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RULE OF LAW

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RULE OF LAW

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KINGDOM OF CAMBODIA

THE KONRAD-ADENAUER-STIFTUNG

The Konrad-Adenauer-Stiftung (KAS) is a German political foundation named after the first Chancellor of the Federal Republic of Germany after the Second World War. The KAS provides counseling and education on good governance with a view to promote democratic political institutions and policies. The KAS works in 120 countries worldwide. Half of the foundation's activities continue to be conducted in Germany. The office in Cambodia has been established in 1994. The partners include the National Assembly and the Senate, the Council of Ministers, the Ministry of Interior and selected other ministries, the political parties represented in Parliament, media, and civil society organizations. In recent years, particular emphasis has been given to the support of democratic decentralization.

OCCASIONAL PAPERS ON DEMOCRATIC DEVELOPMENT

In this series, the KAS makes available documents emanating from the cooperation with its partners in Cambodia that appear of interest beyond the specific program work.

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PREFACE

Is the Kingdom of Cambodia a rule of law country? How much and what kind of rule of law does Cambodia need in the 21st century? What kind of it will the society be able to put in place? What is the rule of law anyway and is it indispensable? Is the rule of law a Western model that might need adaptation elsewhere? These are some of the questions addressed in this fifth edition of the Konrad-Adenauer-Stiftung Occasional Papers on Democratic Development.

This volume suggests that there seems to be a consensus in Cambodia that the rule of law is a desirable principle. None of the authors questions its universality. It is claimed that proper implementation of the rule of law promotes economic development. The rule of law is described as a goal of the country's development policy. Economic growth, political modernization, the protection of human rights, and other worthy objectives are believed to hinge, at least in part, on the rule of law.

However, the debate about the rule of law in the Kingdom of Cambodia is full of controversies. Is the rule of law presently applied or not applied? Some authors express satisfaction with the successes achieved in establishing it after decades without or only weak rule of law. Others complain about serious deficiencies and even allege the powerful to lack interest in introducing the rule of law.

With these papers, we do not intend to provide an academic legal textbook. Rather we want to compile personal statements of outstanding Cambodian personalities on the difficult concept of the rule of law in Cambodia. We would like to contribute to a pluralistic debate on what we consider a central concept for the future of the Cambodian society. We are convinced that the Cambodian society would benefit from more rule of law in the future.

The final chapter is the only one written by a Non-Cambodian. Thus, his contribution has a different objective. It is not an expression of personal views on the rule of law in Cambodia. Rather more, the author provides an overview of the academic debate about the term "rule of law". We assume, that this contribution will put into perspective the controversies raised by the other authors. It is well understood that neither the author nor the Konrad-Adenauer-Stiftung do not wish to be and cannot be "referees" over any opinion put forward in this book. The Cambodians must come to terms with the rule of law for themselves.

In this volume, some of the most brilliant personalities of Cambodia put forward their ideas. All of them are important opinion leaders. We would be satisfied if we had achieved our objective of contributing to a free, balanced and pluralistic debate and indirectly to improvements in establishing the rule of law.

On behalf of the Konrad-Adenauer-Stiftung, I thank all contributors to this volume. As a foreign institution, we are highly honored by the trust all authors have invested in our foundation in addressing this difficult and controversial issue. We have tried to invite a broad spectrum of personalities and institutions to contribute to this volume. If some feel that the spectrum of opinions is not properly covered, another volume on this topic might be justified.

I also like to express my gratitude to Mr. Wolfgang Meyer, who as the former Representative of the Konrad-Adenauer-Foundation has initiated and prepared this volume. Without his support, these exceptional debates of this most sensible topic had not been possible.

Rabea Brauer

Country Representative

Konrad-Adenauer-Stiftung

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THE RULE OF LAW IN CAMBODIA

Samdech Akkak Moha Sena Padei Techo **HUN SEN**
Prime Minister
Kingdom of Cambodia

From the very beginning of time, human being has sought to discipline social relations for the greater good of all. Very early, these relationships were defined around a leader, and religions codified social order. Still today, religions discipline much of our behaviour and relationships. For over a thousand years, Cambodian society was organised around a god king with absolute power. It is only during the twentieth century that our practices were secularised.

Following the upheaval of the seventies and eighties, Cambodia has been adopting liberal norms and practices of which the Rule of Law is one of the cornerstones. We are doing this knowing that it is a gradual process and that in these times of globalisation and interdependency, we must respect a number of fundamental and common principles. Cambodian society upholds values of family, religion, tradition and social cohesion. Cambodia has also adopted the values of a pluralist democracy, a market economy, of integration into the world community and of respect for rights and liberties.

Post conflict societies such as ours, where everything must be rebuilt all at the same time, face many difficulties including a lack of human, institutional and financial resources. Cambodia is no exception. However, Cambodia's case is particular. The Khmer Rouge genocide regime destroyed the country's institutions and infrastructure and more than one third of its people perished; we started from scratch. Peace, security and stability were fully re-established only ten years ago, conditions without which nothing else is sustainable. The Royal Government has had to target the most urgent priorities and needs and gradually increase our efforts, step by step, according to the country's needs, capacity and resources. All this takes time. It is so easy to destroy but so much more difficult to build.

One can define the Rule of Law as a set of practices and institutions that bring order to our society for the better good of all citizens. It is the application of rules and traditions that discipline the exercise of rights and obligations and the exercise of power. The World Bank has identified the Rule of Law as one of six principles¹ of good governance.

¹ (1) *Voice and Accountability*, (2) *Political Stability and Absence of Violence*, (3) *Government Effectiveness*, (4) *Regulatory Quality*, (5) *Rule of Law*, (6) *Control of Corruption*

It is relatively easy to agree on the nature of rights and obligations. However, it is very difficult to agree on their relative importance. For example, the majority of rich countries would consider political and civil rights as priorities, while many of the poorer countries would consider economic, social and cultural rights as priorities. Each society prioritises rights and obligations differently according to its aspirations, needs and circumstances. Some advocate individual liberties, others advocate a harmonious society.

How do we see the Rule of Law in our Cambodian society at the beginning of the XXI century?

After 1979, the country undertook to rebuild its governance regime and to build a rule of law that is effective and anchored in our reality, and that is adapted to our needs and our capacity to implement. There is no miracle recipe. We only know essential ingredients.

The Rule of Law cannot be decreed. It is built with difficulty over time based on the traditions and culture of a society according to its human, institutional and financial capacity. Every one of the reforms undertaken by the Royal Government in the context of its Governance Action Plan directly contributes to the strengthening of the Rule of Law. Whether the reform targets democratisation, public finances, justice, public services or the management of natural resources, it contributes to entrenching and strengthening the Rule of Law in the country.

One can access the Rule of Law by examining three main components:

1. A codified legal framework made of a hierarchy of laws and regulations that complement and reinforce one another to uphold rights and obligations;
2. A framework that is known and understood and that has the support of the vast majority of citizens; and,
3. Enforcement mechanisms (justice, police and prison) that is effective, fair, equitable and predictable.

The National Assembly, the Senate and the Royal Government have been very active to complete **the legal framework** to international standards. For example, during the current legislature, 139 laws were approved ranging from the Civil Code and the Organic Law to laws on domestic violence and to laws to further entrench democracy and to enable the private sector and the market. Other laws are being readied for approval and implementation including the Statute on the Magistracy, the Criminal Code, the Anti-corruption Law and a set of laws to uphold Cambodia's international obligations.

Projects are ongoing to enhance **knowledge, understanding and voluntary compliance**. Already significant achievements have been realised. The Official Gazette has been revamped and Court decisions are being widely circulated. A legal lexicon has been published. Public education about rights and obligations is ongoing throughout the country with the assistance of Civil Society and development partners. Legal service centres are being increasingly deployed at the district level. Legal Aid is being strengthened and made more accessible.

The Royal Government and the Judiciary are investing heavily to increase our **capacity to implement** this enforced legal framework in a fair, equitable, transparent and predictable way. The ongoing Khmer Rouge Tribunal demonstrates Cambodia's commitment to effective justice of the highest standards. Not only is it meeting the long delayed need for justice of the victims of that cruel regime but the ECCC is serving as a model court for our country as well as contributing new approaches to international law. At community level, we are working to establish and strengthen the alternative conflict resolution mechanisms to alleviate pressures on the Court system. A code of ethics for judges and prosecutors has been adopted. Cambodia is also investing heavily in developing capacity within the legal and judicial sectors through such institutions as the Royal Academy for Judicial Professions. The effectiveness and efficiency of police forces are being strengthened, and the prison system is being modernised.

Our achievements are impressive. At the end of the Third Legislature of the National Assembly, Cambodia is a country where, for example:

- Democracy is working and is being further entrenched.
- Internal and international conflicts are being resolved peacefully
- 10.2% of Average Growth Rate during the last 4 years
- Individual and group rights are protected
- Civil Society is vibrant and the press is free
- The Administration is being modernised and refocused on service delivery
- Laws and regulations are increasingly comprehensive and to international standards

Yet, we are at the beginning of a long road. Cambodia's challenges are many and will be confronted systematically. The political resolve is clear and firm. The Rule of Law depends on our collective capacity to implement even the best of laws. The major challenges confronting Cambodia are our continuing lack of human and institutional capacity; lack of financial resources and the time to complete the legal framework to deepen democracy, to favour development and meet our international obligations as a country.

The strategy and the action plan to reform the legal and judicial sectors are bold. They are articulated around seven strategic objectives.² Each of them directly contributes to the reinforcement of the Rule of Law in Cambodia. Progress to date is impressive but much more should be done, and more quickly.

The Rule of Law should be an effective means to enhance the wellbeing of the people. In this context, the pursuit of the Rule of Law is at the core of the Royal Government's strategy to improve governance in our country.

The road is arduous but we have no other course to follow.

² *The seven strategic objectives are: (1) Improvement of the protection of fundamental rights and personal freedoms; (2) Modernization of the legislative framework; (3) Provision of better access to legal and judicial information; (4) Enhancement of the quality of legal processes and related services; (5) Strengthening of judicial services; (6) Introduction of alternative dispute resolution mechanisms; and, (7) Strengthening of legal and judicial sector institutions.*

THE RULE OF LAW IN CAMBODIA IN THE 21ST CENTURY

His Excellency **KEO PUTH REASMAY**
President
FUNCINPEC Party

I have the honor to acknowledge receipt with thanks of your letter dated 7th April 2008, requesting me to contribute opinions and ideas of the rule of law in Cambodia in the 21st century.

As you are well aware of, the National Assembly of the Kingdom of Cambodia has passed hundreds of laws during the last 15 years of its newly found democratic functions. The debates in the National Assembly between lawmakers flourished the mind of the Cambodian people of what a democratic nation should be - opinions and counter-opinions open up new thinking and paved the way towards more understanding and reconciliation from those who used to live under true democratic systems abroad, and those who never experienced the openness and used to live under an undemocratic socialist one party totalitarian regime.

Cambodia has emerged from a long war from the first Kingdom that people enjoyed under the light leadership of His Majesty King NORODOM SIHANOUK in the years 1941-1970, to the current system of governing the nation.

The people had experienced the war of Indo-China when Cambodia participated in the Vietnam War of 1970-1975, the bloody genocidal regime of Pol Pot – Khmer Rouge, the Vietnamese Communist occupation and the return to the current day of the Second Kingdom.

With all this in mind, Cambodia now is trying to pick up bits and pieces of everything and to make it its own. The laws that we think are good and applicable are drafted by the government and submitted to the National Assembly for discussion and support. But there are few laws which are submitted by the members of the Parliament themselves. These laws usually ran counter to the ideas and wishes of the government. They are usually changed to suit the wish of the government and not vice-versa. Nevertheless, the laws in Cambodia are good like in many other democratic nations of the world, but it is rarely put into practice. The majority of the laws which are being practiced every day are the petty theft and criminal laws as well as divorced laws. Sadly, there are large numbers of cases that were seen as

favouring the rich and powerful. The poor and penniless rarely won any court case at all, because of rampant corruption at all levels.

Quite a number of laws also favoured the ruling authority and seemed to be very biased. The many political parties that exist in Cambodia rarely submit meaningful recommendation to the drafted laws. They can discuss and argued as much as they like, but the final vote usually almost tally to one hundred percent in favour of those laws that were submitted by the ruling party.

Despite more than one million fingers printed requests of the people that the corruption laws should now be put on the floor for debate at the National Assembly, nothing has been done for the last 15 years. And now in July, we will have our 4th National Assembly. Perhaps the draft corruption law will not be able to come up again for discussion for the next five years.

The immigration law is very loose and flimsy, and cannot protect the right of the Cambodian people. It is strongly criticized by the people. But the people are powerless and cannot voice opinions in the true sense of a democratic nation. In retrospect, the laws in Cambodia are seen by the vast majority of the people more as strengthening the image and the power of an individual who rules the country than strengthening the rule of laws itself for the people to respect and abide by.

Please accept, Mr. Meyer, the assurances of my high consideration.

THE RULE OF LAW IN CAMBODIA IN THE 21ST CENTURY

His Excellency SON SOUBERT
Member of the Constitutional Council

The English expression “Rule of Law” defines quite well the notion of the supremacy of the law over any power or privilege. The French expression “*Etat de droit*” (State of Law), translated in Khmer as “*Niti Rath*”, does not define the notion as well. For us, it means that no one is above the laws that ensue from the Constitution, the Supreme Law. The laws adopted by the National Assembly and enacted must be enforced. This procedure unfortunately does not apply in Cambodia because the judiciary does not function properly and the other state institutions have no incentive to implement the rules.

Currently the law is implemented for the benefit of the politicians and they are in fact holding a rule by *diktat*. For example, in 2003, the National Assembly violated its own rule of procedure and adopted the “package law”. This law forced the members of parliament to vote for the Bureau of the National Assembly and at the same time to approve them as members of the government. The Constitutional Council declared itself incompetent to examine this Constitutional Law because it was already adopted by the National Assembly. The procedure was unconstitutional by failing to maintain the separation of powers, (violating Chapter 4, Article 51 new, paragraph 4 of the Constitution) and failing to consult with the Constitutional Council prior to passing new Constitutional laws (violating Chapter 12 new, Article 142 new of the Constitution).

Laws, of course, evolve as social thinking evolves in new situations. In Cambodia’s case, thinking has evolved due to globalization. The recent history of Cambodia, in the context of the Cold War from 1970 to 1991, was plagued by two successive communist regimes and foreign occupation. This aborted the golden age of the Sangkum Reastr Niyum, and did not allow for normal evolution towards democracy and the rule of law. In this sense, I refer to the rule of law as ruling in compliance with the wishes of the people’s majority, while respecting the rights of minorities. The present situation in Cambodia shows the reverse trend. The minority group is in power, supported by a corrupt administration, army and police system. The minority group is ruling the majority of the citizens, who especially in the countryside totally depend

on the Chiefs of village. The citizens are forced to be obedient to the diktat of the ruling power and privileged.

The 1993 Cambodian Constitution set a sound base for a society ruled by the law. But for political reasons, some stipulations of the 1993 Constitution have not yet been implemented. For example, the Supreme Council of Defence is to be presided over by the King (Chapter 2, Article 24 new) and the National Congress (Chapter 14 new). This was the expression of the direct democracy during the Sangkum Reastr Niyum time, and both Constitutional laws were awaiting implementation within the organic laws. But unfortunately the weigh of traditions and political conservatism have produced regimes like in Burma ruled by the Military Junta, like in North Korea, Laos and Vietnam ruled by the Communist party, and like in Cambodia where the leaders speak double languages with a façade. For international consumption, they show democracy, and internally, they complacently hold a one man show and a monopoly of power.

1. Revolution of mind

A few years ago, the Konrad-Adenauer Foundation and the Cambodian Royal Government organized the seminar "Democracy, Good governance and rule of law", I was reluctantly invited by the government officials, only after much insistence from the German organizers. I told the audience about the failure of the so-called "revolutionary regimes" to promote human rights and standards of dignity within society. The regimes, succeeding each other since 1970, have failed to protect people who ended up slaves and instruments of exploitation by the political leaders. Instead of the people being masters of their destiny and masters of the political leaders, whom they promoted to that position by their votes, people are still slaves today.

The Cambodian people are fed up with warfare and the threat of unrest. However, recently, the Prime Minister threatened war if his CCP (Cambodian People's Party) did not succeed in the upcoming July legislative elections. This pattern of thinking is directly contrary to that of the hero of France, General de Gaulle. Despite De Gaulle's popularity in the late 1960's, he voluntarily stepped down from power before the end of his mandate, when the referendum he proposed to the French citizens failed to give him support. The threat of war for losing an election is obviously undemocratic because democracy means changeover of power between political parties; otherwise it would mean dictatorship.

