Problems of Court and Adjudication System in Cambodia: A Review

Dr. Bipin Adhikari
Cambodia Office of the High Commissioner for Human Rights
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The judicial system of Cambodia is in making. The country has definitely made some visible progress at this front in the last few years. This progress is not very satisfactory to all equally. There is, however, a realisation of some sort for the need of a more impartial, effective, and well-organised judicial system. Attempts are being made to create new laws and procedures, and weak legal institutions are being strengthened to provide a fair legal system, which all have access and in which all have confidence. Channels and mechanisms for reforming the system and making the rule of law stronger are being strengthened or created through measures such as new judicial reform activities, regulation of military and police, human rights protection, or improved adjudication. These initiatives in the long run will enhance the judicial system's capabilities to investigate and process legal issues speedily and fairly and develop the administrative and management capabilities of law enforcement agencies including courts and prosecution offices.

While the process of reforming judiciary and adjudication system is on, it is high time to make sure that the efforts of all concerned is focussed on the core problems, rather than other peripheral matters. If these core problems are handled effectively, the peripheral problems will disappear without much hues and cries. This is not however happening. This paper attempts to find out these core problems, one by one, according to the sense of priority of those reform professionals who worked at the grassroots level of the court and adjudication system. The deficiencies of the system are clearer at that level. Much of these deficiencies will continue to be there, if the problems at the top are not addressed properly and effectively. Most of these problems at the top are core problems. They are the problems which must be handled first in order to develop in Cambodia a judicial system which meets not only the requirements of the rule of law, but also of the universal principle of justice and human rights. Many of these problems remain unnoticed or underestimated in the wider reform moves hitherto this day.[1]

Few words of caution are essential at this stage. This paper basically concentrates on problems that remain unsolved. It does not deal with achievements of the reform process, or what Cambodia has gained by way of justice-sector interventions during the last seven or eight years. The ground realities of Cambodia before the Paris Peace Agreement,

[1] The problems of criminal law, human rights, and other substantive or procedural laws usually discussed elsewhere are not included in this paper.

which followed the promulgation of 1993 Constitution, were very different. Those of us who do not have the baseline references about the judiciary and adjudication system at that time may end up with a wrong conclusion about the achievements made so far. There are visible achievements. The readers should not therefore think that the system has lost potential for reform, or that reform initiatives have made nothing during the past.

1. Problems posed by systemic contradictions

The present status of Cambodia's legal system must be examined in the context of its fearful political history. The formal codified laws and civil law patterns in the legal system came to be gradually introduced in Cambodia with the change in its status as a French protectorate in 1863. By 1930s, the French legal system had already a firm influence in Cambodia.

Much of the modern elements of the inquisitorial legal system of Cambodia came from France[2] or its continental legal system as a matter of colonial heritage.[3] While France changed a lot in its evolutionary process, and recently also as a member of the European community, Cambodia is still surviving to some extent on the debris that France left long before. Even after the independence in 1953, the civil French legal traditions imbedded in the Cambodian system continued to be applied until the beginning of Pol Pot regime in 1975. The civil war, from 1970 to 1975, largely disrupted the functioning of the Cambodian civil society. During this period, Cambodia was ruled or misruled by Marshall Lon Nol, who had least regards for the rule of law and limitation on his power. The situation went from bad to worst with the rise of Democratic Kampuchea under Pol Pot and Khmer Rouge.

During the genocidal regime of Pol Pot, 1975-79, there was no judicial system of any kind in Cambodia. The law courts were destroyed, and many of the court houses were changed into cattle sheds or warehouse for agricultural products. Most of the lawyers and judges were killed, and the regime resulted in eradication of all existing laws and institutions, both modern and traditional, and any concept of the rule of law. The Khmer Rouge, the party of Pol Pot, which ruled or misruled during 1975-79 nullified all capitalist laws, or the laws enacted before their take over. There was no replacement with

[2] Cambodia became a French protectorate under a Treaty of 1863. The Convention of 1884 conferred full powers on French protectorate authorities to undertake judicial and administrative reforms.

[3] This heritage can be understood by the study of the preliminary version of civil code adopted in 1911; promulgation of Cambodian first criminal code and Code of Criminal Investigation in the same year; promulgation of Cambodian Civil Code in 1920, the 1922 Judicial reform bringing about separation of judicial power from that of Provincial Governors; promulgation of revised criminal code in 1924; promulgation of new criminal code in 1934; promulgation of Code of Criminal Procedure in 1937; promulgation of new Code of Civil Procedure in 1938; the first Cambodian Constitution promulgated on May 6th establishing a constitutional monarchy in 1947; promulgation of law on the functioning of Supreme Council of Magistracy in 1947; creation of Administrative Tribunal in 1948 and High Court of Justice in 1949; promulgation of Code of Military Justice in 1950; and promulgation of Commercial Code in the same year. The country gained full independence from France ultimately in 1953.

the new system or values. The vacuum which was created was enormous. The system that emerged was not a Maoist system, but an anarchist one.

In 1979, a socialist regime backed by Vietnam took over Cambodia after defeating Pol Pot and his insurgent army. Courts were gradually re-instituted and laws and procedures were recreated to fill the legal vacuum. The process of reinstitution was, however, guided by socialist principles. The provincial courts were reconstituted only after 1982, and the Supreme Court only in 1987. The Communists (with a firebrand concept of nationalism) had mixed mindsets as to how to move ahead. While French traditions still had some impact, the communist traditions needed to be enforced in the spirit of a people's republic where a liberal theory of law and concept of independence had no face value. Many survivors of the Pol Pot regime were sent to the communist countries to study law and political economy.[4] The re-established legal system thus followed the socialist model of Vietnam or other communist countries with many jargons of colonial French legal system. The issue of independence of judiciary had marginal importance and the concept of people's court took over the concept of the court of law, minimising the autonomy of justice process. The impact of communist era on the colonial legal heritage was significant. Especially, it gave rise to distortions on the continued growth of the continental system in Cambodia.

The system that emerged on the initiative of Vietnam-controlled People's Republic of Kampuchea in the 1980s borrowed from both France and Vietnam (or other communist systems), belonged to none of them, and could not be unified due to their inherent contradictions. What must be remembered at every step is that until 1988, the Ministry of Justice supervised all facets of the administration of justice and was responsible for revising all judgements rendered by the courts of first instance for factual and legal correctness, and for equity in sentencing. While in 1988, the function of review of judicial judgements was given to the newly created Supreme Court, the transfer of appellate jurisdiction was a purely technical matter and the judiciary remained subordinate to the Ministry of Justice. Furthermore, neither the courts of first instance nor the Supreme Court had the power to interpret laws and executive decrees or the power to review them for constitutionality.

Even the political party could appeal against a court judgement directly at the Council of State, which apparently played the roles of both the Prosecution Department and the Supreme Court. It was only after the Paris Peace Agreement signed in 1991 that a new framework for liberal democratic system based on international norms was envisaged.
This reality had a decisive impact on the psyche of the judges and prosecutors. That still haunts with some modifications to the Cambodian law-persons, notwithstanding the liberal outlook of the 1993 Constitution.

Furthermore, the psychology that the Vietnamese backed regime created does still pervades legal psyche in the country. The Constitution of the State of Cambodia

[4] For example, the present President of Battambang court, Mr Nou Non, Prosecutor of Svey Rieng Court, Mr Chum Samban, Judge of Appeal Court, Mr You Bunleng and Acting Prosecutor General of Supreme Court, Mr Chuon Sunleng were all trained in Hanoi of Vietnam.

highlighted that the people's courts and the military courts are the judicial organs of the state.[5] But it also instructed that people's assessors should participate in court proceedings in accordance with the provisions laid down by law. During the hearing, the assessors enjoyed the same right as judges. The bench was to decide a case by a majority of votes.[6] The National Assembly under the Constitution had the power to establish or dissolve the People's Supreme Court and the Office of the Prosecutor General attached to the People's Supreme Court. It had also the responsibility to monitor the activities of these bodies.[7] The President of the People's Supreme Court and the Prosecutor General had the right to submit draft legislation to the National Assembly.[8] Members of the National Assembly had the power to question the President of the Supreme Court and the Prosecutor General attached to it. With the same vigour, the Constitution dictated that the person thereby questioned answer the members during the session of the National Assembly.[9] The Assembly had power of both establishing and dissolving the Supreme Court.[10] Article 79 of the Constitution listed the following functions of the courts and the Office of the Prosecutor General:

- To defend the state authority of the people and democratic legality;
- To preserve public security and social order;
- To protect public property;
- To protect the rights, freedoms, life and legitimate interests of citizens.

Finally, with the arrival of United Nations Transitional Authority in Cambodia, the legal system started receiving Anglo-Saxon norms and procedures, along with the universal rights values depicted by Universal Declaration of Human Rights. After the commencement of a new Constitution in 1993 and peaceful handing over of authority to the elected government, Cambodia has started the process of rebuilding its institutions. Nevertheless, the introduction of a skeletal modern legal order, with many legal gaps remaining unfulfilled, brought with it many inherent systemic and practical legal challenges.

The present legal system of Cambodia is an amalgamation of all these three different sources and inspiration, creating confusion everywhere. As such, the legal system is in tension in its approach to legal theories and the working of the court and judicial system in some cases seems to be at odds with even established practices of jurisprudence. Cambodia, therefore, needs to decide which model it wants to follow. It is very crucial, because if there is no model, it very difficult to gain from the experience of other developed legal systems.

