to a conviction by the court as a result of the relevant laws being applied regardless of what custom or tradition the person belongs to. This practice has been seen as a complete contrast to what has been practiced in some countries in the Pacific where the customs of indigenous people have been upheld. Fiji and Vanuatu could be examples of the concept of promoting recognition of customary law and the implementation of a special protection system to uphold the rights of indigenous peoples.⁴³ Custom and cul-

41 CERD, Concluding Observations of the CERD: Cambodia, UD Doc CERD/C/304/Add.54, 1998, para. 13.

42 ADB, *Indigenous Peoples/Ethnic Minorities and Poverty Reduction-Cambodia*, 2002, p. 10.

43 Jean G. Zorn and Jenifer Corrin Care, *Proving Customary Law in the Common Law Courts of the South Pacific*, 2002, p. 6.

ture in Fiji have been core issues for politics in the 1990s. For this reason Section 186(1) of the Constitution of Fiji provides:

The Parliament must make provisions for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.

The 1980 Constitution of Vanuatu provides much clearer terms than the constitutions of either Fiji or Cambodia. Article 51 states:

Parliament may provide for the manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings.

The wording of this article reflects the intention of the Parliament of Vanuatu to enact procedural guidelines providing a legal ground to properly uphold the custom and culture of indigenous peoples in practice.⁴⁴

In Cambodia, customary rules and practices are no longer recognized by the local government and formal justice operators.⁴⁵ These rules and practices include the resolution of disputes – ranging from community disputes between neighbors to domestic violence and physical abuse – which according to tradition have been settled by the elder in the village. However, it is noted that there are ongoing efforts by the Ministry of Justice and the Ministry of Interior to conduct research and consult with indigenous communities in order to achieve a normative agreement on how traditional systems can be integrated into the formal legal system or how the two systems could best function alongside one another. There is now a clear tendency to advocate for the recognition of traditional rules and practices that are specific to community needs where they do not contradict national and international norm

VII. Conclusion

The protection of the rights of indigenous peoples has been a relatively new phenomenon, but there has been significant growth in the international law in this area⁴⁶ as well as the law governing the Cambodian context. Efforts have been made at both the regional and international level to establish international legal instruments that are now

⁴⁴ Jean G. Zorn and Jenifer Corrin Care, *Proving Customary Law in the Common Law Courts of the South Pacific*, 2002, p. 11.

⁴⁵ UNDP Cambodia in collaboration with the Ministry of Justice and the Ministry of Interior, *Kreung Ethnicity: Documentation of Customary Rules*, 2010, p. iii.

⁴⁶ Dieter Kugelmann, *The Protection of Minorities and Indigenous Peoples Respecting Culture Diversity*, 2007, p. 254.

in force in a variety of countries, including Cambodia. These legal instruments include: the UDHR (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social, and Cultural Rights (1976), the International Convention on the Elimination of all Forms of Racial Discrimination (1966), the Convention on the Rights of the Child (1990), ILO Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957), ILO Convention 169 concerning Indigenous and Tribal Populations in Independent Countries (1989), Agenda 21 adopted by the UN Conference on Environment and Development (UNCED) (1992), the International Convention on Biological Diversity (1992), and the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) (2007).

In order to acknowledge and adhere to the above international legal instruments, Cambodia has established a number of domestic legal and political instruments including: the 1993 Constitution; the Land Law, 2001; the Forestry Law, 2002; the Interim Paper on Strategy of Land Policy Framework, 2002; the Sub-decree on Community Forest, 2003; the Sub-decree on Procedure, Establishment, Classification and Registration of Permanent Forest Estate, 2005; the Sub-decree on State Land Management, October 2005; the Prakas on Guidelines for Community Forestry, December 2006; the Prakas on Identification and Mapping of State Land and State Land Classification, March 2006; and the Policy for Indigenous Peoples’ Development, April 2009.

However, due to the absence of clear concepts, real protection for indigenous peoples has not yet been achieved. Instead, there remain challenges for indigenous communities. Although some laws and policies are enacted in order to protect indigenous peoples’ rights in Cambodia, they do not comply with international norms for the protection of indigenous peoples’ rights. For this reason, the rights of indigenous peoples in Cambodia – political, social and cultural – are still being marginalized in many respects. The lack of representation and participation of indigenous peoples in Cambodia’s social, cultural and political life are root causes of discrimination and poverty, and a reason for continuing exploitation.

The regulatory frameworks that have been enacted are hardly enforceable. The decision on the nature of the livelihoods of indigenous peoples in Cambodia is questionable because there has not been a clear understanding about the needs of indigenous peoples. The lack of understanding about the needs of indigenous peoples is the result of inadequate representation at most levels of society and in most sectors. Language barriers and political reasons are suggested as key factors relevant to the inadequate representation of indigenous peoples in Cambodia. These are among the constraints that result in the voice of indigenous peoples being unheard and their concerns remaining unsettled.

There is a current trend to systematically uphold the rights of indigenous peoples in Cambodia, however, there is still a need to overcome various challenges to fully realize these rights. Due to the gaps mentioned in the analysis above, the research suggests consideration of the following:

1. Social aspect

- There should be adequate representation ranging from national to local levels to represent the interests of indigenous peoples.
- The representatives could be legal entities formally recognized by the state and possessing legal capacity to pursue legal actions against any potential violators.

2. Legal aspect

- Consistent and substantial regulations should be enacted. The recognition of international law should be explicitly translated into substantive laws with clear, consistent and enforceable procedures.
- Customary rules of indigenous peoples that are not in contradiction to national law should be formally recognized because this recognition is, according to UNDRIP, in accordance with the aspirations and the needs of indigenous peoples.

3. Practical aspect

- A council for the enforcement of the rights of indigenous peoples should be established as a guardian of indigenous peoples rights because they are not able to articulate themselves properly and mostly they do not understand law and necessary procedures. The council should be made up of people who are well informed of the needs of indigenous peoples.
- Well-trained representatives or the council for indigenous peoples mentioned above should be made available so that they can establish suitable and sustainable systems to raise awareness about the rights of indigenous peoples.
- There should be political will to establish appropriate mechanisms for indigenous people to equally access resources and development. There should be consideration of the results of existing literature and research regarding the rights of indigenous peoples and appropriate actions should be taken in response to these findings.⁴⁷

⁴⁷ United Nations Declaration on the Rights of Indigenous Peoples, adopted by general Assembly Resolution 61/295 on 13 September 2007 commits to promote development in accordance with aspirations and needs of Indigenous Peoples, para. 10.

EXTRADITION: INTERNATIONAL AND CAMBODIAN LAW

MEAS Bora

CONTENTS

I. Abstract.....	419
II. Introduction.....	419
III. Extradition in International Law	421
1. Legal Framework	421
2. Grounds for Refusing Extradition	421
IV. Extradition in Cambodian Laws	422
1. Legal Framework	422
2. Scope of Extradition Law	423
3. Extraditable Offences	424
4. Grounds for Refusing Extradition	424
5. Extradition Requests and Procedure.....	425
6. Transit and Expenditure	427
7. Extradition Sought by Cambodia	427
V. Some Comparative Aspects and Discussions	428
1. Failure to Categorize Grounds for Refusal	428
2. Extradition and the Death Penalty.....	430
3. Extradition and Prevention of Torture.....	431
4. Absence of Provision with Regard to Extradition by the Requesting State to a Third State	432
Extradition and the Rule of Non-Inquiry into the Domestic Affairs of Another State	433
5. Priority of Requests	434
6. Presumptive Complex and Time Consuming Process.....	435
VI. Conclusions.....	436
REFERENCES.....	437

EXTRADITION: INTERNATIONAL LAW AND CAMBODIAN LAWS

*MEAS Bora**

I. Abstract

Extradition – the act of returning a convicted or alleged criminal to another State for prosecution or to serve a sentence already imposed by the Requesting State – is being resorted to by states more often than ever before. A significant body of law – legal instruments of universal or regional scope, bilateral agreements as well as national laws – has developed regulating extradition. In Cambodia, a substantial body of law exists but inconsistencies exist between relevant legal provisions and legal loopholes still remain.

This study considers these issues by comparing Cambodian laws and other relevant instruments. It is argued that to address loopholes that prevail in existing laws, it is advisable to resort to international instruments for guidance and that no legal obstacle exists to prevent such an approach. It is important that Cambodia complies with relevant laws and obligations while ensuring that criminals, alleged and convicted, shall not go untried or unpunished.

II. Introduction

Globalization has increased international relations between international law actors, including States, and demands international legal norms in the form of treaties, bilateral agreements and/or multilateral acts of the legislature to regulate these relations. Globalization has notable consequences in the extradition field. Extradition instruments - universal, regional and bilateral - have been adopted, and at national level, relevant norms or laws have been created to facilitate the extradition process between States. Due to the varying demands and interests of individual States, inconsistencies between the provisions of international and regional treaties and those set out in national laws are unavoidable.

* Dr. MEAS Bora obtained both LLM and LL.D from the Nagoya University, Graduate School of Law in 2007. He is vice-rector of the Cambodian University for Specialties in Charge of Research, and a part-time lecturer of international law. He currently serves as a legal officer of the Office of the Co-Investigating Judge of the Extraordinary Chambers in the Courts of Cambodia (the ECCC).

The Kingdom of Cambodia, particularly after the 1991 Paris Peace Agreement, acceded to many treaties and agreements in various fields, such as in the area of human rights. The 1993 Constitution incorporates several human rights treaties; while some national laws also refer to international treaties. Although the status of international treaties in the legal system of the Kingdom of Cambodia and the manner in which such treaties may be implemented in Cambodia remains unclear, it is undeniable that some treaties are directly applicable given that the Cambodian legal system is influenced by the traditions of civil legal systems.¹ This question becomes more complicated however when talking about extradition. Cambodia has entered several bilateral treaties on the issue, but the first significant domestic provisions on the issue were included in a long chapter in the Code of Criminal Procedure (“Code”) in 2007. These instruments set out the legal framework for the actual implementation of extradition. However, loopholes exist in the law and inconsistencies between the treaties and provisions of the national law are undeniable. Several questions remain as regards actual implementation of the law, the manner in which treaties are applied and the manner in which loopholes in the law are dealt with. These questions, if unresolved, will lead to practical difficulties in the extradition process in the future. Regrettably, despite the increase in instances of extradition, no previous study of the subject – insofar as Cambodia is concerned – exists to the knowledge of the author. This, in and of itself, justifies this study.

This study is theoretical, as case law on the subject and practical examples of individual instances are difficult to access. The study will mainly focus on the provisions of the Code, viewed through the prism of relevant treaties and laws for the purposes of giving some clarification to those provisions and to provide an idea of their smooth operation in practice. The United Nations Model Treaty is given particular attention since it represents common rules although it is not an instrument requiring ratification. The study will first present the international legal framework of extradition and will then consider the relevant legal framework in Cambodian law. These two bodies of law will be considered comparatively in order to identify loopholes in the Cambodian law. The study will conclude with some recommendations for practical improvement of the extradition process in Cambodia.

¹ For Preliminary Observation, *see* MEAS Bora, *International Human Rights Law in Cambodia*, 129 *Cambodian Yearbook of Comparative Legal Studies* (2010).

III. Extradition in International Law

1. Legal Framework

Extradition was governed originally by bilateral treaties.² It is defined as the process through which a state in which a crime was committed (“Requesting State”) requests from the state in which the alleged or convicted perpetrator is residing (Requested State) his/her transfer and the process through which that person is transferred to the Requesting State.³ More recently, regional treaties were adopted to serve as a model for domestic laws on and practices of extradition.⁴ On a global level, the United Nations Model Treaty on Extradition also provides a model for domestic jurisdictions.⁵ These regional treaties and global UN treaty provide key common and harmonized rules of extradition which individual states can draw guidance from when formulating domestic laws or agreeing to bilateral treaties. It is interesting to note that some states extradite persons without any treaty regulating the practice while others allow extradition on a much stricter basis – i.e. only if there is a treaty or agreement regulating the procedure.⁶

2. Grounds for Refusing Extradition

Generally, most of instruments on extradition – whether of bilateral, regional or global scope – provide rules on extraditable offences,⁷ grounds for denying extradition,⁸ guidance as to the documents required to support extradition requests,⁹ the actual process of request consideration,¹⁰ transit,¹¹ expenditure,¹² and the postponement of extradition¹³ as well as setting out the institution involved in the process.¹⁴

In this section, grounds for denying extraditions deserve particular mention as this issue is relevant to the discussion in later parts of this paper. Pursuant to the UN Mod-

2 Geoff Gilbert, *Aspects of Extradition*, 9 (1991).

3 *Id.* See also. Christopher L. Blakesley, *the Law of International Extradition: A Comparative Study*, 62 *International Review of Penal Law*, 1(1991).

4 European Convention on Extradition (ETS No. 24), entered into force April 18, 1960; Additional Protocol to the European Convention on Extradition (ETS No. 86); Second Additional Protocol to the European Convention on Extradition (ETS No. 098); Inter-American Convention on Extradition.

5 The UN Model Treaty on Extradition, G.A. res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A) at 212, U.N. Doc. A/45/49 (1990), Art. 3 (Hereinafter is the UN Model Treaty).

6 Some States, such as France, extradite without treaty but have statutes providing for extradition, see Geoff Gilbert, *supra* note 2, p. 26.

7 The UN Model Treaty, *see supra* note 5, Art. 2.

8 *See id.*, Art. 3 and 4.

9 *See id.*, Art. 5.

10 The European Convention on Extradition, *supra* note 4, Art. 12.

11 The UN Model Treaty, *see supra* note 5, Art. 15.

12 *Id.*, Art.17.

13 *Id.*, Art. 12.

14 *Id.*, Art.5.

el Treaty, there are various grounds for denying extradition, these are divided into two types: mandatory and discretionary. Mandatory grounds bar extradition without exception. Discretionary grounds, as the name suggests, are at the discretion of the Requested State and leave it to the State to decide to grant extradition or not. Several grounds implicate human rights protection; thus, it can be argued that human rights law developments have an influence on the law of extradition. For example, Articles 3 and 4 of the UN Model Treaty provide that:

Extradition *shall not be granted*:

*If the person whose extradition is requested has been or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14.*¹⁵

Extradition *may be refused*:

*If the offence for which extradition is requested carries the death penalty under the law of the Requesting State, unless that State gives such assurance as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.*¹⁶

IV. Extradition in Cambodian Laws

1. Legal Framework

The Kingdom of Cambodia has entered into extradition treaties with a number of States, such as Thailand, Lao People's Republic and China.¹⁷ In the framework of the Association of the Southeast Asian Nations ("ASEAN"), the Kingdom of Cambodia is a signatory of the ASEAN Treaty on Mutual Assistance in Criminal Matters in which mutual assistance in criminal or judicial affairs is stipulated.¹⁸ In addition to these instruments, the Kingdom is also a party to certain international conventions and covenants in which provision on extradition is made.¹⁹

¹⁵ *Id.*, Art. 3.

¹⁶ *Id.*, Art. 4; Matthias Wentzel, *Extradition Involving the Possibility of Death Penalty*, 62 International Review of Penal Law, 335 (1991).

¹⁷ A Selection of Laws Currently in Force in the Kingdom of Cambodia, OHCHR (2006), Section I (hereinafter a Section of Laws).

¹⁸ Treaty on Mutual Assistance in Criminal Matters *available at* <http://www.aseansec.org/4964.htm>. Cambodia signed on 29 November, 2004.

¹⁹ See for example the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. Cambodia ratified the Convention in 1992.

At the domestic level, provision for extradition was indicated in the 1993 Constitution which states, in Article 33, that “*Khmer citizens shall not be deprived of their nationality, exiled or arrested and deported to any foreign country unless there is mutual agreement on extradition*”.²⁰ Much more detailed provisions on extradition exist in the Code.²¹ The provisions set forth the applicable limits of extradition,²² grounds for refusing extradition requests²³ and other rules generally recognized in international treaties, such as double criminality.²⁴ The Code also provides for a practical framework governing extradition²⁵ and covers both requests addressed to and made by the Kingdom of Cambodia.²⁶

2. Scope of Extradition Law

Overall, the provisions on extradition in the Code are detailed and represent a positive development of the extradition framework in Cambodia although the provisions are not, in parts, consistent with norms governing extradition in the international context. The Code is applicable if there are no treaties or agreements governing a particular request.²⁷ In this connection, if there is an extradition request from China to the Kingdom of Cambodia, the bilateral treaty on extradition between the Kingdom of Cambodia and the People’s Republic of China will apply.²⁸ Likewise, the international human right treaties to which Cambodia is party and in which extradition provisions are made shall apply.²⁹ Article 567 of the Code provides that extradition of a foreign resident by Cambodia shall be governed by the provisions of international conventions and treaties or, where no such conventions or treaties exist, the provisions of the Code shall apply. In the opinion of the author, this provision and the approach that it creates, harmonizes extradition practices and procedures with provisions in international agreements and law.

20 Constitution, Art. 33, *see* A Selection of Laws, *supra* note 17.

21 The Code of Criminal Procedures, the Extraordinary Chambers in the Courts of Cambodia (2008).

22 The Code, Chapter II.

23 *Id.*, Art. 573, for example.

24 *Id.*, Art. 569. for dual or double Criminality, *see* Michael D. Wims, *Re-Examining the Traditional Exception to Extradition*, 62 , International Review of Penal Law, 331(1991).

25 The Code, *supra* note 21, Sub-Section 3 of Chapter II.

26 *Id.*, Section 2 of the Chapter II.

27 *Id.*, Art. 567.

28 A Selection of Laws, *supra* note 17, section. I, p. 2499.

29 The Convention against Torture, *supra* note 19.

3. Extraditable Offences

Offences which justify the extradition of the suspect are those that are punishable by a prison term of at least two years under the law of the Requesting State³⁰; this applies regardless of the category of offence, its legal qualification, or the terminology used.³¹ Attempted and accomplice offences also require the extradition of the suspect.³² If an individual has six months left to serve in a final sentence handed down by a court of another State, extradition is also allowed.³³ It does not matter if the offender is not a national of the Requesting State if the crime was committed in its territory. A State may request the extradition of its nationals if the crime was committed anywhere.³⁴

4. Grounds for Refusing Extradition

The Code provides some grounds for refusing the extradition. First, the charge is upon which the request was made is of a political nature or implication. Although, “political implication” is not defined, a violent act causing danger to life or physical integrity or personal liberty is not considered a political offence.³⁵ Extradition agreements between Cambodia and other countries, such as Lao PDR and China, adds some content to the notion of “political offence”, saying that regicide, the act of killing a king, is not political offence.³⁶ If an act was committed in Cambodia, tried and a final judgment handed down, extradition might not be allowed.³⁷ Extradition may not be allowed where the criminal action upon which extradition is based is extinct.³⁸

The Code lists a number of grounds for denying extradition requests but does not categorize these grounds. Bilateral Extradition Treaties to which Cambodia is party, generally, like the UN Model Treaty, list several grounds for denying extradition and categorize these grounds into mandatory and discretionary grounds. Requests for extradition of those who committed a political crime,³⁹ or pure military crime,⁴⁰ and those where the

30 The Code, *supra* note 21, Art. 571.

31 *Id.*, Art. 569.

32 *Id.*, Art. 570.

33 *Id.*, Art. 571.

34 *Id.*, Art. 572.

35 *Id.*, Art. 573.

36 Treaty on Extradition between the Kingdom of Cambodia and People Republic of China, in A Selection of Laws, p. 2494, *supra* note 17, Art. 3.

37 The Code, Art. 574, *supra* note 21.

38 *Id.*, Art. 575.

39 Extradition Treaty between the Kingdom of Cambodia and the Kingdom of Thailand (1999), p. 2475, A Selection of Laws, *supra* note 17, Art. 3 (1); the Treaty on Extradition between the Kingdom of Cambodia and People Republic of China (2000), Art. 3 (1); the Treaty on Extradition between the Kingdom of Cambodia and People Democratic Republic of Lao (2005), p. 2513, A Selection of Laws, *supra* note 17, Art. 3(1).

40 Extradition Treaty between the Kingdom of Cambodia and the Kingdom of Thailand, Art. 3 (3); the Treaty on Extradition between the Kingdom of Cambodia and People Republic of China, Art. 3 (3);

accusation or punishment is based on discriminatory grounds, such as race,⁴¹ *shall* not be honored. In addition, extradition requests in instance where the statute of limitation has expired⁴² or where the person in question has been tried *in absentia* without possibility of being tried again⁴³ shall not be granted. The treaties provide that old age of a sought person is one of the grounds upon which extradition may be refused.⁴⁴ Strangely and unlike the UN Model Treaty, the prevention of torture or death penalty is not listed as a ground for denying extradition in all treaties and laws of Cambodia.

5. Extradition Requests and Procedure

The Code provides for greater detail with respect to the applicable procedure for extradition requests addressed to the Kingdom of Cambodia as Requested State than procedure that applies when the request is by the Kingdom itself. In the former scenario, requests of extradition shall be sent to the Royal Government of Cambodia through diplomatic channels with supporting documents, such as documents identifying the wanted person, the applicable law, relevant facts of the case, and a copy of sentencing judgment if there is any. Documents should be officially sealed and enclosed, and if the originals are not in French, English or Khmer, a translation of one set of documents into these languages is required.⁴⁵

First the request of extradition shall be sent through the embassy of the Requesting State in the Kingdom to the Ministry of Foreign Affairs and International Cooperation (“MoFA”) of Cambodia;⁴⁶ and then the MoFA will send the request to the Ministry of Justice (MoJ).⁴⁷ The MOJ will send the request to the Prosecutor General of the Appellate

the Treaty on Extradition between the Kingdom of Cambodia and People Democratic Republic of Lao, Art. 3 (3).