The rule of law also means the existence of state structures adapted to its service, and educated citizens and cadres imbued with civic consciousness and ethical conscience. In Cambodia, the rule of law still has a long way to go,

because the people must set themselves free from fear and ignorance. This change in mentality needs a revolution of the mind, peacefully, through education.

2. Rule of law and education

When the Khmer People's National Liberation Front (KPNLF) was fighting for the liberation of Cambodia from the Vietnamese Occupation troops from 1979 to 1991, we emphasized the importance of education for the reconstruction of Cambodia. To educate on the process of democracy and human rights, we set up primary and secondary schools and a university structure. We first set this up within Cambodian territory and after at the Site 2 refugee camps. We believed that without educated people who could think for themselves, there would be no hope for the democratic progress.

Many Non-Government Organizations (NGOs) exist today in Cambodia to promote human rights, democracy and rule of law. Examples of these NGOs include: Licadho, Adhoc, the Centre for Social Development (CSD), the Khmer Institute for Democracy (KID), and the Cambodian Human Rights Centre (CHRC). These NGOs succeeded in setting up a network of human rights defenders. Others, like the Institute for Peace and Development, CEDAC, and PADEK, aim to promote the welfare of the people in agriculture and other related activities. These activities are important because democracy and rule of law cannot be achieved on an empty stomach. Also important is the work of CDRI (Cambodian Development Research Institute), and other specialized organizations like COPCEL and COMFREL who act as watchdogs for free and fair elections.

Efforts have been made by NGOs to educate the police and military officers. But what we need the most is to educate the top-level leadership; to make them understand that democracy and the rule of law need their participation to clean society from corruption at all levels, especially at the top level. As Samdech SON Sann used to say, when you want to develop the country, you have to start from the bottom and move to the top, but if you want to eradicate corruption, you have to start from the top and move down. Consequently, the Buddhist Liberal Democratic Party (BLDP) he was leading took the first steps towards this goal by proposing two draft laws in 1994: the anti-corruption law and the declaration of revenue by all the government officials. But by that time, the two ruling parties, FUNCINPEC and the CPP, were in no hurry to examine the laws and have the National Assembly adopt them because both parties lacked transparency and had problems with corruption and bribes. Until today the badly needed anti-corruption law has not been adopted by the National Assembly.

Lack of structure or mechanisms for control will not enhance the efficiency of civil society. Frustrated that the grievances voiced by the people are not being heard by the government officials in charge, the former Director of the CHRC decided to launch a political party to defend the human rights of the people. If the party can get a majority of seats at the Parliament, they can directly change the situation.

3. Sine qua non for the rule of law

(a) Education

Education that produces free thinking and a critical mind is required for a democratic society; not fake education, as it exists in Cambodia today. Cambodia is blossoming with many pretentious private Universities, issuing diplomas to students who bribe and pay, if not just to upgrade the government officials. Even if students are unable to grasp the teaching, they just pay for the lessons and the dissertations written by someone else. We produce fake citizens and fake scholars, and we must remember what an early 16th century French author said: "Science without conscience is but the ruin of the soul".

(b) Separation of Powers

The Cambodian people must have fair access to the judicial system. Currently, the judiciary is not working properly because the judges are subservient to the executive power. The proper separation of powers with checks and balances is but nominal, and the other state institutions which are meant to be neutral and separate from political parties have no political will to change. As long as these structures are in place, rule of law in Cambodia has a long way to go.

(c) Freedom of Press

The Cambodian people must have access to a free flow of information. Currently, the Khmer language newspapers are sycophants of the ruling power or to survive, will accept bribes from these leaders. Ethical mores fail to exist and intellectual probity is unknown. The Cambodian leaders have no understanding of the people's interest and welfare, but only the accumulation of their wealth. Transparency remains opaque, and the scrutiny by the press and the civil society is not strong. As long as good governance is just a rhetorical exercise, the rule of law is the horizon or the Taj Mahal which appears further away as we approach it, and seems to come closer to us when we are stepping away – just like a delusion or wishful thinking.

(d) Economic and social rights

As long as the majority of Cambodian people are deprived of their right to a fair share of economic power and continue to live in fear of the morrow, rule of law will not flourish. Currently, Cambodians are deprived of their right to equal education and welfare as stipulated by the Constitution. In the countryside, they are intimidated by hooligan village chiefs who are paid by the ruling party for threats of violence and assassination. As long as the Cambodian people are not free to express their grievances, their opinions and their free will, rule of law is a goal out of their reach.

(e) Action by the international and national communities

The International Community is responsible for Cambodia's current state of affairs because since the 1991 Paris Peace Agreement on Cambodia, they have had the leverage to force the government to comply with the international standard of democracy and rule of law, which means equal rights for the citizens. The International Community must demand that the government be accountable not only to their own tax payers, but also to the Cambodian people whom they meant to help develop and save from all these past years hardships and dictatorships.

But the Cambodian people themselves are the more responsible, because we are incapable of discarding our recently found tradition of fear; of rejecting the trauma of the past communist regimes; and of being superstitious instead of holding a critical mind. We made religion the opium of the people, contravening to the original teaching of the Buddha.

In conclusion, the rule of law in Cambodia needs sustained efforts from its own citizens and the continued international cooperation to support Cambodian Human Rights NGOs and other related organizations.

CAMBODIA AND THE RULE OF LAW

(THE SYNTHESIS ON ACHIEVEMENTS MADE BY THE ROYAL GOVERNMENT OF
CAMBODIA IN THE REFORM OF THE LEGAL AND JUDICIAL SYSTEMS)

His Excellency **TEP DARONG**

President of the Royal Academy for Judicial Profession

INTRODUCTION

This research paper will study the components of the rule of law in Cambodia and make recommendations on how to build a new Cambodia with a real rule of law. Due to time constraints and the wide scope of the above subject, I would like to focus and do a comparative study between the current rule of law in Cambodia and a new Cambodia that follows a democratic model, pluralism and an economic market in the form of “globalization” as stated in the Constitution. It is noted that effective management of a legal framework that is responsive to the needs of a society requires us to focus on various factors including social and cultural factors, civilizations and social concepts, traditions, economics situations and national politics. Therefore, the building of rule of law, which begins with the establishment of legal structures and institutions, are priority actions that a new Cambodia has started since the general election in 1993. Since this time, Cambodia has also focused on re-establishing a free democracy, pluralism and economic markets. The enforcement of a political rule by democracy and economic markets with an ambition to establish a new Cambodia with peace, happiness and development in all fields enables the Royal Government of Cambodia to prepare new legal documents which aim at building rule of law and responsiveness to the needs of economic agencies in Cambodia.

Upon a synthetic look of all legal texts and state institutions as well as other existing institutions and organizations developed since 1993 in Cambodia, we can say that Cambodia at the end of the 20th century, is a “a new real bud of rule of law” that is starting to grow up progressively to achieve maturity in the future. .

1. Cambodia at the end of 20th century - a real bud of rule of law

Once you hear the above description, you may wonder why Cambodia can be called a bud of rule of law at present. How can a bud of rule of law be identified? In fact, we may judge that rule of law has been formed by the existing basic components. Those components include two main types: (A) the existence of a democratic legal system and the respect of human rights in

accordance with principles and hierarchal legal structures; (B) the existence of a clear institutional structure allowing for the establishment of mechanisms to ensure the respect of law and the rights and freedoms of individuals.

A. Existence of legal system containing a basic structure for the rule of law

Every construction requires a foundation, but that foundation can be either strongly or flabbily grounded. Building rule of law that is strongly grounded requires us to start with foundations such as: 1) the establishment of a legal framework with a clear structure separating power and maintaining hierarchy 2) constructing every legal norm with embedded encouragement for the respect of human rights and the respect of equality before the law 3) the creation of legal norms that binds every individual including public authority, specifically identifying the state itself to be subject to the law.

A-1 Existence of hierarchical legal norms and the principle of the separation of powers

What is a hierarchical legal norm? Do Cambodian laws fit with accordance into this hierarchical principle? The hierarchical principle was first established by an Austrian professor, **Hans Kelsen**. He said that rule of law is: “a state in which all of its norms were established with a clear hierarchy that allows a restriction on the broad privilege of the state”. Therefore, Hans Kelsen’s hierarchical legal norm has becomes the most necessary mechanism to safeguard the existence of rule of law. The hierarchical legal norm requires all norms to be in accordance with its hierarchical rules; otherwise, those legal norms shall be null and void. In a democracy, respect of the hierarchical legal norm is not any different from recognizing that the will of the minority shall be less valuable than the will of the majority in a society if the total will is greater than the will of the minority. Based on this reason, Kelsen stated that, if it is counted from the higher to the lower (or the majority’s will to the minority one), the Constitution is the supreme law, then there are international agreements and laws from executive bodies, then orders of the government, and then administrative decisions of public authority. Agreements made among private individuals themselves are at the lowest level in the hierarchy.

A summary of Kelsen’s theory is not an attempt to re-teach it, but to reflect on whether or not the principle exists in the current Cambodian context. Up to this point, I have heard some opinions expressed by individuals that Cambodia has yet to apply this hierarchical principle and others have said that the principle is there, but is not yet elaborated since there is a lack of

regulations to clarify it. I will now try to find out which opinion is reliable, and why.

To answer this question, I must remind you that there are many legal systems in the world. Some legal systems are written, like the Romano-Germanic, and other systems are unwritten or customary, like the common law system. Therefore, the search for the real existence of the legal rule requires us to look not only into written laws, but it also requires us to look into customary legislation such as the traditional legal drafting in each country. The presence of legal rules or principles may be embedded within the law itself or in other branches of law including unwritten laws. Taking this approach to seek the existence of laws is a universal approach used by world famous comparativists. Thus, to seek the existence of the hierarchical principle, I would like to look at the source of law, especially the Constitution, which is the supreme law of Cambodia.

Article 150 new (article 131 old) of the Constitution of the Kingdom of Cambodia stipulates that the Constitution is the supreme law of Cambodia and that all other laws must be consistent with it. The supremacy of the Constitution over other laws and decisions of state institutions is affirmed through article 158 new (article 139 old). Article 142 new (article 123 old) gives competence to the Constitutional Council to judge whether a law is constitutional.

Upon analysis, the hierarchical principle protected by the Constitution is not yet sufficient because it provides only for the supremacy of the Constitution, failing to provide a clear hierarchy of laws for international covenants or government orders. There is no clear provision in the Constitution stating the hierarchy of international covenants or government orders and therefore a gap in the hierarchy principle. Utilizing a comparative approach, I invite you to look into the provisions of the Constitution and other specific legal provisions, especially on intellectual property law, to see whether or not they ascribe to lower or higher standards than set in international covenants.

Hierarchy of laws and international covenants - unclear hierarchy?

According to provisions of the 1993 Constitution, the National Assembly and the Senate are legislative bodies to prepare and adopt laws. The National Assembly and the Senate have competence to adopt, approve or reject international treaties or covenants. We can logically conclude that if laws and international covenants are adopted by the legislative bodies and are promulgated by the King, then the national law and the international covenant are equivalent in value, thus they are of equal hierarchy. But, if we do a comparative study on the legal value of provisions in national law and

international covenant, we see that Cambodia has a tendency to recognize the supremacy of international covenants or treaties over the national law. This tendency is reflected through the expression of article 31 of the Constitution, recognizing and respecting international covenants and treaties that respect human rights, women's rights and child rights.

The recognition and commitment to respect the rights clearly show that the state owes an obligation to force its national laws to be inferior to international covenants and treaties. The tendency to recognize the supremacy of international treaties is clearly seen in intellectual property law. For instance, article 60 of the 'trade mark law and unfair competition' provides that, "Any provisions of international treaties on industrial property rights, to which Cambodia is a party, are also applicable in Cambodia. In case there is a dispute arising out of those articles, the provisions of those treaties are regarded as main provisions." Adding this type of provision is an unavoidable tendency for Cambodia so long as it follows an integration policy for community and for international organizations. By and large, we can say that although international law and covenant have their hierarchies, they are not clearly defined. Now, we will look at the hierarchy of laws and governmental order.

Hierarchy of laws and governmental order

To monitor the hierarchy of laws in government order I will analyze article 39 of the Constitution and the 'law on the organization and the functioning of cabinet of ministers'. Article 39 of the Constitution states: "Khmer citizen have the right to denounce, make complaints or claim for compensation for dangers caused by any breach of the law by institutions of the state, social organizations or by members of such organizations...." This means that the Constitution establishes an obligation for those organizations to respect the law. However, this article fails to clarify the term, and we do not know exactly what is meant by institutions of state or social organizations. Guidance can be sought in the Constitution's definitions. Article 51 new on the separation of powers, article 90 new on the National Assembly, article 99 new on the legislative power of the Senate and other articles on the government as an executive organization all define "Organizations of state and social organizations" as organizations including legislative and executive bodies. In this regard, we can conclude that the executive body shall also respect the so called "legal principle" or "legalism principle" as stated in article 39 of the Constitution that recognizes the rights of citizens and the liability of state institutions when there is a breach of law by members of such institutions. I would like to stress that there are two main forms of abuse to be seen: through material acts and mere decision making like the royal decrees, sub-decrees,

Prakas, circulations, court verdicts and so on. Thus, article 39 provides that the settlement of complaints and claims for compensation for damages is the responsibility of the courts. We can also conclude that the court has the discretion to invalidate government orders that are made contrary to the provisions in the Constitution. In a reverse interpretation of article 39, institutions of state, for instance, the executive body is not liable for its own adverse actions so long as the actions are conducted in accordance with the Constitution. The above interpretation demonstrates that governmental order is generally lower than law. Now we will look at the hierarchy of governmental order.

Hierarchy of governmental order

Before my analysis of the existence of an internal hierarchy for decisions of the executive body within the 'law on the organization and the functioning of Cabinet of Ministers', I would first like to focus on the use of the original concept of the hierarchical legal norm because the Constitution does not have a clear provision to define this norm. Why did Hans Kelsen establish the hierarchical legal norm? The theory is that he derived it to ensure effective implementation of Montesquieu principle of the separation of powers. We know that in a rule of law state, a valid legal norm shall be in accordance with the norms of the hierarchy. Therefore, the respect of this principle will bring about clear competences and a separation of powers. In other words, when we consider the will of the people (as stated in the Constitution) to be higher than the will of parliamentarians (law) and the law to be higher than the will of parliamentarians (administrative), we are discouraging decisions to be made by each institution. This discouragement has often been created through the limitation of competence and authority of each organization and institution. Therefore, when a clear separation of powers, competences, and roles exist, then the legal norm exists. When the legal norm is breached, such as when there is an abuse of power or authority, the individual breaching shall be punished accordingly.

The existence of the hierarchy is explained through theory of "direct and indirect contract". For example, it is most reasonable that the decision of the representative (indirect) shall be less weighty than the right of the owner (direct contractor) who directly gives out the services.

Some provisions of the 'law on the organization and the functioning of the Cabinet of Ministers', dated 20th July 1994, outline hierarchies of governance. For example, article 8 on power delegation to the Prime Minister, and article 13 on competence of the Prime Minister in approving on sub-decrees, decisions and circulation of the Cabinet of Minister are articles that designate hierarchy. Further, the delegation of power to the Prime Minister as stated in

article 29 of the same law recognizes and clearly defines that institutional Prakas or circulations (to be signed by head of an institution) shall not contain anything outside the scope and the framework of its institutional competence and shall not be in conflict with legal letters like sub-decree or governmental circulation. The supremacy of sub-decree over a circulation made by the head of an institution and over an administrative order has been implicitly expressed in article 39 of the Constitution, especially after the synthesis of article 39 with article 29 of the 'law on the organization and functioning of the Cabinet Ministers'.

In conclusion, we can say that the hierarchical legal norm does exist in Cambodia at the end of the 20th century even if its components are not properly structured.

A-2 Existence of a democratic system and the respect of human rights

The Constitution is the supreme law, and in it Cambodia adopts a liberal, multi-party, democratic policy. The 1993 Constitution clearly recognizes international law through the provision of article 31 that says: "The Kingdom of Cambodia recognizes and respects human rights as 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". The same article further affirms that Khmer citizens shall be equal before the law, enjoy the same rights, freedoms and obligations and shall exercise such rights and freedom in accordance with the law to avoid adversely affecting the rights and freedom of others. The respect and the protection of human rights, civil rights and the rights of private individuals is clearly seen through the limitation on the rights of legislator (legislative body) in law making. For example, article 38 provides that: "The law prohibits all physical abuse of any individual. The law protects the life, honor and dignity of citizens." The protection and the respect of human rights can also be seen through the recognition of the right to life and personal freedom, the elimination of the death penalty, human trafficking, and all forms of discrimination. Besides, this new state of Cambodia has also established a Criminal Procedure Code and Civil Procedure Code in accordance with international standards. These Codes are important to ensure the respect of human rights, freedom and benefits of individuals.