2. Problems posed by weak foundation of the court system

[5] Article 80
[6] Article 82
[7] Article 48
[8] Article 53
[9] Article 57
[10] Article 60

For a society with such a traumatic history, the foundation of the court system, which the Constitution of the Kingdom of Cambodia has created, is very weak. In principle, the Constitution is the supreme law of the land.[11] It has adopted a policy of liberal democracy and pluralist order and has vested the sovereign power (i.e., the supreme power of the state) in the people.[12] The people exercise this sovereign power through the legislature (National Assembly and Senate), the executive (Royal Government) and the Judiciary (Courts). The Constitution is based on the separation of powers with emphasis on the independence of the judiciary,[13] the respect for human rights[14] and liberal and pluralistic democracy as a basic feature of the Constitution.[15] Barring the judicial powers granted to the Constitutional Council and oversight functions to the Supreme Council of Magistracy, the judiciary is entrusted with all general judicial powers. According to the Constitution, "the judicial power covers all law suits including administrative ones." The authority to exercise the judicial power is exclusively entrusted to the Supreme Court and other courts of all sectors and levels.[16]

In practice, however, these constitutional norms look like the declarations of political manifesto unsupported by mechanisms and institutional processes to make these declarations functional. The Supreme Court is the apex court of the country, but it does not seem to be a constitutional court. The Constitution does not make the Supreme Court a focal point of judiciary. It does not devote a separate chapter to it. It does not state whether the Supreme Court has the power to review decisions of another organ of the system like the National Assembly or the Royal Government. In fact, it is a court without the power of judicial review of administrative or legislative decisions. The Constitution does not spell out how many types of courts will be established in Cambodia. It does not state how the Supreme Court by virtue of its supremacy performs its constitutional duty of supervision and monitoring of inferior courts. In its present status, it cannot have a control over the activities and management of inferior courts except through its appellate jurisdiction. The Constitution nowhere says that the Supreme Court may inspect, supervise and give directives to its subordinate courts and other judicial institutions. At its present form, the Supreme Court is not a court of record. It does not have constitutional power to initiate proceedings to impose punishment in accordance with law for contempt of itself and its subordinate courts.

The story does not end there. The Constitution is silent on how many judges will be there at the Supreme Court. It does not spell out provisions about appointment, qualification and conditions of service of Supreme Court judges. It does not mention a single word about the jurisdiction of the Supreme Court, which in principle is the biggest court in the country, and a co-ordinate branch of the system. That essentially means that what jurisdiction it is going to have depends on the kindness of the government, which it has monitored. There is no general assumption that order and decisions of the Supreme Court

[11] Article 150
[12] Article 1 & 51
[13] Article 51 & 128-132
[14] Article 31
[15] Article 153
[16] Article 128

is binding to all, and any interpretation given to a law or any legal principle laid down by the Supreme Court in the course of hearing of a suit will be binding on the government and all offices and courts. That is the reason that the court system at any level continues to fight with the hegemony of the government on almost day to day basis.

Lack of these provisions makes the foundation of the court system in Cambodia very weak. At present, the hierarchy of courts is established by a statutory law[17]. This law provides for[18] Supreme Court (highest court of the country), Court of Appeal (located in the Capital), Municipal and Provincial Courts (courts of first instance), and Military Court (located in the Capital to settle disputes of the military personnel on military offences. But decisions of the military courts can be appealed to the regular court of appeal). These courts are least governed, and there is no outline of functional relationship between the Supreme Court and these lower courts. They continue to receive instructions from their political heads. That not only creates lack of confidence on the part of trial courts but also contributes to their inferiority complex. So long as the status of the Supreme Court is not strengthened, and the inferior courts are not placed under its actual control, the judiciary cannot be independent, by just training the judges about the concept of independence, and how it works.

3. Problems of Judicial Review of Legislation and Administrative Actions

Courts have suffered for other reasons as well. The power and sanctity of courts are preserved by their ability to make anybody amenable to their jurisdiction. The Constitution creates a nine member high level constitutional body called Constitutional Council[19] which enjoys three judicial powers which an ideal constitutional court enjoys in many other democratic countries. This is both the strength and weakness of Cambodia's legal system. It is strength because of its perceived representative character. It is weakness because the body which has been assigned to do a jurisprudential work is a political body, which is presumed to work keeping in view the game of politics and balance of power. While the system has worked well in France, where from this model has been inherited, in the context of Cambodia's history, this has prevented the growth of a full-fledged judicial system, which can stand on its own, by giving some basic powers of judiciary to an organ, which does neither have legal orientation nor professional commitment.

The Council has not only the duty to safeguard the respect of the Constitution, but also to interpret it and the other laws passed by the National Assembly and examined by Senate. Any of the King, Prime Minister or President of the National Assembly (Lower House) or Senate (Upper House), or $1/10^{th}$ of the Assembly members or $1/4^{th}$ of the Senate members can forward draft bills already passed by the National Assembly to the Council for examination before promulgation. Similarly, the internal rules of the Assembly and Senate and various organic laws can also be forwarded to the Council for examination for

[17] Law on the Organisation and Functioning of the Adjudicate Courts (1993)
[18] An Office of Justice, which functions out of this hierarchical order, is at Pailin. It has been working under an executive order without any legal basis.
[19] Articles 136 - 144

the same purpose. Article 141 of the Constitution empowers the Council to test the validity also of those laws which are already promulgated. This Article empowers any citizen to file a complaint to the Council on the ground of constitutionality of any law through their representatives or the President of the Assembly, members of the Senate or President of the Senate. As if it is not enough, the Constitution also confers on the Council the power to decide cases involving elections of members of both House of the legislature.

As far as *ultra vires* modules regarding constitutional and administrative actions are concerned, the Constitution as well as other statutory laws do not lay down any specific procedures. The Constitutional Council has no role in this matter. It is strange how one can guarantee that the exercise of power will be within the legal limits conferred by the Constitution and other valid laws – the concept of intra vires – and that those who exercise power are accountable to law.

Nine members of the Council exercise these powers.[20] There are no regular procedures to judge constitutionality issues, and the approach is not litigative. There is no guarantee that they all or at least a majority of the members are lawyers, who understand what they are doing. There is no hearing when constitutionality is being tested, and the decision reached is not a jurisprudentially informed decision. [21] The system of judging about constitutionality by a process of legislative debate gives a political decision. The way decisions as to the validity of an election were done by the Constitutional Council during the past aptly proves this point. Even the parties against whom the decisions were made were not called to take part in the proceedings. Additionally, the Constitutional Council largely remains a defunct functionary since the beginning. In this background, given the reality of Cambodia's dictatorial past, and the present poor rule of law record, the trial courts and overall adjudication system of Cambodia cannot be independent and confident enough to contribute to the growth of jurisprudence.

4. Problems of Judicial Appointment

According to Article 134 of the Constitution and Article 11 of the *Law on Supreme Council of Magistracy* (1994), appointments, transfer, promotion, dismissal, and suspension of judges and prosecutors are to be done by the King on the advice of the Supreme Council of Magistracy (SCM). The King largely acts as the constitutional monarch, without any separate constitutional organ at his disposal. The Supreme Court has no independent role in this process. It can have some influence, but the influence cannot be decisive. The Constitution gives lead role to the Minister of Justice as the second powerful member of the Council. Thus the major work of the Supreme Council of Magistracy is done by or on the initiative of the Ministry of Justice, which traditionally enjoyed upper hand in the justice administration and adjudication system of the country.

[20] The Council consists of nine members with a nine-year term. As a rule, 1/3rd of the members of the Council are to be replaced every three years. Three members are to be appointed by the King, 3 members by the Assembly, and 3 others by the Supreme Council of Magistracy.

[21] For further details see *Law on the Organisation and Functioning of the Constitutional Council* (1998)

The leadership of the Ministry means the opportunity to set agenda, thrash out important issues, give them a shape before presentation, and an opportunity to express its mind from the position of power. The constitutional monarch has largely to depend on his attending Minister. In the present case, the Minister is Minister of Justice. It is clear that his opinion on appointments, transfer, promotion, dismissal, and suspension of judges and prosecutors comes to prevail. He is not just somebody who casts vote. The existence of the Minister as the member of the Council means that that traditional leadership in these matters is recognised. The other members of the Council do not protest this *de facto* exercise of power. The *Law on the Organisation and Functioning of the Adjudicate Courts* of 1993 still acknowledges the role of the Ministry in the appointment process.[22]

A couple of other substantive issues may be highlighted here. As yet, there are no comprehensive criteria for the purpose of appointments, transfer, promotion, dismissal, and suspension of judges and prosecutors. The Council is, for example, entrusted with the tasks of maintaining discipline among the delinquent judges and prosecutors through its two Disciplinary Committees, each respectively chaired by the President and the Prosecutor General of the Supreme Court. One can do least when whatever criteria are applicable are infringed or abused. The system of accountability is lacking. Any irregularity involved in the matter goes unchallenged, because law courts do not have power to hear complaints of this nature. For the appointment and transfer of other judges and prosecutors of the Supreme Court, approvals from the President and the Prosecutor General of the Supreme Court are required in respective cases.[23] In the given situation, their capacity to oppose is almost nil.

The Council is an important constitutional entity created by the Constitution for ensuring independence and smooth functioning of the judiciary. The Council is meant to be powerful because it is headed by the King, and is meant to advise him on appointment of judges and prosecutors, apart from other important functions.[24] However, it is yet to emerge as a strong body, with a strong determination to exercise its powers as a team. The real change will be difficult to achieve in this background.

A 1994 statutory law has further elaborated the constitutional mandate of the Council.[25] This law enables it to make comments and suggestions on draft bills relating to the judicial process; make recommendations to the King on promotion, transfer, disruption and suspension of judges and prosecutors, including the removal of titles; and advising the King for the proper functioning of the judiciary.

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[22] The *Statute on Magistrates* which is expected to determine the service condition of judges and prosecutors by keeping it far from the Ministry of Justice is still not adopted.

[23] Article 21, Law on Adjudicate Courts

[24] The members of the Council are the Minister of Justice, the President of the Supreme Court, the Prosecutor General of the Supreme Court, the President of the Appeal Court, the General Prosecutor of the Appeal Court, and three elected members from among judges.