41 Extradition Treaty between the Kingdom of Cambodia and the Kingdom of Thailand, Art. 3 (2); the Treaty on Extradition between the Kingdom of Cambodia and People Republic of China, Art. 3 (2); the Treaty on Extradition between the Kingdom of Cambodia and People Democratic Republic of Lao, Art. 3 (2).

42 Extradition Treaty between the Kingdom of Cambodia and the Kingdom of Thailand, Art. 3 (4); the Treaty on Extradition between the Kingdom of Cambodia and People Republic of China, Art. 3(4); the Treaty on Extradition between the Kingdom of Cambodia and People Democratic Republic of Lao, Art. 3 (4).

43 Extradition Treaty between the Kingdom of Cambodia and the Kingdom of Thailand, Art. 3(6); the Treaty on Extradition between the Kingdom of Cambodia and People Republic of China, Art. 3 (6); the Treaty on Extradition between the Kingdom of Cambodia and People Democratic Republic of Lao, Art. 3 (6).

44 Extradition Treaty between the Kingdom of Cambodia and the Kingdom of Thailand, Art. 4(2); the Treaty on Extradition between the Kingdom of Cambodia and People Republic of China, Art. 4 (3); the Treaty on Extradition between the Kingdom of Cambodia and People Democratic Republic of Lao, Art. 4(3). Bert Swart, *Refusal of Extradition and the United Nations Model Treaty on Extradition*, 23 the Netherlands Yearbook of International Law, 195 (1982).

45 The Code, *supra* note 21, Art. 579.

46 *Id.*, Art. 580.

47 *Id.*, Art.580.

Courts⁴⁸ so that he or she may start to investigate the case before sending the request to the Investigating Chamber of the same Court.⁴⁹ In the process, the Prosecutor General shall order the arrest and detainment of the sought person.⁵⁰ The arrested person shall, within a short period, be brought before the prosecutor of the court with jurisdiction over the place of arrest so that he or she may be informed by the prosecutor of the reasons for his or her arrest and so that the prosecutor may take testimony. The arrestee shall be transferred to detention in the capital of Phnom Penh.⁵¹ After the case is transferred to the Investigating Chamber, this body will consider the case *in camera* in the presence of the wanted person who may be represented by a lawyer, and if necessary, with the assistance of an interpreter. The Chamber shall issue a reasoned view on extradition after listening to the statements of both the lawyer of the wanted person and the Prosecutor General.⁵² If it finds that the legal requirements for the extradition are not met, the Chamber will oppose extradition.⁵³ In this case, the Royal Government shall not extradite, and the sought person shall be released immediately from the detention. If the Chamber approves the extradition, its decision is final. The Chamber will notify the MoJ immediately and the MoJ will send the case to the Royal Government which will issue a sub-decree ordering extradition.⁵⁴ Finally, if after 30 days of notification of the sub-decree to the Requesting State, delivery of person has not been initiated by the Requesting State, the wanted person shall be released.⁵⁵

The Requesting State can request the provisional detention of the sought person by the Requested State even before submitting extradition request. The detained person shall be released automatically if within a period of two months calculated from the date of arrest, the Requested State did not receive the extradition request and the relevant documents required in Article 579.⁵⁶ The sought person through written request can also seek provisional release from detention by application to the Investigating Chamber, and this body shall decide after considering statements of both the Prosecutor General and the lawyer of the wanted person.⁵⁷ Finally, in instance where the sought person is subject to prosecution in Cambodia, extradition can be postponed where he or she is found guilty even where the sentence is yet to be implemented; however, Cambodia may transfer the wanted person to the Requesting State temporarily. He or shall be sent back to Cambodia after the prosecution process in the Requesting State ends.⁵⁸

48 *Id.*

49 *Id.*, Art. 584.

50 *Id.*, Art. 582.

51 *Id.*, Art. 583.

52 *Id.*, Art. 585.

53 *Id.*, Art. 586.

54 *Id.*, Art. 589.

55 *Id.*

56 *Id.*, Art. 581.

57 *Id.*, Art. 587.

58 *Id.*, Art. 578.

6. Transit and Expenditure

The Code provides that the Royal Government shall honor written transit requests in the context of extradition they do not relate to political offence. The request shall be diplomatically channeled and with the requisite documents.⁵⁹ According to the Code, expenditure relating to extradition shall be borne by the Requesting State.⁶⁰

7. Extradition Sought by Cambodia

The provisions in the Code on the applicable procedure in cases where Cambodia is the Requesting State are very brief. The Investigating Chamber is the only body mandated to examine extradition requests made by Cambodia to foreign countries. After 15 days upon arrival in Cambodia, the person can challenge extradition through written motion to the Chamber.⁶¹ The Chamber makes its decision after hearing statements from the extradited person, his or her lawyer and the Prosecutor General. If extradition is nullified by the final decision of the Chamber, the prosecution process shall be put to an end. The person shall be released and shall leave Cambodia; otherwise the extradited person may be arrested and subject to new prosecution for the charges leading to extradition if 30 days after date of release, he remains in Cambodia.⁶² Cambodia can extradite a person to another country if the State which extradited that person to Cambodia gives approval to Cambodia to do so.⁶³ This is provided for under the “rule of specialty”. However, there is not any mention about extradition of a person to another country by a Requesting State requiring an approval from Cambodia as a Requested State.⁶⁴

⁵⁹ *Id.*, Art. 595.

⁶⁰ *Id.*, Art. 589.

⁶¹ *Id.*, Art. 590.

⁶² *Id.*, Art. 593.

⁶³ *Id.*, Art. 594.

⁶⁴ Geoff Gilbert, *supra* note 2, p. 106. An extradition order may be issued only if the Requesting State guarantees not to prosecute any offense not specified in the extradition request if this offense was committed before the arrest of the wanted person. However, the former offense may be prosecuted if approved by the Kingdom of Cambodia. In this case, the Requesting State shall file an additional request with the Cambodian authorities, *see* the Code, *supra* note 21, Art. 577.

V. Some Comparative Aspects and Discussions

1. Failure to Categorize Grounds for Refusal

For deciding extradition requests, grounds based on which extradition shall/should or shall/should not be allowed are important. Consideration of grounds involves the consideration of international law, and national laws of both the Requested and Requesting States. Suspects subject to extradition, in some cases, might claim that the extradition hearing in the Requested State is not fair since it is he or she is without legal representation⁶⁵ or that he or she would face an unfair trial in the Requesting State after arrival in that state.⁶⁶ Moreover, a person who is subject to an extradition request may allege that he or she would face torture or the death penalty upon arrival or conviction in the Requesting State.⁶⁷ He or she may claim that his or her extradition would violate his or her right to family since his or her departure leaves family members in the Requested State (in cases where he/she is married).⁶⁸ There are many other legal or practical obstacles to extradition which may be raised by a sought person subjected to an extradition request.⁶⁹ These allegations require the thorough consideration of international legal obligations of the Requested State prescribed in treaties to which this State is a party. Ignorance of the international obligations concerned might result in violations of obligations by the Requested State. In this connection, in some cases, relevant authorities may have to consider the possibility of complying with an obligation to extradite imposed by a bilateral treaty in circumstances where extradition would be in violation of the obligation not to extradite set forth in a multilateral treaty. As general rule, the obligation under the latter shall prevail over the obligation under the former.⁷⁰ States shall not follow obligations to extradite where extradition of the sought person would result in his or her torture, such an act would be in violation of amount to a violation of the obligation not to extradite under Article 3 of the Convention against Torture.⁷¹

Insofar as domestic laws are concerned, a lack of careful reflection of the national laws of the Requesting State might lead to disappointment between both States concerned.

Likewise, a breach by courts of the Requested State of its own national laws would also

⁶⁵ *Soering v. the United Kingdom*, No. 14038/88[1989] ECHR 14 (July 7, 1989), para. 112.

⁶⁶ *Id.*, para. 114.

⁶⁷ *Kban v. Canada*, Communication No. 15/1994, U.N. Doc. CAT/C/13/D/15/1994 (Nov. 15, 1994), paras. 92. and 12.3.

⁶⁸ The Right to Family, *see* Art. 23 of the International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171.

⁶⁹ The Treaty on Extradition between the Kingdom of Cambodia and the Kingdom of Thailand, *supra* note 39, Art. 4 (3).

⁷⁰ See for example, Art. 103 of the United Nations Charter, *in* Basic Documents in International Law , 2 (Ian Brownlie, 5th Ed., 2002).

⁷¹ The Convention against Torture, *supra* note 19.

leave that State open to criticism. In sum, extradition involves consideration of both international and national laws which demands extensive and thorough examination of both bodies of law.

There are only three grounds for denying extradition mentioned in the Code. This raises two questions: first, shall the relevant authorities consider only these grounds expressly prescribed in the Code;⁷² and second, should all the term “might not extradite”⁷³ be construed to mean both “shall not extradite” and “might not extradite”. For the first question, the provisions of the Code seem to suggest that the authorities should look at the Code only if there are not other applicable treaties and laws.⁷⁴ If the phrase “applicable treaties and laws” is interpreted narrowly, looking into other treaties or laws is legally acceptable and helpful. On the contrary, if “applicable treaties and laws” is interpreted broadly, it causes problem as the contents of the relevant provisions of the Code are not detailed, and the courts are legally barred from consulting treaties or relevant laws in addition to the Code. For the second question, it is noted that extradition treaties divide grounds for refusing extradition into two categories: mandatory and discretionary, using different words “shall” or “might” respectively. Mandatory refusal is required by the term “shall”, accordingly, the Requested State shall not extradite since the relevant law does not allow it to do so. The expiration of the statute of limitation is generally accepted as one of the mandatory grounds for refusing.⁷⁵ Discretionary refusal is provided for by the term “might” indicating that the Requested State has a choice, whether it allows or does not allow extradition. Sickness or old age of a person that is subject to an extradition request is generally one of the discretionary grounds.⁷⁶

Provisions of the Code use the term “might not extradite” when referring to cases in which the statutory limitation of the alleged extraditable crime has already expired. If the term “might” is strictly interpreted, extradition may be permissible under the Code even where the statute of limitations has expired. Extradition of a person for a crime in circumstances where the statute of limitation has expired is illegal. The term “might” therefore, should be construed to mean “shall” in order to avoid a situation where the provisions of the Code are in breach national law and treaty. Extradition treaties between the Kingdom of Cambodia and China, for example, treat such time-barred obstacles as a mandatory ground for denying extradition. Thus, the authorities should consider both the Code and relevant treaties in deciding the extradition request. It is absolutely necessary to look beyond the Code since treaty prevails over national law.⁷⁷ In this respect, in

72 The Code, *supra* note 21, Arts. 573-575.

73 *Id.*, Art. 573.

74 *Id.*, Art. 567.

75 The UN Model Treaty, *supra* note 5, Art. 3.

76 The Extradition Treaty between the Kingdom of Cambodia and the People Republic of China, *supra* note 36, Art. 4 (3).

77 Cambodia is a dualist country, and follows legal system of French model, *see* Ieng Sary's Appeal against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint

the case China requests extradition from Cambodia, both the Code and the Extradition Treaty between Cambodia and China shall be consulted.⁷⁸

2. Extradition and the Death Penalty

Prohibition of extradition to face death penalty is an optional/ discretionary ground according to the UN Model Treaty on Extradition.⁷⁹ The Code is silent on the prohibition of extradition to face death penalty as one of grounds for denying an extradition request. In theory, in such a case, the Requested State should request from the Requesting State an assurance that the sought person shall not be subject to the death penalty. This is a necessary requirement for Cambodia since it has abolished the death penalty.⁸⁰ Otherwise, an act of extradition where the sought person is subjected to the death penalty would violate the constitution and, due to the mental anguish that results from the time spent on death row waiting for execution,⁸¹ the rule against extradited people in circumstances where they may be subject to torture contained in Article 3 of the Convention Against Torture would be violated as well since Cambodia is a party to this convention.⁸² One might argue that it is not legally correct to claim Cambodian responsibility for human rights violations that occurred outside the territory of Cambodia at the hands of foreign authorities. However, this claim is addressed and provided for in the legal instruments.⁸³ In the case of *Soering*, the United Kingdom raised such a claim arguing that a state is not responsible for acts committed outside its territory by foreign powers.⁸⁴ In response, the European Court of Human Rights (ECHR) held that:

*“Although a Contracting Party was not generally responsible under the European Convention for the treatment by another State of a fugitive whom it extradited, it could not escape responsibility under Article 3 for certain foreseeable consequences of extradition.”*⁸⁵

Although an assurance not to subject to death penalty is allowed in treaties, considering whether such an assurance is sufficient is no easy task, and demands the Requested State to seriously study the nature of that assurance. In the case of *Soering*, the Federal

Criminal Enterprise, para. 28-29. Thus, national law is below the treaty law, Raoul M. Jennar, *Cambodian Constitutions (1953-1993)*, 1995.

78 The Treaty on Extradition between the Kingdom of Cambodia and People Republic of China, *supra* note 36, Art. 19.

79 The UN Model Treaty, *supra* note 5, Art. 4.

80 1993 Constitution, *supra* note 17, Art. 32.

81 *Soering* case, *supra* note 65, para. 107.

82 See *supra* note 19.

83 The Convention against Torture, *supra* note 19.

84 *Soering* Case, *supra* note 65, para. 83.

85 *Id.*, summary part of the case.

Government of the United States gave an assurance to the United Kingdom that the United States would not subject *Soering* to the death penalty after extradition by the United Kingdom to the United States.⁸⁶ The ECHR did not give much weight to the assurance by the United States since the assurance by the Federal Government of the United States did not bind the State of Virginia where *Soering* would face death penalty upon his arrival.⁸⁷ This is what the Cambodian authorities should take into account. Although, the Code does not provide for such an assurance, the authorities should ask for one from the Requesting State in the event that the sought person would face the death penalty after extradition from Cambodia.

3. Extradition and Prevention of Torture

The prevention of torture as a ground for denying an extradition request is not mentioned in the Code nor is it mentioned in any of the bilateral extradition treaties to which Cambodia is a party. Insofar as such cases are concerned, an assurance of that the sought person will not be subject to torture upon arrival in the Requesting State will not suffice to legitimize a decision to extradite.⁸⁸ The competent and relevant authorities shall consider relevant obligations arising from treaties to which Cambodia is a party and the prohibition of torture has the status of *jus cogens* – a rule which always applies with no derogation, even in times of emergency.⁸⁹ This rule is not strange, especially if compared with the legal framework on extradition in Chinese Law which allows relevant authorities to consider whether the sought person will be subject to torture when he or she arrives in the Requesting State after extradition from China.⁹⁰

⁸⁶ *Id.*, para. 20.

⁸⁷ *Id.*, para. 69.

⁸⁸ In practice, an assurance from the Requesting State to the Requested State that the sought person will not be subjected to torture on extradition to the Requesting State. Such an assurance is not a legally acceptable justification for a decision to extradite as the prohibition of torture is absolute prescribed.

⁸⁹ For Notion of the Peremptory Norm, see the Article 53 of the Vienna Convention on the Laws of Treaties, May 23, 1969, 1155 U.N.T.S.331. It is according to Sir Elihu Lauterpacht and Daniel Bethlehem, *the Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 74 (Erika Feller, Volker Turk and Frances Nicholson, ed. 2003).

⁹⁰ The Extradition Law of the People's Republic of China (Order of the President No. 42) (2000), Art. 8 (7) (in the file of the author).

4. Absence of Provision with Regard to Extradition by the Requesting State to a Third State

The international framework for extradition provides for situations where extradition is sought from a Requested State by the Requesting State and thereafter the Requesting State extradites the person in question to the another state (“third state”). As mentioned above, in such cases, international treaties provide that permission must be sought from and given by the Requested State before the Requesting State can extradite the person to a third State.

The Code is silent on the need, or otherwise, for permission to be sought from Cambodia, as the Requested State, before a Requesting State can extradite the sought person to a third state. The question therefore necessarily arises as to whether Cambodia can intervene in the extradition by the Requesting State to a third State of a person originally extradited from Cambodia to the Requesting State. The question also arises as to the permissible grounds for such an intervention? The lack of clarity in these areas requires further consideration.

Extradition involves not only the personal interest of the persons concerned whose rights might be violated but also the integrity of the Requested State. Human rights law concerns an extradition which would facilitate the torture of the sought person as placing the Requested State in the role of accomplice to a human rights violation. In the event of an extradition to a third State via a Requesting State, the Requested State will be responsible for the torture of the sought person to the extent that such torture was foreseeable. Case law exists establishing such liability on the part of the Requested State.⁹¹ Thus, before a Requesting State extradite a person to another State, permission from Cambodia as the Requested State is mandatory. Seeking permission from the Requesting State indirectly informs Cambodia about the likely fate of the person concerned, and Cambodia might intervene to prevent the extradition by the Requesting State to the third state. Cambodia has the right to intervene or to say that the extradition by the Requesting State to third State shall not be effected given the human right violation that might ensue. Cambodia shall intervene and prevent such an extradition and shall consider human rights situation of the third state and assess whether, upon arrival in the third state as a resulted of extradition from the Requesting State, a person would be subjected to torture or the death penalty since otherwise Cambodia itself will be labeled as a human rights violator. That the provisions of the Code are silent on the required permission from Cambodia does not operate to deny Cambodia the legal right to intervene.⁹²

⁹¹ *Mutombo v. Switzerland*, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994), para. 10.

⁹² The relevant human right treaties do not vest power in the Human Rights Committee to assess reservations entered by States, and the absence does not mean that the committee shall not consider reservations, *see* Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Proto-

Cambodia is legally allowed to do so, and the third state cannot claim that such a consideration of the human rights situation prevailing in the third state or the intervention by Cambodia would constitute an interference with the domestic affairs of that state. Such a claim would have no legal basis in the extradition treaties which provide: “*this treaty does affect rights and obligations to which States are parties and respected in the context of any multilateral treaty*”,⁹³ and it will not be illegal to look at the contents of relevant treaties beyond the Code although the Code does not itself include such provision. This conclusion is derived from the obligation to ensure that an extradition would not breach national or international law.

Extradition and the Rule of Non-Inquiry into the Domestic Affairs of Another State

It could be argued that the obligation to consider an extradition request in light of the human rights situation prevailing in the Requesting State is neither legal nor practical. This argument is derivative of the rule of non-inquiry which prohibits authorities of one State from inquiring into what happens in another.⁹⁴ It is an old concept based on the doctrine of State sovereignty and non-interference with the domestic affairs of States. Although the doctrine was provided for in treaties⁹⁵, it should not be loosely interpreted. The development of international law on the promotion and protection of human rights partly erodes the rule of non-inquiry. Now, ill-treatment of citizens by state authorities is not solely an issue of domestic affairs of the State in question.⁹⁶ Moreover, a discussion by one State of the human rights situation prevailing in another is not an act of interference with domestic affairs of the latter State.⁹⁷ This is due to the fact that treaties allow and oblige States to discuss the situation of human rights in other States. Several treaties to which Cambodia is a party make such provision, including the bilateral extradition treaties⁹⁸ which incorporate international norms that the State shall respect and implement.

cols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 6, 14 and 18.

93 Extradition Treaty between the Kingdom of Cambodia and the People's Republic of China, *supra* note 36, Art. 19.

94 See Geoff Gilbert, *supra* note 2, p. 104; John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 the American Journal of International Law, 189 (1998); Susanne Zuhlke and Jens Christian Pastille, *Extradition and the European Convention, Soering Revisited*, 59 ZaoRV (1999), p.752.

95 Principle (c) of the Declaration of the Principles of International Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, *in* Basic Documents in International Law , 2 (Ian Brownlie, 5th Ed., 2002).

96 Akehurst' s Modern Introduction to International Law, 209, 220 (1997).

97 Example, during the General Assembly session, human rights issue of one country is discussed among States.

98 The Treaty on Extradition between the Kingdom of Cambodia and the People Republic of China, *supra* note 36, Art. 3.

In addition, there have been many instances in practice where States have discussed the human rights situation prevailing in other countries.⁹⁹

The authorities of Cambodia should not be reluctant to consider the human rights situation prevailing in the Requesting State since law and treaty permits decisions to deny extradition which would be in breach of national law and international obligation.

5. Priority of Requests

Some crimes affect several States to the extent that they will have an interest in trying the suspected perpetrators; thus, situations can arise where there are two or more extradition requests from different states to the state where a suspect resides. In such circumstances, the Requested State shall decide which extradition request shall be honored. Many factors shall be taken into account in deciding the request. Political and/or diplomatic interests might be among the factors for consideration in determining which request to give priority to.

In the extradition case of *Soering*,¹⁰⁰ the Federal Republic of Germany also sought his extradition on the grounds that German courts had jurisdiction to try him in respect of the killings – which formed the basis for the extradition request by the United States – because of his German nationality. If the extradition request by Germany had been honored by the United Kingdom, the human rights concerns that arose with respect to the United States request would have been avoided as German law does not allow the death penalty. However, the United Kingdom decided to extradite *Soering* to the United States.¹⁰¹ Such an extradition might be regarded as a deterrent to criminals seeking to escape the death penalty by fleeing to the United Kingdom, which does not apply the death penalty.

