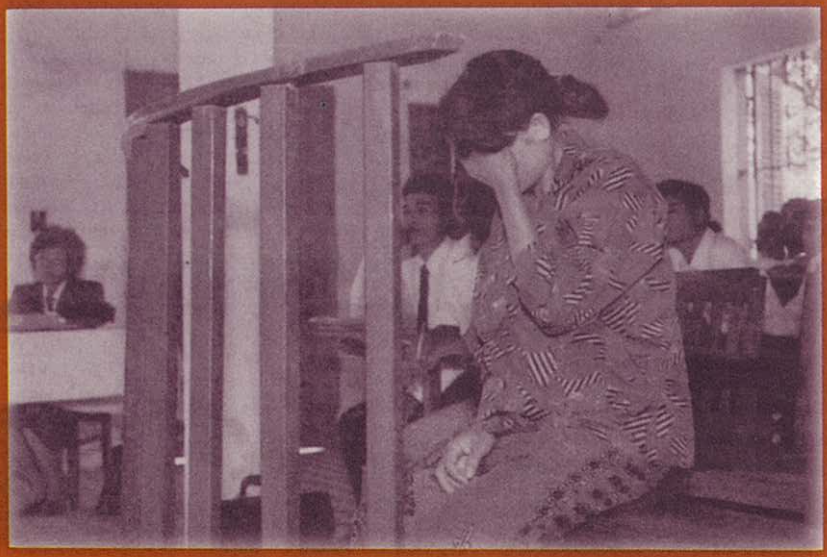
Problems Facing the Cambodian Legal System



Basil Fernando

Foreword by the Honourable Justice Michael Kirby AC CMG' and a Message from the U.N. Special Rapporteur on Independence of Judges and Lawyers, Dato' Param Cumaraswamy

AN ASIAN HUMAN RIGHTS COMMISSION PUBLICATION

PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM

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BASIL FERNANDO

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Basil FERNANDO, a Sri Lankan lawyer, was a senior human rights officer with the human rights component of UNTAC and later the first officer in charge and the chief of the legal unit of the Cambodia office of the U.N. Centre for Human Rights. He is presently the executive director of the Asian Human Rights Commission and the Asian Legal Resource Centre.

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ABBREVIATIONS

CPP	-	Cambodia People's Party
DK	-	Democratic Kampuchea
BLDP	-	Buddhist Liberal Democratic Party
FUNCINPEC	-	United Front for an Independent, Neutral and Free Cambodia
KNP	-	Khmer National Party
KPRC	-	Kampuchean People's Revolutionary Council
NADK	-	National Army of Democratic Kampuchea
PDK	-	Party of Democratic Kampuchea
PRK	-	People's Republic of Kampuchea
SNC	-	Supreme National Council [of Cambodia]
SoC	-	State of Cambodia
UNCHR	-	United Nations Centre for Human Rights
UNTAC	-	United Nations Transitional Authority for Cambodia

FOREWORD

By The Honourable Justice Michael Kirby AC CMG*

At a defining moment in the history of Cambodia, I had the privilege of working with its people to help build a society respectful of the rule of law, fundamental human rights and the independence of judges and lawyers.

My adventure began in the No 1 courtroom of the Supreme Court Building in Phnom Penh in July 1993. This was during the phase when Cambodia was under by the United Nations Transitional Authority for Cambodia (UNTAC). Shortly afterwards, when the Kingdom of Cambodia was re-established, I was appointed as the Secretary-General's Special Representative for Human Rights in Cambodia. At the seminar and later when working with the U.N. Centre for Human Rights in Phnom Penh, I came to know and greatly to respect the integrity, dedication and fearlessness of many marvellous officers of the United Nations who had dedicated their lives to building a better world. Basil Fernando was then the Chief of the Legal Assistance Unit at the U.N. Centre for Human Rights. I came to know his sterling qualities.