Above all, if we look at the components and notions of democracy, we can observe that Cambodia is a new state with a compilation of basic norms for an appropriate development and implementation of democratic norms. For instance, the Constitution recognizes the basic principles of a liberal, multi-party democratic policy. There are laws on freedom of expression. There are

laws for direct or indirect participation for making national policy, especially, through the right to make demonstrations, go on strike, make petitions, and to form associations or civil organizations. Additionally, it is also seen that decentralization and de-concentration policies are being implemented that allow citizens to have direct participation in politics, e.g. through the public contribution policy for the development of local communities. The Public Administrative Reform Strategy of the Royal Government of Cambodia led by Samdech Akkak Moha Sena Padei Techo **Hun Sen** describes well the government's dedication to democracy.

Another essential element of the rule of law is the existence of basic legal rules that bind individuals to be under the law. I will examine this element next.

A-3 Existence of basic legal rules that bind individuals to be under the law

Everyone says that the rule of law exists in a state when its public authority as well as all citizens respect the law and are under the law. The ambition and the desire to have the rule of law can be seen since the creation of the Constitution in 1993. For example, there are many provisions of the Constitution that bind state institutions and individuals to be under the law. Article 38 of the Constitution restricts the freedom and the use of power of legislative bodies to only make laws that protect the life, honor and dignity of individuals. Moreover, although legislative bodies have a broad power, this power shall also be under the Constitution, otherwise, the Constitutional Council, as stipulated in article 142 new, will judge the laws passed as invalid. Article 39 of the Constitution also clearly defines and recognizes not only the legal result of the complaint made before the law but it implicitly expresses that the executive power is under the law and it is under the scrutiny of the courts that have the power to implement penalties for non-compliance. At this point, some of you may ask yourself and may assume that the court must have unlimited and supreme power. This assumption is not correct because article 129 new, paragraph 2 provides that, "Only judges shall have the right to adjudicate. A judge shall fulfil this duty wholeheartedly and conscientiously with strict respect for the law." Likewise, Article 38, paragraph 3, 4 and 5 of the Constitution also provide that, "the accusation, the arrest or the detention of any person shall be in accordance with the law". Having put judicial power under this law reflects the principle of the right to defend and the principle of due process as stated in Criminal Procedure Code and Criminal Code. Having bound the state and state authorities to be under the law, the Constitution, especially, article 49, paragraph 1 requires all Khmer citizens to respect the Constitution and the law. Besides this legal foundation, the real rule of law

does not exist unless there is a formation of necessary institutional structures to ensure the effective implementation of the above fundamental principles.

B. The presence of clear and necessary institutional structures allowing the establishment of a mechanism to ensure the respect of law

As we have realized, the existence of a real rule of law does not solely depend on the presence of law, but, the effective enforcement of the law. The Tunisian Professor Mr. Neji Baccouche stated that, "A mechanism to bring about the real rule of law is mainly based on the judiciary." He also added that the best experiment to seek the existence of rule of law is to distribute questionnaires that question the existence of procedure and recourse, such as the right to log complaints to institutions that allows the victims of the violation to receive an intervention and compensation.

In this regard, the Cambodian Constitution of 1993 established the Constitutional Council to safeguard the respect of the Constitution, interpret the Constitution and laws adopted by the National Assembly and the Senate. The Constitutional Council is the institution with supreme power, jurisdiction and an exclusive right, as stipulated in article 142 new of the Constitution, to examine, judge and nullify any regulation that is contrary to the Constitution. The same article added that the decisions of the Constitutional Council are final.

Attempts to strengthen the rule of law are reflected not only through the recognition of complainants' rights, but also through the organization and the establishment of judicial institutions, defined in the Constitution as the court. Article 128 new of the Constitution provides for the judiciary to be an independent power. The Constitution describes the courts as the future guarantor and protector of rights and freedom of citizens through the law enforcement, respect of personal conscience, and respect of the principle that designates exclusive rights to the prosecutor when processing criminal complaints. Having an understanding of the importance of judicial power and the role judicial agents play to seek justice in a method that maintains the confidence of citizen across social groups; the authors of the 1993 Constitution embedded a fundamental mechanism to allow the accused or defendant to fully prepare for their suits and defend accordingly. Mechanisms to promote the respect of individual freedoms are seen within provisions that allow for individuals to pursue a lawsuit, make a complaint, and review decisions of the provincial-municipal trials if they find injustice and are contrary to the principle of the rule of law. The recognition of the possibility for legal defences

such as self-defence is reflected through the permission for defendants to have lawyer.

The above section is just a brief description of the fundamental principles that exist to judge the existence of the rule of law. This is an appropriate reflection to assist the current context of Cambodia where a new legal structure and a newly flexible economic system that differs from previous political systems was established in 1993. The judicial system of this new state thus has difficulties seeking an appropriate basic legal text to fit the social context.

In Cambodia, it is seen that new laws and judicial systems in the new state hold mainly a political rule, and that the new economy has loopholes despite the careful efforts that have been made to make comprehensive systems. A similar phenomenon can be seen in all countries, whether it is the political system changing, or the economy changing from a planned economy to a market economy. Why? Because the two economic systems are completely different, (one based on state intervention and another based on free contract between economic agencies that depend on the personal talent of citizens) which makes the transition period difficult. Because Cambodia has a high level of poverty, I think that the rule of law in this context is just a starting point (a bud) of rule of law that requires time, proper maintenance and participation for its fullest growth.

2. The development of Cambodia in the early 21st century - development toward a full rule of law

Every development requires the establishment of an action plan before enforcement of those actions can take place. The plan can be in the minds of the developers, or written down. The plan can be devised with or without consultation with others. The development of rule of law in Cambodia also requires the respect of these logical rules.

The development of this new rule of law requires us to prioritize two main points to ensure its fullest growth: 1. The development of the economic environment, social affairs, basic legal rights and freedoms, and a proper enforcement of power 2. The development of effective mechanisms to protect and respect of the law.

A. Further development of the economic environment, social affairs, and basic rules - a friendly environment for the culture of rule of law

Why does the development of economy, social affairs and basic rules establish a friendly environment for forming the vision and confidence on the theories

of state political systems? How can this be? The existence of these criteria are not necessary the ones that lawyers or politicians would suggest. However, deeply embedded in the rules of the nature, unavoidable to every individual, is “the need for life”. In other words, if we talk about the minority whose economics, social and cultural situations differ from the majority who draft the law, an attempt to respect the law in the society is not different from forcing themselves to respect or respond to the need and the understanding of the majority (this is based on democratic principle and the social contract theory of Mr. Jean Jacques Rousseau). The above implication shows that the enforcement of the law is always problematic because some people voluntarily apply it while others ignore for the reason that the application of the law may negatively impact their life (if the law is made without considering each person’s economic, social and cultural situation) or negatively affect their personal economic or social interests. If this happens to us, are we going to enforce the law? Changing the behavior of members in a social group is the key to have them abide by the law. Thus, the Royal Government of Cambodia established not only a development plan and appropriate legal frameworks for social well-being (A-1), but also developed physical contentment through the development of economy (A-2).

A-1 Additional developments with appropriate and realistic legal frameworks - a fundamental factor of social well-being

‘Law’ is a broad term. Some people define the law as a leading instrument; others define it as an instrument to ensure social order and others define it as a rule to bind social relations. In this context, I would like to mention only one of its meanings, that is, law is a rule, a line defined by human beings to adjust the behavior of social members aiming at ensuring peace, happiness and social development. Having realized its importance, it is seen that legal texts for urgent needs have been adopted and subsequently promulgated along with the preparation of laws to educate on the change of social concepts.

A-1-1 Development of laws for social relations - responding to urgent needs

Among laws adopted by the royal government and promulgated, it is seen that most are legal texts aiming at managing the daily contact between citizens and economic agencies. The laws do not aim at changing behavior or the concept of individuals. Instead, they help ensure the existence of relevant laws and help to create legal statutes for everyone. The laws are to ensure regularity, fairness, and certainty in the justice system. Examples of these laws include: the civil code, the civil procedure code, the law on commerce and trade, the law on entrepreneurs, the law on commercial trade marks and

unfair competition, the law on invention, patent and important terms, the law on insolvency, the law on intellectual property, the law on trafficking instruments, the law on market shares, and the law on secured transactions. At first glance, we can say that these laws are made only in response to urgent needs and to promote economics growth. However, if we look at their impact and scope, we will see that they are not only needed laws, but they also seem to generate personal benefits. There is no one happier to enforce an order than the one who foresees the benefit out of it.

Having understood this matter, the legislators and the Royal Government of Cambodia have made careful reforms. They have made slight changes in processes that were incoherent to our new political tendency. Some changes have come from integration policy for international communities and some are the influenced by economics globalization. In order to adapt the behavior of our citizens, our economic agents and the civil servant who provides public services should have a clear understanding and be confident on the new approach of thinking and working. They should be ready to be in state with a full respect of law and where law is used as a managing instrument promoting rights, freedom and other powers. The government has created some important laws attempting to educate, change and give direction on how to adapt to new behaviors to better promote the rule of law and economic development.

A-1-2 Development of law to change social behavior - a necessary approach to breeding a culture of rule of law

We know that a rule of law state is one with well formed laws that everyone respects. For a brief meaning of rule of law, especially the term 'respect the law', we may preliminarily assume that every individual is obliged to respect law. Everyone must know what or what not to respect to avoid breaching the law. Breeding a culture of rule of law requires the development of curious willingness. Thus, development requires training in language and literature because they are necessary to facilitate the dissemination of the law. In the same concept, it is said that a rule of law state is one that encourages citizens and public authorities to know the law, meaning that they know the rights, duties, roles and responsibilities for themselves, and for the rest of society.

Breeding a culture of rule of law - readiness to change old concepts through competence and professionalism

In a state with a strong rule of law, all social contacts, both private and public, are managed by law. Therefore, to maintain an effective breeding culture of rule of law in Cambodia, it shall be done by building upon the current concept of citizens and public agents to adopt new concepts that fit within the ideals of

a rule of law society. Currently, the source of rights, duties, roles and responsibilities are unclear and will be the main challenge of law enforcement. For example, what is the difference between gratefulness (a principle derived from Buddhism and from tradition) and corruption (a principle and law derived from foreign countries)? What does reliability mean in terms of doing and receiving well? How is this notion different from the fulfilment of a legal role and obligation? How do you apply the principle of respect for seniority (a Khmer cultural tradition that is deeply rooted in Cambodia) when faced with the principle of freedom of expression or equality derived from the west?

Breeding a culture of rule of law - generating readiness to accept new concepts required by the new society

In addition to the above laws, we also see other draft bills prepared by the Royal Government. Some of the laws have already been promulgated and some are being read. Many of the legal texts or draft bills are aimed to educate. For example, the law on domestic violence, the law on monogamy, and the law on human and child trafficking are laws that include education to individuals on how to behave within the family. Some draft bills aiming at educating citizens and changing the old concepts are further studied to avoid or minimize social crisis, such as the draft criminal code and the draft anti-corruption law.

Is managing the law in this way a revolution of human concepts? We must remember at every turn that if the turn is very sharp or completed at high speed, that the concepts may fall down, or fall apart. The law is a managing and leading instrument and all laws have the power to act as instruments to bring about peace, development and happiness to a society. Therefore, law shall be used to facilitate living in a society. Examining the criminal procedure code currently being enforced is a good example to study the impact of adopting and changing laws. Is the adoption of this criminal procedure code regarded as a new step in a revolution and a peaceful change of power management? For example, what impacts do the new provisions have on the separation of powers between prosecutor and investigating judge, and are they fully enforced? I believe that there is nothing harder than changing human mental concepts, especially if the change to a new concept makes them lose benefits. To make a successful change and ensure that the new concept is harmless to society, the change must be made carefully with initiatives to find reasons, advantages and disadvantages to implementing the change.

Doing this carefully is important for the development of changing concepts so individuals respect law and are confident in their legal system. This approach is important for the public interest, public order and social security.

A-2 Economics development - development of physical well - being and factors promoting the adoption of the rule of law

The Royal Government is implementing a rectangular strategy; one that responds to the social, economic and geographic situation of Cambodia. The government is also making economic development by establishing more qualified vocational training centers. These centers are necessary to allow citizens gain knowledge and experience in different arenas including sustainable natural resources. We can conclude that effective and profitable development shall be in place with the development of villages by and for the villagers themselves. Besides making law available, promoting a real rule of law must be based on other effective mechanisms such as the judicial system to ensure the respect of law.

B. Development of judicial field - development mechanism to ensure effective respect of the law

Rule of law states have laws that govern the use of rights, freedom and the power of public authorities, so that basic rights and freedom of all citizens are respected. Thus, building the rule of law requires creating the opportunity for judicial power to adjudicate and to take measure against illegal acts. Building this judicial power must be done in a transparent manner through the use of law as an instrument to make judgment. This means that the court and especially the judges whose role is to apply and to interpret the law, have become an important mechanism to strengthen the rule of law to ensure the balance of powers and the prerogative of public power. The judge is not only an arbitrator to safeguard the fairness and the implementation of power; he or she is also a teacher that educates citizens and public authorities of all levels to respect the law and respect each other. The judge is also a guarantor of peace and social development. Accordingly, in order to facilitate the judge's work and ensure that he fulfils his role, the judge shall possess sufficient professional skill, have good professional ethics and be independent when fulfilling his mission (B-1). The great power of the judge may lead some individual judges to abuse their powers, so that in rule of law countries, there are mechanisms being established to monitor and punish the judges who breach the law (B-2).

B-1 Royal Academy of Judicial Profession - the key institution for the development of professional judicial competence

Our society's desire is to build a system of rule of law in Cambodia includes the improvement of social affairs, economics and politics remaining after the civil war. The Royal Government of Cambodia under the leadership Samdech Akkak Moha Sena Padei Techo **Hun Sen** and with the direct instruction of H.E

Sok An, deputy prime minister and the minister in charge of cabinet of ministers, a board director of the Royal Academy of Judicial Profession and with participation of a French cooperation partner have established the “Royal school for judges”. This school plays an important role in developing training curricula, promoting the professional competence of senior judges, and recruiting and training new judges. We are proud to have the royal school for judges, but it is not enough to ensure a proper functioning of our legal system. It is also an essential mechanism to watch law enforcement and to ensure the balance of powers, the respect of rights, personal freedoms, social and private benefits. A mechanism to seek justice cannot be properly established if there are not enough qualified, independent and neutral judges accompanied by judicial police, court clerks, and lawyers who assist the effective implementation of the mechanisms to make judicial decisions.

This situation pushed the Royal Government of Cambodia to adopt and promulgate a new Royal Decree, No. NS/RD/0105/019 dated January 21st, 2005, on the establishment of the Royal Academy for Judicial Profession. This Royal Decree provides not only competence to this new institution to manage the process of the Royal School for Judges and Prosecutors. It also provides enough competence to manage the establishment, the organization and the functioning of other royal academies involved in providing judicial assistance, including the Royal School for Court clerks, the future Royal School for Bailiffs, the Royal School for Public Notaries and for the administration of professional training for lawyers.

According to the above Royal Decree and political will of the Royal Government of Cambodia to build a real rule of law, the Royal Academy for Judicial professions has established programs and activities related to training and developing professional competence (B-1-1) and breeding a culture to harmonize laws in Cambodia (B-1-2).

B-1-1 The Royal Academy of Judicial Profession - the place for training and developing professional judicial competence

Training and building professional judicial competence includes raising awareness to teaching practices and building professional conscience. Before developing a curriculum, building knowledge in these two fields requires us to think critically about the loopholes in our current judicial system, and do studies on what a real rule of law state requires. Knowing this allows us to respond to urgent needs by using our existing resources and getting ready to appropriately change the behavior and working habits according to the development of Cambodia.

Based on these reasons, the Royal Academy for Judicial Profession, through the Royal Academy for Judges, has organized two different training categories: Category One is an in-service training for judges (judges who are practicing in provincial-municipal courts and all levels of trial courts). Category Two is training new future judges (judges who have been recruited out of a general examination).

If we look at the curriculum for the training, we will see there is a focus on the code of ethics for professional judges and an inclusion of some programs aimed at building basic knowledge and experience in the field and to receive an understanding of new laws and new techniques for its application. For instance, the inclusion of a study on the new criminal procedure code, new civil procedure code and other new laws are good for gaining basic knowledge. Other subjects have been selected to enhance practical work skills. Besides updating the curriculum so that it is responsive to international standards, building the capacity of the court and the judges requires the Royal Academy for Judicial Profession to develop new methodological approaches to educate and train. For example, the Academy should invite foreign legal experts doing legal drafting in Cambodia to deliver lectures to the Judicial Professionals.