The Code makes detailed provisions with regard to the prioritization of extradition requests. The factors for considering the priority of requests include: *obligation imposed by the treaties concerned, gravity of offence, time and place of crime commission, the date of request; nationality and residence of sought person and victim, and possibility of delivery of sought persons to the Requesting State*.¹⁰² It is not clear whether the listed factors are exhaustive and the treaties mentioned only include bilateral treaties. However, human rights factors should also be taken into account in determining the priority of two or more extradition requests. Finally, a request from an international body, such as the International Criminal Court,¹⁰³ shall be taken into consideration and compared with similar requests from states. This practice allows a State to ensure that diplomatic relations between States are maintained and future crimes are deterrent.

⁹⁹ See *supra* note 96.

¹⁰⁰ *Soering* case, *supra* note 65.

¹⁰¹ *Id.*, summary part.

¹⁰² The Code, *supra* note 21, Art. 576.

¹⁰³ Cambodia is a party of the Rome Statute in 2002; see the Rome Statute, 2187 U.N.T.S. 90, Art. 86. Cambodia is a party in 2002.

6. Presumptive Complex and Time Consuming Process

The relevant provisions of the Code do not outline in detail the nature of the roles and duties of all institutions involved in the extradition process. For example, what is the role of the prosecutor, and to what extent does the Royal Government have discretion in determining extradition requests? Insofar as the role of the Prosecutor General is concerned, guidance may be taken from the fact that the Prosecutor General is an institution vested with the duty to defend the interest of public. In this regard, it may be assumed that the role of the Prosecutor General is to investigate and review relevant documents contained in or attached to the request, as well as requests for the provisional detention of the suspected criminal that is subject to an extradition request.¹⁰⁴ For the involvement of the Government, practical guidance may be taken from the extradition case of General Pinochet. In that case the Government of the United Kingdom and North Ireland, after a decision by the House of Lords that Pinochet did not have diplomatic immunity and that an extradition requested from Spain should be honored, decided to send Pinochet to Chile on humanitarian grounds. In other words, the British government determined that General Pinochet's illness justified sending him back to Chile for medical treatment.¹⁰⁵

According to the Code, the Investigating Chamber in the Court of Appeal plays a significant role in the extradition process; however, as mentioned above, the applicable law on considering requests is very brief and there are no more national laws or guidelines on how the Chamber should operate in practice. For example no guidance exists as to how the Chamber should proceed if wanted person does not accept the decision of the Investigating Chamber. In this connection, the legal framework of China on extradition is much more detailed and provides persuasive guidance. The Higher People's Court examines the request of extradition, and the decision of this court is subject to review by the Supreme People's Court.¹⁰⁶

In practice, consideration of an extradition request is akin to a trial; thus, the Investigating Chamber should act as an independent, impartial and competent court. It shall follow due process rules and other international norms. In the event of a failure to comply with international law, Cambodia will be responsible for attributive act of its agent.¹⁰⁷

Preliminary observations of laws and practices reveal that the process of extradition as a whole ranging – from the receipt of a request to the actual surrender of a wanted person – is a complex and time consuming process without great effort and effective co-

104 There should be a study on the actual practice of all relevant institutions participating in extradition process or practical guidelines for functioning of these bodies.

105 Richard Tyler, Pinochet returns to Chile after Britain halts extradition proceedings, March 3, 2000 at World Socialist Website (<http://www.wsws.org/articles/2000/mar2000/pino-m03.shtml>), visited on July 26, 2010.

106 See generally section 3 of Extradition Law of China, *supra* note 90, Arts. 22 and 16.

107 Draft Articles on State Responsibility, *in* Basic Documents in International Law, Part II (Ian Brownlie, 5th Ed., 2002), Arts. 1 and 5.

ordination between relevant institutions. Provisional detention of wanted persons upon the request of the Requesting State without legal action may go beyond the legally justifiable period of such detention as a result of delays in the process. Such circumstances constitute a breach of that person's human rights. In this connection, it is recommended that more laws and practical guidelines should be adopted. Finally, sought persons should be encouraged to avail of the provision which permits him or her to consent to extradition thereby reducing the complexity and duration of the extradition process. In all circumstances, the rights of the person concerned should be of paramount concern.

VI. Conclusions

Overall, having considered both national law and bilateral treaties on extradition to which Cambodia is a party in comparison with international treaty on extradition, this paper concludes that the Cambodian law on extradition is quite rich and reflects current developments in relevant international laws. However, there are loopholes in existing legal provisions, such as substantive and procedural norms in the event that a sought person is dissatisfied with the decision of the Chamber and wishes to appeal. Addressing these loopholes demands the relevant and competent authorities of Cambodia to look beyond national laws in order to ensure that extradition practices are in keeping with obligations imposed by treaties to which Cambodia is a party. This approach will equally ensure that criminals not go unpunished. Both national law and international law permit looking beyond the Code. Finally, as a matter of human rights, great effort and effective coordination among institutions participating in the extradition process are needed to secure the appropriate purpose of the extradition and compliance with obligation in national and international law.

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THE ECCC IN THE CONTEXT OF CAMBODIAN LAW

Franziska ECKELMANS

CONTENTS

I. Context and background.....	441
II. The ECCC	445
1. Founding documents	445
2. Court structure	446
3. Jurisdiction	451
Temporal jurisdiction.....	451
Personal jurisdiction	452
Subject-matter jurisdiction.....	453
4. Applicable Law	456
5. Character of ECCC	459
III. Implication on the legal system of Cambodia	461
1. Implications on the substantive law	461
International crimes	461
Forms of responsibility and sentencing	462
Reparations	464
2. Implications on the procedural law.....	465
Fair trial and rights of the Accused and the Internal Rules	465
The Internal Rules	467
Conclusion relevant to the procedural law	468
Other implications	469
IV. Conclusion	470
V. Supplement (13 February 2012).....	471
REFERENCES	472

THE ECCC IN THE CONTEXT OF CAMBODIAN LAW

*Franziska ECKELMANS**

I. Context and background

The Kingdom of Cambodia (Cambodia), although ancient, is in many ways a very young country. Its people had to endure a war of nearly 30 years that only came to an end in 1998. In addition, the regime of Democratic Kampuchea had the country in its grip from 17 April 1975 to 6 January 1979. This specific period and crimes committed by the senior leaders of Democratic Kampuchea as well as by the persons most responsible for such crimes form the subject of the criminal proceedings taking place today before the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The regime of Democratic Kampuchea destroyed the legal system of Cambodia.¹ The criminal system was originally based upon the French legal system, and fully codified. The Codes stemmed from the beginning of the 20th century and were promulgated, basically without amendment, after the independence of Cambodia from French colonial rule. The most important codifications in the area of criminal law were the 1956 Penal Code² and the 1964 Criminal Procedure Code. In the 1980s, under the influence of the Vietnamese, socialist law was the basis of the judicial system and in this period some decrees were promulgated by the executive branch of the government relevant to the area of criminal

* Ms. Franziska ECKELMANS is Legal Officer, Appeals Division of the International Criminal Court (ICC); from 2009 to 2011 Legal Advisor, ECCC Trial Chamber through CIM (Centre for International Migration); the opinions expressed in this contribution are opinions of the author alone and not opinions of either the ICC or the ECCC. This contribution refers to developments at the ECCC until September 2011.

1 Case File 001/18–07–2007/ECCC/TC, *Judgement*, Trial Chamber, E188, 26 July 2010 (“TC Judgement, Case File 001”), section 2.2.3, para. 94; Case File 001/18–07–2007/ECCC/TC, *Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes*, Trial Chamber, E187, 26 July 2010, (“TC Statute of Limitations Decision, Case File 001”) para. 14.

2 *Code pénal et lois pénales*, Recueil judiciaire. Royaume du Cambodge. Ministère de la Justice, numéro spécial, 1956.

law.³ Students were sent to e.g. Vietnam, the Soviet Union or the German Democratic Republic (GDR) to study law.⁴

The laws in the area of criminal law of the 1990s promoted, as required by Annex 5 to the 1991 Paris Peace Agreement,⁵ the re-establishment of the rule of law and the independence and impartiality of the judiciary.⁶ However, only in 2007, a comprehensive Code of Criminal Procedure (2007 Code) was promulgated, based on the French system.⁷ In 2009 the new Criminal Code (2009 Criminal Code) followed.⁸ The first Part of the 2009 Criminal Code establishes rules relevant to punishment and individual criminal responsibility and is in force since December 2009. The remaining Parts define the crimes and are applicable since December 2010.⁹ 250 judges and prosecutors work in Cambodia nowadays; however the country is struggling to implement rule of law principles. The need to strengthen the judicial system has been acknowledged by many different actors over the past two decades and at present.¹⁰

The civil war to which the Khmer Rouge were a party throughout only ended in 1998. However, in 1993 the Kingdom of Cambodia was established based upon a new Constitution,¹¹ despite the Khmer Rouge's refusal to participate in the United Nations di-

3 *Decree Law No. 2 on the Penalty for Betraying the Revolution and Various Penalties for Other Betrayals* (15 May 1980), which formed the criminal law applicable during the 80ies; see also TC Statute of Limitations Decision, Case File 001, para 19; see also Decree Law No. 53 K on *Criminal Trial Procedures* (26 July 1989) adopted by the National Assembly.

4 For a comprehensive study of the political system of the 1980ies in Cambodia, see Kristina Chhim, *Die Revolutionäre Volkspartei Kampuchea 1979 bis 1989* (Peter Lang, 2000).

5 *Agreement on A Comprehensive Political Settlement of the Cambodian Conflict*, concluded in Paris on 23 October 1991, 1663 UNTS No. 28613.

6 See *Provisions dated September 10, 1992 relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period*, promulgated by the Supreme National Council ("1992 UNTAC Law"), which was, despite its title, applicable in Cambodia until the 2009 Criminal Code was promulgated (see article 158new of the 1993 Constitution (amended version)); Decree Law 06 K on *The Organisation and Activities of the Adjudicate Courts of the State of Cambodia* (8 February 1993) ("1993 SOC Law").

7 *Code of Criminal Procedure of The Kingdom of Cambodia*, the English translations cited in this contribution derive from the publication *Khmer-English Translation, First Publication – September 2008*, by Bunleng CHEUNG and Jürgen ASSMANN.

8 *Criminal Code*, the English translations cited in this contribution derive from the publication *Khmer-English Translation* by Bunleng CHEUNG, published in 2011.

9 Article 672 provides: "Except for the general provisions of Book 1 (General Provisions) of this Code which shall immediately be applicable after the entry into force of this Code, other provisions shall be applicable one year after its entry into force".

10 See with respect to the problems of the Cambodian judiciary, Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, Singapore Year Book of International Law, (2007) 11 SYBIL 195–259 [205–207]; Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, Journal of International Criminal Justice 4 (2006), 327–341; Duncan McCargo, *Politics by other means? The virtual trials of the Khmer Rouge tribunal*, International Affairs 87:3(2011), p. 616, 618; Situation of Human Rights in Cambodia, UNGA. A/RES/52/135 (27 February 1998), para. 8.

11 *The 1993 Constitution of the Kingdom of Cambodia* (21 September 1993 with later amendments), available at: <http://www.ccc.gov.kh/english/CONSTITUTIONEng.pdf>.

rected elections and disarmament process that took place from 1992 to 1993. The Cambodian government issued in 1994 a Law Outlawing the Khmer Rouge. In 1997, the Cambodian government requested assistance from the United Nations “in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979”.¹² As a consequence of this request, in 1998 the United Nations Group of Experts requested to advise on accountability for the crimes of the Khmer Rouge stated, “the Cambodian judiciary presently lacks three key criteria for a fair and effective judiciary: a trained cadre of judges, lawyers and investigators; adequate infrastructure; and a culture of respect for due process.”¹³ The ECCC Trial Chamber determined with respect to this period:

In common with many countries weakened by decades of armed conflict, these provisions [those relevant to upholding judicial independence and impartiality] required time to implement and some have only recently been adopted. Others are still in the process of elaboration and norms in this area are evolving. This should be viewed in the context of the various systemic weaknesses which have been observed within the Cambodian judiciary dating from the Democratic Kampuchea period, many of which have proved enduring. These weaknesses were well-known at the time of the ECCC’s creation and were among the reasons for its establishment in the first place.¹⁴

The process of creating the legal basis for the ECCC took about seven years, i.e. from 1997/1998 to 2004, which started, as advised by the United Nations Group of Experts, with the intention of establishing an international tribunal.¹⁵ Nevertheless in 2004, the “Agreement between the United Nations and The Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea”¹⁶ (Agreement) was concluded and the amendments to the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the

12 See letter dated 21 June 1997 from the two Prime-Ministers of Cambodia requesting the assistance of the United Nations to investigate and prosecute the crimes committed during the Democratic Kampuchea regime, on the basis that Cambodia “does not have the resources or expertise” to carry out such trials, annexed to UN Doc. A/51/930-S/1997/488 (24 June 1997).

13 *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, transmitted by the Secretary General along with his report, UN Doc. A/53/850 – S/1999/231, 16 March 1999, (“Report of the Group of Experts”) paras 6, 126.

14 Case File 002/19–09–2007/ECCC/TC, *Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn*, Trial Chamber, E5/3, 28 January 2011 (“TC Nil Nonn Disqualification Decision”), para. 14.

15 See Report of the Group of Experts, paras 138, 139; see also the ECCC website (www.eccc.gov.kh); and for a comprehensive overview: Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, Singapore Year Book of International Law, (2007) 11 SYBIL 195–259; Sylvia de Bertodano, *Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, Journal of Criminal Justice, May 2006, Vol. 4 Issue: Number 2, pp. 285–293.

16 Signed 6 June 2003, in force since 19 October 2004.

Prosecution of Crimes committed during the Period of Democratic Kampuchea¹⁷ (ECCC Law) were promulgated by the King of Cambodia.

The ECCC started their work in 2006 and are about to conclude their first case, i.e. Case 001 relevant to Kaing Guek Eav, alias “Duch”. In March 2011, the Supreme Court of the ECCC held a hearing on the appeals of the Defence, the Co-Prosecutors and the Civil Parties against the judgment of the Trial Chamber which was delivered on 26 July 2010.¹⁸ The judgement of the Supreme Court Chamber is expected shortly.¹⁹ The Trial Chamber started hearing Case 002 with a so-called “initial hearing” in the week of the 27th of June 2011. The Case relates to the Accused persons Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan.²⁰ The fitness of Nuon Chea and Ieng Thirith was the subject of a hearing held at the end of August 2011; a decision on whether they are fit to stand trial will have to be taken in due course.²¹ The Trial Chamber also decided to sever the charges laid in the Closing Order.²² The first trial “in Case 002” will concentrate on the structure and functioning of the Democratic Kampuchea government, its policies, the roles of the Accused, and on the alleged crimes relevant to the movements of population within Cambodia in 1975 and 1976.²³ The fate of Cases 003 and 004 against unnamed suspects, pending before the Co-Investigating Judges, is at the moment unresolved. The Co-Investigating Judges appear determined to terminate the proceedings apparently because they doubt that the unnamed suspects fall within the personal jurisdiction of the ECCC.²⁴

This article endeavours to look at the ECCC from a Cambodian law perspective by analysing the defining features of the ECCC and comparing them, where possible, with contemporaneous Cambodian law. In concluding this article, implications that the ECCC may have on the Cambodian legal system are discussed.

17 Promulgated on 27 October 2004 (NS/RKM/1004/006).

18 Case File 001/17–07–2007/ECCC/SCC, *Order Scheduling Appeal Hearing*, Supreme Court Chamber, 4 March 2011, F20; see TC Judgement Case File 001.

19 See ECCC Press statement of 1 September 2011 entitled “*Statement from the Supreme Court Chamber Regarding Appeal Judgement in Case 001*”.

20 NUON Chea was the so-called “Brother No. 2”, IENG Sary is the former Minister for Foreign Affairs, KHIEU Samphan is the former Head of State, and IENG Thirith is the former Minister of Social Affairs and wife of IENG Sary.

21 Case 002/19–09–2007/ECCC/TC, *Scheduling Order for Preliminary Hearing on Fitness to Stand Trial*, Trial Chamber, 11 August 2011, E110.

22 Case File 002/19–09–2007/ECCC/TC, *Severance Order pursuant to Internal Rule 89ter*, Trial Chamber, 22 September 2011, E124 (TC Severance Order).

23 TC Severance Order, paras 1, 5.

24 See Case File 003/07–09–2009/ECCC/OCIJ, *Decision on International Co-Prosecutor’s Re-Filing of Three Investigative Requests in Case 003*, OCIJ, 27 July 2011, public redacted version, D26, p.4; and OCIJ Press statement of 8 August 2011, available at: <http://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-civil-parties-case-004>; see in this context also Stephen Heder, *A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, 1 August 2011, available at: <http://www.cambodiatribunal.org/blog/2011/08/review-negotiations-leading-establishment-personal-jurisdiction-extraordinary-chambers>.

This article does not deal with the possible broader effects of the ECCC on Cambodian society, i.e. whether there will be justice for victims or reconciliation, whether the historical record will be straightened or what effects the trials will have on victims or the young Khmer generation.²⁵ The article does also not endeavour to compare the ECCC jurisprudence with that of international tribunals or courts.

II. The ECCC

1. Founding documents

The Agreement is an international treaty between two subjects of international law: the Kingdom of Cambodia and the United Nations. Article 31 of the Agreement and Article 47*bis new* of the ECCC Law provide that the Agreement and the ECCC Law have the rank of simple laws within the Cambodian legal system. Therefore, the founding documents of the ECCC both form part of Cambodian law, while the Agreement is at the same time an international treaty.

Despite the character of the ECCC Law as a Cambodian law, Cambodia is not allowed to amend it without prior “consultations” between the concluding parties, as stipulated in Article 2(3) of the Agreement. In the same manner, the Cambodian government is prohibited from requesting an amnesty or pardon “for any person who may be investigated for or convicted of crimes referred to in the present Agreement.”²⁶

The motivation of the Cambodian Government and the United Nations to conclude the Agreement is laid down in several documents. The Preamble of the Agreement clarifies the perspective of the Cambodian government with respect to the ECCC and stresses that they requested “*assistance* from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”.

The perspective of the United Nations was expressed in the General Assembly resolution 57/228,²⁷ where they considered that the “serious violations of Cambodian and in-

25 On the goals and effects of the ECCC, a lot has been written; *recently*: Duncan McCargo, *Politics by other means? The virtual trials of the Khmer Rouge tribunal*, *International Affairs* 87:3(2011), 613–627; Thorsten Bonacker, Wolfgang Form, Dominik Pfeiffer, *Transitional Justice and Victim Participation in Cambodia: A World Polity Perspective*, *Global Society*, January 2011, Vol. 25, Issue: Number 1, pp. 113–134; James L. Gibson, Jeffrey Sonis, Sokhom Hean, *Cambodians’ Support for the Rule of Law on the Eve of the Khmer Rouge Trials*, *The International Journal for Transitional Justice*, vol. 4, 2010, pp. 377–396; see also the Report of the Group of Experts, paras 219–2, 220.

26 Article 11 of the ECCC Law.

27 UNGA resolution 57/228, 27 February 2003, Fifty-seventh session, Agenda item 109(b), see also the Preamble of the Agreement.

ternational humanitarian law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole". This conforms to the interest of the international community in contributing effectively to the fight against impunity for the most serious crimes of concern to humankind, a mission to which the international community subscribed.²⁸ Further, the Cambodians' legitimate concerns in the pursuit of justice and reconciliation were recognized by the United Nations too.²⁹ The United Nations considered that they would be providing "international *assistance*" in the establishment of "Extraordinary Chambers within the existing court structure of Cambodia" and that "the legal basis and the principles and modalities for such *cooperation*" were laid down in the Agreement.³⁰ Below, the specific features of the ECCC are addressed.

2. Court structure

The Cambodian court structure is based upon the French court structure: the judicial investigation is carried out by an investigating judge under the review of an investigating chamber; there are first instance courts and an appeal court and there is the highest court, which is in Cambodia the Supreme Court (cour de cassation).³¹ Article 2^{new} of the ECCC Law provides that the "Extraordinary Chambers shall be established in the existing court structure". The ECCC are situated in a building at the outskirts of Phnom Penh,³² the capital. However, they are not only physically separate from the Phnom Penh district or appeal court or the Supreme Court of Cambodia.

The founding documents of the ECCC did not provide for an appeals phase, which requires in Cambodian law a hearing of the parties and allows for a *de novo* trial,³³ but created only one Trial and one Supreme Court Chamber. In many legal systems,³⁴ as in

28 See e.g. the Preamble of the Rome Statute of the International Criminal Court.

29 See UNGA resolution 57/228, 27 February 2003, Fifty-seventh session, Agenda item 109(b), see also the Preamble of the Agreement.

30 See Preamble of the Agreement, Article 1 of the Agreement (emphasis added).

31 Cambodia also has a Constitutional Council (see Articles 136^{new} to 144 of the Constitution).

32 Article 43^{new} of the ECCC Law provides that the ECCC shall be located in Phnom Penh. The *Supplementary Agreement Between The United Nations And The Royal Government of Cambodia Ancillary to the Agreement Between the United Nations And The Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law Of Crimes During the Period of Democratic Kampuchea Regarding Utilities, Facilities And Services* provides that parts of the High Command Headquarters of the Royal Cambodian Armed Forces in Phum Ang village, Kantok commune, Ang Snoul district, Kandal province are available for use by the ECCC.