[25] Law on the Organisation and Functioning of the Supreme Council of Magistracy (1994)

Since 1997, the Council has held only seven meetings until the end of August 2002. Membership of the Minister of Justice in the Council was a big controversial issue during the debate of the law at the National Assembly. His membership continues to affect the sanctity of the Council to work independently. A Supreme Court Judge is currently working as Secretary to the Council, and he cannot ignore the presence of the Minister at the meeting. The Minister was also said to be responsible for making delay in establishing the Council's separate secretariat, because that meant decreasing reliance on the Ministry of Justice as a *de facto* supervising body. In addition to the absence of political commitment of the major national actors and political parties to empower the judiciary, the other reasons for the failure of the Council are over politicisation and lack of independence of the Supreme Council itself.

Recently, an Amendment Bill on the Law on SCM has been tabled at the National Assembly for granting more autonomy to the Council's Secretariat, with a view to make the Council more effective. However, there has been no effort made for the structural reform of the Council by giving more independence to it, by making it more representative, by creating a device to make the Disciplinary Committees more effective, and by increasing the jurisdiction of the Council to enable it to ensure judicial independence through the establishment of a sound judicial service system.

The role of the Ministry in appointment and related procedures means recognition of its role in oversight functions. Many of the court problems are contributed by the Ministry of Justice in the exercise of its alleged supervisory powers, which in fact do not exist in law books. It is easier for the Ministry people to influence judges because most of them are the members of the political parties. They are not yet required by law to relinquish their official party allegiance. Why judges need to have a party allegiance to be appointed has its origin in the communistic philosophy, which has pervaded the way of life and thinking in Cambodia for too long.

5. Problems of oversight role

As in every other judicial system, it is not too much to expect the Supreme Court as a supreme oversight body in the judicial sector. However, this expectation is too much in at the face of Cambodian realities. A lion's share of the power of the Supreme Court has been vested in the Constitutional Council and the Supreme Council of Magistracy, both of which have yet to prove their worth. With 21 first instance courts at the municipal and provincial level and one appeal court at the centre, the Supreme Court does not have a sufficient standing to oversee the activities of the judicial system.

Under the current scheme, firstly, the Supreme Court as an appellate authority supervises and assesses performances and works of all the lower courts, including the Appeal Court and Military Court, through the evaluation of the legality and quality of court judgements and orders. Secondly, through the Supreme Council of Magistracy and its Disciplinary committees, as stated above, mitigate the declining ethical values of the delinquent judges and prosecutors, on the one hand, and improve the competency and quality of courts by overhauling the norms regulating the appointment and termination of judicial services

and also by bringing appropriate changes in the laws governing the judicial process, on the other hand.

Even to do these things, the Supreme Court does not have a proper system in place. There is no law on Supreme Court management and procedures. Judges at the Supreme Court seem to be too shy to ask for such a law because they fear that that will be misinterpreted as their increasing desire to have more power in their relation with the Ministry of Justice. They hardly visit the inferior courts. They never advise on how judges at the inferior courts should work or not work. They never issue quality control directives. Their decisions are not accessible to trial courts or the court of appeal. There is no feedback mechanism at all. Even after almost ten years of existence the Supreme Court has not been able to assert its role as a constitutional court to protect the rights of the individual or to apply a proper culture of human rights in its decision making process.

On constitutional matters the Supreme Court is still labouring under a misconception as to its power of interpreting the Constitution in view of Article 19 of the Law on the Constitutional Council, which enjoins the Supreme Court to refer a constitutional issue to the Constitutional Council. But this does not necessarily preclude the Supreme Court from giving a reasoned opinion, as it is its responsibility to study the constitutional point before referring it to the Constitutional Council. But this is too much to expect from the Supreme Court. Worst of all, there is no concept of law reporting at work. All that exists is a compilation of judgements of the Supreme Court for the years 1995 to 1998. These are bound in different volumes and distributed to a few courts and prosecution service. The compilations contain no index and no head notes accompany the cases. In these circumstances, it would be difficult for anyone to locate a decision on any particular subject matter. In fact, the Supreme Court does not serve as an ideal for the inferior courts.

6. Problems of delegated legislation

In principle, delegated or subordinate legislation, or the powers given to the executive and the public service to make regulations, are an extremely important part of modern administration and lawmaking. But this power needs to be regulated. Cambodia is a nightmare to a foreign legal consultant who wants to understand the system of delegated legislation in this country. The truth is that there is no system at all.

Article 90 and 99 of the Constitution confer legislative power on National Assembly and Senate. There is no reference in the Constitution about the power of issuing rules and regulations to implement the Constitution and other laws enacted by the legislature. There is no Law on Delegated Legislation which lays down how the delegated legislation should be created, checked and enforced. There are hundreds of decrees, sub-decrees, declarations, instructions and circulars issued from several governmental offices. There is an increasing proliferation of these rules and regulations these days. They are issued indiscriminately and are not published as a routine job. No attempts have ever been made whether they contradict with the laws passed by the legislature, or any provision of the Constitution. This is a matter of increasing concern. Issues that should generally be

regulated by statutory law are today often addressed through regulations issued by the executive. The role and power of the elected legislature is thereby undermined. This undermining process has become further acute in view of the recent order of removal of some of the Senators in violation of parliamentary privileges and constitutionally guaranteed freedom of speech and expression.

To maintain control over the delegated lawmaking process, and oversee it, scrutiny committees have been established within the legislature in many countries. They must undertake the work required to examine subordinate instruments and safeguard the people against any abuses or inappropriate uses of regulation-making power. This is done in the recognition that regulations, like any legislation, may adversely affect the rights, liberties, duties and liabilities of citizens. Such a system also ensures that the regulations under its supervision do not exceed the powers given to the government and to ensure that they conform to the spirit, intent, purposes and wording of the statutes passed by the legislature.

Only those rules that clearly satisfy all grounds for review should be approved as a delegated legislation. Otherwise, like the Directive of Prime Minister Hun Sen of December 1999, even the matter of arrest, re-arrest and prosecution will be dealt with under a subordinate legislation. Everybody in the trial and other adjudicate courts believed that the directive issued by the Prime Minister contravened the existing law on the point, but it was enforced. The Constitutional Council or the Supreme Court could not invite the Prime Minister to appear before it in order to prove its legality. The point is that there is no mechanism to deal with the situation.

Moreover, despite the timely adoption of some important laws, unfortunately, the process of passing many important draft legislations into law is almost invariably delayed for long periods of time or stalled in the Council of Jurists, a body set up within the Council of Ministers to review new legislation. The Council of Jurists is not a part of constitutional law making process and an amendment of its role must be a top priority in the legislative reform. The slow lawmaking process often leads to the government taking other action to fill the legislative void, resulting in the inappropriate use of regulations such as sub-decrees, proclamations and circulars.

7. Problems of independence of trial courts

All the factors discussed above, from the story of systemic contradictions to the story of subordinate legislation, have direct pressure on the independence of the trial courts at the grassroots. Interference in judicial matters from the executive through law and delegated legislation (decrees, sub-decrees, circulars and orders); lack of service security in practice (including non-observation of appointment procedure); low salary and benefits; failure of the Supreme Court to provide judicial leadership and supervise the functions of the lower courts; and non-functioning Supreme Council of Magistracy (and its disciplinary committees) may be cited as some major hurdles in securing the judicial independence.

Independence is a function of integrity and ability with appropriate training or qualifications. The term of office of judges in Cambodia, their independence, security, remuneration, conditions of service, and pensions are not adequately secured by law. Low salary and corruption in the judiciary are to a certain extent interrelated. Moreover, lack of adequate resources and financial autonomy makes judiciary functionally dependent on executive. Promotion and transfer of judges, whatever the spirit of the Constitution, has so far mostly been based on subjective factors, in utter disregard to ability, integrity and experience. There is pressure to the court on assignment of cases to judges. It is at times not an internal matter of judicial administration. Any charge or complaint made against a judge in his/her judicial and professional capacity at the Supreme Council of Magistracy are kept hanging intentionally. They are never processed expeditiously and fairly under an appropriate procedure. Decisions in disciplinary, suspension or removal proceedings are not subject to an independent review.

These factors hit on the constitutionally perceived principle of separation of powers, with judicial powers exclusively entrusted to the courts. Judges and prosecutors will continue to be affiliated with political parties, especially the ruling party, as it happened during the 1980s because the existing regime does not give them sufficient space to escape from their clutches. Where the system fails to give protection, it is natural that they take refuge in the available parallel system which is stronger than the constitutionally designated order. Even now the legal system remains crude in its approach. Due to substantial gaps and virgin areas in it, lack of conceptual clarity in procedural matters and on the application of constitutional laws, Cambodia is still entangled with inherited legacy of the past.

There are distortions in the roles and responsibilities of the constitutional functionaries. These distortions are politically protected on the grounds of personal stakes and interests they serve. Due to the low professional capacity of judges and a similar shy and inadequately organised bar association, the assaults on the trial courts in particular and the judiciary in general are never made an issue in the high level of governmental system. As of today, nobody ever heard of any judge of Cambodia speaking against the tendency to undermine laws and escape justice by powerful people or authorities or the problem of impunity, or reconciliation of cases at the community level. They cannot point out that judicial accountability to executive institutions is violative of the Constitution.

8. Problems of control of court clerks

All court clerks in Cambodia are non-judicial court personnel. Court clerks also mean those administrative clerks who do not perform judicial business like administrative assistants, accountants and storekeepers. Since the concept of para-judicial or judicial cadre to run the business of the courts and prosecution offices is yet to emerge, the legal status of court clerks has become another problem area.

Two reasons make it difficult to give precise definition of their role: first, because court clerks do not have any specific law defining their responsibilities in regard to the rest of the court personnel, second, because the few legal texts which may serve as a framework

for this position, as they refer to it, encounter numerous problems of enforcement. Concerning the position of court clerks proper, the role it plays within the court system relies more on general expectations and assumptions as well on precise tasks that may be defined by each judge and prosecutor to whom court clerks are assigned. In other words, the most common conception of the role of court clerks consists in a role of assisting judges and prosecutors for administrative matters.