Foreign legal expert training should be arranged through national and international workshops or conferences in order to have an exchange of knowledge and experience. Another approach could be to have new judge students conduct a field study at the Khmer Rouge Tribunal, or to dispatch outstanding students for international study tours in countries such as France, Singapore, or Germany.

International scholars drafting Cambodian law should provide training on the objective of the law, a technical analysis of the law, and methods for improving the research skills of judges so they can qualify as guarantors to balance social and private benefits, public powers and social order. Therefore, the Royal Academy for Judicial Profession placed a strong focus of training on a code of ethics for the profession, on the rights, obligations and scope of responsibility for judges, and on the statute for judges. Since the establishment of the Royal Academy for Judicial Profession, there has been a development of professional guidance for judges. The code of ethics for judges was established, and then the statute for Judges in Cambodia was created. Other schools under the supervision of the Royal Academy for Judicial Profession have also benefited from these educational activities.

Besides fulfilling the mandate of a state institution to provide capacity building for judicial professionals, this young institution contributes to strengthening and developing the judicial system in Cambodia. It has

contributed to judicial professionals gaining better qualifications and a coherent understanding of the laws under the Constitution of Cambodia.

B-1-2 The Royal Academy of Judicial Profession - the center to ensure the harmonization of law in Cambodia

The Royal Academy is the only competent institution to organize a general examination to recruit and train Cambodian judges, court officials and court assistants. This allows the Royal Academy of Judicial Profession to offer a complete contribution and facilitation to establishing a unified interpretation and enforcement of the law and other regulations. Cambodia should include the use of national and international legal resources, customary laws and international treaties to strengthen rules. The harmonization provided at the Academy is reflected through providing basic subject knowledge delivered by teachers. Judges, lawyers, and court clerks nationwide are thus provided with the same approaches and proper legal interpretation techniques that are used internationally. Unifying the techniques to interpret the objective of the law brings about harmonization and avoids social unrest and destruction. This training provides the guarantor of legal execution approaches and interpretation techniques that allow the law to fulfil its greatest role as an instrument to serve social benefits, to facilitate living in a society, and to seek peace, happiness and development for society. The contribution of bringing a unified interpretation and enforcement of the law can be regarded as a contribution to bring national laws into harmony. This is an effort to avoid conflicts when implementing the law and to facilitate the justice process by reducing the burden on the high courts who must correct errors in lower level judgments.

Besides improving the capacity of judicial professionals, improving effective mechanisms to ensure proper law enforcement requires a consideration of other factors such as updating essential infrastructures and facilities so that proper forums exist to conduct the truth seeking process. Creating policies that give incentives for positive behavior and punish wrongdoing is also important for the development of the judicial field.

B-2 updating essential infrastructures and making policies awarding incentives and imposing appropriate punishments

Seeking justice by using law as an instrument it is not an easy task. In some cases, the court may seek assistance from experts to make an assessment to assist their judgment. Experts should have a proper place to work and should have sufficient facilities. Judges, lawyers, court clerks and prosecutors need practical resources and assistance as well as participation from society in order to pursue justice. To help the court perform work independently,

neutrally and properly, society must remember that judges are also members of the society and they also need security of their personal and family life. These concerns and needs are being addressed by the Royal Government through the rectangular strategy. The strategy is aiming to raise judges' salaries and modernize and create a systematic court system including the reform of the detention facilities.

Remembering that we are human, a society that wishes to pursue rule of law should establish mechanisms to award incentives for good behavior or impose appropriate punishment for wrongdoing. These mechanisms bring justice and transparency to balance with the role of the judge, court official and court assistant.

The above interpretations show the building of rule of law foundations in Cambodia. Though it is not yet perfect, a complete construction is there. Now, further sustainable and progressive development of the rule of law in Cambodia requires the participation of the whole society. The state leaders of all **eras** should update achievements and action plans for the reform of the current royal government. The rule of law is not a thing to be gained in one quick moment, and it should not be imagined as an easy thing to successfully attain.

THE RULE OF LAW

His Excellency KASSIE NEOU
President
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The rule of law means that government rulers are subject to the law and must rule by legal means. Government officials, even top leaders are held accountable to the nation's laws and regulations. No government system is problem-free, and the rule of law helps ensure that governance is not left to the will of the rulers.

Under the rule of law, fundamental rights are protected by the legal system. Fundamental rights include political, social, and economic rights that empower people to pursue lives of dignity. Governments should create laws that protect these rights, and establish justice systems to enforce those laws equally among the population. Freedom of the press and freedom of expression are also fundamental rights in a functioning rule of law system.

The principle of majority rule should be applied in a legal system that is coupled with the protection of the fundamental rights for all individuals, especially minorities. Democratic governments exercise their authority to serve the people by way of laws that express the will of the people. Citizens in democracies not only have rights, but also have responsibilities. They must agree to abide by the rules and obligations by which they are governed. Citizens bear the burden of responsibility to their society in order to benefit from its protection of their rights.

Thus, the rule of law is a fundamental component of democratic society in which all members, both citizens and rulers alike, are bound by a set of clearly defined and universally accepted laws. The rule of law is manifested in an independent judiciary, a free press, a system of checks and balances and separation of powers among the branches of government.

The rule of law is an improvement from the notion of rule *by* law. However, many countries in the world still rule by law, or even by the will of rulers in which the electoral and judicial systems protect their ruling elites and maintain the status quo. These countries not only prosper, but also enjoy the luxury of support and diplomatic relations from well-founded democratic governments.

Some may have a view that the rule of law is not necessary as long as peace, stability and prosperity continue to exist. It is the efficiency of the ruling that counts.

Others argue that the lack of fundamental freedoms and social justice, which are core components of the rule of law, will eventually lead to greater disparity between the rich and the poor, economic instability, eventual social unrest and political upheaval.

Perhaps a closing statement here? About Cambodia?

HOW WEAK RULE OF LAW IMPEDES ECONOMIC GROWTH AND DEVELOPMENT: CASE OF CAMBODIA

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WHAT IS THE "RULE OF LAW"

The rule of law is a "government authority exercised uniformly only accordance with pre-existing laws adopted in accordance with prescribed procedures – a safeguard against arbitrary exercise of power"³. Rule of law is not rule of man, nor is it a synonym for freedom.⁴

Law is "the rule whereby the indivisible border line is fixed within, which the being and activity of each individual holds a secure and free sphere".⁵ Law is the delimitation of individual spheres by rules, which are not determined by demarcation of a concrete boundary, but by the observation of a rule, a rule that is honored in action⁶.

COMPONENTS OF THE RULE OF LAW

Four components can serve as a yardstick to measure the strength of the rule of law. The components are⁷:

1. *Uniform Application* – All persons are treated equally under the law
2. *Legal Certainty* – Laws are implemented prospectively, not retroactively. The laws should be objective, not discretionary.
3. *Separation of Power* - Legislature to legislate, Executive to execute and Judiciary to adjudicate
4. *Law & Order* – Law refers to the judicial system. Order refers to policing crime.

³ The concept of the rule of law originated from the Italian term "Isonomia" meaning "equality of laws to all manner of persons". This eventually evolved into terms such as "state of equal laws for all", "equality before the law", and then "government of law", and "rule of law". (Hayek, 1960, pg. 163)

⁴ (Louw, 2006)

⁵ (Hayek, 1960, pg. 148)

⁶ (Hayek, 1960, pg. 149)

⁷ (Louw, 2006)

THE RULE OF LAW AND SUSTAINABLE ECONOMIC GROWTH

A number of cross-country studies have illustrated the significance of the rule of law to economic growth and development. The renowned publication, the '*Economic Freedom of the World Index*' (*EFW*), is an index that measures the degree to which the policies and institutions of countries are supportive of economic freedom. The *EFW* index was initiated by Michael Walker of The Fraser Institute and Nobel Laureate Milton Friedman in the late 1980's. This initiative evolved into a network of scholars from over 100 countries.⁸ There is consensus among scholars that economic freedom consists of four ingredients:

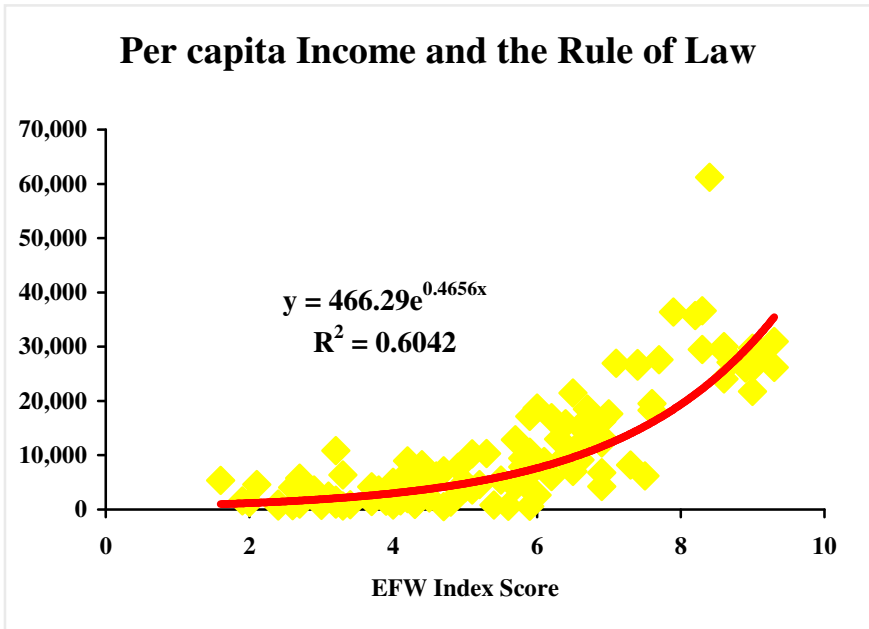
- personal choice rather than collective choice;
- voluntary exchange coordinated by markets rather than allocation by the political process;
- freedom to enter and compete in markets; and
- protection of persons and their property from aggression by others.

The *EFW* index is composed of 38 components and sub-components, which measures the degree of economic freedom in five areas: (1) size of government; (2) legal structure and protection of property rights; (3) access to sound money; (4) international exchange; and (5) regulation.

Rule of law, which falls into the second area of the index, is an essential component. Governments promote economic freedom when they establish a legal structure that enforces contracts and protects individuals and their property in accordance with the rule of law. The study shows that countries with higher ratings in rule of law (indicating stronger rule of law) tend to have higher income per capita (See Box 1).

⁸ The Cambodia Institute of Development Study is the partner institute in Cambodia for the Economic Freedom Network.

Box 1: Rule of Law and Per Capita Income



Source: (Walker, 2006)

The rule of law relates to the economy through its power to:

- *Protect property rights* – If individuals and businesses are not confident that the fruits of their productive efforts will be protected, they will be discouraged to undertake investment, especially long term investments that is needed to sustain economic growth and development. Instead, they may turn to speculation;
- *Enforce contracts* – Similarly, if individuals and businesses lack confidence that contracts will be enforced and protected through the rule of law, their incentive to engage in productive activity will erode;
- *Ensure fair competition* – A legal system that prohibits fair competition by creating barriers for market entry will cause distortions in the economy and misallocation of scarce resources;
- *Mobilize and Disburse Financial Capital* – In countries with weak rule of law, low public confidence in the government and public institutions will also undermine trust in financial institutions. In such an environment, it may be difficult to mobilize capital from individuals, businesses and investors. Moreover, weak rule of law will also limit the disbursement of financial capital because banks may demand high collateral from borrowers to hedge against risk. This will slow down capital accumulation and, hence, economic growth.

Weak rule of law cripples the dynamism of the economy by creating an environment of high risk. However, weak rule of law goes deeper than this. Not only are investors discouraged, but the general public will have low confidence to participate in the development process, such as in upgrading their skills and so forth. The overall lack of trust in the government and in public institutions, like a vicious cycle, will further undermine the country's laws and legal system. Thus, it is unlikely that countries with weak a rule of law will be able to achieve and sustain high growth rates.

The level of rule of law, as we discussed above, is measured in terms of four components: 1) uniform application, 2) legal certainty, 3) separation of powers and 4) law and order. There is still debate on which of these components may have the strongest impact on rule of law. Some scholars, such as John Locke, place emphasis on the separation of powers, which in his view, is the main practical safeguard against the abuse of authority of the government.⁹

In this article, we are not in a quest to understand how to develop the rule of law, but to focus on the significance of rule of law for economic growth and development, and how to measure rule of law. The level of public confidence in government performance and public institutions is one way to measure how people perceive the situation of rule of law.

PUBLIC CONFIDENCE ON THE RULE OF LAW IN CAMBODIA

To gain knowledge on the perception of rule of law in Cambodia, the Cambodia Institute of Development Study (CIDS) with financial support from the Heinrich Böll Foundation recently conducted a *Public Confidence Survey* in five provinces – Battambang, Banteay Meanchey, Kampot, Prey Veng and Kep. A total of 465 people were interviewed. A *Public Confidence Index (PC Index)* was developed based on the survey findings to quantify the current level of confidence in public institutions and services.

The PC Index is not a scorecard of the actual performance of government bodies (i.e. it does not account for all the reforms and improvements made by the government), but is a device for measuring the perceptions of local people. **The PC Index is a reflection of how local people evaluate the rule of law in their province.** Therefore, the ratings of interviewees are highly influenced by their individual experiences and by what they see ("visible services").

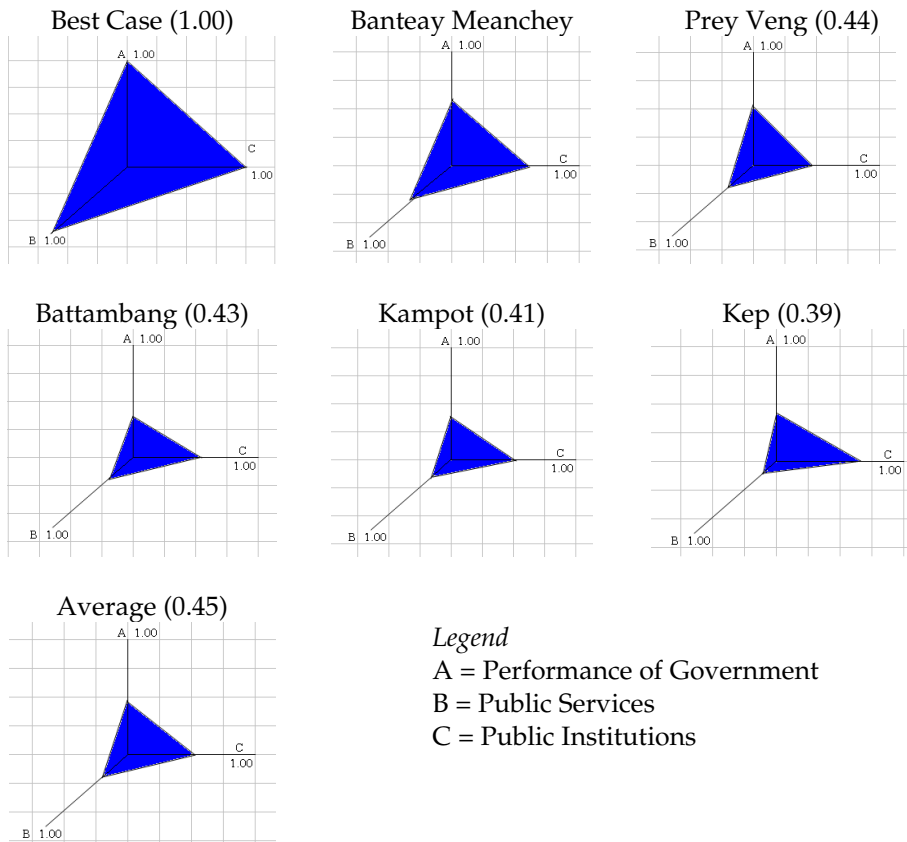
The PC Index is comprised of three categories, all related to the body of government:

⁹ (Hayek pg. 170-171)

- performance of government
- public services
- public institutions

In the best case scenario, the perfect score is 1 and means that citizens are highly confident in public institutions and services. For the five provinces surveyed, the overall level of confidence is 0.46, less than half of the perfect score. Among the five provinces, Banteay Meanchey had the highest score, 0.50, while Kep had the lowest with 0.39.¹⁰

PUBLIC CONFIDENCE SCORES



Source: CIDS, 2007

¹⁰ (CIDS, 2007)

More than half of the 465 people interviewed in the PC Index (59%) stated that their trust in financial institutions is related to their confidence in public institutions. Overall, these findings indicate that the prerequisite for households to trust financial institutions (and to put

**"I have no confidence in banks because I am afraid that the money holder will run away, and that the state will not be able to help." -
Businessperson in Battambang**

their money in such institutions) is confidence in public institutions. Thus, the strength and development of Cambodia's economy in the future will depend on how much confidence citizens have in their government, which will depend on the successful implementation of rule of law.