33 Article 406 of the 2007 Code provides: "If the Court of Appeal finds the judgment of the Court of First Instance is invalid, the Court of Appeal shall re-decide on the merits of the case in the same way that a Court of First Instance would".

34 At the ICC, ordering a new trial is within the powers of the Appeals Chamber (see article 83 of the Rome Statute).

the Cambodian,³⁵ a Supreme Court Chamber as a chamber of review can remand a case to a newly composed trial chamber for re-trial. At the ECCC, this possibility is explicitly excluded by Article 36^{new} of the ECCC Law: “[T]he Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.” As the provisions relevant to trial are applicable “*mutatis mutandis*” to the proceedings before the Supreme Court,³⁶ the precise scope of the powers of the Supreme Court and of the rights of the Accused, as established in the founding documents, is hard to discern. The Internal Rules determine the scope of the powers of the Supreme Court Chamber³⁷ and “clarify” that only “additional” evidence can be heard at the hearing. A *de novo* trial is therefore not foreseen. Internal Rule 105 also establishes that only errors of law, fact and procedural errors can form grounds of appeal; in a similar way as e.g. in Article 81(1) of the Rome Statute. The ECCC Supreme Court Chamber is therefore of its character rather a chamber of review.

The composition of the ECCC Trial and the Supreme Court Chambers is “hybrid”. Three Cambodian and two international judges form the Trial Chamber, while four Cambodian and three international judges constitute the Supreme Court Chamber.³⁸ The President of the Chamber must be a Cambodian judge.³⁹ Extraordinary, and thereby, to the authors knowledge, different from any other court world-wide, is the voting mechanism. While the Cambodian judges have the numerical majority, a decision can only be taken if there is a “super-majority”.⁴⁰ Four judges of the Trial Chamber and five judges of the Supreme Court Chamber need to vote affirmatively for a decision. The judges are required to strive for unanimity where possible. Nevertheless, there might be instances where a Chamber is required to take a decision but cannot find a super-majority. The question is what is happening in such a situation? For the Trial Chamber (and accordingly the Supreme Court Chamber) Internal Rule 98(4) gives only partly an answer, in that it provides, “[i]f the required majority is not attained, the default decision shall be that the Accused is acquitted.” And indeed, in the application of the principle in *dubio pro reo*,

35 Article 439 of the 2007 Code provides: “If the Supreme Court reverses a contested decision, it shall return the case and the parties to another Court of Appeal or to the same Court of Appeal. However, in the latter case the composition of the bench shall be different than the previous composition.” Only if the crime in question was not an “offence” [the term should rather be translated as “felony”, see Articles 1 and 46 of the 2009 Criminal Code]; or if the crime carries the same penalty, the Supreme Court is allowed to reverse the decision without remanding the case (Articles 440, 441 of the 2007 Code).

36 See Article 37^{new} of the ECCC Law.

37 See Internal Rules 108 and 109.

38 Article 3(2) of the Agreement, Article 9^{new} of the ECCC Law.

39 Article 9^{new} of the ECCC Law.

40 Article 14^{bis}(1) of the ECCC Law reads: “The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply: a. a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges; b. a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.”; see also Article 4 of the Agreement.

where Judges cannot find the required majority on the question of guilt or innocence, the accused must necessarily go free. However, what happens when the Chambers have to decide on preliminary questions or even procedural matters? The Trial Chamber, in not finding a “super-majority” on a preliminary objection according to Internal Rule 89 in Case 001, decided that the default decision is that the prosecution (with respect to the charged crimes in question) is terminated.⁴¹ If only one of the Judges disagrees with the majority, this judge issues a dissenting opinion, or the opinion will feature in the judgment or decision.⁴²

The ECCC is different from any ordinary and from any international court in that the prosecutors and the investigating judges always appear “in pair”. A Cambodian and an international prosecutor have to work together and take decisions together.⁴³ In the same way, a Cambodian and an international investigating judge lead their office and carry out their functions together.⁴⁴ Crucial to the functioning of the ECCC is the mechanism relevant to a disagreement among the two Co-Investigating Judges or the Co-Prosecutors. It appears that, without regulation, investigation and prosecution might easily be jeopardized should the Co-Investigating Judges or Co-Prosecutors not be able to agree. Therefore, the founding documents created a Pre-Trial Chamber established for the purpose to decide on a disagreement between the Co-Investigating Judges or between the Co-Prosecutors. The super-majority necessary for decision-making of the Trial and Supreme Court Chambers is also required for the Pre-Trial Chamber composed of three Cambodian and two international judges.⁴⁵ The rule of major importance to the functioning of the ECCC and a reason why it took so long to find agreement between the United Nations and the Kingdom of Cambodia,⁴⁶ is the default rule of Article 23*new* (6) of the ECCC Law and 7 (4)

41 TC Statute of Limitations Decision, Case File 001; see also in this context: Sylvia de Bertodano, *Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, Journal of Criminal Justice, May 2006, Vol. 4 Issue: Number 2, pp. 285–293.

42 Examples for dissenting opinions of the Trial Chamber are the following: Case File 001/18–07–2007/ECCC/TC, *Decision on Civil Party Co-lawyers’ joint request for a ruling on the standing of Civil Party lawyers to make submissions on sentencing and directions concerning the questioning of the accused, experts and witnesses testifying on character*, Trial Chamber, E72/3, 9 October 2009; TC Judgement Case File 001, with Judges Cartwright and Lavergne dissenting on different matters; recently: Case File 002/19–09–2007/ECCC/TC, *Dissenting Opinion of Judge Jean-Marc Lavergne Concerning the Trial Chamber Decision in Memorandum E62/3/10/4*, Trial Chamber Memorandum, E62/3/10/4.1, 23 August 2011 (in this context, it should be explained that the Trial Chamber in Case 002 often issues decisions on motions in the form of memoranda); an example relevant to the Supreme Court Chamber is: Case 002/19–09–2007/ECCC–TC/SC(04), *Partially Dissenting Opinion of Judge Noguchi, Decision on Immediate Appeal by KHIEU Sambhan on Application for Release*, 23 June 2011, E50/3/1/4.1 (the latter is though rather a separate opinion).

43 See Article 6 of the Agreement, Articles 16 to 22*new* of the ECCC Law.

44 See Article 5 of the Agreement, Articles 23*new* to 28 of the ECCC Law.

45 Article 23*new* of the ECCC Law provides: “A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges”.

46 See for an overview of these negotiations: Sylvia de Bertodano, *Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, Journal of Criminal Justice, May 2006, Vol. 4 Issue: Number 2, pp. 285–293.

of the Agreement. It provides that, if there is no majority as required for a decision, the investigation or prosecution shall proceed.⁴⁷

The Pre-Trial Chamber, while under the founding documents apparently solely established to solve conflicts between the Co-Prosecutors and the Co-Investigating Judges, developed, especially under the scheme of the Internal Rules and by its own jurisprudence, to a nearly full-fledged investigating chamber as existent in Cambodia and generally in the French legal system.⁴⁸ The provisions of the Internal Rules in that respect are mostly similar to the provisions of the 2007 Code.⁴⁹ A noteworthy decision of the Pre-Trial Chamber is a recent one. The Pre-Trial Chamber allowed an appeal by the defence against the Closing Order with the limitation that only matters relevant to the jurisdiction of the Court could be appealed.⁵⁰ However, under Cambodian law, the Closing Order can only be appealed by the Prosecutor. As a consequence of this approach of the Pre-Trial Chamber, the four accused in Case 002 raised before the Trial Chamber in preliminary objections under Internal Rule 89 similar arguments as those decided upon by the Pre-Trial Chamber in the appeals against the Closing Order in Case 002, just a month earlier.⁵¹

Currently, in Cases 003 and 004, the Co-Investigating Judges have agreed on a specific course of action with which the international Co-Prosecutor disagrees.⁵² The founding documents do not address such a situation. Under the mechanism of the Internal Rules though, the international Co-Prosecutor can appeal decisions of the Co-Investigating Judges.⁵³ Nevertheless, a default rule addressing the consequences of a non-decision in

47 See also Internal Rules 71 and 72 detailing the applicable procedure; to provide but one example for a (non)-decision: Case File 003, *Corrigendum to the considerations of the Pre-Trial Chamber regarding the disagreement between the Co-Prosecutors pursuant to Internal Rule 71 and Annex II*, 31 August 2009, Disagreement number: 001/18–11–2008/ECCC/PTC.

48 See Articles 257 to 277 of the 2007 Code, Articles 191 to 230 of the French Criminal Procedure Code; see also Nina H.B. Jørgensen, *The Extraordinary Chambers in the Courts of Cambodia and the Progress of the Khmer Rouge Trials*, Yearbook of International Humanitarian Law, December 2008, Vol. 11, Issue: Number 1, pp. 373–389 (at p. 379).

49 Cambodian law is applicable under the scheme of Article 23^{new} of the ECCC Law and Article 12 of the Agreement; see Internal Rules 73 to 77; Articles 266 to 269, 277 of the 2007 Code.

50 002/19–09–2007/ECCC/OCIJ (PTC 145&146), *Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise*, 20 May 2010, D97/15/9 (PTC JCE Decision), paras 30–34; *Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process*, 10 August 2010, D264/2/6; Case File 002/19–09–2007/ECCC/OCIJ (PTC145&146), *Decision on appeals by Nuon Chea and Ieng Thirith against the Closing Order*, Pre-Trial Chamber, 15 February 2011, D427/2/15, (PTC Nuon Chea/Ieng Thirith Appeal), paras 70–73, 83; the definition given to the term “jurisdiction” in the latter decision is also of interest, paras 60–63.

51 See Case File 002/19–09–2007/ECCC/TC, *Preliminary Objections concerning jurisdiction* (KHIEU Samphan), 14 February 2010, E46; *Ieng Thirith Defence's Preliminary Objection*, 14 February 2011, E44; *Consolidated Preliminary Objections* (NUON Chea), 25 February 2011, E51/3; *Summary of Ieng Sary's Rule 89 Preliminary Objections*, 25 February 2011, E51/4; see also Case File 002/19–09–2007/ECCC/OCIJ, *Closing Order*, 15 September 2010, D427.

52 See *supra*, section “Context and background”.

53 See Internal Rule 74(2) and Article 266 of the 2007 Code.

case of such an appeal is missing. It appears that where the Pre-Trial Chamber cannot find such a majority, the appeal must be dismissed.

The authority responsible for the appointment of Judges, disciplinary measures etc. is in Cambodia the Supreme Council of the Magistracy which is functioning under the authority of the King.⁵⁴ This Council is also responsible for the election of Cambodian and international Judges to the ECCC. While the process of selection of the Cambodian Judges was not subject to foreign scrutiny,⁵⁵ the international Judges were prior thereto nominated by the Secretary-General of the United Nations who submitted a list with names to the Council.⁵⁶ The appointment is made for the duration of the proceedings before the ECCC.⁵⁷ The Judges have to conform to high standards of impartiality and integrity to which they subscribed when they were sworn in.⁵⁸

The accused has the right to a Cambodian lawyer, but can also choose an international counsel who acts “in collaboration” with a Cambodian lawyer.⁵⁹ All counsel must be registered with the Cambodian bar association (BAKC).⁶⁰ Article 21 of the Agreement attributes to Cambodian and international counsel certain privileges and immunities from the applicability of Cambodian law in order to protect the “free and independent exercise” of their functions.

Civil Party groups are also often represented by a Cambodian and an international lawyer. Nearly 30 Cambodian and international lawyers represent the different interest groups of the 3,866 Civil Parties admitted to participate in Case 002.⁶¹ Recent amendments to the Internal Rules introduced two “Co-Lead Lawyers” who have the sole right to represent the “consolidated group of Civil Parties” in proceedings before the Trial Chamber.⁶²

⁵⁴ *Law on Organization and Functioning of the Supreme Council of Magistracy 1994*, No. 09 NS.94 (22 December 1994).

⁵⁵ See the critical account by e.g., International Bar Association, *Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future*, September 2011, available at: <http://www.cambodiatribunal.org>; see also Hanna Bertelman, *International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia*, *Nordic Journal of International Law*, July 2010, Vol. 79, Issue: Number 3, pp 341–382.

⁵⁶ Article 3 of the Agreement, 10^{new} to 12 of the ECCC Law.

⁵⁷ Article 12(2) of the ECCC Law.

⁵⁸ The Judges also agreed on a *Code of Judicial Ethics*, adopted on 31 January 2008 by the plenary of ECCC Judges.

⁵⁹ See for an overview of the provisions relevant to the defence: also Rupert Skillbeck, *Defending the Khmer Rouge*, *International Criminal Law Review*, 2008, Vol. 8 Issue: Number 3, pp. 423–445.

⁶⁰ See Internal Rule 22 (1); remarkable is the appeal mechanism provided in Internal Rule 22(1)(f): the Pre-Trial Chamber is in charge of appeals against decisions of the BACK refusing the recognition of an international lawyer.

⁶¹ See Internal Rules 23^{bis} and 23^{ter}; Case 002/19–09–2007/ECCC/OCIJ / PTC, *Decisions on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, 24 June 2011, D404/2/4, D411/3/6, see also the dissenting opinions of Judge Marchi-Uhel attached thereto; Case File 002/19–09–2007/ECCC/TC, Transcript of Initial Hearing, 28 June 2011, p. 117 (3.850 Civil Parties); latest VSS Press statement refers to 3.866 Civil Parties, available at: <http://www.eccc.gov.kh/en/articles/seventh-regional-forum-350-civil-parties-case-002-be-organized-kampong-thom>.

⁶² See Internal Rules 12, 12^{ter}, 23.

The international Co-Lead Lawyer and her Cambodian colleague are both employees of ECCC/UNAKRT (the United Nations Mission at the Khmer Rouge Tribunal).

Staff of the ECCC are partly employed by the ECCC as such, i.e. the Cambodian administration of the ECCC and partly employed by UNAKRT in accordance with United Nations rules. The purely administrative aspects of the ECCC are therefore functioning separately: e.g. Human Resources (interview panels are often either international or Cambodian). The other sections require close cooperation, especially among staff in sections providing legal services and staff in the sections providing services to the Chambers. The Director of the Administration is Cambodian and the Deputy Director is UNAKRT staff.⁶³ It is remarkable that despite this unique setting apparently no specific language training, intercultural training or other working method related training took place at the ECCC.

Unlike international tribunals, the ECCC do not have a Presidency, but, as the name suggests, Chambers with a President each. To fill this gap to an degree, a Judicial Administration Committee was established by the Judges in plenary, in charge of “advis[ing] and guid[ing] the Office of Administration concerning all activities relating to the administration and judicial support provided to, Office of the Co-Prosecutors, the Office of the Co-Investigating Judges and the Chambers, including the preparation and implementation of the budget.”⁶⁴

Having addressed the features that make the ECCC truly special, the following part addresses the jurisdiction of the ECCC, which is different from the jurisdiction of Cambodian courts.

3. Jurisdiction

Temporal jurisdiction

The jurisdiction of the ECCC is limited in many respects. The most remarkable one is the limitation of the jurisdiction to crimes committed between the 17th of April 1975 and the 6th of January 1979. The first date marks the day at which soldiers of the alliance between the Communist Party (Khmer Rouge) and Prince Norodom Sihanouk’s National United Front marched into Phnom Penh. The latter date is the day at which the leaders of Democratic Kampuchea left Phnom Penh and were then driven out of Cambodia.⁶⁵

The jurisdiction of Cambodian courts is generally not limited in time, but all-embrasive. Limitations to the exercise of jurisdiction are set primarily by other means, e.g. by the principle

⁶³ See Article 8 of the Agreement (also providing that they shall cooperate in order to ensure an effective and efficient functioning of the administration), see also Articles 30, 31*new* of the ECCC Law; since 2008, the ECCC has an Acting Director of the Administration (but see Article 31*new*(1) of the ECCC Law).

⁶⁴ Internal Rule 19.

⁶⁵ The international and/or non-international armed conflict on Cambodian territory though continued, with few periods of cease fire, until 1998, see *supra* I. Context and background.

of legality⁶⁶ and statutes of limitations.⁶⁷ However, international criminal courts generally have a limited temporal jurisdiction.⁶⁸ The exercise of jurisdiction of the International Criminal Tribunal of Rwanda (ICTR) was limited in a similar manner.⁶⁹ The ECCC is though truly extraordinary in that the period of temporal jurisdiction lies nearly 30 years back in time.⁷⁰

Personal jurisdiction

A further special feature is the limitation of jurisdiction to “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws [...]”.⁷¹ Case 001 dealt with the definition of the “most responsible” persons and concluded that Kaing Guek Eav (alias “Duch”) was a person most responsible for the crimes committed at the time in S-21 (the special security prison in Phnom Penh).⁷² This matter is currently before the Supreme Court,⁷³ as one of the main arguments of Kaing Guek Eav (alias “Duch”) on appeal. Also during trial, he made the argument that he was not the most responsible person. However, the argument was not raised as a preliminary objection to the trial, but only at the closing statements.⁷⁴ Further, article 29(4) of the ECCC Law is noteworthy in the context of personal jurisdiction. It establishes that a suspect or accused cannot be excused from his criminal responsibility even though he acted “pursuant to an order of the Government of Democratic Kampuchea or of a superior”.

66 The principle of legality incorporates e.g. the *nullum crimen sine lege, nulla poena sine lege* principles, see Article 3 of the 2009 Criminal Code and TC Judgement, Case File 001, paras 26–34; PTC Nuon Chea/Ieng Thirith Appeal, paras 95–103, 105–106 and with respect to the principle of legality in a broader sense: paras 182–183.

67 The statute of limitations set by currently applicable law can be found in Articles 9, 10 of the 2007 Code (while the statutes of limitations for imposed penalties are laid down in Articles 143, 144 of the 2009 Criminal Code); see also Articles 7 and 8 of the 2007 Code enumerating the reasons for which a criminal action is extinguished.

68 The Rome Statute of the ICC limits the jurisdiction of the ICC to crimes committed after the entry into force of the Rome Statute (1 July 2002), see article 11 of the Rome Statute; (for a comprehensive overview on the matter, see Sharon A. Williams, Article 11, in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd Edition, paras 9–10); the competence of the International Tribunal for the former Yugoslavia (ICTY) is limited to crimes committed “since” 1991, see article 1 of the ICTY Statute.

69 The competence of the International Criminal Tribunal for Rwanda (ICTR) is limited to crimes committed between 1 January 1994 and 31 December 1994, see article 1 of the ICTR Statute.

70 The International Crimes Tribunal of Bangladesh recently followed this example by giving effect in 2010 to a law (Act of 1973) providing jurisdiction to a specific (purely national) Chamber for crimes allegedly committed in 1971.

71 Article 2^{new} of the ECCC Law; see also Article 2(1) of the Agreement and Article 1 of the ECCC Law.

72 TC Judgement, Case File 001, paras 18–25.

73 Case File 001/18–07–2007/ECCC/SCC, *Appeal Brief by the Co-Lawyers for Kaing Guek Eav alias “Duch” against the Trial Chamber Judgement of 26 July 2010*, 18 November 2010, F14.

74 See Case File 001/18–07–2007/ECCC/TC, Transcript of Trial Day 77, 27 November 2009, E1/82.1, pp. 60–62.

Considering that such a rule was considered necessary by the drafters,⁷⁵ it is evident that more persons than those who gave primarily the orders during the Democratic Kampuchea regime should fall in the scope of the personal jurisdiction of the ECCC.

A definition of what are “senior leaders” has not yet been given by the Trial Chamber and therefore cannot be expected from the Supreme Court Chamber when issuing the Judgement in Case 001. In Case 002 though, the Accused Khieu Samphan, who was Head of State of Democratic Kampuchea, argues that he was not a senior leader because he was in a position of formal, not actual, power.⁷⁶

Subject-matter jurisdiction

The subject-matter jurisdiction of the ECCC is confined to specific crimes defined by Articles 3^{new} to 8 of the ECCC Law.⁷⁷

Article 4 of the ECCC Law refers to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948⁷⁸ (“Genocide Convention”) and adopts the definition of the Convention. Cambodia ratified the Genocide Convention already in 1950.⁷⁹ Cambodia also ratified, as one of few Asian states at the time, the Rome Statute of the ICC in 2002 and implemented the crimes defined in the Rome Statute in the 2009 Criminal Code. The 2009 Criminal Code therefore also criminalizes Genocide in Articles 183 to 187, by using in essence the same terminology as the one used in article 6 of the Rome Statute and in the Genocide Convention.

Article 5 of the ECCC Law deals with the Crimes against Humanity and provides a definition of such crimes. It is noteworthy that Article 9 of the Agreement refers to “crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court”. Article 7 of the Rome Statute and Article 5 of the ECCC Law however differ in many respects. These differences though are less important because the Trial Chamber in Case 001 and the Pre-Trial Chamber in Case 002 clearly stipulated that the principle of legality requires the Chamber to apply only the law which was applicable between 1975 and

75 However, it should be noted that such a rule is similar to rules applied by international criminal tribunals and courts.