The duties of the clerks are as numerous as they are complex. Some of them are *greffiers* (court clerks), some process servers or bailiffs, and some bench assistants. Some of them also help judges to carry on interrogations. Depending on where they are assigned, clerks are in charge of registration of cases, authentication of documents, issuing summons, observing other rules of procedures, filing records and notifications, assist judges during hearing; record proceedings before and during judgement, issue court decisions written by judges, and so on. Similarly, the prosecution clerks help their prosecutors in matters under the responsibility of prosecution office. For administrative matters, all clerks are under the supervision of the chief clerk who also handles budgetary matters, and supervises those responsible for financial accounting. But for the rest of the things, he has very limited supervisory powers over these clerks. Each clerk is loyal to the judge or prosecutor he is assigned. They cannot be used interchangeably by judges and prosecutors. There is a separation between court clerks and prosecution clerks. Contrary to what seems to be commonly assumed, legal references to court clerks' responsibilities are not that rare. But the main problem relies in the facts that the legal framework concerning court clerks is dispatched in all laws related to rules of criminal procedure and occasional instructions issued by the Ministry of Justice, sometimes only with implicit references. The absence of a civil procedure code makes the problem more difficult.

Another problem regarding clerks is that Cambodian Constitution does not create something like an independent Judicial Service Commission to deal with the appointment, promotion, transfer or dismissal of court or prosecution clerks. They are not even appointed by the court themselves; nor do these courts have power to take or initiate disciplinary action against them. All clerks of the courts in Cambodia including the Supreme Court are appointed, transferred, promoted and demoted by the Minister of Justice. The executive control over court can be decisive anytime due to the lawful power of control over the court management. Anybody could be sent to the court, and anybody transferred from there. The vulnerability of this system to the independence and integrity of the adjudicate courts is thus apparent.

Court clerks serve as connecting points as they intervene in two directions: first, they provide information on the process of cases pending before court, mainly through notification processes as far as the connection with outside the court system is concerned (i.e., information of parties and their lawyers), but also through the internal organisation of the court system in order to inform all different judicial authorities which may be involved in a same case; second, they are also the ones in charge of receiving court fees and, more generally of managing the court's budget, which explains the role they are able to play in court's corruption net work. In the absence of a comprehensive legal

framework, the situation is confusing for everybody, and what clerks do officially is follow the rules of the thumb depending on the circumstances.

In the higher courts, the clerks receive all documents relating to appeals and file them properly. They can only submit a file to the President if it is in shape as time for the determination of an appeal starts running when the file is in shape. But there is no control on the length of time during which a file can stay with the clerks. The clerks deal with the files on their own. In addition, they have to issue the entire summons, deal with the public and lawyers, and write out reasons for judgements after the court has given the verdict. At present, though they do try their best, they are not properly equipped to cope with all these important duties.

Most of these clerks do not have legal degrees. They have some sort of short duration training from the Ministry of Justice, and trainers like judicial mentors. But no attention has ever been made on making them proficient and under the control of judiciary.

9. Problems of legal practitioners at the court

Access to justice due to lack of adequate number of practising lawyers is a big problem in Cambodia. As yet, Cambodia has only 221[26] lawyers the country. Only 175 of them are practitioners. The rest of them work with the government or the private sectors and never turns up to the court as counsels. They do not have any contribution to the bar of practising lawyers. Even among the practising lawyers, some are not full-fledged practitioners. The Bar Association exists only in Phnom Penh. Except one court office at Phnom Penh Municipal Court, the Association does not have branch anywhere in Cambodia. There is no court specific bar units. Only a couple of provinces like Kampong Cham, Kampong Chhnang and Battambang have the presence of local lawyers with their personal law offices. Otherwise, lawyers visit the provincial courts from Phnom Penh as and when the need arises.

This makes the lack of citizen access to legal representation a serious issue. But this issue has been further complicated by Cambodian Bar Association which pursues a "closed shop" policy in order not to allow the entry of new lawyers to the Bar. Many of approximate 1200 law graduates of Cambodia are said to be on queue for obtaining the practitioners license. There are still many others who have rich experience in law, although they do not have formal qualification, but may be entitled to practise law according to the statute. The lawyers with license to practice must pay USD 50 on trimester basis as the membership (licence) fee. This amount is discouraging to many young lawyers.[27] The Association has demonstrated general unwillingness to admit them to the bar. Meanwhile, two Phnom Penh based legal aid organisations – Legal Aid of Cambodia (LAC) and Cambodian Defenders Project (CDP) – provide services to indigent clients of a defined category. LAC is staffed by about two dozen lawyers and has 8

[26] This author is informed that 46 of them are not working at all. However, there are 30 interns currently working with Cambodian Bar Association.

[27] The licences of six lawyers were suspended in the past for their failure to pay the membership fee on time.

provincial branch offices. Similarly, CDP has also a slightly larger team of lawyers, and has physical presence in at least four provinces. Human rights organisations have also retained some lawyers for their investigation, monitoring or counselling purposes. But they are quite limited in numbers.

Many of those lawyers who are seen in the courts are basically from the human rights or legal aid NGOs. They visit the courts to plead the case taken up by their respective organisations in favour of certain targeted groups like juveniles, women or other economically poor suspects. Usually court appointed lawyers in cases which call for compulsory legal aid come from the pool of these NGO lawyers. The inevitable consequence in such cases is that there is not enough client-lawyer relationship. They are not surviving in the profession because of their commitment for excellence. These lawyers survive in the profession not because of their professional efficiency or the relation of confidence with their clients, but because of a third party who hired them or is paying for them. As such, it is not uncommon to find these lawyers going to argue the case without much preparation, and at times even without consulting their clients beforehand. Some lawyers go straight to the trial room on the appointed date; argue their case and return before the hearing completes. It is unusual to find a lawyer advising the client on whether to move an appeal or not. Generally, this is not considered a part of their duty.

A couple of other important comments may be made. Although perceptions are gradually changing, Cambodian lawyers generally think that what they are to do is to make ‘submissions’ to the court; and not argue the defence of their clients, for example, to call the prosecutor to bear the burden of proof in criminal cases. Whether the lawyers are private practitioners or NGO practitioners, they mostly focus on questions of fact and not on questions of law. This prevents the development of jurisprudence based on courtroom exercise, particularly debate on the ambit of a particular legal provision or its application on a given fact. Finally, a lack of bar office at the court, and their regular presence, means that the bar continues to be far from the realities of the court. The presence of a judicial mentor always boosted the confidence of lawyers, and gave them the opportunity to have feedback on their performance and almost anything that related with the court and provincial administration.

There are noticeable signals that some lawyers are going beyond their professional ethics in their dealing with judges, prosecutors or the administrative staff of the court. There is a danger of some of them being converted into a bridge between the party and the judge to win the case. One can see, for example, a lawyer requesting the postponement of trial, even if the duration of pre-trial detention of his client has already been exceeded. A grant of this request without sufficient reasons necessarily smells of other considerations involved in the decision. At times, a wilful and inadequate follow up on the part of the lawyer during/at the time of first appearance of the suspect's results in the decision in favour of temporary detention. In many land cases, lawyers do not question about the validity of land title certificates, although they are clear on the face of the record. These are just simple cases where integrity of lawyers has been seen to be doubtful.

The existing law has enough provisions for taking appropriate action. In fact, the Bar Council has already dismissed two lawyers from the roll of practitioners, suspended the other two from the profession for two years, and warned more than a dozen of lawyers for the breach of professional code of conduct. But the Council needs to be more active in this regard.

In the past, professional training to law students aspiring to join the profession were supported by French and Japanese Governments and the American aid agency USAID. Such training used to have two-year duration – one year for study and the other for internship. The endeavours of the Cambodian Bar Association to maintain the flow of external fund have not always been successful. This is one of the reasons that the Association could not restart its training schedules after a few rounds of lawyers training in the past. While there are indications of positive development in the matter of their capacity building,[28] there is a possibility looming large that delay in enforcing their professional discipline might make the issue of integrity of lawyers as complicated as the issue of the existing judges and other judicial personnel.

10. Problems of docket management

There is no concept of docket management at work at the provincial court level. The existing system might be termed random, inconsistent, irregular and erratic.

A docket of official court record is not something ever conceived during the last ten years. No specific documents covering the same issues are stored together in a docket that could be easily available. In fact, none of the courts have a Dockets Office to review documents, to make sure they meet filing requirements, register the document, and to provide quality service to the suspects, victims, lawyers and other actors of the administration of justice.

As an effect, there is no centralised filing system in any court in Cambodia including the Supreme Court. It is difficult to find information about cases on the prosecutor's roll, the cases in progress at investigating judges, court cases, hearing schedules, the lawyers attending the court, status of exhibits, and similar other matters. Similarly, documents like affidavits, briefs, discovery orders, hearing transcript, interlocutory appeals, and testimony transcript, withdrawal of complaint or witness list, or similar things would not be easily available if the concerned clerk of the concerned judge is not effectively tackled. None of the courts of Cambodia has official publication of any sort including of important cases decided by them. Information about proposed and final regulations, copies of public comments on proposed rules, and related information cannot ever be available at the court level. Whatever materials are there, it is unlikely that they are available for review by interested parties. Files are with those judges who decided the cases. If the cases are with the prosecutors or at a later stage with the investigating judges, the files too will be with the concerned prosecutor or investigating judges. The

[28] A recent sub-decree has created a training school for lawyers of Cambodia as assistance to the Bar of Cambodia. It is both for lawyers seeking entry to the Bar and, in theory at least, for purposes of continuing legal education.

court does not have a comprehensive registration system. There is no index system and a centralised mechanism. This gives a lot of opportunity to the court staff to make money by manipulating documents and related unscrupulous trade.

11. Problems of enforcement of judgement

This is another problem area which needs to be taken into account. Even though it is the responsibility of the prosecutor to act as the leader of the judgement enforcement team, he hardly has the time to go to the place of enforcement. The deputy prosecutors also avoid this job. Usually, the chief clerk of the prosecution office leads the team with other two clerks to enforce the judgement. They are not legally competent and adequately skilled to do the job. Judgements rendered by the court might have been right, but the way it has been executed may be quite wrong.