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THE RULE OF LAW IN CAMBODIA IN 21ST CENTURY

His Excellency LY KIMSOK
Director of School of Royal Academy

In recent centuries, Cambodia has experienced a chronicle of civil war and has had many political ruling regimes. However, the dark pages of Cambodian history have turned since the existence of the 1991 Paris Peace Agreement. Since that time, Cambodia made a firm decision to initiate an ambitious plan of national reconciliation, complete peace, democracy, rule of law, and economic development.

These plans are a challenge for Cambodia because civil war and especially the democratic Kampuchea regime had completely destroyed Cambodia.

In the face of these difficulties, since 1993, the Royal Government of Cambodia, with the support of the international community, has implemented a policy of good governance through various reform programs, especially through the National Rehabilitation and Development Program of Cambodia.

The National Program for Administrative Reform, a component of the National Rehabilitation and Development Program in 1994, aimed at institutional restructuring. Restructuring focused on five areas including:

- (a) building the rule of law in Cambodia;
- (b) Strengthening the management capacity of governmental institutions;
- (c) Public reform;
- (d) Human resource development; and
- (e) Capacity building for the management and execution of local administration.

Building the rule of law is an utmost necessity for Cambodia because the development of our country is based on a legal environment that requires transparency and accountability, respect of tradition, and the ability to respond to the needs of our people.

1. Definition of the Rule of Law

The Khmer expression “Rule of Law” is the result of active debates among Cambodian lawyers at the beginning of 1990s. At that time, Cambodia was

preparing its new Constitution and was deciding which legal system: Romano-Germanic, or common law, was best for Cambodia.

Eventually, the Khmer expression for the “Rule of Law” which is used today is best described through the French expression, "Etat de droit". Since the end of 19th century and the beginning of 20th century, the rule of law has been referred to a type of State under a legal system, in which power cannot be used outside the set legal framework, and individuals are entitled to lodge legal complaints against any violation that may arise.

In this regard, the use of power is performed by the competent, to be established and managed by law. This is the supremacy of administrative law or in other words, administration is under the law. Law is the framework and the limitation of administrative activities. The law shall be under the Constitution, and set in this law is the assurance of hierarchal stability within jurisdictions.

The rule of law is a fundamental principle of democracy, sustainability of the royal government and of all institutions. Rule of law is an assurance of freedom, national interest, justice, prosperity, and social sustainability.

According to the common law system, the “Rule of Law” is not necessarily referring to the notion of the State. The “Rule of Law” is established with a focus on the protection of individuals’ rights and freedom.

2. Building the Rule of Law in Cambodia

According to the above definition, building the rule of law in Cambodia started a long time ago. But this building had been interrupted by a coup, civil wars and was destroyed by a genocidal regime. In this situation, under the framework of administrative reform program since 1994, building the rule of law in the Kingdom of Cambodia focused on three main activities:

- (a) Developing a legal base and rules for government ministries and institutions. This included developing the delegation of competences and functions of the ministries; and defining the framework for the management of the institutions;
- (b) Re-establishing the production, printing, and distribution of the royal gazette;
- (c) Developing and adopting laws and regulations for legal enforcement in the Kingdom of Cambodia.

Further to these the three main activities, other actions have been taken in accordance with the 1993 Constitution of the Kingdom of Cambodia to strengthen the rule of law. In the last 14 years, the National Assembly and the Cambodian government established institutions such as the Constitutional Council, the Supreme Magistracy Council, the National Audit Authority, and the National Committee for elections. All of these institutions have important roles to ensure the rule of law.

A. Capacity building and mechanisms for law making

Since 1994, effort has focused on building the capacity of the Cabinet of Ministers. Specific fields of focus were co-ordination, management and the examination of the draft bills from ministries and inter-ministries. This capacity building work included the adoption of a law on the management and functioning of the Cabinet of Ministers, which was promulgated by Royal decree No. 02/NS/94, dated July 20, 1994. A law on the establishment of ministries and a sub-decree on the management and the functioning of those ministries were also created.

Currently, legal counsels have monitored the Cabinet of Ministers economic, cultural, and social organizations. The Cabinet of Ministers have experts and senior members in all fields coordinate and review technical aspects of the inter-ministerial meetings which discuss drafts prepared by ministries before submitting the draft to the Cabinet of Minister. Therefore, as a result, draft bills which were adopted by the National Assembly and the Senate were first proposed by the government.

Significantly, since the establishment of the Royal Government after the universal election in 1993, many draft bills had been prepared by or with support from foreign technical experts. Although the number of competent government officials has increased, they have not yet responded to the need of governmental institutions. Therefore, it is important that, in the future, Cambodian experts develop the organizational skills to create rules in Khmer for Cambodian citizen.

To facilitate the organization and the development of rules, the Cabinet of Ministers and the Council for Legal and Judicial Reform have been preparing procedures and mechanisms to clearly define the steps for reviewing and amending draft bills to avoid the delay and ease the preparation of sub-decrees on law enforcement.

Although the National Assembly, the Senate, and the government have adopted many laws in the last 14 years, we are well aware that the enforced legal framework in Cambodia is still insufficient for the rule of law. New

mechanisms for legal drafting and creating rules for the royal government and the National Assembly are now being created to supplement the current structure.

B. Publication and Distribution of Laws and Rules

Since 1995, in the framework of the Cabinet of Ministers, the General Secretariat of the Royal Gazette regularly produces the royal gazette in Khmer and distributes it to governmental institutions at national and regional levels. The Council for Administrative Reform co-operates with foreign organizations to publish the royal gazette in Khmer on the internet. In addition, some magazines like the monthly magazine of the Co-ordination Unit of Legislation have also produced publications of laws and rules in Khmer and in foreign languages (French and English).

Instruction on laws and rules have been given at the Royal Academy of Administration, the Royal Academy for Judicial Professions, the Vocational Training Institute for Lawyers, and at training programs for senior and junior officials, judges, prosecutors, and lawyers. Instructors explained laws, especially those relating to the relevant professions such as administrative law, civil law and civil procedure law, criminal law and criminal procedure law.

At the Royal Academy of Administration, students and participants study approaches and techniques to draft official letters, sub-decrees, royal decrees, and laws. To be able to draft a bill, a royal decree, or a sub-decree, students and participants are required to do research on the currently enforced law and have a clear understanding of that law.

Publicizing laws in mainstream society has been achieved through the initiatives of state institutions, the public sector, and civil society. Information on laws has been distributed by television and radio, written publications, posters, and educational seminars and conferences. The aim of the information is to assist people in understanding the laws and rules being enforced, especially laws related to their individual rights. This work is a challenge and Cambodia must continue to help our citizens more clearly understand the laws and rules being enforced.

C. Enforcement of laws and rules

After creating and publishing laws and rules, the next phase is enforcement. Enforcers of legal documents and official letters range from senior officials to the individual citizen. An example of this is when Cambodian political leaders tried to overcome the political deadlocks after the 1998 and 2003 elections by

relying on the existing legal framework, with particular respect to the Constitution.

Senior leaders and management officials in the executive branch have been trained on laws and rules in order to understand the organization and the functioning of institutions for the purpose of enforcement. For instance, at the School of Royal Academy, training modules include management of public institutions, economics, finance, legal skills, and international relations. These topics provide students, officials and participants with relevant legal knowledge and other technical expertise to enforce laws.

A clear understanding of laws helps improve the work of government officials who work in institutions and helps them shape the rule of law for the future. Former participants of the Royal Academy of Administration whose positions include Director of the Cabinet of Ministers and Cabinet Director of the Provincial-Municipal Governors stated that their previous work performance was based on habits. After the training, they said that the performance of their duties was based on the legal framework in place, which made them more confident to make decisions, and created an improved work environment. Judicial officials who receive training from the Royal Academy for Judicial Profession are also important officers who are trained because they will apply laws when fulfilling their duties. These actions contribute to strengthening the rule of law in Cambodia.

The Royal Academy of Administration has applied a transparent selection process and has promoted fair opportunities for all candidates across social groups including students who are senior officials and other government officials. This procedure includes a lucky draw of one subject out of five for each module to be done publicly before the candidates, representatives of international cooperation and media officials, writing tests that are designed to not disclose the students' names, and the use of an information technology test scoring system. The enforcement of a selection procedure to recruit government officials that is in accordance with international standard ensures that the government attracts talented students and that future government officials are competent.

Government officials who receive good grades after one year of training (after two years of training for senior officials) are prioritized and permitted to select their desired workplace. Remarkably, due to the Cambodian historical tragedies in the last decades, Cambodian citizen are generally concerned about respecting laws and rules. However, the enforcement of laws and rules has yet to reach the expectation.

Inactivity in the enforcement of laws and rules remains a challenge for Cambodia as the rule of law is built. Challenges include the limitation of human resources in both civil and military service; the limited number of police with competence to understand laws and apply them professionally; and insufficient technical and financial means to ensure the respect and the enforcement of laws.

3. The Rule of Law and Challenges of Cambodia in 21st century

After 14 years, it seems too early to require Cambodia to be a rule of law state like other developing countries in the world. The most important point is the commitment of political leaders in turning Cambodia toward the rule of law. Presently, the commitment has clearly been shown.

To achieve the goal, in 21st century, Cambodia must engage with the following challenges:

- formulate legal structures and rules which reflects Cambodian legal tradition and responds to economics and political requirements;
- ensure that judicial officials, civil servants, security forces, local authorities, civil society members, and the general public have the same understanding, interpretation, respect and application of laws and rules in Cambodia;
- strengthen and provide capacity building for officials who draft laws and rules;
- Establish control mechanisms and follow up strategies for effective legal drafting planning that includes mechanisms for adopting, amending, and modifying legal texts with a required clarification of the set legal hierarchy.

The Rule of Law is a precondition for Cambodia to ensure sustainability, peace and development. It is important to remember that building the rule of law in the Cambodian context is a long and special process that requires participation across all social groups.

RULE OF LAW IN CAMBODIA: WISH, WORKS AND REALITY

Mr. HENG MONYCHENDA
Director of Buddhism for Development

Following two decades of war, United Nations-sponsored elections held in 1993 gave Cambodia a newly elected government. In dealing with the many residual problems from the period, agencies and government have introduced new political governance and legal language and terms that for many people are difficult understand well.

This article is a study paper but it is unavoidable to include some comments on the subject, especially in regard to the presence and the development of rule of law in Cambodia. My limited knowledge of the subject might lead to some disagreements with some readers who have different thoughts, and therefore any comments on this article are very much welcomed. Readers may find that most of the sources stated in here are from Buddhism principles and Buddhist literature. I have had a long time as a Theravada monk and I am glad having opportunity to reveal some concepts and practices relating to the rule of law in Buddhism along side with the western philosophy which I mostly found in the internet.

Some Buddhist scholars may disagree with me regarding the translation of some terms from Pali language which is different from the traditional translation. This is because I want Cambodians in the 21st century to understand Buddhist language which has been used for 2600 years. Should there be any mistakes, please kindly accept my apology.

Rule of law is a deep subject and can be seen and interpreted from every corner. What is presented in this article is just a small portion of its scope. I intend to do further study on this subject and if all goes well a book will be coming later.

Lastly, I would like to thank Konrad Adenauer Foundation and Mr. Wolfgang Meyer, the former country representative to Cambodia who initiated this free flow of expression and would also like to thank all readers willing to give feedback to me. I hope this article will contribute to the development of rule of law in my beloved Cambodia.

Yours in Dharma
Heng Monychenda

INTRODUCTION AND SYNOPSIS

Following the 1st General Election organized by UNTAC in 1993 to form a new government for Cambodia after long years of conflict, the Royal Government of Cambodia (RGC) was born. The new RGC faced many challenges including the problems remaining from the wars of the previous two decades, the problems arising during the election, the problems relating to the needs of the people and the problems raised by donors' condition and globalization. As parts of the problems and the solutions, politicians, lawyers, economists, policy makers and donors have introduced many new words which are unfamiliar to ordinary people such as: Transparency, good governance, social justice and rule of law, etc. I believe that most people have no idea of what they have heard or meant although sometimes they unavoidably need to use the terms. Konrad Adenauer Foundation, one of the main long time donors of Buddhism for Development, is very interested in the term 'Rule of Law' in Cambodia, a term which usually is translated in Khmer as 'Niterath' but that I would like to translate as 'Nitiphibal' instead. KAF has asked me to contribute an article to express my personal view on the term. I am glad to respond to the request but I would like to say that this writing does not reflect the view of Buddhism for Development although I hold the position as Director of the organization.

The first part of this article focuses on the rationale for coming up with a new translation of the word Rule of Law in Khmer. In the second part, I attempt to compare 'rule of law' between Western and Eastern perspectives and especially from Buddhist points of views. Since rule of law is predominantly connected with the body of law, some understanding in the field of law is presented in part three, including some characteristics within a law that can put the state under its rule. In part four, the discussion will go to the evolution and development of rule of law influenced by economics, education, and freedom of thought condition and of course time. In the fifth part, a conclusion is raised on how the wish for rule of law shall be worked out in light of the reality of rule of law in Cambodia that we have to live with.

1. Terminology in Khmer Translation

There is a minor difference in translating the word Rule of Law into Khmer language due to various backgrounds of the academia: The formal and spoken one is "Niterath" but also "Thammearthipatey" was one used by a scholar in law and economics several years ago. In this paper (in Khmer version only) I would prefer to translate as "Nitephibal" instead because 'Rule' in Khmer mean Karkrupkrong (governing, managing,) or Abhipala in Pali whereas the term 'Law' is "Chbab" in Khmer or "Niti" in Pali. Cambodians who are

interested in comparing the Khmer to the English term may wonder where the word 'Rath/state' comes from because the word "state" does not exist in the word Rule of Law (only Rule and Law) in English at all. It might be that the word 'Rechtsstaat' in German is meant for the translation as 'Nitirath' because 'Staat' means 'state' whereas 'Recht' means 'Law'. The reason why the translated word is important is because in Cambodian terminology the word comes first, before a detailed understanding of the real meaning of the term. However, in translating to English Rule of Law is used for the discussion instead of Nitirath or Nitiphibal.

2. Define Rule of Law

WESTERN PERCEPTION

Rule of Law is a concept and a principle which the definitions of the individual terms themselves do not readily capture. Rule of law in British is not necessarily identical to rule of law in the United States, thus it is not clear what Cambodian citizens really mean by rule of law. It is simple that although Cambodian and Baraing (Westerns) are human beings; geography, culture, knowledge and food (rice – bread) are factors that make rule of law of these countries not at all exactly the same.

In general, rule of law is a principle proposed in order to improve relation sbetween the leaders (government) and the persons to be led (citizens): "standing on the same rule(r)" and "under the same rule of the same law". Both parties should have the same rights of mankind, enjoy equal freedom and of course they are born and died as human being.

The term "standing on the same rule(r)" is a natural hypothesis of everyone who was similarly born from mothers; therefore, s/he should enjoy the same freedom regardless of nationalities. Whereas the term "under the same rule of the same law" is a social proposal (based on the "standing on the same rule(r)") referred to the fact that in a governed state the government frequently uses its power to abuse the rights and freedom of its own citizens by arrogantly proclaiming that "l'état, c'est moi" (I am the State).

This social proposal while acknowledging the government has the power to govern the citizens and do whatever it can in the interest of citizens, at the same time it must obey and submit itself under the supremacy of law as ordinary citizens. Therefore, the key point of the rule of law is to limit the power of a government to the law, and to protect the rights and freedoms of the citizens to be free from the abuse of power by the government.

In 1959, an international gathering of over 185 judges, lawyers, and law professors from 53 countries, meeting in New Delhi and speaking as the International Commission of Jurists, made a declaration as to the fundamental principle of the rule of law. "The Delhi Congress gave rise to three important elements in the concept of the Rule of Law. First, that the individual possesses certain rights and freedoms and that he is entitled to protection of these rights and freedoms by the State; second, that there is an absolute need for an independent judiciary and bar as well as for effective machinery for the protection of fundamental rights and freedoms; and third, that the establishment of social, economic and cultural conditions would permit men to live in dignity and to fulfil their legitimate aspirations."

A.V. Dicey who has been well known as the scholar of the Rule of Law in the west states in his book entitled "The Law of the Constitution" that "the Rule of Law" means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government. Dicey identified three principles which together establish the rule of law: (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts."