76 Case File 002/19–09–2007/ECCC/TC, *Preliminary Objections concerning jurisdiction* (Khieu Samphan), 14 February 2010, E46; the hearing on the preliminary objection will only take place during trial, see Trial Chamber Memorandum “*Directions to parties concerning Preliminary Objections and related issues*” 5 April 2011, E51/7, point 5: “Resolution of this question entails a mixed assessment of law and fact. Oral argument will accordingly not occur at the initial hearing but will instead be scheduled during an early stage of trial, following the hearing of evidence in relation to the role and responsibility of all four accused”.

77 The Agreement simply refers to the ECCC Law (except for a reference in Article 9). However, Article 1 of the Agreement and Article 2 of the ECCC Law describe the crimes (with minor differences between the versions) in a generalized way: “for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia”.

78 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277.

79 See PTC Nuon Chea / Ieng Thirith Appeal, para. 108; see also paras 109–115, 118–123.

1979, the period of temporal jurisdiction of the Court.⁸⁰ The Rome Statute agreed upon on 17 July 1998, i.e. about 20 years later than the period relevant to the ECCC according to the principle of legality, has therefore only limited influence on the definition of the crimes at the ECCC. Crimes charged on the basis of underlying crimes that appear in the Rome Statute (but are not specifically mentioned in the ECCC Law) were challenged as inapplicable in preliminary objections of the Defence teams in Case 002.⁸¹ The Defence teams, for example, challenged whether forcible transfer of population, forced disappearance and other offences falling within the scope of “other inhumane acts” such as rape, forced marriage etc. were already applicable between 1975 and 1979.⁸² Conversely, the Co-Prosecutors requested that the indictment be amended and the legal characterization of the facts which form the basis of the charges be changed in part in order to include e.g. rape as a separate “underlying” offence of Crimes against Humanity and not only as “other inhumane act”.⁸³ Articles 188 to 195 of the 2009 Criminal Code incorporate Crimes against Humanity in conformity with the definition provided by the Rome Statute.⁸⁴

Article 6 of the ECCC Law deals with violations of the grave breaches provisions of the (four) Geneva Conventions of 12 August 1949. Cambodia ratified the Geneva Conventions already in 1958 but did not implement them into its national law.⁸⁵ The Trial Chamber in Case 001 and the Pre-Trial Chamber in Case 002 found them to form part of the law applicable between 1975 and 1979 in Cambodia.⁸⁶ Article 7 incorporates a specific violation of the 1954 Hague Convention for Protection of Cultural Property, and Article 8 deals with the violation of the 1961 Vienna Convention on Diplomatic Relations. Cambodia ratified both treaties before 1975.⁸⁷ The Co-Investigating Judges did not charge violations of Ar-

80 PTC Nuon Chea/Ieng Thirith Appeal, paras 129–133; TC Judgement Case 001, paras 283–295.

81 Case File 002/19–09–2007/ECCC/TC, *Preliminary Objections concerning jurisdiction* (KHIEU Samphan), 14 February 2010, E46; *Ieng Thirith Defence’s Preliminary Objection*, 14 February 2011, E44; *Consolidated Preliminary Objections* (NUON Chea), 25 February 2011, E51/3; *Summary of Ieng Sary’s Rule 89 Preliminary Objections*, 25 February 2011, E51/4; the Trial Chamber did not hear oral submissions on this matter at the Initial Hearing.

82 The Pre-Trial Chamber held that rape can only be charged as “other inhumane act” and not as a specific underlying offence under Crimes against Humanity, see PTC Nuon Chea / Ieng Thirith Appeal, paras 149–154; with respect to “other inhumane acts”, see paras 155–165.

83 PTC Nuon Chea/Ieng Thirith Appeal, paras 134–148 determined that Crimes against Humanity required in the 70ies a “nexus”, i.e. link, to an armed conflict; the Co-Prosecutors disagree and requested that the legal characterization be changed again (similarly for rape); see Case File 002/19–09–2007/ECCC/TC, *Co-Prosecutors’ Request For the Trial Chamber to Exclude The Armed Conflict Nexus Requirement From The Definition of Crimes Against Humanity*, 15 June 2011, E95; *Co-Prosecutors’ Request For the Trial Chamber to Recharacterize The Facts Establishing the Conduct of Rape as The Crime Against Humanity of Rape Rather than the Crime Against Humanity of Other Inhumane Acts*, 16 June 2011, E99.

84 From a Khmer legal terminology perspective it is interesting to study the terms used in the ECCC Law and in the 2009 Criminal Code for e.g. “widespread” and “systematic”.

85 See PTC Nuon Chea/Ieng Thirith Appeal, para. 108.

86 TC Judgement Case 001, paras 402–408; PTC Nuon Chea/Ieng Thirith Appeal, paras 116–123.

87 See Hague Convention: UNTS registration number I–3511, 249, Cambodia ratified on 1 May 1962 with effect as of 4 July 1962; Vienna Convention: UNTS registration number I–7310, volume 500,

ticles 7 or 8 of the ECCC Law; neither in Case 001 nor in Case 002. The question though, whether the Grave Breaches under Article 6 of the ECCC Law are subject to a statute of limitations, has been raised before the Trial Chamber in form of a preliminary objection.⁸⁸

In this context, it is worth mentioning that the Rome Statute embraces under the heading “War Crimes” not only the Grave Breaches of the Geneva Conventions but many other crimes that are part of the body of humanitarian law. The 2009 Criminal Code though does not implement the entire corpus of the Rome Statute but refers only to the Grave Breaches and some selected additional War Crimes. Articles 197 and 198 of the 2009 Criminal Code are the crucial articles in this respect. Although these articles do not reach the level of criminalization established by the Rome Statute (and over which the International Criminal Court has jurisdiction also in Cambodia), they fully embrace all crimes as laid down in Articles 6 and 7 of the ECCC Law.

Article 3 of the ECCC Law established that the subject-matter jurisdiction of the ECCC also includes “any of these crimes set forth in the 1956 Penal Code [...]: Homicide (Article 501, 503, 504, 505, 506, 507 and 508), Torture (Article 500), Religious Persecution (Articles 209 and 210)”. The 1956 Penal Code is not applicable anymore in Cambodia and was not applied since the Democratic Kampuchea regime. In other words, none of the contemporaneous legal practitioners of Cambodia were or are familiar with the 1956 Penal Code.

The issue with Article 3 of the ECCC Law lies in the second paragraph which establishes that “[t]he statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.” The original 10-years period of limitations of Article 109 of the 1956 Penal Code was thereby extended to a total of 40 years. The Constitutional Council of the Royal Kingdom of Cambodia declared that this provision is in line with the 1993 Constitution.⁸⁹ In the trial relevant to Kaing Guek Eav (alias Duch), the Judges of the Trial Chamber could not agree on whether or not the statute of limitations had expired.⁹⁰ The Cambodian Judges argued that based on the specific situation in Cambodia (non-existence of the judicial system and later limited functionality of the judicial system, the war and the fact that the Khmer Rouge were a party to the war), the statute of limitations for the Accused did not run until at least 1993. As he was arrested in 1999, the 10-years period had not yet expired. The international Judges could not agree with the factual analysis of their colleagues, but stated that the term “extended” in Article 3 of the ECCC Law can only be understood (in light of international human rights standards) as extending a running period. Arguing that the period of limitations had already expired, Article 3 of the ECCC Law could not, in their opinion, extend the period of limitation and therefore was considered to be without effect.

p. 95, ratification took effect on Cambodian territory on 31 August 1965.

88 See Summary of Ieng Sary’s Rule 89 Preliminary Objections, 25 February 2011, E51/4.

89 See for reference, TC Statute of Limitations Decision, Case File 001, footnote 60.

90 TC Statute of Limitations Decision, Case File 001.

Despite this decision, which was partly specific to the accused person in Case 001, the OCIJ included domestic crimes in the scope of the Closing Order for Case 002. The Pre-Trial Chamber confirmed that domestic crimes should be charged against the four accused in Case 002.⁹¹ Nevertheless, the four accused raised the expiry of the statute of limitations in the form of preliminary objections to the trial in Case 002.⁹² The matter was discussed in open court during the initial hearing of Case 002.⁹³ The Trial Chamber, ruled that the domestic crimes were not properly charged in the Closing Order as required by Internal Rule 67(2) and that therefore “the Trial Chamber is not validly seised of the offences in the 1956 Penal Code”.⁹⁴ Therefore, in Case 002, the Trial Chamber was not required to take a decision on the substance of the preliminary objection relevant to the statute of limitations of domestic crimes.

4. Applicable Law

The governing documents of the ECCC are the Agreement and the ECCC Law. They create the jurisdiction of the court, determine the substantive law applicable (the crimes and forms of responsibility) and establish the sentence to be applied. However, an important area, i.e. the procedural law, has not been addressed in any detail in the governing documents. Instead, Article 12 of the Agreement, given effect to by Articles 20^{new} (for the Co-Prosecutors), 23^{new} (for the Co-Investigating Judges and the Pre-Trial Chamber) and 33^{new} of the ECCC Law (for the Trial and Supreme Court Chambers), determines:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.⁹⁵

91 Case File 002/19–09–2007/ECCC/OCIJ (PTC145&146), PTC Nuon Chea/Ieng Thirith Appeal, 170–184; 002/19–09–2007/ECCC/OCIJ (PTC75), *Decision on Ieng Sary’s Appeal Against the Closing Order*, Pre-Trial Chamber, 11 April 2011, D427/1/30, (PTC Ieng Sary Appeal Decision) paras 278–287, adopting the opinion of the Cambodian judges of the Trial Chamber in Case 001.

92 See Case File 002/19–09–2007/ECCC/TC, *Preliminary Objections concerning jurisdiction* (KHIEU Samphan), 14 February 2010, E46; *Ieng Thirith Defence’s Preliminary Objection*, 14 February 2011, E44; *Consolidated Preliminary Objections* (NUON Chea), 25 February 2011, E51/3; *Summary of Ieng Sary’s Rule 89 Preliminary Objections*, 25 February 2011, E51/4; Trial Chamber Memorandum “*Directions to parties concerning Preliminary Objections and related issues*” 5 April 2011, E51/7 requested the Parties to make additional submissions.

93 Case File 002/19–09–2007/ECCC/TC, Transcript of the hearing of 29 June 2011.

94 Case File 002/19–09–2007/ECCC/TC, *Decision on Defence Preliminary Objection (Statute of Limitations on Domestic Crimes)*, Trial Chamber, 22 September 2011, E122.

95 Article 12 of the Agreement; Article 33^{new} of the ECCC Law reads: “The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there

At the time that these provisions of the governing documents took effect, the Cambodian legislature was still in the process of discussing the 2007 Code, which was finally promulgated shortly after the ECCC Internal Rules were adopted by the plenary of Judges in 2007. The Internal Rules purpose was [and still is], as explained in the Preamble,

to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.

Having no explicit basis in the governing documents, the legality of the Internal Rules was challenged by the parties to the proceedings on several occasions. The main criticism was and is directed towards the dissimilarity between the Internal Rules and the 2007 Code of Criminal Procedure.⁹⁶ Nevertheless, Pre-Trial and Trial Chamber held consistently that the Internal Rules are legal; the Trial Chamber only recently stating:⁹⁷

6. The substance of Nuon Chea's objections to the Internal Rules is in any event without merit. Nothing in Article 12(1) or elsewhere in the ECCC Agreement prohibits the adoption of procedural rules by a Plenary Session convened for that purpose.

7. The purpose of the Internal Rules is to consolidate applicable Cambodian procedure, supplemented by international standards where necessary and appropriate. As the Pre-Trial Chamber has previously held, trials at the ECCC differ substantially from cases before ordinary Cambodian courts. Other international courts trying cases similar to those before the ECCC have also adopted Rules of Procedure and Evidence specifically adapted to the requirements of complex international criminal trials. As the Accused acknowledges, the Rules and Procedure Committee referred to those rules in the course of designing the ECCC Internal Rules. These rules represent prevailing

is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level".

⁹⁶ See Guido Acquaviva, *New Paths in International Criminal Justice? The Internal Rules of The Cambodian Extraordinary Chambers*, *Journal of International Criminal Justice*, March 2008, Vol. 6, Number 1, pp. 129–129; Stan Starygin, *Internal rules of the extraordinary chambers in the courts of Cambodia (ECCC): Setting an example of the rule of law by breaking the law?*, *Journal of Law and Conflict Resolution*, Vol. 3(2), pp. 20–42.

⁹⁷ Case File 002/19–09–2007/ECCC/TC, *Decision on Nuon Chea's Preliminary Objection alleging the unconstitutional character of the ECCC Internal Rules*, 8 August 2011, E51/14; referring to *Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment*, Pre-Trial Chamber, 26 August 2008, D55/1/8, para. 14; see also PTC Ieng Sary Appeal Decision, paras 215–221; see also in this context: Special Tribunal for Lebanon, *Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing*, *Appeals Chamber*, 10 November 2010, CH/AC/2010/02, para. 42.

international standards in relation to cases adjudicating international crimes and are consonant with the ECCC's obligation, enshrined in Article 33 new of the ECCC Law, to conduct proceedings in accordance with international standards of justice, fairness and due process of law as expressed in Articles 14 and 15 of the ICCPR. The Trial Chamber therefore agrees with the Pre-Trial Chamber when it noted that,

[t]he Internal Rules... form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Code of Criminal Procedure of the Kingdom of Cambodia ("CPC") but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialised system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.

Also Judge Noguchi of the Supreme Court Chamber stated in June 2011:

However, the Internal Rules are an independent and distinct legal document adopted by the ECCC for the purposes of consolidating applicable Cambodian procedure for proceedings before the ECCC and adopting additional rules for certain circumstances. Due to the special mandate, jurisdiction, and structure of the ECCC, there are many provisions in the Internal Rules which do not exist in or differ from the procedures for ordinary domestic cases to be tried before ordinary domestic courts. Therefore, the context within which to interpret the Internal Rules is first and foremost the Internal Rules themselves. Otherwise, it will be difficult for readers of the Internal Rules to know precisely what the procedural rules are before the ECCC. Guidance from similar provisions of the Code of Criminal Procedure may be useful depending on the circumstances. When the meaning of a particular provision of the Internal Rules is sufficiently clear in its own context, recourse to the Code of Criminal Procedure is not necessary.⁹⁸

The Internal Rules were constantly amended by the plenary of Judges,⁹⁹ often in order, so it can be ascertained, to create a degree of legal certainty for the parties in the proceedings. One of the most important amendments concerned Civil Party participation, put in place in 2010 before the envisaged start of trial in Case 002. It appears that Cambodian law is the source of Civil Party participation at the ECCC.¹⁰⁰ The change effected in 2010

⁹⁸ Case File 002/19–09–2007/ECCC–TC/SCC(04), *Partially Dissenting Opinion of Judge Noguchi, Decision on Immediate Appeal by KHIEU Samphan on Application for Release*, 23 June 2011, E50/3/1/4.1, para. 6.

⁹⁹ The latest amendment took place in August 2011 (Revision 8).

¹⁰⁰ See David Boyle, *The Rights of Victims*, Journal of International Criminal Justice, May 2006, Vol. 4, Issue: Number 2, pp. 307–313; however, except for mention of the term "victim" in article 36new of

relates to the presentation of Civil Parties in trial and appeal proceedings and their right to request reparations. The Internal Rules now determine that Civil Parties form a group of Civil Parties and, while they have their own legal representatives, they are represented in trial proceedings by two, so called, “Civil Party Lead Co-Lawyers”.¹⁰¹ The group is constituted by the Co-Investigating Judges determining who *prima facie* has suffered direct harm because of the alleged criminal conduct of the Accused.¹⁰²

Another aspect which is of utmost importance to the governing law of the ECCC and the standards applicable at the ECCC is that Article 12 of the Agreement provides in paragraph 2:

The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.

This provision, mirrored in Articles 23^{new} and 33^{new} of the ECCC Law, provides a yardstick to the Chambers of the ECCC, in that they have to conduct the proceedings according to fair trial standards (Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”) and in line with the principle of legality (Article 15 of the ICCPR).¹⁰³ The Chambers seek to adhere to these standards. An interesting example is that both the Trial and the Pre-Trial Chamber considered that, although the Cambodian Constitutional Council had declared that the ECCC Law, specifically Article 3^{new} of the ECCC Law, is in conformity with the Constitution (a decision, they considered, the ECCC have no power to review), it was necessary for the Chamber to consider whether the provision in question conformed to standards set by Articles 14 and 15 of the ICCPR.¹⁰⁴

5. Character of ECCC

From what transpired in the previous sections, the character of the ECCC is hard to discern: It can be argued that the ECCC are based upon Cambodian laws, i.e. the Agreement and the ECCC Law. Further, the Agreement (and its name is indicative again) and the ECCC Law were carefully referring only to international instruments which Cambodia had ratified or which were otherwise applicable in Cambodia, such as the Genocide Convention, the 1949 Geneva Conventions, the ICCPR, etc. The founding documents included

the ECCC Law, the founding documents do not provide for participation of civil parties.

101 See Internal Rules 12–12^{ter}, 23–23^{quinquies}.

102 See Internal Rule 23^{bis}, see also TC Severance Order, para. 8, where it was clarified that “limiting the scope of facts to be tried during the first trial accordingly has no impact on the nature of Civil Party participation at trial, and their formulation of reparations claims made on their behalf by the Lead Co-Lawyers should take account of Internal Rule 23^{quinquies}(1)(a)”.

103 Cambodia ratified the ICCPR; see also Article 31 of the 1993 Constitution.

104 TC Statute of Limitations Decision, Case File 001, para. 36; PTC Ieng Sary Appeal Decision, para. 280.

crimes of the 1956 Penal Code (apparently applicable in the 70ies in Cambodia) within the scope of the ECCC's subject-matter jurisdiction and made Cambodian procedural law applicable to the ECCC. According to the principle of legality, the substantive law (the crimes), although international, must have been applicable in Cambodia between 1975 and 1979. Considering the Court from a (traditional) public international law or domestic constitutional law perspective, a lot speaks for the ECCC's characterization as a domestic court (with specific elements).¹⁰⁵

On the other hand, the Agreement is an international treaty, the crimes are international crimes and, where Cambodian law does not make specific provision, it is foreseen that international law and rules can apply. On that basis, the plenary of the Judges of the ECCC decided to adopt Internal Rules which form in effect the "procedural law" of the ECCC. The ECCC therefore have, in a way, developed over time and through jurisprudence and rule-making to a "self-contained unit".¹⁰⁶

Enlightening is the approach of the different Chambers of the ECCC to the question of its character. The Pre-Trial Chamber characterized the ECCC, in line with the submissions of the Co-Prosecutors¹⁰⁷ the ECCC as "a special internationalised tribunal".¹⁰⁸ The Trial Chamber decided:¹⁰⁹

The Chamber notes that the ECCC, which were established by agreement [...], is a separately constituted, independent and internationalised court. Although its constitutional documents show that the ECCC was established within the existing Cambodian court structure, the ECCC is, and operates as, an independent entity within this structure. As a court of special ("extraordinary") and independent character within the Cambodian legal system, the ECCC was designed to stand apart from existing Cambodian courts and rule exclusively on a narrowly-defined group of defendants for specific crimes committed within a limited period.

In Case 002, the Trial Chamber referred to the ECCC in comparison to "other" international courts or spoke of the ECCC as having "many features distinct from *other*

105 See Mohamed Shahabuddeen, *Teething Phase of the ECCC*, Chinese Journal of International Law (2011), 469 (470, 471); Lilian A. Barria, Steven D. Roper, *Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia*, Human Rights Review, October 2005, Vol. 7, Issue: Number 1, pp. 5–26.

106 see Special Tribunal for Lebanon, *Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing*, Appeals Chamber, 10 November 2010, CH/AC/2010/02, para. 41, explaining that international courts (such as the Special Tribunal for Lebanon) are not part of a "judicial system" but are "self-contained units".

107 See Case File 001/18–07–2007/ECCC/OCIJ (PTC01), *Ruling on Defence Request for Redaction of Some Parts of Co-Prosecutor's Response to Appeal Brief – Order of Provisional Detention*, Pre-Trial Chamber, 6 December 2007, C5/46.

108 Case File 001/18–07–2007/ECCC/OCIJ (PTC01) *Decision on appeal against provisional detention order of Kaing Guek Eav alias "Duch"*, 3 December 2007, C5/45, paras 18, 19.

109 Case File 001/18–07–2007/ECCC/TC, *Decision on Request for Release*, Trial Chamber, 15 June 2009, E39/5, paras 10–13.

internationalized courts and tribunals” and mentioned in the same decision the “hybrid nature of the ECCC”.¹¹⁰

Also many commentators characterize the court as being of a hybrid character,¹¹¹ somewhere between a purely international tribunal and a purely national court.¹¹²

How the ECCC are perceived is consequential for how the actions and decisions of the ECCC are being perceived. Staff, parties and observers often do not share the same perceptions about the character of the ECCC. The hard-to-define character therefore makes the ECCC vulnerable to criticism and implies that parameters of accountability cannot be easily applied.

III. Implication on the legal system of Cambodia

This contribution does not aim to provide the correct characterization of the ECCC, nor is this necessary for a discussion of the implications of the ECCC on the legal system of Cambodia. Of course, if the view was taken that the ECCC would be a domestic court, their decisions would have, in theory, a direct (not binding though) precedent effect on the Cambodian judiciary. In practice though, the ECCC are not applying directly Cambodian law, as already indicated above in the “applicable law” section. Nevertheless, the ECCC decisions and judgments (and the ECCC as a whole) might have effects on the criminal law system. What, if any, implications those are, is considered in more detail below.