The team needs co-operation from police officials from the law and order office or local authority in cases where the parties do not comply with the court order, or reject it, or there is threat to the team from these parties. At times, the response of the law and order police to the request of the court to provide security to the team is poor, and the court takes the help of the provincial Governor to order the police to respond to the request. There is, however, no special police squad to help the court carryout this work. Usually, enforcement of judgement related with land disputes, confiscation of property, or offenders who need to be taken to gaol are believed to have weapons is always problematic. Problems also come up when judges don't issue clear-cut orders according to the terms of judgement they deliver (i.e. the lower part of the judgement), or these clerks fail to understand the terms of judgement, even if they are well specified, or when the judgement is not clear for easy enforcement. One can usually find these clerks returning back to the trial judge for further clarification of judgement. Some judges dare to use this power of clarification to rectify or improve their orders according to the changed context. There are plenty of such cases where the land in dispute is not discovered, or even if it is discovered its area, size and border do not conform to the specifications given in the judgement.

Another problematic issue about enforcement of judgement is the expenditure involved in the process. The official payment for enforcement of judgement of each case is less than US $ 2. The court does not pay for any expenditure exceeding this amount. Thus, the winning party who requests the court to enforce judgement is compelled to borne all expenditure including food/beverage and transportation of the team members. This explains corruption at that level. Usually, clerks and prosecutor who visits the site expect compensation, and the Cambodian society does not take it as otherwise.

One more issue never discussed is Article 153 of SOC Law which states that where a sentence involves imprisonment and the collection of fine, the judgement shall be enforced and ensured by the prosecutor. In principle, in the criminal cases as well as in civil cases the claim for a forfeit penalty may not be done, unless upon there is an ordered formula specified in a court's judgement.[29] But this rule has been very often ignored.

[29] Article 10, Law on Forced Physical Imprisonment (SOC, Decree No 18, 1992)

Similarly, in criminal cases, no complaint is necessary; the court can decide to order for a forced physical imprisonment to claim for a forfeit penalty if the debtor refuses to pay it.[30] The method of forced physical imprisonment is to be calculated based on "one day in jail for an amount of debt of five hundred (500) Riels or less." Even if such amount of debt is a big amount up to a hundred thousand (1000, 000) Riels, this imprisonment method is always to be calculated on the basis of "one day in jail for five hundred Riels of debt," until it corresponds the whole amount. If the amount of debt exceeds 100,000 Riels, its surplus is to be calculated on the basis of "one day in jail for 1000 Riels of debt." But regardless of how big the amount of such debt is, the term of imprisonment which will determine for a convicted person in the same case should in total not exceed two years.[31] This provision looks so sub-human in its application.

12. Problems of court budget and financial procedures

Not only judges and prosecutors in the courts are least paid, but the money that comes for court management is also meagre. The functions and dignity of the judiciary also require that judges are housed in adequate courthouses and provided with necessary tools of the trade, including appropriate materials and equipment, vehicles, adequate library and legal research facilities, and other courtroom facilities. The budget that comes is never adequate for these things. This is so harsh a reality that there is no use in discussing further about this. Budgetary issues are considered here for their human rights implication.

There are many glaring examples. The budget of 40-50 million Riels provided annually to the court is also expected to cover the expenditure of the prosecution office. There is no separate budget for the prosecution office. Normally, there are four category of expenditure: salary for court staffs, payment for the investigation of cases, trial expenditure, and sundry expenses like reception for visiting dignitaries. Court clerks receive only 5000 R for each day they spend outstation for criminal investigation of a case both inside and outside the province. Judges and prosecutors receive only 8000 R for investigation inside the province, but 10,000 outside it. There is no budget for investigation of any civil case, unless the investigation is being done on the order of the Appeal or Supreme Court. Similarly, clerks receive 6ooo R for assisting to and taking part in the trial, and the judges and prosecutors receive 10,000 per hearing, apart from their monthly salary. Besides, the court requires to pay for office supplies and miscellaneous. Most of the time there is no money. Judges and prosecutors spend from their own pocket, and claim reimbursement later. If the claim exceeds the amount allocated to the court, the expenditure is personal.

Most of the courts do not have professional accountants. They do not have bank accounts. The money they receive keep as a private purse of the chief judge until it is spent. There is no billing system, and no concept of prior authorisation before expenditure. As soon as the money comes it is reimbursed to all who submitted their claims. Most of the time there is no balance. If there is some, they keep it as petty cash.

[30] Ibid.
[31] Article 7, Ibid

It is already too late for the Supreme Court to establish budgeting and funding policies and procedures consistent with judiciary plans and policies, directions from the Ministry of Finance, and in consideration of input from the appeal and trial courts. It should take over the Ministry of Finance in budgetary matters as soon as possible. At present, there are no guidelines on how to –

- make recommendations to the supreme court on the trial court component of the annual judiciary budget request
- advocate for the trial court component of the annual judiciary budget request and associated changes in the rules
- make recommendations to the supreme court on funding allocation formulas and budget implementation
- monitor trial court expenditure trends and revenue collections
- recommend rule changes related to trial court budgets
- develop recommended responses to findings on financial audits and reports
- recommend to the supreme court trial court budget reductions required by the legislature
- identify potential additional sources of revenue for the trial courts
- recommend to the Supreme Court legislative pay plan issues for trial court personnel.

13. Problems of corruption

Cambodian civil servants are the worst paid civil servants of the world. Leaving aside the issue of dignified life, it is hardly possible for anybody even to pull on a couple of days by what he/she receives as monthly salary. Certainly, they need to be amply compensated for their work, and surely, by any objective measure they are underpaid in virtually all agencies. Despite that the government job is considered lucrative as it affords opportunity to bribery, extortion, embezzlement and other types of corruption. It is an open secret that the job of police officers, army commanders, prosecutors, judges, are lucrative as they offer abundant opportunities for making money.

The issues of court budget and financial management, moreover, have direct bearing on judicial corruption. This is a pervasive issue everywhere in Cambodia. It is an issue both the international donors and their local counterparts very often talk about in the context of legal and judicial reform. Yet a very few of them ever realise that the courts are less corrupt in Cambodia than the rest of the other major public authorities. It is an open secret that the military, *gendarme*s, judiciary police, the politicians and pseudo politicians like the so called *His Excellencies*, and senior bureaucrats have made more money in recent years than the judges and prosecutors working in the courts. In fact, if certain examples are overlooked, judges or prosecutors are not taken as rich people or the people with a better access to wealth. A majority of judges feel that due to the rampant corruption and dramatic change in the social status of these entities, they are under severe external pressure to raise their financial status.

In a majority of cases of impunity, for example, the culprits are not the prosecutors, investigating judges, or judges, rather those powerful officials and politicians of the country, who often use courts as their instrument. When traffickers or pimps are released and young women and children fall under the traps of the prosecutor, the reason is obvious. The independence of the court in a majority of cases is not compromised in the chambers of the court officials, but at the cabins of these powerful people, who are very far from the court. Bribes are usually taken by those who do not prosecute or decide a case. Yet the blame is on the court. It is because the court faces the lawyers, victims, the press and the ordinary people. The capacity of the court to ignore or counter the threats of these culprits is severely constrained. A judicial mentor is helpless in such situation.

However, these instances do not prove that there is no corruption at the court. Three types of corruption can be noted: corruption to run the office, corruption to pay others, and corruption to live a dignified life. The first type of corruption is presumed to be reasonable; the second inevitable and the third justified by survival principles. The usual argument is: “how can we meet our requirements by about USD 25-30 per month?” Court or prosecution clerks are the principal channels for extortion of money to run the office from the clients. But in the rest of the next two types, the involvement of the concerned judge or prosecutor is more direct.

The senior officials from the Ministry of Justice and other Ministries visit the court regularly to take their ‘tips’. When the court officials visit the Finance Ministry to receive the monthly budget, they receive only 80 percent of the receipt they sign. The remaining amount goes as bribe to the senior officials of the Ministry. As soon as the monthly instalment is received, the Ministry of Justice people also visit the court to take their share. Then a portion of it again needs to be given back to the visitors. Such visitors especially are those people who have monitoring authority, or those who can really influence the power of transfer or dismissal. When a senior official is marrying off his son or daughter, or there is some family tragedy calling for financial compensation, he does not bother about how the judge might be able to pay him; all he would do would be to asking for payment of a certain sum. Judges or prosecutors must make money to pay kickbacks to their supervisors. None of the courts would dare to defy these people due to imminent danger involved. The problem, to say the least, is the same old problem of belling the cat.

14. Problems of law enforcement agencies

Criminal investigation is a primarily police function. The purpose is to reconstruct events at crime scenes through complete and impartial inquiry. The role of judiciary police to identify criminal offenders and criminal activity and, where appropriate, to apprehend offenders and participate in subsequent prosecutorial and court proceedings is most crucial. It is the process through which police discover, preserve, gather, and evaluate evidence in order to identify, apprehend, and prosecute criminal offenders.

Judiciary police along with other criminal justice agencies must interact exclusively with people who have been accused of crime, were victimised by crime, or have witnessed

crime. As far as police business is concerned, it requires officers to exercise authority over others and to engage in a variety of activities that require confidentiality and trust. Consequently, the most fundamental requirement for a police agency's aspirations to deliver high quality service is the integrity of its own personnel. That is missing in a number of cases in Cambodia.

Comprehensive educational efforts are required to clarify the role, functions and responsibility of the National Police and Gendarmerie in the administration of justice. Now the National Police already have a comprehensive statute to guide its business. But hundreds of proclamations ('prakash') resembling standing orders on the police activities are still being implemented. Their legality needs to be tested. Additionally, these orders have not been widely disseminated. It is important that they reach all police posts in the provinces.