EASTERN PERCEPTION

In this perspective, I would like to discuss some terms in the Buddhist Canons in comparison to the western view to see what sorts of rule of law principles are embedded in the Eastern view. In Cakkavattisutta (The Discourse on the Universal King), the Buddha advised that four principles should be followed by the Great King in leading the country towards peace and development. The Sutta states the Great King should (1) abide in Dharma, honor the Dharma, respect the Dharma, believe in Dharma, sacrifice for the Dharma, surrender to the Dharma, take the Dharma as the flag (light), depend on Dharma as the bridge, take up **Dhammadhipateyya** (supremacy of Dharma), and protect, safeguard and governing with Dharma¹¹ (2) to let no wrong doing prevail in the kingdom (3) to let wealth be given or distributed to the poor and

¹¹ *abide in Dharma (Dhammam yeva nissaya), honor the Dharma (Dhammamsakkaronto), respect the Dharma (Dhammangarukaronto), believe in Dharma (Dhammammanento), sacrifice for the Dharma (Dhammapujento), surrender to the Dharma (Dhammapacayanamano), take the Dharma as the flag (Dhammketu), take the Dharma as the bridge (dhammadhajo), honor the supremacy of the Dharma (Dhammadhipateyya), and protect, safeguard and governing with Dharma (Dhammikam rakkhavaranaḡutti samvidahassa)*

(4) to go from time to time to see and ask for advice the men of religious life who maintain high moral standard.

There are many definitions of the word Dharma in Pali but which definition should be applied in the context of this Sutta. This powerful word was admired and advised by the Buddha as the flag (light) of the nation, as the bridge to link between leaders and followers, and that the rulers must abide in, honor, respect, believe, sacrifice, surrender, and as supremacy in ruling the country. In a nation state “constitution” seems to fit to the meaning of the word Dharma, and in a society “Law” seems to fit to the word of which in the dictionary Dharma is also translated as “Law”. The point is whether the Dharma is “constitution” or “rule of law”¹² in this word of Dhammadhipateyya. Whatever it should be, Dhammadhipateyya is one of the most valuable principles in Buddhism to be studied and compared with the rule of law from Westerns. Here the word Dhammadhipateyya (Supremacy = adhipateyya + Dharma = Law) seems to be well comparable to the word Rule of Law as we discussed.

By taking the Dharma (law) as supremacy and following the other codes of conducts towards the Dharma the leaders must protect, safeguard and govern under the guidance of Dharma (under the rule of law) to the following subjects: (a) one’s own folk; (b) the army; (c) the administrative officers; (d) the civil servants; (e) professionals, traders, and agricultures; (f) town and country dwellers; (g) the religious groups; (h) and to the beasts and birds.

In this regard, we can say that Dhammadhipateyya (supremacy of law) has a broad scope and cannot be violated. All of the eight subjects (from a to h) shall be equally under the law, from the top class to an ordinary citizen. Moreover, even animals are under the rule of law. In this context, the supremacy of Dharma cover up both the rulers and the citizens and they shall not be allowed to use law as instruments neither to gain personal benefits nor for the benefits of their relatives or of their groups. However, the word Adhipateyya (Supremacy) was not used only with the word Dharma as in Dhammadhipateyya but also used for two other objects: Attādhīpateyya, supremacy of self, and Lokadhīpateyya, supremacy of the public. Among the three Dhammadhipateyya was encouraged and admired by Buddha in practicing the Dharma. For instance, regarding the exercise of supremacy of law in Buddhism and as far as the second point of Dicey is concerned (equality before the law) is seen when Ananda, Buddha’s personal assistant who was

¹² Some Chinese scholars think that the rule of law is equivalent to constitutionalism, and that the supremacy of law is first the supremacy of the constitution. (See, Chen, 1999, p. 149.) A. V. Dicey, the noted English jurist, viewed “the universal rule or supremacy ... of ordinary law” as one element of English constitutionalism (Dicey, 1982, cxlviii)

ranged the best scholar in Buddha's teachings and is the one who had achieved arahantship, was without any exception disciplined by the board of disciplinary because he was careless and breached 5 points of his roles. Although Ananda believed that his acts did not constitute a breach of his roles, he accepted the sentence because he believed that the decisions of the board of disciplinary were always fair. Another example to be quoted for food of thought in the current field of rule of law is; when all Buddhist monks, although they were turned into monkhood either just only one day or already for 100 years; a simple monk or a supreme patriarch who has 50 thousand monks under his supervision, once he violates the monk's rule of 227 articles (provisions of disciplined ranged from the most serious one, which is to be dismissed from the monkhood to the least one, to confess the mistake to other monks) shall be disciplined accordingly.

For the moment both the western and the eastern concepts show the focus on supremacy of law in developing the countries. However, rule of law is not easily obtained in a short term, especially, in Cambodia, a country where the war has just recently been finished. Whether or not the rule of law in Cambodia can strongly grow will be discussed in the next points on "law and law that can rule".

3. Law and law that can rule

WESTERN PERCEPTION

Every state has its own laws although the laws may serve the interests of social groups, which could be the leader's group or groups to be led or both. Therefore, we cannot talk about the rule of law without mentioning the law itself. Naturally, human beings do not want to live under the law at all. Simple examples are the following three natural laws: birth, growth and death, the most powerful laws of the universe in which human are attempting to escape from these natural laws. In a society consisting of humans (who by nature do not want to be ruled by law), laws are needed to govern them, but making these laws is not an easy job. At least the law makers surreptitiously do not want to be ruled by the law. Therefore, a law that must be respected and enforced needs many elements to become the law that rules and the law that the people submit their actions to.

In his book *The Morality of Law*, American legal scholar Lon Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law. Fuller states the following¹³:

¹³ --World Bank, *The Rule of Law as a Goal of Development Policy* By Helen Yu and Alison Guernsey

1. Laws must exist and those laws should be obeyed by all, including government officials.
2. Laws must be published.
3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
4. Laws should be written with reasonable clarity to avoid unfair enforcement.
5. Law must avoid contradictions.
6. Law must not command the impossible.
7. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed.
8. Official action should be consistent with the declared rule.

Another important element of the rule of law is the separation of power of the three top state institutions: the legislative, the executive and the judiciary. The most famous justification of the principle of separation of powers was drafted by John Adams for the constitution of the Commonwealth of Massachusetts:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.
 — Massachusetts Constitution, Part The First, art. XXX (1780).

EASTERN PERCEPTION

In Buddhism, the interrelation between law, society and individuals is undividable and it is a very important element to be respected by all members of the society. Ideally, the relation may be seen in the Three Refuges (Three Guidance) of all Buddhists namely The Buddha, the Dharma, and the Sangha.



This relation is the foundation for consideration in making law (the monk's rule) before enforcing it upon the people. Below are some characteristics advised by Buddha to be considered before making and introducing law to any community and to evaluate whether the existing law is qualified to maintain the society:

Characteristic 1: Intention of the law

In the Book of Discipline (Vinayapitaka) the Buddha expressed his intention in regulating rules for monks which can be a pattern in making law and reviewing the intention of law for a country:

A- For the benefits of society

1. Law must be approved by the National Assembly and for the improvement of social order.
2. Law shall benefit the comfort of the society

B- For the benefits of individuals

1. Law shall effectively prevent the perpetrator from disturbing social order
2. Law shall bring about comfort of well-behaved people

C- For the benefits of a perfect performance in life (Physically and spiritually)

1. Law shall effectively prevent bad behavior not to happen in the present time
2. Law shall prevent any destruction that might happen in the future

D- For the benefits of people

1. Law shall pull more support from people who do not have confidence in the rule of law
2. Law shall increase more confidence on those people who already have confidence in rule of law

E- For the sake of the country

1. Law shall bring stability for the country
2. Law shall improve the use of law
3. Law shall not cause people to be greedier.
4. Law shall not cause problems
5. Law shall increase defilement
6. Law shall be helpful in decreasing greed
7. Law shall be helpful for contentment
8. Law shall be helpful for good social environment
9. Law shall be helpful for those who are hard working

10. Law shall be helpful in bringing an easy live
11. Law shall be helpful in the improvement of knowledge
12. Law shall be helpful in bringing peace for the country

Characteristic 2: Nature of law

By analyzing the six natures of the Buddha's Dharma we can apply these natures into the making of law as follows¹⁴:

1. Law shall be harmony within itself from the beginning till the end and no contradiction from one article to another including clear language, words, and contents.
2. Law shall be clearly understood, its importance recognized, and enforced by individuals
3. Law shall not be limited by time.
4. Law shall be firmed to be tested by all means for its rule of law.
5. Law shall encourage and motivate people to obey the law as a means to avoid problems.
6. Law generally is the language of scholars; therefore extensive education for the common people is important.

Characteristic 3: Legitimacy

1. Law shall be made under legitimacy that allows creating a law¹⁵
2. Law shall be a law by its characteristics. It is not just a reading text but has its own law's structure.¹⁶
3. Law shall be created with non- violence and not with force¹⁷

Characteristic 4: Non-retroactivity

The effect of the law shall not be extended to individuals who committed the act before the law comes into effect. In Buddhism, any individual who committed mistakes before the rule came into force or prior to the existence of the rule are not punished.¹⁸

Characteristic 5: Amendability

Uncertainty is the basic truth in Buddhism and it applies to everything in the world including the law. Therefore, right before the Buddha passed away, he told the monks the possibilities for the amendment of the viniya' rules to bring

¹⁴ *Dhammo, sandithiko, akàliko, chipassiko, opanayiko, paccattamveditappo viññūhi*

¹⁵ *Dhammeneva upādito*

¹⁶ *Dhammiko*

¹⁷ *Dhammaladdho*

¹⁸ *Viniyapitaka*

great benefits for the community of monks when there is a change in time or generation and the amendment shall be considered based on four principles:¹⁹

1. Whatever has not been objected to as not allowable, if it fits in with what is not allowable and goes against what is allowable, that is not allowable
2. Whatever has not been objected to as not allowable, if it fits in with what is allowable and goes against what is not allowable, that is allowable
3. Whatever has not been permitted as allowable, if it fits in with what is not allowable and goes against what is allowable, that is not allowable
4. Whatever has not been permitted as allowable, if it fits in with what is allowable and goes against what is not allowable, that is allowable

Characteristic 6: Education

The level of education of the people is another essential factor to promote and maintain the rule of law. The knowledge of law, understanding of law, the ability to explain the law, the ability to defend oneself on the basis of law are qualities contributing to promote the rule of law. In Buddhism, Buddha had paid great attention to the study of rules and disciplines of his followers by determining that before passing away, his followers must be knowledgeable of the Dhamaavinaya (Dhamma and Law), be able to practice appropriately, be able to explain to others and be able to settle any accusation on the Dhammaviniya, the development and great attention on the rules will be seen everywhere and will be respected by both, the leaders and citizens of the country.²⁰

Characteristic 7: Law Enforcer's Qualification

An effective law is also based on those who require citizens in the country to obey the law. I have already commented on the roles of government and leaders of a country in promoting the rule of law. Here, I would like to discuss the quality of judges in Buddhism which includes knowledge, experience, judgment, and ethics.

Judgment is equal to a war in the Buddha's word. Small judgment is compared to a small war²¹, and big judgment is compared to a big war.²² Thus,

¹⁹ *Viniyapitaka, mahavagga, dutiyabhàga, page 377 of Khmer Tripitaka*

²⁰ *Mahaparinibbànasutta, suttantapitaka*

²¹ *Culasangàma: viniyapitaka, parivàra, dutiyabhàga, volume 13, page 190*

²² *mahasangàma: ibid. page 199*

the judge who is the one that has to be in between of two persons, two groups or more who are in conflict play a very big role in tranquilizing war or escalating war by his judgment. If the judgment is not in accordance with the principles of the rule of law, the war will be escalated. The judge or Vinayadhara in Buddha's word will be regarded as good if s/he possesses the following qualifications²³:

A. Education

As a judge whose role is to maintain the principle of rule of law, he shall be the one who is knowledgeable, well-educated and recognized by related schools or institutions. Buddha suggested a judge should possess the following knowledge:

- Knowledgeable in the language of the client
- Knowledgeable in history and good vision of the future
- Know well and remember well the law and its substance
- Knowledgeable in criminology
- Knowledgeable in dispute resolution
- Knowledgeable in judiciary

B. Experience

Experiences from previous generations and from his profession are additional powers for judges to improve the quality of rule of law. According to Buddhism, a good judge should possess experiences in at least 39 aspects which I would like to summarize in the list below:

- Study and understanding previous experiences in judgment
- Knowledgeable in own profession
- Knowledgeable in the nature of the conflict (case) and wise in making judgments according to the law and corresponding to the nature of the dispute.
- Self-assured in the judgment
- courteous speech, easy to understand and not waffling
- Self- assessment in handling the case and truthful in confessing if not able do so
- impartiality to both the plaintiff and the defendant
- Encourages those who are mentally weak to be brave and suppress those rude ones to be well-behaved.
- Thorough analysis and consideration before making judgment
- Appropriate behavior for the law profession and judgment

²³ *mahasangāma: Ibid. page 61-226*

- etc...

C. Judgment

As stated earlier, making judgment is just like going to the war. Therefore, justice must be in the judgment. Judgmental qualifications were mentioned in many books of Vinaya of the Buddha of which I would like to share some here:

1. Judgment within time not judgment within wrong time
2. Judgment within truth not on within falsehood
3. Judgment within kind words not within unkind words
4. Judgment within beneficial words not within waffling words
5. Judgment within compassion not within hatred
6. Judgment according to the law
7. Judgment according to the confession
8. Judgment according to the provisions
9. Judgment without prejudice caused by love or desire
10. Judgment without prejudice caused by hatred or enmity
11. Judgment without prejudice caused by delusion or stupidity
12. Judgment without prejudice caused by fear

D. Personal ethics

Knowledge, experiences and judgment shall also be grounded on the ethical values of the judge himself, i.e. the level of spiritual and emotional development. If his ethical values are low, he is not only unable to promote the rule of law, but instead degrading the rule of law. The Buddha had set some 20 ethical values to assess those who will become the judge of which six are stated here as the summary:

1. To abide by the law and not violate the law
2. To be one who embraces love, compassion, sympathetic joy, and equity
3. To be non-greedy, non-corrupt, and non-partisan.
4. To be modest, handsome, firm, and trustworthy
5. To live within the scope of law not for the gaining of image among the public
6. To be not arrogant and looking down anyone for the reason of number of groups one belong, number of supporters, elder age, or even better knowledge.

As mentioned above, law that cannot govern a state and citizens unless that law has a clear objective that is lawful, legitimate, non-retroactive and amendable. The law shall be promulgated and enforced through the judicial

system. Besides being independent, a court shall have a precise knowledge of his profession, sufficient experience, a fair judgement, and possess a professional ethic.

For leaders who lead the government with full authorities, it is hard to put themselves under the law. Learning to live and forcing themselves under the law is important. Those who are well-educated, brave, and confident in law are the vital forces in promoting the rule of law. Nevertheless, having a government submit itself to the law, a brave court that dares to force the government to submit to the law, and the people who are clever in choosing leaders committed to the rule of law are not easy things that can be done in such a short time. Therefore, creation of good leaders and good people willing to promote the rule of law shall be started from now, since they are young, and shall be socialized in all social institutions: family, economics government, education, religion and recreation. Rule of law must be a subject in Cambodian socialization.

4. From the Rule of Men to Rule by Law, and towards the rule of law

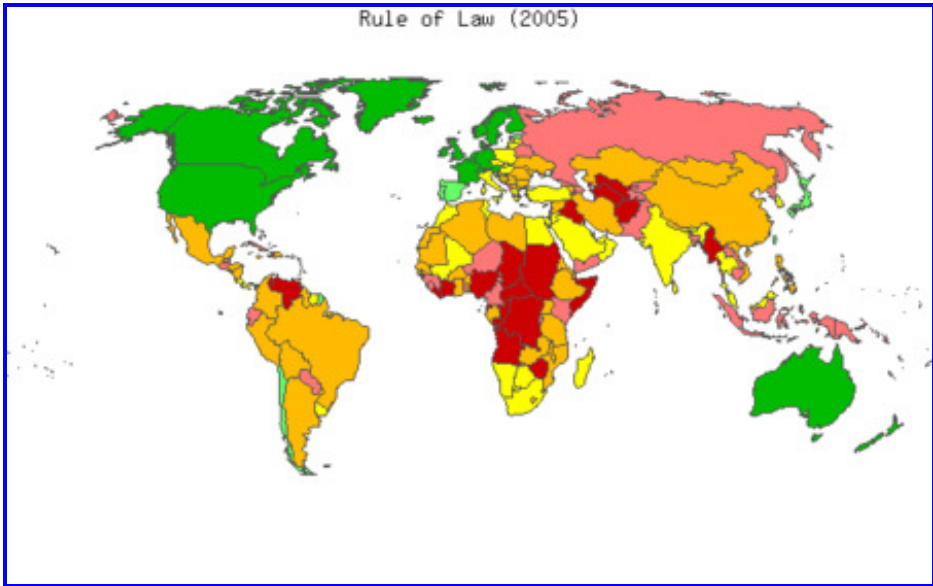
The Buddhist teaching of Impermanence (Anicc1a) besides making us realize and worried of the instability of lives and things, it also encourages us with a hope that everything can be positively changed when time passed and when our positive Karma is in place. Preparedness and management for change are important courses of action for the change in the rule of law.