1. Implications on the substantive law

International crimes

One immediate effect of the ECCC on the legal system is that the ECCC has established that international crimes, i.e. Genocide, Crimes against Humanity and Grave Breaches of the Geneva Conventions were international crimes applicable in Cambodia in the 1970ies.¹¹³ It is only for this reason that the crimes can still be investigated and prosecuted by the ECCC today. Consequently and according to general principles of criminal law, these crimes could also be the subject of a Cambodian investigation or prosecution. Should,

110 TC Nil Nonn Disqualification Decision, para. 14.

111 Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 *Ariz. J. Int'l & Comp. Law* 347 (356); Duncan McCargo, *Politics by other means? The virtual trials of the Khmer Rouge tribunal*, *International Affairs* 87:3(2011), 614.

112 Robert Petit, Anees Ahmed, *A review of the jurisprudence of the Khmer Rouge tribunal*, *Northwestern University Journal of International Human Rights* 8:2, 2010, pp. 166–7.

113 Crimes against humanity, see TC Judgement, Case File 001, paras 284–294; Grave Breaches of the Geneva Conventions, *ibid.*, paras 402–408; Genocide and Grave Breaches: see PTC Nuon Chea/Ieng Thirith Appeal, paras 108–124 (see also paras 129–133); see also PTC Ieng Sary Appeal Decision, paras 242–257; the parties to Case 002 have challenged the applicability of these crimes in their preliminary objections before the Trial Chamber; therefore this is still an issue before the ECCC.

and this is at this stage fully hypothetical, further proceedings – outside the framework of the ECCC – be initiated with respect to international crimes committed in or around that period, the jurisprudence of the ECCC would be extremely important to the Cambodian judicial authorities dealing with such proceedings.

If Genocide, Crimes against Humanity or War Crimes became the subject of criminal proceedings according to contemporaneous Cambodian laws, i.e. if those crimes were committed anytime after the entry into force of the 2009 Criminal Code, the definition and application of the crimes by the ECCC would be of importance to such proceedings too but with a caveat. The relevant provisions of the 2009 Criminal Code were couched according to the provisions of the Rome Statute of 1998 and mirror contemporaneous international criminal law. Consequently, the ICC jurisprudence would be more to the point for the definition of the crimes.¹¹⁴ Nevertheless, the ECCC jurisprudence, also available in Khmer, has the potential to highly contribute to any such (hypothetical) proceedings as this jurisprudence is built on the core underlying offences of international crimes which are still applicable today.¹¹⁵

Forms of responsibility and sentencing

In the areas where the governing documents of the ECCC were not complete and where the ECCC had to choose which substantive law to apply, the ECCC applied only rarely Cambodian law but reverted to rules applicable in international criminal law or to *sui generis* regimes.¹¹⁶ The most obvious areas are those relating to forms of responsibility and sentencing. The ECCC Chambers for example allowed the application of “joint criminal enterprise” which is a concept applied in international criminal law, but a notion unknown to Cambodian law.¹¹⁷

114 E.g. a discussion of whether rape as a Crime against Humanity is a separate underlying offence of Crimes against Humanity or part of “other inhumane acts”, or whether there was a need for a nexus between an armed conflict and the attack on the civilian population, as currently before the Trial Chamber, would be unnecessary due to the clear texts of the 2009 Criminal Code / Rome Statute.

115 When teaching international criminal law in Cambodia, any such differences between international crimes that were applicable in Cambodia in the 1970ies and the texts of the Rome Statute / 2009 Criminal Code should be taken into account.

116 This contribution does not touch upon all aspects of the substantive law, i.e. not on defences and grounds for excluding criminal responsibility, or on all forms of criminal responsibility.

117 TC Judgement, Case File 1, para. 510; compare also the Pre-Trial Chamber’s jurisprudence to which reference is made by the Trial Chamber: Case File 002/19–09–2007–ECCC–OCIJ (PTC37) PTC JCE Decision, para. 41; see also Case File 002/19–09–2007/ECCC/TC, *Decision on the Applicability of Joint Criminal Enterprise*, Trial Chamber 12 September 2011, E100/6; see also Robert Charles Clarke, *Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II*, Journal of International Criminal Justice, September 2011, Vol. 9, Issue: Number 4, p. 839; Katrina Gustafson, *ECCC Tackles JCE: An Appraisal of Recent Decisions*, Journal of International Criminal Justice, November 2010, Vol. 8, Issue: Number 5, pp. 1323–1332; Luke Marsh, Michael Ramsden, *Joint Criminal Enterprise: Cambodia’s Reply to Tadić*, International Criminal Law Review 11 (2011) pp. 137–154.

Recent Cambodian jurisprudence has apparently not yet addressed the criminal responsibility of leaders of organizations or the commission of crimes through other persons. Therefore, the meaning of “any person who commits the relevant criminally prohibited act” as laid down in article 25 of the 2009 Criminal Code dealing with the “definition of perpetrator” will need to be defined within the Cambodian context. The jurisprudence of the ECCC which focuses on the criminal responsibility of leaders and the most responsible persons might therefore play – probably along with relevant French case law – a certain role in the future development of jurisprudence in this area of Cambodian law. In any event, it should be expected that the Cambodian legal professionals who now serve at the ECCC will take those issues up for academic discussion and education.

The Agreement and the ECCC Law are also rather cursory in the area of sentencing. Article 10 of the Agreement establishes that the maximum penalty in case of conviction is life imprisonment. Articles 38 and 39 of the ECCC Law lay down that imprisonment is the only penalty and that the Chamber may impose a sentence between 5 years and life imprisonment.¹¹⁸ The Trial Chamber in Case 001 was therefore faced with the question which sentencing principles it should apply. The majority opted for the ECCC as a *sui generis* regime, seeking guidance in international sentencing principles and imposing 35 years (minus a further five years for illegal detention at the Military Prison).¹¹⁹ Judge Lavergne in his separate and dissenting opinion relevant to the sentence pointed out that the 2009 Criminal Code, Part 1 of which is dealing with sentencing principles (*see* article 95), was in force at the time that the Trial Chamber determined the sentence in Case 001. Based on this and other arguments, he reasoned that “the law does not allow the Chamber to sentence Kaing Guek Eav to more than 30 years of imprisonment”.¹²⁰ The applicable sentencing regime is currently before the Supreme Court Chamber.

It appears that the ECCC jurisprudence will probably have limited effect on Cambodian sentencing practice which currently needs to tackle many new issues raised by the 2009 Criminal Code.¹²¹

118 The Agreement, in line with international criminal law standards, does not impose a minimum sentence, while the ECCC Law follows the Cambodian law provisions, which always impose a minimum and maximum sentence.

119 TC Judgement, Case File 001, paras 575–578.

120 Case File 001/18–07–2007/ECCC/TC, *Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence*, Trial Chamber, 26 July 2010, E188.1.

121 The 2009 Criminal Code seems to lay down a two-step process for determining sentence, first, the determination of the scope of sentence, i.e. the minimum and maximum sentence applicable in the case in question, based on mitigating and aggravating “circumstances”, and second the determination of the concrete sentence within the pre-determined scope of sentence, for which mitigating and aggravating “factors”, not laid down in the 2009 Criminal Code, are of the essence. Other important matters relate to the imposition of sentence in case of “concurrent offences”, etc.

Reparations

Reparations too are part of substantive, not of procedural law. The current ECCC scheme relevant to Civil Parties and to reparations developed fully into a *sui generis* regime, despite the fact that Civil Party participation as such stems from Cambodian procedural law.¹²² Article 14 of the 2007 Code entitled “Compensation for Injury” clarifies that an injury (which can be damage to property or physical or psychological damage) can be compensated by “paying damages, by giving back to the victim the property that has been lost or by restoring damaged or destroyed property to its original state”. In determining the exact amount of damages to be paid or action to be taken by the person who has been convicted for the offense that led to the injury, the Cambodian courts will often have to take recourse to the rules laid down in the Cambodian Civil Code¹²³ relevant to damages.

The elementary rule applicable to reparations at the ECCC is Internal Rule 23*quinquies*. It clarifies that only collective and moral reparations can be awarded to civil parties. Moral reparations are not moral damages, in the sense of awarding compensation for psychological harm suffered, but are meant to be of symbolic character.¹²⁴ These reparations have to be at the same time “collective”.¹²⁵ Similar to the Cambodian legal system, the ECCC reparation awards are directed against and have to be borne by a convicted person.¹²⁶ However, the Internal Rules now stipulate that the ECCC Trial Chamber can also “recognise that a specific project appropriately gives effect to the award sought”.¹²⁷ Such a “project” is different from an award directed against a convicted person and independent from the financial situation of this specific person.¹²⁸ Considering that 3.866 Civil Parties participate in Case 002¹²⁹ and are seeking symbolic measures to alleviate their suffering, such “projects” offer the opportunity to the many interested persons and organizations within and outside of Cambodia to combine efforts in order to give a lasting voice to the victims of the Khmer Rouge regime. It’s meant to encourage the realization of projects in this field.

Comparing the reparation schemes of Cambodian law and of the ECCC, it cannot but be concluded that they are different. The ECCC reparation scheme (except for some

122 See *supra*, section on “applicable law”.

123 The 2009 Cambodian Civil Code is not yet in force.

124 See TC Judgement, Case File 001, footnote 1144.

125 See in this context and with respect to the newly created “consolidated group” of Civil Parties: TC Severance Order, para. 6.

126 See TC Judgement, Case File 001, para. 661.

127 Internal Rule 23*quinquies*(3)(b); see also Internal Rules 12*bis*, 12*ter*.

128 See Trial Chamber Memorandum of 23 September 2011, *Initial specification of the substance of reparations awards sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23quinquies(3)*, E125.

129 See *supra*, section on “Court structure”.

decisions and judgments relevant to Civil Party participation¹³⁰) will therefore not have direct implications on the criminal justice system of Cambodia.

2. Implications on the procedural law

The section above on the “applicable law” addresses also the ECCC’s procedural law: The founding documents stipulate that the procedure of the ECCC should follow Cambodian law. However, the plenary of Judges decided to adopt Internal Rules which now serve as the ECCC’s procedural law. In many respects the procedural rules of the ECCC and of Cambodian criminal law coincide, but they also differ.¹³¹ Below, a short analysis of the possible implications of the ECCC’s jurisprudence on Cambodian procedural law is given.

Fair trial and rights of the Accused and the Internal Rules

The ECCC are obliged to exercise their jurisdiction in accordance with international standards, especially those set out in Articles 14 and 15 of the ICCPR,¹³² to hold a fair trial and to respect the rights of the Accused, as laid down in Articles 33^{new} and 35^{new} of the ECCC Law. The Preamble to the Internal Rules and Internal Rules 2 and 21 expressly stipulate the central role of human rights. The Internal Rules serve, in a way, as a tool of the ECCC plenary of Judges to adjust the Cambodian procedural law to international human rights standards and especially to the rights of the Accused and the requirements of a fair and expeditious trial.

From the perspective of Cambodian law, it is of the essence to know how the Internal Rules deviate from specific Cambodian legal provisions for the reason that the latter were considered not to be in conformity with human rights. Human rights standards are applicable in Cambodia because of article 31 of the 1993 Constitution and therefore impact the interpretation of Cambodian law too. The ECCC Internal Rules are not introduced by a comment specifying the purpose of the Internal Rule in question. Therefore, it will be an important task for the Cambodian legal professionals to analyse the Internal Rules and the ECCC jurisprudence on procedural matters from this specific viewpoint. This will help to establish whether and where the ECCC applied international human rights standards instead or alongside Cambodian procedure. The Cambodian legal professionals can then draw from such analysis for their own jurisprudence or pleadings.

130 The questions relevant to the constitution of a Civil Party, addressed by the ECCC, will be of relevance to Cambodian courts, because the prerequisites are similarly formulated; however, the ECCC were not uniform in their interpretation: *compare* TC Judgement, Case File 001, paras 642–642; Case 002/19–09–2007/ECCC/OCIJ / PTC, *Decisions on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications*, 24 June 2011, D404/2/4, D411/3/6, see also the dissenting opinions of Judge Marchi-Uhel attached thereto.

131 See for a critical account: Stan Starygin, *Internal rules of the extraordinary chambers in the courts of Cambodia (ECCC): Setting an example of the rule of law by breaking the law?*, Journal of Law and Conflict Resolution, Vol. 3(2), pp. 20–42.

132 See *supra* section on “applicable law”.

To give but one example, rules relevant to the presence of the accused at trial are discussed. The background thereto is the following: The 2007 Cambodian Code provides for two main avenues to conduct trial proceedings. One avenue is the holding of a trial in the presence, and the other avenue the holding of a trial in the absence of the accused.¹³³ In the latter case, the chamber of first instance issues a so-called “default” judgment and the convicted person has the right to have an entirely new trial held, as soon as she/he has been informed of the default judgment.¹³⁴ The ECCC, as international criminal courts too, did not incorporate this approach stemming from the French criminal law system. Article 35^{new} of the ECCC Law specifies that the accused persons have the right “to be tried in their own presence”. The articles in the 2007 Code relevant to the “default” judgment are therefore clearly not of relevance to the ECCC. Nevertheless, the 2007 Code also has a couple of articles that deal with the presence of the accused during trials at which he or she is supposed to be present. Article 300 of the 2007 Code stipulates that the accused “shall appear in person during the hearings at the court”. Article 309 of the 2007 Code then provides that the accused can be questioned at his/her place of residence because of “health reasons and other serious concerns”. Finally, Article 333 of the 2007 Code provides that “[e]ven if the accused is absent, the court shall seek the truth, listen to the answers of the other parties and witnesses, and examine the exhibits.” These rules establish a diverse picture relevant to the requirement that the accused be present during the proceedings. Can he/she simply stay away without providing reasons? Can a trial continue even though the accused is mentally and physically unfit to stand trial? Especially Article 333 of the 2007 Code leaves much to wish for in its concrete wording. This article is a typical example for a provision that requires interpretation in light of internationally recognised human rights; if not, the differences between proceedings in the presence and in the absence of the Accused would exist in Cambodia only on paper but not in reality. Internal Rule 81, dealing with the presence of the accused before the ECCC Trial Chamber, apparently attempts to provide a minimum standard relevant to the right of the accused to be present at his/her trial.¹³⁵ By the same token, Internal Rule 32 relevant to the fitness of the charged person or accused mirrors international standards because a person who is not mentally and physically fit to stand trial cannot be made the subject of criminal proceedings.

133 See Articles 360, 361, 362 of the 2007 Code.

134 See Article 371 of the 2007 Code.

135 As a note, attention is drawn to Internal Rule 81(5) that allows, subject to the overall fitness of the accused, participation in the proceedings by way of audio-visual means. For health reasons, the accused persons in Case 002 during the Initial Hearings and follow-up hearings already made use of the holding cells close to the courtroom from which they could follow the proceedings by way of audio-visual means. see <http://www.eccc.gov.kh/en/articles/behind-scenes-holding-cells>.

The Internal Rules

Many Internal Rules are based on the provisions of the 2007 Code. This is true with respect to the general procedural scheme which the ECCC is following, be it during investigation, arrest proceedings, trial or on appeal. Especially relevant is that the ECCC unlike other international tribunals does not follow the principles of an adversarial trial based upon the common law system, where a chamber hears the “Prosecution Case” followed by the “Defence Case”. Instead, the overall features of the procedural law are in line with Cambodian procedure, which is again based upon the French criminal justice system. The Co-Investigating Judges have to prepare and investigate the case neutrally and with full respect for the rights of the suspects, and then transfer the Closing Order with the Indictment (if any) to the Trial Chamber. The Trial Chamber has to prepare and hold the trial based upon the entire Case File prepared by the Co-Investigating Judges and is primarily in charge of calling the witnesses, civil parties and experts considered relevant and of asking questions in order to find the truth. Nevertheless, the parties have important functions in that they provide guidance to the Chambers and Co-Investigating Judges as to the relevant witnesses, experts, civil parties and documents from the Case File.¹³⁶ They can, during trial, request that evidence from the Case File or additional evidence be heard.¹³⁷ The ECCC Supreme Court Chamber is in charge of specifically enumerated interlocutory appeals, again similar to the Cambodian system, and in charge of the appeals on the merits, i.e. on conviction, sentence and reparations. Underlying the ECCC is not only the procedural scheme of Cambodian courts but also, to a degree, their working methods. This is not only true with respect to the investigation, but also during trial with respect to e.g. summonses issued by the court, the oaths given by witnesses, the manner documents are managed, and the functions of “greffiers”.¹³⁸

Some Internal Rules, while not existing in the 2007 Code, are useful additions to the 2007 Code. An example is rule 89*ter* “Severance”, which seems to incorporate a rule that is as such applicable in most legal systems. The 2007 Code, while providing for a joinder of trials in Article 299, did not mention its counter piece, the separation of trials. Other Internal Rules do not exist as such in Cambodian law, because apparently they are meant to provide more detailed rules allowing the ECCC to deal with vast and complicated cases (e.g. Internal Rules 26, 27, 33, 80, 80*bis*).

¹³⁶ See Internal Rule 80.

¹³⁷ See Internal Rule 87.

¹³⁸ For a more detailed overview of the procedural law of the ECCC, see Nina H.B. Jørgensen, *The Extraordinary Chambers in the Courts of Cambodia and the Progress of the Khmer Rouge Trials*, Yearbook of International Humanitarian Law, December 2008, Vol. 11, Issue: Number 1, pp. 373–389; Kate Gibson, Daniella Rudy, *A New Model of International Criminal Procedure?: The Progress of the Duch Trial at the ECCC*, Journal of International Criminal Justice, November 2009, Vol. 7, Issue: Number 5, pp. 1005–1022; Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, Journal of International Criminal Justice, May 2006, Vol. 4, Issue: Number 2, pp. 314–326.

Several Internal Rules deviate to a degree from Cambodian procedure. While e.g. Articles 325 and 326 of the 2007 Code provide that the Presiding Judge of the Trial Chamber must question the accused or witnesses first and then authorizes questions by other parties, Internal Rules 90 and 91 provide for flexibility, i.e. leave it to the discretion of the President, how to determine the order of questioning witnesses and accused persons. Rules relevant to evidence also differ, e.g. in that Internal Rule 87 provides that the “onus is on the Co-Prosecutors to prove the guilt of the accused”. The same rule stipulates that material from the Case File has to be “put before the Chamber” while Article 321 of the 2007 Code is broader by providing that the judgment of the court “may be based only on the evidence included in the case file or which has been presented at the hearing”. A number of Internal Rules also deal with specificities of the ECCC and its institutions and are not of relevance to Cambodian procedural law, such as Internal Rules 4 to 12ter and 18 to 20.

Sometimes, the language versions of the Internal Rules are not coherent. An example for the latter, resolved by the Trial Chamber, is the standard of proof necessary for the conviction of an accused.¹³⁹ Article 321 of the 2007 Code requires, in accordance with French law, “intimate conviction” of the judges, while Internal Rule 87(1) requires the Chamber’s conviction “beyond reasonable doubt”, in the Khmer and English versions. The French version of the same Internal Rule refers to intimate conviction. In other words, the problem of the ECCC’s three official languages is even apparent in the Internal Rules and led e.g. to various changes at the August 2011 plenary of Judges to the scheme relevant to appeals before the Supreme Court Chamber.¹⁴⁰

A careful analysis and comparison of the Internal Rules and the 2007 Code is necessary in order to evaluate the precise impact which the Internal Rules and related ECCC jurisprudence may have on the application of the 2007 Code. The ECCC, by establishing the Internal Rules without giving concrete guidance as to how they fit into the scheme of Article 12 of the Agreement and congruous provisions of the ECCC Law, require Cambodian legal professionals to analyse on a case-by-case basis and in detail the relevance of the ECCC Internal Rules and jurisprudence to the scheme of Cambodian procedure law.

Conclusion relevant to the procedural law

In conclusion, there is a need to transfer the jurisprudence of the ECCC which is mainly based upon the Internal Rules into Cambodian jurisprudence. Where the rules are the same (subject to careful analysis), their application by the ECCC is and will be relevant to future Cambodian jurisprudence. In addition, where the Internal Rules adapted Cambodian law in order to align them to internationally recognized human rights, it will be of the essence for Cambodian courts to apply Cambodian law along similar lines. Finally, there will be instances where the jurisprudence of the ECCC will be without consequences to

¹³⁹ See TC Judgement, Case File 001, paras 44, 45.

¹⁴⁰ See ECCC Press statement of 3 August 2011, last sentence, *available at*: <http://www.eccc.gov.kh/en/articles/tenth-eccc-plenary-session-concludes>.

the current scheme of the Cambodian procedural law, because the procedural rules were adapted to the needs of cases before the ECCC. However, should Cambodian courts in future have to deal with similarly large case files (e.g. in the area of economic crimes), the ECCC's practice might serve as a source of inspiration for finding ways of trial management which are in line with the 2007 Code.

Compared to many other national jurisdictions which are in development and try to adhere to international standards, the Cambodian judiciary has the advantage of having received with the Internal Rules and the relevant ECCC jurisprudence instruments that can assist in interpreting the 2007 Code, subject to the notes of caution just expressed. They are surely helpful means to the development of the criminal law system of Cambodia. In addition, the ECCC procedural rules and trial management provisions often also follow practices and standards used by modern, up-to date and in line with internationally recognised human rights operating international criminal courts and tribunals which try to combine the best of different law systems. The Cambodian legal professionals have the chance to use this material and such knowledge to their advantage.