With the amendment of Article 36[32] of the law on criminal procedure, role of military police in judicial affairs has virtually ended. The military police is not a judicial police for all purposes. This is a positive development. Now their role is appreciated only in cases of misconduct involving military discipline and abuses. In practice, however, there is still co-operation between courts and military police in judicial affairs. The level of co-operation is different from place to place according to the choice of respective courts. Some courts still involve military police in their work such as investigation, enforcement of court warrant, and enforcement of judgement. Others avoid involving with military police anymore. But given the security situation in many places, courts still need discretion to use military police in serious type of cases, especially those which involve powerful interests. So provisions could still be made to take their help without reviving the earlier system of concurrent responsibilities: parallel competing organisations covering the same field to conduct criminal investigations of crime dissipating responsibilities and accountability.

The country has limited infrastructure to deal with crime, and basically, few technological, human, and economic resources. Criminal investigation is always in the process of evolving due to scientific, legal and social developments, as well as changes in the behaviour of criminals. While many investigative techniques are fundamental and remain basically the same over time, there are also significant changes that occur on a continuing basis. Cambodia does not have resources to keep up with this pace. Thus, confession is still a starting point for criminal investigation, and many other criminal law rules and procedures do not apply in investigation process, because if they are applied, the police will fail to submit the accused and the investigation report for the consideration of prosecutor, investigating judges or trial judges.

Many prosecutors feel handicapped in conducting verification of the investigations, which require police assistance. The law enforcement agencies function under their own senior officers or commanders. Article 36 requires that the prosecutor should direct the police investigation, but he does not have enough basis for control over them, especially as opposed to the decisions taken by their senior officials. Experience has shows that

[32] Law on Amendment to the Law of Criminal Procedure (2001)

investigating judges encounter multiplicity of problems when dealing with judiciary police, because they do not have even the power that the prosecutor has been enjoying. In many cases, investigating judges accept the contentions of the police or the material evidences produced by them without evening inspecting the scene of crime. Making a joint visit or inspection is something which is rarely heard of. The grassroots realities are different.

The constitution of a separate, independent and autonomous Directorate of Prosecution appears essential to translate into reality the provisions of criminal justice administration.

Criminal cases brought by police to the court have a number of implications with them. The police staffs at the commune and district level, from where most of the files are forwarded, do not have enough knowledge in taking statements, minuting and other paper works. Their skills in criminal procedure and human rights are still low, although things have improved quite a lot in recent years. Many of them have received training on criminal procedure and human rights from our office, and similar other topics including the art of doing procès-*verbal* from the Ministry of Interior. The existing strength of the prosecution office is simply not enough to closely supervise police works.

A couple of problems of judiciary police must be noted at this stage. The expenditure for police investigation is traditionally borne by judicial police office at the provincial police headquarters. They are paid with 5,000R to 10,000R for one complete investigation even if such investigation involves more than one working day. The official budget for investigation every month is around 5 millions Riel. This is the figure of Svey Rieng, but most of the remote provinces receive more or less the same amount. The assigned person pays the cost of transportation (vehicle, fuel, etc), and there is no provision for reimbursement. The official budget does not cover many incidental expenses on the way, for example, food for the victim, the cost of first aid, and so on. Many police officers are assisted by local commune chief and/or chief of the local community police. The allocated money does not come directly from the Ministry of Interior; it is delivered from the financial department at the province. On its way to the judicial police office, the amount loses its size considerably.

Misconduct of police and prosecutors may be classified in several ways, but one of the most fundamental distinctions is between profit motivated corruption and that which involves non-profit abuses of citizens ranging from brutality through verbal abuse to simple discourtesy. Especially as regards police, they resort to brutality as the conscious and intentional use of more force than officers need to defend themselves or other as, to make arrest, or to accomplish any other legitimate police purpose. Unnecessary force may cause as much damage as brutality, but it involves no ruthlessness on the part of the officers involved. Instead, it occurs when – through lack of training or expertise or because of recklessness, negligence, overconfidence, or haste – officers needlessly put themselves into dangerous situations in which they must subsequently use force to escape injury or death. A list of profit motivated police/prosecutor corruption may be summarised as follows:

- Failing to arrest and prosecute those the officer knows have violated the law

- Agreeing to drop an investigation prematurely by not pursuing leads which would produce evidence supporting a criminal charge

- Agreeing not to inspect locations or premises where violations are known to occur and where an officer's presence might curtail the illegal activity

- Reducing the seriousness of a charge against an offender
- Agreeing to alter testimony at trial or to provide less than the full amount of evidence available

- Arranging access to confidential departmental records or agreeing to alter such records
- Referring individuals caught in new and stressful situations to persons who can help them and who stand to profit from the referral.

There is no effective administrative mechanism accessible to common people to move complaints against officers who abuse their power. Some police and gendarmes have been subjected to greater judicial scrutiny in recent years, but it is still far behind as a widespread form of external oversight on them. Prosecutors need some disciplinary powers to deal with these cases of abuse administratively. An amendment on Article 51 of the Statute on civil servants is a positive change, but it will still need a better environment to call liability for illegal or unconstitutional behaviour by public employees. Finally, elected officials may show willingness to subject police and other operations to critical study. But that again depends on institutionalisation of political parties, and especially recognition of the role of the opposition in the House.

15. Problems of Appellate Procedures

Trial courts suffer also at the hands of the Phnom Penh based Appeal Court. Prior to the establishment of the Appeal Court, all appeals went directly to the Supreme Court of Cambodia. The Appeal court now hears appeals from all the lower courts of Cambodia – municipal, provincial and military. It is a court of a general jurisdiction with the power to review all issues of law and fact presented to the court of first instance. The Appeal Court has power to conduct *de novo* re-trials pursuant to which new investigations may be conducted and evidence not presented below considered. It can affirm reverse or modify the judgement appealed, and also has jurisdiction to hear appeals of decisions by the prosecutor or investigating judge below concerning issues of pre-trial detention and grounds for prosecution. But most of the clients never reach the Appeal Court because it is not accessible to all.

It appears that most appeals tend to be general appeals, there being no rules requiring appellants to limit the issues presented for appeal. The result is that nearly all appeals from final judgements are heard as retrials, which constitutes a tremendous waste of judicial resources. In addition, there are also serious legal problems inherent in this procedure. For example, in any criminal case in which the accused is acquitted by the lower court, the effect of a full trial (with a new investigation of generally stale and possibly contaminated evidence) is to effectively subject the accused to double jeopardy. At the least, the entire system tends to render the lower court proceedings irrelevant.

The appellate process has many anomalies and contradictions. Some defendants do not move appeal, because they are told that the trial judge adjudged them with leniency, and if they go on appeal, the Appellate court might take a rigorous attitude. Thus the rights of the appellate defendants hardly have any impact on their decision making. Even if they decide to go on, an appeal is to be moved through the Chief Clerk of the trial court which passed the sentence.[33] In principle, the appeal may be made by filing a written complaint, complaining orally, or mailing a complaint by regular or registered mail.[34] While the system of filing an appeal by mail is not in vogue, the rest of the methods fall under the trap of the chief clerk. The appellant is expected to be present physically and put the date of signature or thumbprint in the Appeal Register as it is considered as the date of appeal,[35] and about this a majority of criminal defendants are ignorant.[36] It has been found that the clerks manipulate appeals received, and in cases where they have vested interest, suppress the documents till the time limit for moving an appeal is over. Most of the time when the defendant is in prison, moving an appeal will be more difficult either because his lawyer has already left him so that he cannot ask him to do it under the power of attorney, or because the prosecutor does not help him to come to the court himself. This provision is the first gate of victimisation.

Even if a case is appealed, the trial court is under no compulsion to send these appeal documents to the Appellate Court quickly. Furthermore, even the acquitted accused is required to stay in prison, if there is an appeal to the decision right away.[37] There is no law which requires the appeal court to decide an appeal within a particular time frame. This lacuna in law has a direct bearing on the liberty of the accused awaiting appellate decision. There is no provision requiring the prosecutor or the appeal court to give updates of his situation to the accused. It's quite normal that the accused is in a provincial prison while his hearing is being planned in Phnom Penh. There is no dispute that the only one Appellate Court based in Phnom Penh for the whole of Cambodia is overburdened with significant increase in caseloads. The appeal process is either dangerously short or desperately long, depending on the vested interests of the concerned actors over a certain case. Finally, there is no legal basis for both the trial and appeal courts on how to decide on the reparation and damages should it be granted.[38] It is wholly discretionary, and there is a high degree of differences between almost similar cases.

[33] Article 178 states: "The appeal may be lodged within a time-limit of two months. When the judgement is contradictory, this time limit starts on the day of the judgement. When the judgement was made by default, the time limit shall be determined from the expired date of the opposition. The party who was not present may appeal before the expiration of the time limit for opposition.

[34] Article 178
[35] Article 176
[36] The Ministry of Justice Circular No. 4 of November 22, 1994 states that the appellant must file an appeal in person with the clerk's office.

[37] Article 152
[38] Article 151

Cambodia needs at least six appeal courts for its six officially declared zones. One of the main reasons why the problem of excessive pre-trial detention cannot be completely cured is the existence of only one appeal court in Cambodia. Once an appeal is lodged by one of the parties during the investigation of investigating judge, the case becomes *sub judice* at Appeal Court, and the concerned investigating judge cannot move until the Appeal Court gives its ruling. In many cases, it is found that by the time the Appeal Court decides an appeal, the imprisonment passed on the convicted person by the provincial court, against which the appeal was filed, is already completed. So the appeal decision comes to be just a formality.

16. Problems of criminal laws and procedures

The society in Cambodia is yet to be clear about the role of government in defining and responding to crime. The assumptions based on the rule of law that there are limits to the power of government to define and respond to crime, and that, therefore, rules limit the discretionary power of decision-makers in criminal justice are generally missing. The Cambodian psyche, despite many legal provisions to the contrary, looks as based on crime control model operating according to a presumption of guilt. Those who remain in the criminal process are considered as "probably guilty" and there is a limited focus on removing the innocent at the earliest possible stage.