The function of rule of law is to limit the unbridled power of the leaders who will always try to use laws as tools to manipulate the power. The current problem stands on whether the law can liberate itself from being a manipulated tool to a ruling tool that can oblige the government to reverse its position towards the law? Will the rulers consent to be under the rule of law and by what way? And what challenges are in reversing from the rule of men to the rule of law? The answers can be long, wide, and deep and are therefore worth to be further studied.

In His teaching on the Three Supremacies, Supremacy of self (Attàdhipateyya), Supremacy of the Public (Lokadhipateyya), and the Supremacy of the Dharma (Dhammàdhipateyya), Buddha meant to demonstrate how people make decisions and under what influences prior to do Karma and with the same token if we apply these Supremacies in influencing the decision in ruling a state, the Buddha does not seem to criticize which one is bad but rather which one is the best and what attentiveness one should consider prior the action are taken. He suggested that:

1. One who uses the Supremacy of Self (Rule of Man?) shall be mindful and conscious (Sati)
2. One who uses the Supremacy of the Public(Rule by Law?) shall be wisely scrutinize the public opinions
3. One who uses the Supremacy of Dharma (Rule of Law?) shall be submitting to the rule of Dharma

Although both in the Adhhipateyya Sutta and the Cakkavatti Sutta the Buddha always admires the use of the principle of Supremacy of Dharma (Dhammàdhipateyya). But it does not mean that all can reach the Dhammàdhipateyya due to many reasons and condition. This also can be seen in the world today that not many countries reach the level of the Rule of Law that it should mean. Rule of Law is a goal that a country should reach but the journey to the best rule of law needs to pass through many steps. The map below is evidence that not many countries reach the best level.



The map is the assessment result of the World Bank Worldwide Governance Indicators²⁴ in each country. In this assessment rule of law is one of the 6 key dimensions of governance including: (1) voice and accountability, (2) political stability and lack of violence/terrorism, (3) Government effectiveness, (4) Rule of law, (5) Regulatory quality and (6) control of corruption. Colors are ranged

²⁴ http://en.wikipedia.org/wiki/Worldwide_Governance_Indicators

from green (top quartile), to yellow (middle high), orange (middle low) and red (bottom quartile).

The dark green color is the No. 1 level (from 90% to 100%), the light green is rated No. 2 (from 75% to 90%), the yellow one is rated No. 3 (from 50% to 75%), the orange is rated No. 4 (from 25% to 50%), the bright red is rated No. 5 (from 10% to 25%) and the red one is rated No. 6 (from 0% to 10%). Cambodia is classified under the bright red color which is between 10% to 25%.

What should be noticed on the map is that the green color is only among those economically well-developed like in North America including the United States and Canada. There is only a small dot in South America. In Europe, it is only the European Union, in the Oceanic states only in Australia and New Zealand. This means that the rule of law has a great correlation with the development of GDP and the level of education. This is not any different from what the Buddha found in the ancient India and this was why the Dhammadhipateyya was only found in the teaching he gave to the Imperial Kingdom (Cakkavatti King) with strong economy but did not find such a teaching for the small kingdoms with weak economy at all. For small states, The Buddha teaches the Tenfold Dharma for kings (Dasabidharàdhamma)²⁵ aiming to improve the moral values among those using autocracy in ruling the states. For the Republic States such as the Vajjian king in Vesàli the Buddha taught a different principle in ruling the state which is called *aparihaniyadhamma*: Dhamma leading never to decline but only to prosperity. Again we do not see *Dhammàdhipateyya* in this Discourse²⁶.

In Buddhism rule of law is one of the fourfold goal of social evolution and development. The fourfold goal of development is called *Bhàvanà* ⁴²⁷ means Fourfold Development Concept: *Kàya-bhàvanà* _ physical development; *Sila-bhàvanà* _ moral development; *Citta-bhàvanà* _ mental development; and

²⁵ *Suttantapitaka, khuddakanikaya, jàtaka: Ràjadhamma: virtues or duties of the king or virtues of a ruler* 1-Dàna: charity; 2- Sila: high moral character; 3-Pariccàga: self-sacrifice; 4-Àjjava: honesty; integrity; 5-Maddava: kindness and gentleness; 6-Tapa: self-control; 7-Akkodha: non-anger; 8-Avihimsa: non-violence; 9-Khanti: tolerance; 10-Avirodhana: non-opposition; non-deviation from righteousness

²⁶ *Suttantapitaka, Anguttaranikàya, sattakanipàta: aparihniyadhamma: things leading never to decline but only to prosperity:* 1. to hold regular and frequent meetings; 2. to meet together in harmony, disperse in harmony, and do their business and duties in harmony; 3. to introduce no revolutionary ordinance, or break up no established ordinance, but abide by the original or fundamental Vajjian norm and principles; 4. to honor and respect the elders among the Vajjians and deem them worthy of listening to; 5.-the women and girls of the families are to dwell without being forced or abducted; 6. to honor and worship the Vajjian shrines, monuments and objects of worship, both central and provincial, and do not neglect those righteous ceremonies held before them; 7. to provide them rightful protection, shelter and support for the Arahants and wish that the Arahants who have not come may enter the realm and those who have entered may dwell pleasantly therein

²⁷ *Suttantapitaka, Anguttaranikàya, pañcakanipàta*

Paññāa- bhaṅvanā _ wisdom development. The development of rule of law is to be matched up to *Sila-bhaṅvanā* which relating to rule, regulation, and law (Sila). Within this connotation the rule of law can only be fully developed when the other three folds side by side developed and matured - economic development (stand for physical development), emotional development (stand for mental development), and educational development (stand for wisdom development).

What needs to be done first is to empower the citizens to be able to drive the three state institutions to place the development of rule of law as the state agenda. Nevertheless, the power of the people can be with the people only when they are liberated from economic deficiency, thought limitation, and educational low standard. In a common language it means that the people have high income and can live without depending on government assistance, have high and good education, and have freedom of thinking and doing things. The three liberations can only subsist when the government and the rulers have political willingness in empowering the people therefore it is very vital that in a democratic country the people must be knowledgeable, clever, and brave in electing good representatives and leaders who can commit in leading the people towards the liberation and lift up the submission to the principle of rule of law.

Time is an essential condition for the liberation and in fully put into action the rule of law. All the green countries in the map with high percentage of rule of law have passed through coldness and heath in a long course of development. The countries that are just recovered from wars, dictatorships, famine, and poverty will be challenged by the rule of men and the rule by law which is of course a normal phenomenon in the under-developed and developing countries. Ones have to acknowledge this phenomenon or even to live with but at the same time ones need to help removing the concept of rule of men and trimming the concept of rule by law with limitless power down to rule by law with limit of power before totally placing the state and the government under the rule of law. Attention should be taken in the development of rule of law for most of the times it has been disrupted by violence which is caused by the intolerance of the people towards time, by the anger against Human Rights violation, and by the lost of power and wealth of which this lost would never been happened under the government of rule of men.

5. Cambodian's Rule of Law: Wish, works, and reality

It has been 15 years that the three elected government of Cambodia making effort with its willingness and with the influences from outsiders in improving the condition of the rule of law. It is true that although Cambodia's rule of law is not classified as red but the journey to the green state will have to cross over

many obstacles and fulfil many works by all citizens: government, public servants, politicians, business sectors, and the civil society groups to make the wish come true. The most importance prior to the journey is the self-questioning of the Cambodians especially the government whether we do need to go to the green level.

In the 2008 election campaign we do not see any leading political parties namely Cambodian People Party, FUNCINPEC Party, Sam Rainsy Party, Norodom Ranaridh Party, and Human Rights Party speak of the rule of law within their political platform for the voters. This could be explained that rule of law is not yet the priority of the agendas for winning the election and to form a new government. On the one hand the low rank of rule of law will not be the obstruction for the legitimacy of the new Cambodian government. On the other hand Cambodian voters mostly want to see concrete outcomes produced by the government such as physical infrastructure rather than the rule of law which is a rather intangible subject and is difficult to illustrate, to explain, and to measure its development.

To have the rule of law included on political parties' national agendas might be difficult mainly because of the low level of importance of the rule of law as seen by the government or the political parties however it may be included by the pressure from the people or the external power demanding to the government and the political parties. Therefore, understanding of the rule of law and its necessity in putting in the right order the country ruling system are the essential condition for Cambodian citizen in demanding the government and the political parties to set rule of law as its prime agenda in the future. If Cambodian citizens seriously take action in rule of law education I strongly believe that the sixth General Election campaign for the sixth government term of office (2018-2023) will pay attention to the principle of rule of law for sure.

For the moment, although Cambodia is most likely ranked as living in the state of rule of men, in a state where the leaders are manipulating the law for their own group's sake, or in the state that the level of rule of law is quite low, it is the fact of life that Cambodians must face up to and confront with and make our life happy so that we can collaborate with others in liberating ourselves from the economic deficiency, thought limitation, and educational low standard in the sooner time.

I am convinced that we can live together and improve the rule of law side by side.

THE RULE OF LAW: A VIEW ON CAMBODIA FROM A GERMAN PERSPECTIVE

Dr. JÖRG MENZEL*

RULE OF LAW AND RECHTSSTAAT: INTRODUCTORY REMARKS

The rule of law is part of any discussions about law, constitutionalism, development cooperation, and even international relations²⁸. The rule of law is the English term for a principle that has its equivalents in basically all legal systems. Within the Western legal traditions there have been many attempts to accentuate differences between the concepts of the German “Rechtsstaat” (literally: “State based on Law”), the French “État de Droit” and the English “rule of law”. Most recent analyses usually conclude, however, that there is at least a convergence of these concepts²⁹. To assume that there is now one general concept of the rule of law, which can be transplanted around the world at national and international levels seems however naïve as there is no consensus on what defines the rule of law. There are “thin” and “thick” models, and there are procedural and substantive approaches. Sometimes *rule of law* and *rule by law* are distinguished, with the latter normally implying a more technical (“legalistic”) approach and carrying a somewhat negative connotation. Short explanations like “Rule of Law is defined by government through law, not through men”, might be easy to recall, but are not really helpful in clarifying the details.

The vagueness of the term “rule of law” has not prevented its global success; to the contrary, it might be part of the reason for its success. The term is actually so open that people with substantially different ideas can formally agree on it (as long as they do not try to agree on a precise definition). Authoritarian regimes refer to the rule of law as their guiding principle as do human rights organisations which challenge these regimes. The former have

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²⁸ For a recent monograph see e.g. Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory*, Cambridge 2004 (Cambridge University Press); for the Asian context see Randall Peerenboom (ed.), *Asian Discourses of Rule of Law*, London / New York 2004 (RoutledgeCurzon); for the Rule of Law discourse in development cooperation see for example Thomas Carothers (ed.), *Promoting the Rule of Law Abroad*, Washington D.C. 2006 (Carnegie Endowment); Michael J. Trebilcock & Ronald J. Daniels (eds.), *Rule of Law Reform and Development*, Cheltenham & Northampton 2008 (Edward Elgar Publishing).

²⁹ Rainer Grote, *Rule of Law, Rechtsstaat und ‚Etat de droit‘*, in: Christian Starck (ed.), *Constitutionalism, Universalism and Democracy – a comparative analysis*, Baden-Baden 1999 (Nomos), pp. 269-306; Neil McCormick, *Der Rechtsstaat und die rule of law*, *Juristenzeitung* 1984, pp. 65-70.

“law and order” in mind and people who have to follow restrictive regulations, the latter refer to rule of law as a principle protecting against such restriction of freedom. The former expect the people to follow what the government defines as law, the latter expect the government to follow general standards defined by law as the legitimizing source of government action. As far as I am concerned, the rule of law is actually both, but the details even remain difficult if one accepts this as a starting point.

In speaking of the rule of law one has also to distinguish different contexts of discussion. The rule of law is often labelled a “political theory” but academic theories should not be confused with down to earth constitutional law. As a constitutional principle the rule of law has to be defined in the systematic context of a broader constitution in which other principles apply as well. In the German constitutional context, for example, the “Rechtsstaat”-principle co-exists with other principles such as democracy, the social state and a catalogue of fundamental rights. Therefore, it does not make much sense to include aspects of democratic legitimacy or social justice in the concept of Rechtsstaat, as these aspects are covered by other principles already. However, the quite widespread assumption that the German principle of Rechtsstaat is somewhat similar to a minimalist “rule by law” is misguided. The concept of Rechtsstaat in Germany is historically connected with the concept of individual freedom and was used to guarantee some aspects of individual liberty even in the pre-democratic monarchic times of the 18th and 19th century. Later, formalist approaches to democracy and law allegedly weakened the preparedness of legal institutions to promote justice against unjust legislation³⁰. It seems quite obvious, however, that although National Socialism is quite infamous for its extreme abuse of legal form, it in fact broke with central elements of the Rechtsstaat-principle, most notably by stipulating the Nazi-leader Adolf Hitler as the ultimate legal authority (“Der Führer schützt das Recht”).

The current German constitution, adopted in 1949, re-established a broader concept under which “the rule of law” again involves certain standards of substantive justice. The term “Rechtsstaat” is used in Article 28 (1), which requires certain standards of homogeneity from state constitutions, but central aspects are embedded in other provisions, most notably in Article 20, where the principle of Rechtsstaat is generally considered to be located (without being explicitly mentioned). Such principles as proportionality, trust-protection, non-retroactivity, legal certainty, the respect for human rights and comprehensive protection of rights by courts *including* a constitutional court are elements of this current version of “Rechtsstaat” under the German constitution. While it is therefore clear that the German concept of

³⁰ For an excellent reader see Arthur J. Jakobson & Bernhard Schlink (eds.), *Weimar. A Jurisprudence of Crises*, Berkeley / Los Angeles / London 2000 (University of California Press).

“Rechtsstaat” is in fact fairly thick and substantive, it is also obvious that there is still plenty of discussion about the detail of the principle. Furthermore, within the political discourse the term is often used with a quite negative connotation. Historically, the German Rechtsstaat-principle was, quite similar to British “rule of law”, often invoked as a firewall against social activism. Even today, the “Rechtsstaat” is widely considered to be a “legalistic” concept, inflexible, somewhat cruel and unable to provide equity in individual situations. This kind of scepticism has famously been articulated by a former Eastern German civil rights activist, who after German reunification sarcastically said that the East Germans had been searching for *justice* in their peoples’ revolution, but what they got with the reunification of Germany was only the “Rechtsstaat”.

RULE OF LAW IN A SOUTHEAST ASIAN AND CAMBODIAN CONTEXT

As far as I know, within Southeast Asia³¹, the German term “Rechtsstaat” is basically only used in respect of Indonesia where it was imported from the Netherlands, the former colonial power³². Elsewhere the term “rule of law” is used, although this may only be because it is the most appropriate English translation for a term in the local language. What I attempt to argue is that despite different legal, cultural and political circumstances, today’s differences between German and Southeast Asian concepts in general or the Cambodian Constitution more specifically are in principle not as fundamental as is sometimes suggested. The “rule of law”, as other constitutional law concepts, has migrated around the world. There are local versions, but not so much regional standards.

At first glance it may seem that my argument is contradicted by recent Southeast Asian legal history where the rule of law in Southeast Asia has often been defined in what can be labelled as a quite thin rule by law concept. Authoritarian and semi-authoritarian regimes invoke the rule of law without necessarily adopting “Western” ideas of pluralistic democracy or human rights. The concept of “Asian Values” has been invented in order to create some distance from “Western” concepts of human rights. It seems difficult if not impossible, however, to identify a positive definition of “Southeast Asian rule of law”. Furthermore, there is the problem of different concepts on paper and in reality. Whereas some Southeast Asian states follow fairly specific concepts by clear and open policy³³, in other states deviations from Western

³¹ For a documentation and analysis of the constitutional systems, see Clauspeter Hill / Jörg Menzel (eds.), *Constitutionalism in Southeast Asia*, Vol. I-III, Singapore 2008 (Konrad-Adenauer-Foundation).

³² See Tim Lindsey, *Indonesia: devaluing Asian values, rewriting the rule of law*, in: Peerenboom (note *), pp. 286-323, at 293-5; Todung Mulya Lubis, *The Rechtsstaat and Human Rights*, in: Timothy Lindsey (ed.), *Indonesia. Law and Society*, Leichhardt 1999 (The Federation Press), pp. 171-185.