Other implications

There are and will be many indirect or side-effects of the ECCC on the Cambodian legal system. The Cambodian judges of the ECCC are also Judges in the Cambodian legal system. Their knowledge and experience are and will be transferred into the Cambodian legal system. They will have gained a lot of experience, not least with respect to working methods and methods of interpretation relevant to the application of law. The same is true with respect to the Cambodian (often very young but well-educated) staff and also interns who will in future be otherwise employed, either as judges, prosecutors, lawyers or in other positions relevant to the Cambodian judicial system. The capacity-building of this generation, while neither a priority of the ECCC nor of UNAKRT, takes place daily at the workplace, where they are confronted with the application of human rights, different ways of interpreting legal provisions and various working methods.

Cambodian law, like most systems belonging to the Romano-Germanic law traditions, does not have explicit rules explaining how law should be interpreted, except by incorporating human rights and general principles of law in the body of applicable law. The ECCC jurisprudence gives examples as to how law should and could be interpreted and can guide Cambodian legal professionals in their daily work. The ECCC also serve as an example in giving a central role to human rights in the interpretation and application of law.

All Cambodian judges and legal staff are at the forefront of re-establishing Khmer legal terminology. The submissions, orders and decisions of the ECCC are always issued in Khmer and have to accord with the highest possible standards of language. The legal professionals often have to deal with legal concepts and terminology rarely used in the past 40 years in Khmer. This development of legal terminology will therefore be an important part of the ECCC's legacy. To that one must add the rich treasure built of relevant

international jurisprudence and articles which the ECCC are translating into Khmer. While Khmer is not a widely spread language, the ECCC will leave a lot of knowledge to the Cambodian people, directly accessible to the public and every Cambodian legal professional and student, without requiring in-depth knowledge of English or French.

More than 60.000 persons visited the ECCC in 2009 and 2010.¹⁴¹ Many more will come to see a day in court during Case 002. In addition, the proceedings are broadcast live on Cambodian television. The Cambodians therefore form expectations about criminal proceedings based on the model ECCC. This will surely impact on how they judge and address other criminal proceedings in Cambodia.

IV. Conclusion

Considering the many possible implications on the Cambodian legal system, it cannot but be concluded that the ECCC has the potential to play an important role in the further development of the Cambodian criminal law system. The precise impact of the ECCC on the legal system will depend on the will and ability of Cambodian legal professionals to use the jurisprudence and materials of the ECCC in the drafting of decisions, filings and legal contributions, in the ways described in this article. As pointed out, the effects would have been more immediate, if the ECCC had chosen to apply more directly Cambodian law. However, it is surely one lesson learned of the ECCC that it is hard to impose on a court of hybrid composition the application of law that firstly was not yet as such fully existing at the time that the ECCC was created (as the relevant comprehensive codes stem from 2007 and 2009) and that secondly is not based on any settled practice that was laid down in accessible jurisprudence. Of course, Cambodia had judges and legal professionals, but due to the devastating 30 years of war and insecurity, law was of little importance, and experience with vast trials as the ones the ECCC is currently conducting did not exist. Nevertheless, the hybrid composition of the Chambers and the court as a whole create a direct connection of the ECCC with Cambodian society and all the parties to the proceedings. The main language in the courtroom, especially where accused, witnesses and civil parties are speaking, is Khmer and can be understood by the entire population. This immediacy is a vast advantage compared to international criminal courts, which often operate far away from crime scenes and victims and without prior knowledge of the country, its structure, culture and often language(s).

The courage of staff to get involved in the ECCC, learn and contribute to it to the best of their knowledge and ability on a daily basis cannot but be held in esteem. The hope and expectation are that the Cambodian legal staff will continue to work in the Cambo-

¹⁴¹ See Press statement of 30 December 2010, *available at*: <http://www.eccc.gov.kh/en/articles/32633-persons-visited-eccc-2010>.

dian legal system and use in positive ways their experiences and apply the knowledge gathered at the ECCC.

The ECCC are an experiment in many respects. It is easy to criticise them, be it from an international criminal law, a Cambodian criminal law or any other perspective taken, because the ECCC do not conform to commonly known structures and categories. The ECCC are though seeking to fulfil their mission by bringing to trial alleged perpetrators of crimes committed during the duration of the Democratic Kampuchea regime. The ECCC, as shown in this contribution, will also have various positive effects on the further development of the young Cambodian criminal justice system.

V. Supplement (13 February 2012)

This contribution has been written before start of the substantive hearing in Case 002 at the end of 2011, before the delivery of the Supreme Court Chamber Judgment in Case 001,¹⁴² and before developments took place, hopefully not fateful to the ECCC, that relate to the standing of the reserve international Co-Investigating Judge and the continuation of investigative action in Cases 003 and 004.¹⁴³

¹⁴² The written version of the Supreme Court Judgment is not yet available, only a summary; Case File 001/18-07-2007/ECCC/SCC, *Summary of Appeal Judgment*, 3 February 2012, F26/3; important from a Cambodian law perspective is the sentencing scheme and regrettable is the super-majority decision relevant to compensation for illegal detention in the Cambodian Military Prison that is apparently based on the ECCC's unclear jurisprudence relevant to its character.

¹⁴³ See Case File 003/12-12-2011-ECCC/PTC, *Opinion of Pre-Trial Chamber Judges DOWNING AND CHUNG on the Disagreement Between the Co-Investigating Judges Pursuant to Internal Rule 72*, 10 February 2012. This opinion appears to provide a full factual and legal background to the matter.

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CAMBODIAN LAW: SOME COMPARATIVE AND INTERNATIONAL PERSPECTIVES

Jörg MENZEL

CONTENTS

I. Introduction	479
II. Cambodian Law and the Legal Systems of the World	479
1. Comparative Legal Families, Traditions and Cultures	479
2. Cambodia as a mixed Civil Law System	482
3. Cambodia as a Developing Legal System	483
III. International Elements in Cambodian Legal Development	485
1. Migration of Law and the emerging global legal gene pool	485
2. Development Cooperation	486
3. The Khmer Rouge Tribunal	488
IV. International and transnational Law in Cambodia	488
1. International Treaties	489
2. Customary International Law	489
3. Transnational Application of Law (Conflict of Laws)	490
Private Law	490
Criminal Law	491
Public Law (Administrative and Constitutional Law)	492
V. Conclusion	493
REFERENCES	494

CAMBODIAN LAW: SOME COMPARATIVE AND INTERNATIONAL PERSPECTIVES

*Jörg MENZEL**

I. Introduction

In this chapter some comparative and international law perspectives on Cambodian Law shall be presented. Globally, the importance of comparative and international law has increased significantly in recent decades, which have been defined by globalization and regionalization. Although legal concepts have been migrating between countries for millennia, today's speed and intensity of such migration seems to be unprecedented. In many countries influential voices warn against outside influences on the legal system, but such complaints are to some extent like complaining about the weather, as the development is basically unavoidable in a modern state. Furthermore, I believe, the migration of concepts and ideas is a positive thing in principle and an important part of the permanent learning process within each legal system.

In the following I will first discuss some general aspects of the Cambodian legal system from a comparative perspective. I will then turn to external influences on Cambodian law and to the rank and status of international law in Cambodia, before addressing the question of how the law deals with transnational questions. I should note that these are reflections on the basis of a few years of experience in Cambodia, but not a fully fledged academic research regarding the issues. As in all fields of Cambodian law, also here are interesting topics waiting to be explored by future researchers.

II. Cambodian Law and the Legal Systems of the World

1. Comparative Legal Families, Traditions and Cultures

For a long time the national legal systems of the world have been grouped into “legal families” or “legal traditions”. As legal comparativists have a passion for theoretizing and discussing about terminology, it is difficult to provide definitions. Recent literature in

* Dr. Jörg MENZEL is an Associate Professor at the University of Bonn, Germany, and was a Legal Advisor to the Senate of the Kingdom of Cambodia from 2003 to 2010.

theory of comparative law is abundant¹. Leaving all the theoretical disputes aside it is true that most modern legal systems are said to be either a member of the “civil law” or the “common law” group in their cores. Whereas the civil law tradition has its origin in continental Europe with French law and German law probably being its most influential sources, the common law has its home base in England. The differences are substantial, although now sometimes overrated after significant convergence. Whereas in the civil law tradition written laws and particularly the major codes are the epicenter of the law, in the common law it is the decisions of the courts, which are the conceptual source. Although today written laws and court decisions are important in modern systems of both groups, the difference in approach is still important for the methodology and philosophy of law. It is still true that students of common law learn mostly about court decisions, whereas civil law students have the laws as the intellectual starting point of investigation. Differences in court procedure are also still significant, but much more so in criminal law than in private law, and also with remarkable differences between e.g. the French and the German version of the civil law system.

Although dominating, civil law and common law are not the only relevant legal traditions in today’s post colonial world. In addition, a specific concept of socialist law as well as a number of regional, religious and indigenous legal traditions can be identified. However, apart from the principle dichotomy between civil law and common law much is under dispute. There is for example no consent if socialist law is part of the civil law tradition or an independent tradition². Another disputed concept is that of “Asian Law”. Today most scholars with some knowledge on the region will probably agree that Asian legal cultures and systems (Indian, Chinese, Singaporean, Japanese etc.) are so diverse that it makes no sense to throw them into one basket for analytical purpose.

What makes things difficult is that many countries today have somewhat mixed systems³. This is even true in Europe, where the distinction between civil and common law was born but where nowadays the influence of European Union law as well as the European Convention on Human Rights results in new mixes in the national legal orders. Outside Europe voluntary adaptation and colonialism resulted in sometimes complicated fusions. In some states we have different systems in different regions, e.g. in Canada with a civil law system in Quebec and common law in the rest of the nation. Asia is a particularly interesting melting pot of legal concepts. Japan, for example, is generally considered

1 See e.g. the general handbooks: *Esin Örücü / David Elken* (eds.), *Comparative Law. A Handbook*, Oxford 2007; *Matthias Reimann / Reinhard Zimmermann* (eds.), *The Oxford Handbook on Comparative Law*, Oxford 2006; a very theoretical collection is *Pierre Legrand / Roderick Munday* (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003.

2 See for example *Peter de Cruz*, *Comparative Law in a Changing World*, 3rd ed. 2007, p. 187 with references.

3 On mixed systems see e.g. *Jaques du Plessis*, *Comparative Law and the Study of Mixed Legal Systems*, in: *Reimann/Zimmermann*, *The Oxford Handbook on Comparative Law*, pp. 477-512; *Esin Örücü*, *A General View of ‘Legal Families’ and ‘Mixing Systems’*, in: *Örücü/Nelken*, *Comparative Law*, pp. 169-188.

a civil law country because it adopted European (mainly German) concepts more than a century ago, but later it also has been significantly influenced by some common law concepts (mainly US). Malaysia is a common law country, but for its Muslim population, which is the majority in the country, religious Sharia'h law plays an important and formalized role. The Philippines, to mention another example, is somewhat a mix of civil law and common law country as a result of being colony of Spain and the United States subsequently. Like in cooking, fusion might sometimes cause confusion. Some authors question the classical distinctions of legal families at all as being euro-centric, claiming that they are no adequate analytical framework for the modern legal world. Ugo Mattei has therefore suggested to change the categories and distinguish between systems based on professional law, political law and traditional law⁴. Andrew Harding thinks that the concept of legal families is particularly useless with respect to the legal systems in this region⁵. And rightfully he also criticizes Mattei's all too simplistic idea that law in Southeast Asia would generally have to be qualified somewhere between political and traditional⁶.

Whereas comparative law in general is a long established field, comparative *constitutional* law is not well developed yet. Currently it seems to be (re-) emerging, however, and in recent times not only textbooks and handbooks are mushrooming⁷, there is also a number of articles requesting that in the field of comparative constitutionalism the horizon needs to be broadened, including countries around the world and not only Europe and North America. Asia and Southeast Asia are among the regions which increasingly draw attention of comparative constitutional lawyers, from within and outside the region alike⁸. Interestingly, the distinction between civil law and common law countries is largely pointless when it comes to constitutional law. Here, the mother land of the common law is in isolation, as England is only joined by New Zealand and Israel in not having a written constitution these days. The concept of a written constitution was invented in the United States but adopted quickly since the French Revolution in continental Europe and spread around the world in the 19th and 20th century. Today, nearly all states in the world have written constitutions and increasingly they claim that these constitutions are effec-

4 Ugo Mattei, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, XLV American Journal of Comparative Law 1 (1997).

5 Andrew Harding, Global Doctrine and Local Knowledge: Law in Southeast Asia, 51 International and Comparative Law Quarterly 36 (2002), at 51.

6 Andrew Harding, Comparative Public Law: Some Lessons from Southeast Asia, in: Harding/Örücü (eds.), Comparative Law in the 21st Century, p. 249, at 264.

7 Most recently Tom Ginsburg / Rosalind Dixon (eds.), Comparative Constitutional Law, Cheltenham 2011. A "Oxford Handbook on Comparative Constitutional Law" will be published in 2012. A fairly new specialized periodical is the "International Journal of Constitutional Law" (Oxford University Press).

8 See Graham Hassall / Cheryl Saunders, Asia Pacific Constitutional Systems, Cambridge 2002; Clauspeter Hill / Jörg Menzel (eds.), Constitutionalism in Southeast Asia, Vol. I-III, Singapore 2008/2010; most recently also Jiunn-Rong Yeh, The Emergence of Asian Constitutionalism. Features in Comparison, 4 National Taiwan University Law Review 38 (2009).

tive supreme laws⁹. As with law in general, constitutional concepts and ideas migrate¹⁰. Democracy, fundamental rights and rule of law are the emerging common standards for constitutionalism and at the core of a global constitutional gene pool¹¹, although there still is controversy what these principles mean in detail and many states struggle to implement them not only on paper but also in practice. In detail, many choices are to be made when designing a constitution: monarchy vs. republic, presidentialism vs. parliamentarism, unicameralism vs. bicameralism, unitarism vs. federalism, effective protection of basic rights or not, judicial review or not etc. When making these choices, constitution makers rely on the histories of their own countries, but also take into account experiences elsewhere. Most recently there is even handbook-advice for “constitution builders” around the word¹².

2. Cambodia as a mixed Civil Law System

Due to its French colonial history and its current legal reforms, Cambodia is generally considered to be part of the civil law family. A few influences of common law concepts have been identified. The fact that there are no specialized administrative courts has been interpreted as such an influence¹³ and there are occasional references to legislation influenced by international institutions like ADB or bilateral cooperation partners like Australia. On an overall perspective those influences are mostly marginal with respect to the legal system as such. Maybe more importantly, the socialist history between 1975 and 1989 still has consequences for today’s legal system. Whereas this influence is slowly fading, there might be some future potential for Islamic law as well as indigenous law concepts for minorities in Cambodia, but it seems that the concept of legal pluralism has not much arrived in the formal legal structures of Cambodia yet¹⁴. However, its advancement would most certainly not change the general nature of the Cambodian legal system, which, with the new Civil Code and Civil Procedure Code (drafted with the help of civil law country Japan) as the new Penal Code and Criminal Procedure Code (drafted with the help of civil law country France) is more and more firmly rooted in the civil law as its main tradition. It should be noted, however, that some confusion might already result again from transplanting law from different sub-groups of the civil law tradition, French on the one hand, German and Japanese on the other hand.

9 See famously *Bruce Ackerman*, *The Rise of World Constitutionalism*, 83 *Virginia Law Review* 771 (1996).

10 *Sujit Choudhry* (ed.), *The Migration of Constitutional Ideas*, Cambridge 2006.

11 *Cheryl Saunders*, *Towards a Constitutional Gene Pool*, 4 *National Taiwan University Law Review* 2 (2009).

12 *Markus Böckenförde / Nora Hedling / Winluck Wabiu*, *A Practical Guide to Constitution Building*, Stockholm 2011 (International IDEA).

13 *Roque Reynolds*, *Dicey in Cambodia or Droit Administrative meets the Common Law*, *The Australian Law Journal* 72 (1998), S. 204 ff.

14 See also *Soth Sang Bonn*, in this Volume, with further references.

When it comes to constitutional law, Cambodia defines itself as a “liberal democracy”. Cambodia has written constitutions since 1947¹⁵. With the self-proclaimed exception of the constitution of 1976¹⁶ all of these constitutions were also influenced from outside. The 1947 constitution was strongly influenced by the French model of the time, the 1972 constitution had elements of United States constitutionalism, the 1981 constitution was influenced by socialist concepts from the Soviet Union and Vietnam, the 1993 constitution followed guidelines from international treaties and was influenced by various historical and foreign models. The constitution makers finally decided for a monarchy, for a parliamentary system, for a unitary state (although decentralization is now a state policy), for the constitutional protection of basic rights, and for the concept of judicial review by a Constitutional Council. Whereas initially they opted for unicameralism in the original 1993 constitution, a Senate was established and bicameralism established in 1999. When discussing all the difficult details it is always worth remembering that the overall constitutional concept of the Cambodian Constitution is based on the concepts of democracy, fundamental rights and rule of law. With this set of basic principles and despite the occasional reference to Khmer culture and traditions this constitution is firmly rooted within the mainstream of modern constitutionalism.

3. Cambodia as a Developing Legal System

The quality and nature of legal systems around the world depends to a significant extent on the question how developed a country is in general. As a general rule it can be said that the more developed a country is economically, the more developed its legal system typically appears to be. Good law isn't cheap and a quality legal system needs adequate financial and human resources with enough money and well educated and qualified professionals.

Cambodia undoubtedly is a “developing country”. Despite significant economic development and strong growth rates in recent years it even is still considered a “least developed country” by the definition of the United Nations. This terminology might also be applied with respect to its legal system, which is, like the country as a whole, recovering from a period of extreme hardship. The extent of this hardship with respect to the legal system can't be overestimated. Cambodia is widely unique in the way it experienced a total collapse of its legal system in the second half of the 20th century. Rule of Law had been deteriorating under the conditions of civil war before, but during the rule of the

15 All constitutions are collected in *Raoul M. Jennar*, *The Cambodian Constitutions (1953-1993)*, Chiang Mai 1995. For an outline of Cambodia's constitutional history see *Hor Peng*, in this Volume.

16 Khieu Samphan, Head of State at the time, declared that this constitution of 1976 was “not the result of any research of foreign documents, nor ... the fruit of any research by scholars. In fact – workers, peasants, and the revolutionary army – wrote the constitution with their own hands.” (Quoted in *David Chandler*, *The Tragedy of Cambodian History. Politics, War and Revolution since 1945*, Chiang Mai 1991, p. 262).

Khmer Rouge between 1975 and 1979 no formal laws were made or applied (with the only exception of the adoption of the constitution of 1976) and no courts operated. It seems misleading to qualify the time of the Khmer Rouge rule as a legal system of extreme communist or Maoist nature, as the Khmer Rouge did not operate under any kind of “legal” system. Whereas other extreme dictatorships like the German National Socialists or the Soviet Union under Stalin abused and perverted the legal structure for their evil purposes, the Khmer Rouge simply abolished the law. People with legal background were considered to be part of the old elite and killed; reportedly only a few people with legal education survived the regime of the Khmer Rouge. To make things more difficult today, even after the collapse of the Khmer Rouge regime the vacuum continued to some extent, as during the 1980s the reconstruction of rule of law was not immediately considered a priority in Cambodia. Although some basic structures were re-established after the new beginning in 1979, the courts and the judicial system as a whole often had to operate without formal laws and without properly trained legal professionals in the 1980s. When the re-establishment of rule of law became a government policy since the late 1980s, the challenges were obviously huge. Cambodia’s legal system had to be built from the scratch. In 1993, the situation was summarized as follows:

“In 1975, the Khmer Rouge destroyed the Cambodian legal system. Legislators, prosecutors, judges, lawyers, and law professors were killed and forced to flee the country. Law books were destroyed and the buildings that had housed the courts and law school were converted to other uses. At the end of the destruction and the massacres, an estimated six to ten legal professionals remained alive in Cambodia. The situation has improved only slightly since then. Cambodia now has laws, but they are few and far between. The country has established courts, but most of them are barely functioning. Likewise, persons have been appointed judges and prosecutors, but few of them are educated in the law. In one respect, the situation has deteriorated even further; because of the attrition to death, the number of fully trained legal professionals now present in Cambodia has declined to five. Moreover, Cambodia has no private lawyers.”¹⁷

Considering those circumstances, the quality of the 1993 constitution is actually remarkable. However, after it was adopted, it had to be difficult to get the reform process on track and re-establish a serious legal and judicial system, even more so as political conflict was still intense during the 1990s. Now, nearly twenty years after adoption of the constitution, there are still many problems, but progress is visible. Today, many new laws have been adopted. In fact there is so much new legislation in recent years and the new main codes in private and criminal law are so complex that it poses an immense challenge to

¹⁷ *Dolores A. Donovan*, Cambodia: Building a Legal System from Scratch, 27 *The International Lawyer*, p. 445 (1993).

put them into practice and all legal professionals made familiar with the new bedrocks of the Cambodian legal order. However, such problems may be solved over time (even it may take a generation), as a new generation of legally educated professionals is emerging. Today there is a number of Universities providing law education and the quality of education is increasing. Special schools for the legal professions are operating, a Bar Association is established and hundreds of private lawyers are working in Cambodia. A newly founded Cambodian Society of Comparative Law holds an annual conference since 2009 and publishes a Yearbook, basically the first legal periodical in Cambodia. At the same time, the situation of the judiciary is still difficult. The budget allocated to the Ministry of Justice and the judicial system is still small not only in absolute numbers, but also in comparison to other ministries. The official salaries of judges have been increased some years ago but are still not sufficient to guarantee the lifestyle of a upper middle class family without additional income, which is a basic precondition for the creation of a professional, qualified and dedicated judicial workforce. Within the population trust in the judicial system is not well developed for various reasons¹⁸ and the government knows that it needs to be improved through better performance. The independence of the judiciary, although clearly provided by the constitution¹⁹, still is a construction site in the Cambodian legal reality. Legal and judicial reform in general still is among the core topics of the Cambodian Government's "Rectangular Strategy".