With the arrival of United Nations Transitional Authority in Cambodia, the legal system started receiving Anglo-Saxon norms and procedures, along with the universal rights values depicted by Universal Declaration of Human Rights. For example, in criminal cases the burden is beyond a reasonable doubt, in comparison to the civil burden, a preponderance of the evidence. All that is required in civil case is that the evidence the plaintiff presents be considered weightier than the contrary evidence presented by the defendant. Proving that a defendant is guilty beyond a reasonable doubt is a heavy burden, but a strict standard on the government is also imposed because this system believes that it is better to release a guilty person than to convict an innocent one. Unfortunately, still Cambodian law people are ambivalent about this standard principle.

The presumption of guilt still works effectively in Cambodia because informal fact finding by the judiciary police and prosecutors obtains the correct result in most cases. Therefore, the criminal process should place few restraints on police and prosecutors. The due process requirements are considered as an obstacle course. In fact, many people still presume that the government can invade the lives, liberty or property of citizens, even without established procedures and fairness. The liberal conception of fundamental rights as outlined in the Constitution remains without remedies because of the failure of the system to provide for effective institutions and procedures.

In general, the development of the criminal law and procedure has generally tended to be sporadic and haphazard, with too little thought given to the long-term implications of the criminalisation decision. The legal system is still at the stage of under-criminalisation. The country still does not have basic laws dealing with breaches of peace, drunkenness at public places, eve-teasing, to take a few minor examples to prove this general comment.

Even the issues of a high-risk criminal negligence (or a gross deviation from the standard of care that a reasonable person would observe) cannot be settled through judicial process because there are no laws targeted towards it. The criminalisation process needs to be speedier because the society offers a larger number of offenses than what the Cambodian law-books provide for. Similarly, many types of modern offences are not taken care of by the legal system. If there is an air hijacking, for example, the prosecutors of Cambodia will have to do a lot of ridiculous exercise to fit in air hijacking on the definition of robbery under UNTAC Law.

It need not be overemphasised that most of the rules and procedures regarding criminal laws in the present day Cambodia are enshrined in what is popularly known as UNTAC and SOC Laws.[39] Continuity was given to the UNTAC Law, although in disregard to the spirit of its Preamble which envisaged that the law will be applied i*n good faith until such time as the legislative assembly resulting from the elections amends them or adopts new legislation in this area.*[40] The SOC Law was also enacted in hurry without giving a second thought on it. Apart from these two significant legislations, although drafted in haste and intended to be of *adhoc* use, there are other statutes, decrees and circulars, which are believed to supplement these major laws,[41] but also conflict with them on occasions. Despite these spade-works, there are still a lot to be done, as the criminal justice system is still in making.

The law on criminal procedures lacks provisions setting out summary trial methods. Therefore, the procedure for theft of chicken or green vegetable from a courtyard is dealt with the same procedure with which a burglary is dealt with. Even the proposed criminal procedure does not handle this issue well. In several jurisdictions abroad, summary trials are established ways to deal with some type of offences in a summary way.

The object of summary trial should generally be to have a record sufficient for the purpose of justice but not so long as to impede speedy disposal of cases. In essence, summary trial implies speedy disposal of a case which can be tried and disposed at once. Whether a case can be tried summarily or not must be determined by the offence complained of and the testimony of the complainant. It is not intended for a contentious and complicated case which necessitates a lengthy inquiry or which may involve significant imprisonment. The offences not punishable with imprisonment for life or imprisonment for a term exceeding five years such as theft, receiving or retaining stolen property, and similar other offences of low intensity and impact may be included in the list. If the mode of trial is sought to be altered in the midstream on the ground that the offence is such which cannot be tried in a summary way, the trial can always be conducted in the regular manner from its inception.

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[39] *Law on Criminal Procedure*(1993) (hereafter referred as SOC Law)

[40] UNTAC Law, Preamble, Para 12

[41] See, for example, Sub-Decree No 43 on the *Maintenance of Social Order in Phnom Penh, in Provinces and Municipalities* (Phnom Penh, September 10, 1994*); Law on Suppression of Gambling* (1996)

Another significant concept which might be worked on in Cambodia with all pros and cons examined in advance is the plea bargaining procedure which allows to discuss the charges against defendants and to agree on a reduced or modified plea that would spare the state the cost of a trial and guarantee the defendant a sentence more lenient than the original charge warranted. It simply requires guarantee that no one be coerced and that all pleas are voluntarily entered, with full awareness of the consequences. In the absence of this system, at present, –

- There are no devices to keep the courts from getting hopelessly clogged with criminal cases;
- There are no other desirable means of compensating for the harshness of the sanctions provided by the statutes;
- The existing laws do not allow for adjustment of inadequately developed legal rules regarding attenuating circumstances of felonies;
- There is nothing against the tendency to include more and more offenders within the sweep of the criminal justice system;
- Laws do not allow for consideration of legally irrelevant but factually important factors, ranging from poverty and despair to intense emotional distress.

17. Problems of sentencing

Sentencing has been characterised as the most controversial of all the stages in the criminal justice process. This is not surprising. At earlier stages, the defendant benefits from the presumption of innocence and certain safeguards are built into the adversarial system. Once the defendant is convicted, however, the focus shifts from these concerns to the imposition of punishment. Sentencing is a tough task in Cambodia because a majority of judges are not properly educated and trained and even the law graduates who serve in this capacity do not have adequate exposure. This entails an inevitable risk to the rights of the common people.

Fortunately, however, judges in Cambodia cannot impose a sentence of death for any offence.[42] They must choose from the variety of sentencing options ranging from incarceration to fine. A defendant may be fined and incarcerated, fined and placed on suspended sentence, or fined and ordered to pay restitution. Article 68 of UNTAC Law until recently laid down the following attenuating circumstances regarding sentencing:

> (1) Judges must weigh attenuating circumstances to reduce even below the minimum punishments prescribed in the present text and in particular the youth, the convicted person; the personal background of the convicted person which might reduce responsibility; the psychological or psychiatric state of an accused which is certified by a psychologist or psychiatrist; circumstances of the crime or

[42] Article 67, UNTAC Law; Article 32 of the Constitution

misdemeanour which rendered absolutely necessary the actions of the convicted person.

(2) For any accused person under 18 years of age, the punishments set out in the preceding articles shall be reduced by half for any accused under the age of 18, without prejudice for more favourable provisions contained in the standards defined by the existing administrative structures.[43]

In defiance to this, a recently enacted statutory law has created a disastrous provision:

> The judge shall not consider attenuating circumstances or reduction of sentence to below the minimum term or suspension of the sentence, for the sentences to imprisonment for felony and felony with forced labour. For misdemeanours, the sentences may be suspended partly or totally. In this case, the convicted person shall not serve out the whole sentence, provided that he she has not committed one of the offences as provided for in the preceding articles within a period of five (5) years after his/her judgement.[44]

With this provision, judges have lost much of their discretionary power regarding sentencing of premeditated murder, voluntary manslaughter, rape, robbery, and kidnapping and illegal confinement. Even if they are convinced that the minimum sentences in these cases will be unjust, unnecessary, counterproductive and inappropriate in view of attenuating circumstances, for example, cases involving minor, they will not be able to adjust the sentence to meet the requirement of justice.

Cambodia is yet to start the system of community supervision with special limitations as a form of sentencing. In countries, where the system of probation is at work, the court sentences a defendant to a term of incarceration but suspends that sentence for a specified period of time during which the offender is on probation. If the terms of probation are not violated, the sentence is not imposed; but if the offender violates probation, he or she may be incarcerated. Article 70[45] of UNTAC Law tries to imitate this system albeit on an insufficient way. The provision allows the court to suspend a sentence (partly or fully) in cases other than crimes as a matter of judicial determination. This allows an alternative to imprisonment, allowing a person found guilty of an offence to stay outside the prison at the discretion of the court.

Article 70, however, does not speak about a probation officer or a process that involves the activities of the probation system: preparing reports, supervising probationers, and providing or obtaining services for them. As such, judges do not write anything like prohibitions against travelling outside the state or country without permission; prohibitions against the use of alcohol and other drugs; prohibitions concerning associating with questionable people; requirements of holding a job; attending

[43] Article 68, UNTAC Law
[44] Article 8, Law on Aggravating Circumstances of the Felonies (2001)
[45] It states: "Suspended Sentences: Prison sentences, with the exception of those for crimes may be suspended totally or in part. In this case, the condemned persons shall not serve out the sentence provided that he or she does not commit one of the offences covered by the preceding articles for a period of five years after judgement." UNTAC Law

counselling, etc. Most of the judges do not know in what situation they should consider suspending a sentence, and what type of cases are appropriate to be considered.

Article 71[46] of UNTAC Law also provides for conditional release of convicted persons who have served half of their prison term for a misdemeanour or two-thirds of their term for a crime if the correctional officials feel that this release will serve to facilitate their reinsertion in the society. This release must be done by the concerned court itself on the advice of correctional officials. The provision somewhat draws on the system of parole in other countries, but Article 71 does not speak about any parole board, responsible for release decisions, and parole officers, who supervise parolees. Additionally, Cambodia lacks any norms for granting of parole or its revocation, and the need for certain due process requirements must be created.

One good thing about the UNTAC laws and other criminal laws of the country is that judges are not totally deprived of the power to determine the lengths of sentences within the fixed structures. When sentences are mandatory, judges have no discretion to alter them. Thus presumptive and mandatory sentencing leaves judges with little power to respond to the needs of the individual offender. Although Cambodian laws provide a relatively fixed punishment that corresponds with prevailing notions of harm, they allow for upward or downward adjustment on the basis of specific aggravating or mitigating circumstances. But the country has not yet developed any sentencing guidelines for the use of the judges.