³³ On Singapore see e.g. Li-ann Thio, *Lex Rex or Rex lex?*, *Competing Conceptions of the Rule of Law in Singapore*, 20 *Pacific Basin Law Journal* (2002), pp. 1-76.

ideas concerning the rule of law are more a consequence of difficulty in realizing accepted concepts or even part of what can be labelled as a kind of doublespeak, stipulating Western style concepts in the formal law and practicing them in an “Asian” way (or not practicing them at all). Last but not least, we should not overlook the fact that Southeast Asian societies are politically at least as diverse as societies in the “West”. On closer examination Asian values are as difficult to precisely identify as Western values. Ruling concepts of the rule of law may therefore be contested by opposition and civil society organisations, as soon as and as long as they are free to organize and express themselves.

At least as a formal reference, respect for the (rule of) law is quite standard in Southeast Asia. Some constitutions have full provisions dealing with the rule of law, others mention the term rather briefly, and some do not use the words but stipulate aspects of the rule of law. In Cambodia (and here again we find a similarity to Germany), aspects of rule of law are stipulated in numerous provisions of the constitution. The preamble forcefully declares the “respect for law” as one of the primary goals of the whole constitution; “rule according to the constitution” (Article 1), extensive human rights (Articles 31 to 50) and separation of powers (Articles 51) are guaranteed. Among the main duties of the government is to “protect and preserve legality and ensure public order and security” (Article 52) and the independence of the judiciary is clearly stipulated as well (Article 128). Rule of law is, we can conclude, among the cornerstones of the principles of the Cambodian Constitution. It is not only a policy, but the “supreme law” and state practice shall fulfil the promises provided by this constitution.

COMPARATIVE REMARKS ON SOME ASPECTS OF RULE OF LAW

The full range of constitutional issues which can be associated with the “rule of law” cannot be discussed here. In the following, I just want to address three aspects which seem particularly interesting from a general perspective. Whereas the first and second of these aspects are inspired by the German constitutional law and the question, to which extent we can observe similar developments in Southeast Asia/Cambodia, the third aspect addresses a major concern with respect to the Cambodian system of “rule of law”.

Constitutionalization of the Legal Order

The German Legal Order has been fundamentally constitutionalized since 1949³⁴. The constitution and its supremacy are now considered cornerstones of

³⁴ See also Gunnar Folke Schuppert, *Constitutionalization of the Legal Order*, in: Eibe Riedel (ed.), *German Reports on Public Law, Baden-Baden 1998 (Nomos)*, pp. 18-39.

the German “Rechtsstaat”. Although the supremacy of the current constitution has its foundation in the constitutional text, the process of “real life” constitutionalization after 1949 was gradual and some of the major steps were initiated by the newly established constitutional court³⁵, which is considered to be the protector of the constitution. Administrative law in particular has been affected by constitutional law in a fundamental way, but criminal law and even private law are not immune either. Not everybody agrees with all aspects of this development and some of the decisions of the Constitutional Court which extended the scope of the constitution are highly controversial, but it seems that the development is irreversible.

In Southeast Asia, the first attempt to establish a constitution was in the Philippines at the end of the 19th century, but the United States’ takeover of the country made this a brief episode. Thailand, the only Southeast Asian country that did not experience colonial domination, adopted a constitution in 1932, the first of many. Most countries adopted constitutions in the context of decolonisation, but since decolonisation there have been one or more new constitutions. At least formally, most Southeast Asian countries have had constitutions since decolonization, with some exceptions such as Laos (1975 to 1991) and Myanmar. Sometimes they were hardly worth the paper they had been written on. The Constitution of Democratic Kampuchea of 1976 was such a case, although its promise of a right to work was consequently put into practice and it was frank in clarifying that any opponent of the system would be killed. The concept of constitutionalism, defined as a state which does not only have a constitution³⁶ but also takes it seriously as an effective regulation on the political process and binding basis for the legal system, has significantly gained ground in more recent times. Constitution making or significant constitutional reform has taken place nearly everywhere in Southeast Asia in the last twenty years³⁷. The Philippines’ Constitution of 1987, the Indonesian Constitution since its four reforms 1999 to 2002 and the Thai Constitution of 1997 might be considered important evolutionary steps, although the latter was shattered by the military coup, the fate of many of its predecessors, in 2006, and was replaced by another constitution in 2007.

³⁵ The most accessible English language books are Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., Durham 1997 (Duke University Press); David P. Currie, *The Constitution of the Federal Republic of Germany*, Chicago & London 1994 (The University of Chicago Press). Recent important decisions of the Constitutional Court are often reviewed in English in the *German Law Journal* (<http://www.germanlawjournal.com>).

³⁶ It seems mostly accepted that Constitutionalism can even exist without a written constitution, as in countries like Great Britain and New Zealand.

³⁷ For an overview see Kevin YL Tan, *The Making and Remaking of Constitutional Orders in Southeast Asia: An Overview*, in: *Singapore Journal of Comparative Law* 6 (2002).

The Cambodian Constitution of 1993 is another landmark, introducing the concepts of liberal democracy as well as substantial constitutionalism to Cambodia³⁸. According to Article 150, the 1993 Constitution is the supreme law of the Kingdom and all laws and decisions made by State institutions must be in strict conformity with the Constitution. Since 1993, the Constitution has therefore been the measure-stick for new legislation, although it needs to be acknowledged that at least the 2004 “Additional Law to the Constitution” has been a reminder that in situations of crisis, the concept of strict and substantial constitutionalism might still be challenged.

The Role and Rule of Parliament made Statutory Law

The concepts of the “priority” and the “necessity” of the (Parliament-made) law are two of the most essential elements of German “Rechtsstaat”. The first concept is clearly stipulated in the constitution (Articles 1 and 20), not only does the law have to follow the constitution, but all government activity has to be within the framework of the law. The second concept of the necessity of the law is partly enshrined in the text of the constitution, as Article 80 requests a legal basis for executive regulation. The constitutional court established something more, called the essentials-theory (“Wesentlichkeitstheorie”), according to which all essential decisions shall be made by a law *which is adopted by parliament*. The concept has been criticised for its vagueness and one can also doubt whether the criteria for what is essential are always convincing. Some important areas such as foreign policy, foreign trade and development cooperation still lack substantial legislative regulation in Germany. Sometimes what is essential is highly controversial. A bit more than a decade ago, the whole German nation was fascinated by the question of whether the change of some rules in school-orthography was so essential that a law was necessary to legitimize the reform. Many administrative courts declared the reform unconstitutional, until the German Constitutional Court decided in 1998 that the reform was only marginal and did not affect the individual freedom to write as one wishes (outside school)³⁹. On other occasions the Court often passes the ball back to politics, arguing that certain regulations might be possible, but that they have to be made by parliament. A recent decision on a teacher’s right to wear a Muslim headscarf is an example of this approach. The court decided that because of the fundamental rights implications of such a decision it has to be made by parliament, and not by government⁴⁰.

In Southeast Asia the role of parliaments in the law creation process seems to be quite diverse. In some parts of the region, parliamentary legislation was for

³⁸ On the Cambodian Constitution see also Jörg Menzel, in: Hill Menzel (note 4), Vol. II, pp. 37-68.

³⁹ Decisions of the German Constitutional Court, Vol. 98, at 218.

⁴⁰ Decision of September 24, 2003, Decisions of the German Constitutional Court, Vol. 108, at 282.

significant periods of time either not happening or was only occasional and rudimentary. Government regulations or political party decisions were the dominant sources of law. Because of this history, law reform is now a central agenda item in a number of Southeast Asian countries but sometimes it seems still tempting for governments to keep parliamentary laws very general and to include within the law broad authority to issue government regulations again. In Cambodia, teachers of constitutional law occasionally joke that here we do not have a rule of law, but a “rule of sub-decree”. Sub-decrees are indeed quite dominant in this country and even where there are laws, they often do little more than define vague goals and concepts, establish some kind of national council, and give authority to the government to regulate on most of the substantial details. We should notice, however, that rule of law does not mean that there is no subsidiary governmental regulation. To the contrary, one might argue that parliaments can only function if they concentrate on the essential decisions, leaving the details to the executive. With respect to Cambodia it should also be noted that legislative activity has increased significantly in recent years and parliament has strengthened at least its formal roles as lawmaker. In practice we still observe a tendency to quickly adopt laws presented by the government. More substantial impact of parliament remains an important reform agenda.

Constitutional Jurisprudence

The rule of Law is connected to the idea of judicial review. Strong and independent courts are essential in the common law world and in the civil law tradition. Nearly all modern constitutions emphasize the role and independence of the courts. The control of state action can either be given to the normal courts or to administrative courts. Which model is better might depend on the circumstances, but the German concept of specialized administrative courts and a separate constitutional court may have the advantage of specialization of judges and it also highlights symbolically that state action is not beyond judicial control.

In Southeast Asia as in Asia generally we often find a traditional belief that court litigation is non-Asian and more a concept of the Western than the Eastern world. However, the constitutional and judicial reform development in recent years clearly indicates that nearly all Southeast Asian states at least officially appreciate the idea of strong and independent courts. In the Philippines the Supreme Court seems to be more “American” than “Asian”, and countries like Indonesia and Thailand have not only introduced special constitutional courts⁴¹, but also administrative courts. Singapore does not have

⁴¹ *On the Indonesian Constitutional Court see Petra Stockmann, The New Indonesian Constitutional Court, Jakarta 2007 (Hams-Seidel-Foundation); on its Administrative Courts Adriaan Bedner, Administrative Courts in Indonesia, The Hague / London / Boston 2001 (Kluwer).*

a special constitutional court, but praises itself for its efficient, competent and non-corrupt judicial system (critics, however, claim a certain bias of the courts towards the government in “political” matters). Even in Vietnam, which is still under a strict one party system, administrative courts have been established and a system of constitutional jurisprudence is under discussion⁴². Brunei seems to be the only country where judicial review is seen as inappropriate from the outset. A 2004 constitutional amendment even prohibits it explicitly. The country seems to have officially defined itself as an absolute monarchy, which makes it somewhat of an anachronism in the early 21st century.

Cambodia has established a Constitutional Council. From its name and self-understanding this Council seems to be in the French tradition, but in fact it is much more a court than its French counterpart has traditionally been⁴³. The Constitutional Council can not only be addressed to check the constitutionality of laws before they get into force (which is the original concept of a “Conseil Constitutionnel”), but it also exercises control after enactment and can even be addressed by judges to clarify constitutional issues (which is the concept of a German style “Constitutional Court”). Although the Constitutional Council has so far mostly worked low profile, it is a potentially powerful constitutional organ and quite recently it has delivered at least one highly important decision on the status of international human rights treaties under the Cambodian Constitution⁴⁴. It should be noted, however, that judicial protection of the rule of law is not assigned to the Constitutional Council exclusively. It is, to the opposite, a duty of all courts. With respect to the protection of constitutional rights it is particularly important that the Cambodian Constitution provides for a competence of the courts to hear administrative cases (Article 128 [3]). Currently this still seems to be widely unknown among the public and even judges, with the result that there are basically no administrative cases in Cambodia yet. Strong courts which are trusted by the public are, however, a backbone of the rule of law. Therefore the reform of the judiciary which has, as is officially acknowledged⁴⁵, been plagued by problems of lack of competence, political interference and corruption, is rightly a core element of the governmental “Rectangular Strategy” for the development of Cambodia.

⁴² For details see Mark Sidel, *Law and Society in Vietnam*, Cambridge 2008.

⁴³ On substantial recent changes in France in 2008, where *ex post* constitutional jurisprudence has been introduced in 2008, see Federico Fabbrini, *Kelsen in Paris: France’s Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation*, 10 *German Law Journal* 1297-1312 (2008).

⁴⁴ Decision of July 10, 2007 (Dec. No. 092/003/2007).

⁴⁵ See the quasi-official “Who’s who” of Cambodia (edition 2006 – 2007), published under the auspices of the Ministry of Information, Phnom Penh 2006, at p. 299.

Enforcement of the Law

The rule of law is based on the idea of the actual relevance of law, and therefore, on sufficient enforcement. Full enforcement is typically not necessary and would be destructive of the freedom that rule of law is intended to protect. It is historically interesting that England, which is sometimes considered a kind of home base of the rule of law, often mitigated its criminal laws by a widespread practice of granting pardons etc. English criminal law in the 18th century was outrageously harsh, stipulating the death penalty for even the smallest “crimes”⁴⁶. Some of the cruelty of the system was softened by amnesties and pardons. Today we expect a legal system to be fair from the outset, and that it does not impose extreme sanctions at all. On the other hand, we expect some seriousness in enforcement. The German Constitutional Court has recently declared void a taxation law because its inherent structures provided no prospect of equal enforcement⁴⁷.

Serious and equal law enforcement is a major problem in many parts of Southeast Asia as in other parts of the world. Singapore with its effective institutions is more the exception than the rule. Other states have significant problems when it comes to law enforcement. The lack of the rule of law is usually not the result of a deficient constitutional framework and also not primarily of deficient laws (although that often plays a role), but a simple lack of capacity and functioning institutions that put the law into practice. Effective law enforcement needs strong, qualified, reliable, neutral, effective and non-corrupt law enforcement agencies. Lack of decent salaries, training, funding, equipment and a specific corporate spirit make law enforcement difficult if impossible. How are the Cambodian traffic police supposed to prosecute people for driving over the speed limit or drunk driving, if they have no instruments to measure speed or blood alcohol levels available to use on the roadside? How can they follow the rules and report properly, if some of them are hardly literate? Furthermore, how can they claim authority to challenge the so called “rich and powerful”? As we know well from the tabloid news, police in the USA sometimes seems to particularly enjoy stopping and arresting important and famous people for traffic law violations or other offences. In Phnom Penh, there is plenty of police on the roads (during daylight), but that does not prevent numerous high end SUV’s and other luxury cars from cruising the Phnom Penh streets without licence plates or illegally obtained special state licence plates. The traffic policemen simply have no standing to confront the passengers of such cars and they will

⁴⁶ See Morton J. Horowitz, *The Rule of Law: An Unqualified Human Good?*, 86 *The Yale Law Journal* 561-566 (1977).

⁴⁷ *Decision of March 9, 2004, Decisions of the Constitutional Court, Vol. 110, at p. 94.*

normally not try to do so. Such a “blind eye” in enforcement (which is not restricted to traffic law violations) is among the real challenges to the rule of law, not some theoretical differences between Western liberalism and Eastern communitarism.

CONCLUSION: A UNIVERSAL PRINCIPLE TO BE EXPLORED LOCALLY

My conclusion might sound somewhat simplistic, but I believe that the world is sometimes less complicated than academics, including legal scholars, try to suggest. The core problem in parts of Southeast Asia is the realization of rule of law in practice, not so much the theoretical concept. Undoubtedly, there is a tendency for governments to emphasize the people’s obligations to follow the state made rules as the core element of the rule of law, but governments have this tendency nearly everywhere. Reminding the government that they are subject to the law as well is the job of political oppositions, courts, academics, newspapers, civil society institutions and especially the people affected by allegedly illegal government behaviour. In recent decades Governmental attempts to limit such criticisms might have been somewhat more successful in Southeast Asia, with its more recent emergence from colonialism to independence, than in Europe or North America, but they can also be found around the world. We should be careful with terms such as “Asian Values” or “Western values”. Asia and the West are each extremely diverse in their cultures and in their legal traditions.

From my perspective, a significant problem is the lack of academic discourse and legal literature in parts of Southeast Asia. In Cambodia, the publishing of a legal textbook is a problem even from an economic perspective. A few copies of the “original” book will be sold and then illegal copies will be available everywhere. Intellectual property is still an alien concept here and we will have to wait and see if WTO-obligations will change that in the near future. For the time being, there are only a few quality legal textbooks. Furthermore, there is not a single law journal in Cambodia. For the rule of law the deficits in legal discourse are a problem. The rule of law is a permanent challenge. It demands the intelligent drafting of rules, appropriate dissemination, critical reflection and plenty of interpretation. The rule of law can not operate without substantial discussion about law, legal issues, solutions, loopholes and reform. The rule of law therefore depends, among other things, on strong legal faculties, providing academic excellence in teaching as well as research and operating on the basis of academic freedom. All this was not an accepted truth in the socialist era and the consequences of decades of neglect are difficult to overcome. The situation in Cambodia has, however, somewhat improved in recent years and I am happy to observe that law has not only become a

popular subject to study in Phnom Penh but also to see a new generation of academics thinking about law substantially.

In loose variation of Winston Churchill's famous assessment of democracy I would conclude: The rule of law is the worst way to organize society, except all the other ones tried yet. And somehow, as a German who has worked in Cambodia for some years, I sense that this is not Western or Eastern, but universal, at least for the time being.

A Khmer language version of this paper is available. It may be obtained from the
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