III. International Elements in Cambodian Legal Development

1. Migration of Law and the emerging global legal gene pool

As mentioned, Cambodian law, as nearly every legal system, has developed over time under outside influence. Knowledge on early Cambodian law is sparse, but sources of the law during the times of the Angkor Empire are obviously rooted in Indian law²⁰. During

18 See *Sok Siphana*, Role of Law and Legal Institutions in Cambodia Economic Development: "Opportunities to skip the learning curve", PhD thesis (Bond University) 1998, p. 159: "The judiciary is one of the main pillars of any legal system based on the rule of law. The presence of an independent, capable, and uncorrupted judiciary is the foundation of the Rule of Law and underpins the development of a market economy. In Cambodia, however, this is not the case. The judiciary is not equipped to assume its rightful role in a rule-based environment. Amongst the issues which are specific to the Cambodian judiciary are: judges' intellectual capacity, salaries, discipline, appointments and promotions, court organization, judicial procedures and infrastructure needs. Against this backdrop, any attempt to reform the judiciary is complicated further by the social context of years of war, internal struggles which have left deep psychological scars and underlying tensions."

19 See also *Hor Peng*, The Separation of Powers and Independence of Judicial Power in Cambodia, in: *Cambodian Yearbook of Comparative Legal Studies* 2 (2011), p. 83.

20 An often quoted report on aspects of Cambodian law during the Angkor time is that of a Chinese traveler, who visited Cambodia at the end of the 13th century. See *Zhou Daguan*, *A Record of Cam-*

the colonial times French law was increasingly dominant²¹. Afterwards there were influences of American law (e.g. in the 1972 constitution), socialist law (from 1979), and the influx of numerous concepts since from various countries as well as international law itself since the early 1990s. As in every other country the migration of legal concepts does not leave their contents unchanged. When using foreign concepts often the lawmaker himself will make adjustments which are considered necessary to reflect the state's own legal traditions or cultural circumstances. But even where provisions are formally copied "one to one" they will often function somewhat differently in another legal system, particularly when the overall legal culture is significantly different in the two states. Some comparative law scholars even think that legal transplants are generally impossible due to this transformation, although that opinion might be an academic exaggeration. It is often true, however, that although probably unavoidable, the large scale import of legal concepts from a developed legal system into a developing legal system has its problems. With respect to Cambodia, one might just take the new Civil Code as an example, which poses an enormous challenge just because of a complexity unknown to the previous Cambodian legal system. The challenges are also significant in other fields, be it the introduction of "Western" concepts of intellectual property law (much pushed for by the USA and other partners), access to information or substantial decentralization in administrative law.

The migration of legal ideas and concepts has significantly increased around the globe in recent years. Not only with respect to constitutions, but with regard to many aspects of the legal systems there are standards which are increasingly difficult to ignore once a state follows general constitutional concepts of liberal democracy, rule of law and human rights. The development of a modern administrative law, which is still in process in Cambodia, might serve as another example. Concepts like priority and necessity of the law, proportionality, transparency, accountability etc. are promoted and increasingly put into law around the globe. Such common concepts still allow for varying details and "local" solutions, but they are sufficiently persuasive as manifestations of general ideas of justice to be difficult to ignore in a modern democratic society. They generally can also be identified as principles either rooted in the Cambodian Constitution or in some of the administrative laws in place²².

2. Development Cooperation

As mentioned, Cambodian law has been under heavy development in recent years. The Cambodian Government has developed extensive plans and strategies to reform the le-

bodia. *The Land and its People*. Translated with an Introduction and Notes by Peter Harris, Chiang Mai 2007.

21 See in detail *John Tully*, *France on the Mekong. A History of the Protectorate in Cambodia, 1863-1953*, Lanham 2002.

22 See for details my "Report on Principles of Administrative Law" for the Council of Legal and Judicial Reform of the Royal Government of Cambodia, Phnom Penh 2011 (unpublished).

gal and judicial system²³. It has asked for and received support by the international community in this process. The re-building of the Cambodian legal system falls in a time of increased interest in “rule of law” in development cooperation. Once again and rightfully so law is considered to be an important aspect of development. International players like World Bank and UNDP have been pushing for reforms in the field of (good) governance and rule of law. Whereas the initial approach of the World Bank was probably mostly economical (rule of law as a condition for good investment climate etc.) it has until now become clear that rule of law is an essential condition for human freedom, with freedom being a core of development as such²⁴. It is, however, much more difficult to reform legal systems than to build roads etc. For various reasons cooperation-partners might have different expectations and important conditions for improved legal systems like a qualified judicial workforce and the development of a strong legal culture might only be (re-)generated within decades – much longer time frames than the typical planning horizons of development organizations. Support often fades away with misunderstandings between the partners or after some kind of measurable result (most often the adoption of a law) has been achieved. As a result, although rule of law promotion is generally considered important, the permanent global crisis mode in this area has not disappeared, and to some extent has even become stronger again²⁵.

In Cambodia, the major codifications in civil law and criminal law have been prepared with the intensive assistance of Japan and France respectively. Other legislation has been supported by bilateral cooperation or the help of various international organizations or foreign advisors. Although foreign experts should ideally never try just to export their home concepts to Cambodia, it is clear that any help by foreign experts will usually produce some influence of foreign concepts on the respective legislation, development cooperation has played a significant role in bringing foreign concepts and international standards to Cambodia. It seems, however, that assistance is all too often mostly reduced to the process of drafting laws. Strategies for putting new legislation into practice, teaching new codes at law schools and providing research tools are often developed too late if at all, and underfunded. As the new Cambodian private law has large similarities to the Japanese law and the new Criminal Code is largely influenced by France, wouldn't it be helpful to translate some of the textbooks in this field from Japan and France into

23 See *Kong Phallack*, in this Volume (Chapter 1).

24 *Amartya Sen*, *Development as Freedom*, New York 1999.

25 For a few recent publications see *Michael J. Trebilcock / Ronald J. Daniels*, *Rule of Law Reform and Development*, Cheltenham 2008; *J. Arnscheidt / B. von Rooij / J.M. Otto* (ed.), *Lawmaking for Development*, Leiden 2008; *T. Carothers* (ed.), *Promoting the Rule of Law Abroad. In Search of the Knowledge*, Washington 2006; *J. Faundez* (ed.), *Good Governance and Law: Legal and Institutional Reform in Developing Countries*, New York 1997; *T. Lindsey* (ed.), *Law Reform in Developing and Transitional States*, London 2007; *C. Antons* (ed.), *Law and Development in East and Southeast Asia*, London 2003; *D.M. Trubek / M. Galanter* (eds.), *The new Law and Economic Development: A Critical Appraisal*, Cambridge 2006; *A. Seidman* (et al), *Making Development Work. Legislative Reform for Institutional Transformation and Good Governance*, The Hague 1999.

Khmer? It seems that legal education as a whole is an often undervalued aspect of cooperation. Various foreign development partners support the legal education in Phnom Penh and they provide scholarships that give Cambodians the opportunity to study in countries like France, Japan, Korea, Australia, Singapore etc., but given the importance of such assistance much more resources should be located here. Ideally many of the recipients of such scholarships will not only have their own legal thinking improved by studies abroad and taking a bird eye's view on the own system, they will also bring back ideas and spread them within the Cambodian system after coming back, be it through lectures at universities or within their practical work. Furthermore, the knowledge of such legal experts with international experience also increases the government's capacity to discuss, evaluate and decide on concepts delivered by international experts within the different law reform projects conducted with international assistance.

3. The Khmer Rouge Tribunal

One specific international influence on the Cambodian legal system is the establishment and work of the Extraordinary Chambers in the Courts of Cambodia (ECCC), often called the Khmer Rouge Tribunal. This "hybrid court" was established through cooperation between Cambodia and the United Nations and in the court national and international judges, prosecutors and staff work together in order to bring to justice some of the surviving leaders of the Khmer Rouge Regime. According to the Cambodian government the ECCC shall also serve as a kind of model court for Cambodia. Although its main purpose is to provide some late justice for the victims of the Khmer Rouge, it shall also bring the Cambodian judicial system closer to international standards in the field of criminal prosecution²⁶. As the court is discussed elsewhere in this book, it shall not be addressed in more detail here.²⁷

IV. International and transnational Law in Cambodia

The role of international law has significantly increased since World War II all around the world. The number of multilateral (global and regional) as well as bilateral treaties has multiplied, as has the number of international courts and other for a dealing with international disputes.

It seems remarkable that the modern Cambodian state itself is to some extent the product of modern international treaty law, as the Paris Agreements were the basis for ending war and bringing peace as well as a new constitutional system to the country.

²⁶ See also *Jörg Menzel*, Justice delayed or too late for justice? The Khmer Rouge Tribunal and the Cambodian "Genocide" 1975-79, in: 9 *Journal of Genocide Research* 215-233 (2008).

²⁷ See *Franziska Eckelmans*, in this Volume.

Even some of the main characteristics of the current system were already defined by those Paris Agreements²⁸, which, in Annex 5, provided for the supremacy of the constitution and the concept of a liberal, human rights and rule of law based democracy. The transition of the country itself happened within the framework of the largest United Nations mission until that time (UNTAC)²⁹. Cambodia has ever since been a very active member of the international organizations and treaties that shape international law. It is a member of the United Nations, of ASEAN and of many specialized organizations. More recently Cambodia has been the first “least developed country” to join the World Trade Organization. Cambodia has signed and ratified most human rights treaties as well as numerous treaties regarding the environment and other fields. Fifty years ago it was able to benefit from its commitment to the system of the International Court, as it was able to bring the Preah Vihear dispute with Thailand in front of this court and get ownership over that temple area confirmed³⁰.

1. International Treaties

There is no clear provision providing for the status of international treaties in Cambodian law. However, as treaties are transformed into Cambodian law through a vote in parliament, similar to a piece of legislation, it seems appropriate to assume that international treaties have the rank of national laws at least. This actually is the solution in many countries including Germany for example (Article 59 paragraph 2 of the German Constitution). With respect to human rights treaties one might even argue in favor of a higher rank and even the rank of constitutional law, as Article 31 of the Cambodian Constitution embraces such treaties explicitly. Whereas the Constitutional Council seems not to have decided clearly on this question, it has clarified in a landmark decision that international human rights treaties (such as the child rights convention) have to be directly taken into account when applying and interpreting national Cambodian law such as criminal law³¹. Similarly the ECCC also have relied on international human rights treaties from the very beginning of their decisions.

2. Customary International Law

The status of customary international law is a matter of debate in many jurisdictions around the world as well. Some constitutions provide a rule. For example, in Germany

28 *Steven Ratner*, *The Cambodia Settlement Agreements*, 87 *American Journal of International Law* (1993) 1.

29 *Lucy Keller*, *UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace*, 9 *Max Planck UNYB* 2005, 127.

30 *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), ICJ Reports 1962, 9.

31 Decision of July 10, 2007 (Dec. No. 092/003/2007). On this decision see also *Menzel*, in: Hill/Menzel, *Constitutionalism in Southeast Asia II*, p. 60.

Article 25 stipulates that the general principles of international law have a rank higher than the federal laws, which in the interpretation of the Constitutional Court, means that they are ranked between the normal laws and the constitution. Other countries provide for a rank even on the level or above the level of the constitution or only for the rank on the level of the general laws.

In Cambodia, the constitution does not provide for any or direct indication on the status of customary international law. However, as the Cambodian Constitution is “international law friendly” in many of its provisions, it seems appropriate to assume that it has a rank of national law as a minimum. This topic still needs to be explored.

3. Transnational Application of Law (Conflict of Laws)

Today’s world is a world of national legal systems. They need to be coordinated and every legal system needs rules defining (1st) the extent of its own laws in a transnational context, and (2nd) the extent to which it allows foreign laws to be applied in its own sphere. The transnational dimension of laws is twofold, as modern states rely on two main principles to justify their jurisdiction, namely (1st) territory and (2nd) personality. The fact that states have jurisdiction in their territory and with respect to their citizens is the most significant (but not the only) reason for the overlapping of jurisdictions. International law is far from precise when it comes to solve the problems in this field.

Private Law

In many jurisdictions Private International Law (Conflict of Laws) is one of the most difficult fields of law academically as well as practically. As mentioned, in its core it is not part of the international law, but national law. Thus there are as many private international law systems in the world as there are nation states, in fact there are even more, as in the USA, for example, it is not a matter of federal but of state law, resulting in fifty “conflict of law” systems within the USA alone. Systems around the world also differ significantly, with, for example, very different approaches being followed in the USA in comparison to Europe³².

It seems that Cambodia currently still has no comprehensive framework in the field of private international law. In the early 1970s it was suggested that due to the lack of relevant legislation usually the French principles were applied³³. Today, however the new Civil Code and Civil Procedure Code are not influenced by France but by Japanese legal concepts, thus it might be appropriate to draft legislation largely inspired by Japanese pri-

32 On „Comparative Private International Law“ see e.g. *Mathias Reimann*, *Comparative Law and Private International Law*, in: Mathias Reimann / Reinhard Zimmermann (eds.), *The Oxford Handbook on Comparative Law*, Oxford 2006, pp. 1363-1396.

33 *Ponn Vongs Vaddey*, Article „Khmer Republic“, in: R. David et al. (eds.), *International Encyclopedia of Comparative Law*, Volume I. National Reports, K-16, VIII.; *Béatrice Balivet and Chaing Sineath*, in: B. Balivet (ed.), *Introduction au Droit Cambodgien*, Phnom Penh, give no explanation where the principles they describe are taken from (see p. 77).

vate international law and apply those principles as much as appropriate for the interim period. In contrast to France, which has no codified private international law, Japan also has (in contrast to France) modern legislation in the field³⁴. However, any solution will pose a challenge, as the main idea of private international law is to apply foreign law in domestic courts if that is more appropriate. This sounds like a fair solution in principle but is difficult to do, as the court in charge has to investigate that foreign law. This is a difficult task even in Germany with its well equipped research institutes, universities and experts. In Cambodia, with its still limited legal infrastructure and expertise, this seems difficult for the time being. Currently it is difficult to imagine how a judge in a Cambodian provincial court would be able to properly apply, for example, German family law in a divorce case between a German and a Cambodian national.

Criminal Law

In criminal law the application of foreign law by national courts typically doesn't happen. Every country only applies its own criminal laws when prosecuting and punishing people for criminal behavior, although we should acknowledge that sometimes foreign criminal law will still play some role. As a starting point, the challenge in criminal law is to define the territorial and personal scope of national criminal laws. A range of principles apply³⁵.

- Territorial Jurisdiction: in most legal systems today the basis is the territoriality rule, meaning that national criminal law will apply to crimes committed in the territory of the country.
- Flag Jurisdiction: this principle mainly applies to crimes and offenses committed on ships and aircraft sailing or flying outside the country or even research stations in Antarctica, which are under the flag of a country.
- Active Personality Principle: In addition, states often also punish criminal behavior of their own citizens outside the country. This is particularly important if a state does not allow extradition of own nationals to foreign country³⁶.
- Passive Personality Principle: states will also sometimes punish, if the crime happens abroad and the victim (not the perpetrator) is its citizen.
- Protective Principle: Furthermore, states might punish certain acts committed abroad if they are directed against nationally protected goods, e.g. the disclosure of state secrets.
- Universality Principle: Finally, certain crimes are considered "universal" with the

³⁴ Japan just recently reformed its private international law, which is traditionally influenced by German concepts, by enacting a new „Law on General Rules for the Application of Laws“ (2006). For a short overview see *Hiroshi Oda*, *Japanese Law*, 3rd edition, Oxford 2009, pp. 452-463.

³⁵ Details in: *Ilias Bantekas / Susan Nash*, *International Criminal Law*, 3rd ed. London 2007.

³⁶ Example: If a German national commits a murder in Cambodia and afterwards travels back to Germany, he can't be extradited to Cambodia, as the German constitution (Art. 16) does not allow so. In order to make sure that there is punishment for the murder, the German state has to punish for the crime committed in Cambodia.

consequence that any state might prosecute a perpetrator without regard to the locus delicti or nationality of people involved.

Whereas the new Civil Code in Cambodia ignores the topic of private international law, the new Penal Code of Cambodia has a whole chapter on the “Application of Criminal Law in Space” (Chapter 3, Articles 13 to 24). It mostly applies the principles which were just mentioned in an appropriate manner. The use of the “passive personality principle” might be somewhat far reaching, as this principle is normally only applied for a selected number of serious crimes, whereas the Criminal Code uses it for any criminal behavior.

Public Law (Administrative and Constitutional Law)

The least developed field of conflict of laws is public law. This is not only true for Cambodia, but also around the world. Standard wisdom suggests that (in contrast to private law) each state and its courts only applies its own laws in the field of public law and that public laws are only applied within the own territory (territoriality principle). Other principles have been often applied: The state will respect foreign public law (“act of state doctrine”)³⁷, but it will ignore it in its courts (“public law taboo”)³⁸. These two “principles” already indicate the confusion in this field, as they are partly contradictory: You obviously can’t always respect foreign public law by ignoring it. Here is not the place to explore the possible principles to be applied in Cambodia in this field.

With respect to constitutional law the most discussed question typically is the extent to which foreigners will enjoy constitutional rights under the constitution. Cambodia, as many other countries, has basic rights which seem to be provided for everybody, and others, which seem to be provided for Khmer citizens only. But more than often drafters of constitutions do not pay very much attention to the question and often questionable distinctions are the result. Usually fundamental liberal rights (life, prohibition of torture etc.) are rights provided for “everybody”, whereas community oriented rights (political participation, social security etc.) will often be restricted to citizens. This concept seems to be generally followed in the Cambodian constitution, but the restriction of freedom of belief to Khmer Citizens (Art. 43) for example seems questionable under this general approach. An important distinction can also be found with respect to the right to property: Whereas generally property is an “everybody’s right”, land ownership is restricted to Khmer Citizens (Article 44)³⁹. Regarding political rights, restriction might even go beyond citizenship, as electoral laws will often request citizens to be resident in the coun-

37 For a critical discussion see *Anne-Marie Burley*, Law among liberal States: Liberal Internationalism and the Act of State Doctrine, 92 *Columbia Law Review* 1907 (1992).

38 Again for critical analysis see *William S. Dodge*, Breaking the Public Law Taboo, 43 *Harvard International Law Journal* 161 (2002).

39 See also *Ly Chantola*, Recent Development of Land Law in Cambodia: The Legal Framework of Buildings co-owned by Cambodians and Foreigners, *Cambodian Yearbook of Comparative Legal Studies* 2 (2011), p. 125.

try to vote or be elected, and they might also request candidates not only to be citizens, but citizens by birth⁴⁰.

An example of the difficulty in defining the “extraterritorial” reach of rights is the protection from dangers posed by other states. This is a practical issue in extradition law and culminates e.g. in the question if extradition is allowed to a country where it is feared that the extradited person will be sentenced to death or torture. This question is much discussed in Europe, where it has significant consequences particularly for the cooperation with the United States in criminal matters. It is particularly interesting and relevant in the Cambodian context, as Cambodia, which constitutionally bans the death penalty, is surrounded by countries who still apply it. Therefore the topic is discussed more precisely elsewhere in this book⁴¹.

V. Conclusion

Cambodia is a country with a re-emerging legal system and legal culture after times of hardship and neglect. This rebuilding is occurring during a time of unprecedented migration of legal concepts. As a result, Cambodia has become a melting pot of legal concepts during a time when it is still building up the necessary know how in the making and implementation of a modern legal system. From an outside perspective it seems that significant progress has been made, particularly in fields like legislation and legal education in recent years, but that there is still much to do and there are still areas of concern, particularly with respect to the functioning of the judicial system. Obviously the process of reconstruction is still ongoing. May Cambodia be successful in strengthening a legal system that serves its people and improves the living conditions of its people. May the legal system fulfill its role as a “Bridge between Is and Ought”⁴².

With respect to academic research, Cambodian law has much to offer not only for domestic researchers but also for those “outsiders” interested in legal reform and transition. There is much more to explore than the much discussed Khmer Rouge Tribunal, which until now has been the main reason for “international” attention to the legal development in Cambodia.

⁴⁰ Regarding the latter, restriction often even goes beyond citizenship, as electoral laws will often request citizens to be resident in the country to vote or be elected, and they might also request candidates not only to be citizens, but citizens by birth.

⁴¹ See *Meas Bora*, in this Volume.

⁴² *Edgar Bodenheimer*, *Law as a Bridge between Is and Ought*, 1 *Ratio Juris* 137-153 (1988).

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