At the heart of all guidelines in the other countries (whether created by the judiciary or mandated by the legislature) is a sentencing grid, most often in the form of a matrix, in which a ranking of the severity of the offence is combined with a defendant's criminal history or other characteristics to arrive at a recommended sentence or sentence range. There is still a great scope for judges, prosecutors and the defence lawyers of Cambodia to go ahead with training on sentencing options in order to –

- to prevent and condemn the commission of offences
- to promote the correction and rehabilitation of offenders

- to ensure the public safety by preventing the commission of the offences through the deterrent influence of sentences imposed and the confinement of offenders when required in the interest of public prosecution

- to safeguard offenders against excessive, disproportionate, or arbitrary punishment
- to give fair warning of the nature of the sentences that may be imposed on conviction of an offence
- to differentiate among offenders with a view to a just individualisation in their treatment

[46] It states: Conditional Release: (1) Convicted persons who have served half of their prison term for a misdemeanour or two-thirds of their term for a crime may be granted conditional release by the court which convicted them, if the court, having received the advice of correctional officials, feels that this release will serve to facilitate reinsertion; (2) Anyone released conditionally shall be required to serve out the remainder of the sentence if he or she commits an infraction of any of the preceding articles during the period of conditional release.

- to advance the use of generally accepted scientific methods and knowledge in sentencing offenders.

18. Problems of law of evidence

It must be acknowledged at this stage that there are very limited rules of evidence in Cambodia as yet. A human rights system without a comprehensive law of evidence is a tragedy. There are a number of rules, here and there, but they do not make a complete system. A comprehensive law therefore is needed with full coverage to issues like relevancy of facts, facts which need not be proved, oral evidence, documentary evidence, their production and effect, burden of proof, witnesses, their cross-examination, and so on.

In the absence of the law, many prosecutors or lawyers hardly raise questions on proof,[47] testimony in oral form, admissibility, relevance and test of materiality. The test of competence of evidence which relates to its legal significance to the case is also not debated. There are no requirements or rules of evidence that a particular item of evidence may not be admissible. For example, there is no rule of evidence to the effect that the defendant's character cannot be attacked by the prosecution unless and until the defendant tries to show that he or she is of good character. Hence unless the defendant did proceed in this direction, any attempt by the prosecution to introduce evidence of the defendant's character would be inadmissible on the grounds of incompetence.

Similarly, regardless of their knowledge of the facts of a case, certain individuals should not be permitted by law to testify for or against a defendant in a criminal case. Again, court procedures generally should require that the prosecutor proves the existence of the *corpus delicti* at trial before attempting to show the guilt of the defendant.[48] The judge should have express authority of allowing the introduction of evidence to establish the guilt of the defendant prior to the prosecution's showing the existence of all the elements of the crime. Trial judges rarely exercise their discretionary power to allow evidence to be submitted to prove a point out of order.

Even now there is no rule in Cambodia which states that hearsay evidence normally cannot be used because, when information is repeated, it tends to become distorted. The witness has no personal knowledge of the facts in question. Thus, the truth of the testimony depends on the truthfulness and the competence of the person from whom the information was heard rather than of the person testifying. For these reasons the hearsay rule is perhaps one of the most important yet most confusing rules of evidence in all jurisdictions. A defendant has the right to be confronted by the witnesses against him or

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[47] Proof may be defined as the combination of all of those facts – of all the evidence – in determining the guilt or innocence of one accused of a crime.

[48] The *corpus delicti* is the combination of all the elements of the crime. It is, of course, only logical that the prosecution be required to show that a crime has been committed before it can begin proving the defendant's guilt.

her and the right to cross-examine those witnesses. The hearsay rule also excludes written statements by people not in the courtroom to testify.

Besides the hearsay rule, another problem in this context is the inability of a trial judge to say no to evidence obtained and submitted to the court in violation of the rights of the accused. In many other jurisdictions, the exclusionary rule prohibits the introduction of any evidence that does not meet the strict standards of the law of evidence. Evidence found as a result of illegally received information cannot be introduced as evidence at trial. The prohibition against unreasonable search and seizure would not be effective unless all evidence seized illegally was excluded from trial. This rule serves two different purposes. First, if police violate suspects rights in order to obtain evidence 'to be used at trials, the government is setting a negative example. It breeds contempt for law. This is a symbolic purpose. The second reason for the exclusionary rule is a practical one. It is assumed that the rule prevents police from engaging in illegal searches and seizures. The existence of this rule leads police departments to increase the quantity and quality of police training, thus educating officers more extensively in what they may and may not do in the area of search and seizure.

19. Problems of civil law and procedures

Cambodia does not have a Civil Procedure Code or a similar comprehensive arrangement as in the case of many other jurisdictions. Almost 60 to 70 percent of the litigation in modern Cambodia is said to be civil in nature. It is in the civil courts that a majority of Cambodian peasants, women, poor and downtrodden people suffer in terms of human rights and access to justice. This fact has never been taken care of.

The latest Cambodian Code of Civil Procedure [CCCP], enacted in Cambodia in 1963, which many elderly judges and prosecutors of Cambodia still remember, appears to have assimilated all reforms of procedural law occurred in France till 1958. Many problems related with civil procedures under the 1935 Code were addressed in France only in 1965 when many far-reaching reforms were made. Thus, the Cambodian Code of 1963 also had the impact of both good and bad aspects of the 1935 Code. Various attempts were made in subsequent years to explain the Code, and manuals were written to help implement the procedures in a correct perspective. One such manual was issued in 1965. Another such manual came in 1967 as well. The available Khmer language manuals also do indicate that the Code had undergone a number of minor amendments until mid-seventies. The Code of 1963 however was released in Khmer, notwithstanding the fact that it was enacted in French.

During the Khmer Rouge annihilation process in 1975-79, the Civil Procedure Code of 1963 was also dispensed with. All existing courts were pulled down, and justice machinery trampled. But they could not establish any alternative system to fill the vacuum in the process. Even after 1979, when the Khmer Rouge lost the final battle, the 1963 Code was forgotten in favour of various ad hoc arrangements on which there are little reliable references.

The only important law that had some intervention on civil court traditions of modern Cambodia is the 1984 Circular of the Ministry of Justice. This Circular is still in force, although certain provisions have become defunct due to the transformation of Cambodia from a people's republic to a constitutional democracy. Apparently, there were a number of ad hoc arrangements from 1979 to 1984, but they did not exist as legal institutions capable to survive in the court practice. Various types of standing orders were issued based on the exigency of the hour, but none of them were taken up as a reference of a rule for the future. It was only in 1984 that the then communist government issued a new circular dealing with some type of important procedural norms. With the promulgation of the new Constitution in 1993, many of the communist and authoritarian patters established by the 1984 circular have been discontinued. Except for what were expressly provided by other provisions in it, the rest of the civil court practice still had to build upon the lost traditions of Cambodia. It is important to understand that there are still many good practices which can be codified and further refined.

Most of the present problems regarding civil procedures relate with summons and discovery, appearance of parties and consequence of non-appearance, inspection, production, impounding and return of documents, summoning and attendance of witnesses, attachment of property, and execution of orders. There is a legal vacuum regarding suits by or against the government or public officers in their official capacity.

The question of human rights of civil parties is something nobody ever thought of. Procedural matters are always important. But the focus most of the time is on criminal law and processes. The role of government in this area is threefold. It should (a) ensure that just and efficient court services are provided; (b) assure that mechanisms are in place to provide cost-effective access to the civil justice system for people who could not otherwise afford it; and facilitate the development of logical and comprehensible structures and pressures for efficiency in all parts of the system.

There should be a greater degree of focus on conciliation methods. A range of procedural methods should be available to manage different types of simple and complex cases. The rules should give full details about investigation of a civil case, case preparation, interlocutory orders or injunctions, hearing, and enforcement of judgement. There should be a focus on the objectives of reducing delay and cost. They should incorporate effective incentives and penalties. Penalties should be proportionate, targeted, timely and foreseeable. A system with summary procedure is necessary. That means, in essence, that the law should focus on the fast track as well as slow track techniques. Meanwhile, the existing court fee structure should be amended to reflect the cost of court services. There should be separate arrangements for funding cases that raise issues of wider public interest like land cases affecting many rural poor. Conditional fee arrangements should become available for all civil proceedings. The case for contingency fees should be reconsidered.

Civil legal aid is something very important in any country with a number of poor civil litigants. Attempts may be made to consider the interaction between the civil justice and legal aid reform programmes. They are indeed mutually consistent and reinforcing. But

creation of structures to manage the implementation and secure the benefits of change is essential.

Conclusion

As noted at the beginning, the objective of this paper is to set forth the problems of the Cambodian courts and adjudication system as they are seen from the grassroots. The focus is on the core problems, rather than other peripheral matters. If these core problems are handled effectively, the peripheral problems will disappear without much hue and cry. Although no attempts are made to suggest solutions for these problems, they are not very difficult to find.

It need not be overemphasised that building the capacity of the judiciary and adjudication system is a long-term process. This process is bound to have both the structural and technical components. On technical side, the interventions from different quarters have contributed significantly in building the system. This needs to go ahead for few more years. But they alone are not enough.

The core problems that are found at the trial courts or provincial level have strong links with the situation at the centre, especially the infrastructural matters. These matters must be sorted out as a priority work. Additionally, courts have problems because those functionaries at the centre who have responsibility in this regard either do not want to have solutions, or cannot find solutions because of their own limitations. Solution finding endeavours must be informed by ground realities of the legal system. Structural reform by way of review and change of the inappropriate rules governing the legal system, usually reflected in constitutional provisions and laws, is a preliminary step in rule of law development. Together with it, programmes need to be undertaken to formulate specific, well-grounded proposals for improvement. Poorly functioning or biased judicial system contributes to conflict when they support the arbitrary use of political and economic power and help maintain the *status quo* by denying citizens legal recourse against the state or against privileged non-state actors for wrongs against individuals or groups, including genocide, torture, expulsion, persecution, or other political violence.

Building a state system in a country which had unfortunately gone through a trauma of several civil wars and has its institutions totally destroyed by various autocratic regimes for decades, is a challenging task and may need utmost patience to gradually evolve a workable process that can restore the lost faith.