Although Basil Fernando has completed his mission for the United Nations and departed from Cambodia to work in a larger theatre of human rights, he has left (as I have) part of his heart behind. He continues to work for the improvement of human rights in Cambodia. After decades of revolution, war, genocide, invasion and subjection to autocracy, the brave hopes of the United Nations, and people around the world, were that UNTAC would usher in a pluralistic democracy, constitutional institutions and a restoration of respect for human rights. The experience of many countries shows that these objectives are difficult, or impossible, to attain without "competent, independent and impartial" courts established by law. Only such bodies can defend the weak, the vulnerable and the unpopular from the brutal power of money and guns. Although some progress has been made

* President of the International Commission of Jurists; Justice of the High Court of Australia; formerly Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia.

towards the objectives of the United Nations, most especially the rise of valiant proponents of human rights and the establishment of a plethora of insistent civil society organisations, most of the recommendations of the July 1993 seminar and most of those made by me as Special Representative of the Secretary-General, remain unimplemented. This book is a record of the many continuing failures in the Cambodian legal system. Yet it should be looked upon positively - as a challenge to the stalwart and enduring Cambodian people, and an agenda for action by their leaders.

I challenge anyone to read Mr. Fernando's analysis of the legal scene in Cambodia and to emerge without a sense of frustration, distress and determination to help to put things right. Many of the fundamental constitutional bodies have still not been established because of political wrangling. Still, many of the systems introduced during French colonial rule, inimical to independence of the judiciary, remain in place. Some judges still telephone the Ministry of Justice for guidance on how a case should be determined. Still in operation is the communist system of public prosecutors determined to obtain a confession from the accused at all costs. This is a relic of the autocracy that came to Cambodia with the Vietnamese invasion; although at least the invaders helped to rid the country of the genocide and chaos of the Khmer Rouge. Still, judges, prosecutors and citizens lack modern laws to govern their conduct. The legislative programme of the National Assembly still remains slow and uncertain. Still, the military and some officials can place themselves beyond the effective control of law and the civil power. Still, effective remedies to strike down laws and actions that are inconsistent with the Constitution and fundamental rights, remain imperfect or unavailable. Reports of extra-judicial killings and comments attributed to governmental leaders justifying or even supporting them, still continue to be a source of great anxiety.

My successor as Special Representative, Ambassador Thomas Hammarberg, has continued, like me, to insist on the centrality of building an effective legal system for the practical protection of the rule of law and fundamental rights in Cambodia. Some progress has been made. Proposals are currently before the National Assembly substantially to increase the salaries of the judges without which the risk of corruption is ever present. Legal education is increasing. The foundations for a civil society have been laid. The Cambodian people have tasted freedom, protection of fundamental rights and the rule of law during UNTAC. Above all people of the world, they know the alternatives.

The strength of this book is that it does not only concentrate on the problems facing the Cambodian legal system. It contains an agenda for change and for action. I certainly agree with the author that the impetus for, and direction of, such change must be found in the culture and traditions of Cambodia. But it must also be found in the universal principles of human rights to which Cambodia has subscribed and by which its government and officials are bound. I hope that Basil Fernando will continue to share his wisdom and experience with the people of Cambodia and those of us in the wider world who support the efforts to free its people from the shackles of the past, A modern society and a prosperous economy demand au effective legal system. In their hearts all of Cambodia's people know this. That is why a book like this is so important and timely.

Michael Kirby

Canberra

1 July 1998

A MESSAGE

from Dato' Param Cumaraswamy, the U.N. Special Rapporteur on the Independence of Judges and Lawyers

The principle of separation of powers in government is the bedrock of a democratic state based on the rule of law. The judicial power is one of the three powers of a democratic government. It is pursuant to this power that justice is dispensed in disputes, not only between citizens and citizens, but also between citizens and government, between government organs and agencies, and between states in a federation. Hence the need to vest this judicial power in a mechanism independent of the legislative aud executive powers of the government, with adequate guarantees to insulate it from political and other influences, in order to secure its independence and impartiality. Understanding of, and respect for this arrangement in constitutional government, is a *sine qua non* for the effective and sound system of justice within which judges can discharge their roles independently and impartially. It is also essential that the judiciary not only remain independent, but also be perceived by all consumers of justice to be so.

As recent as 1993, 171 independent sovereign states gathered in Vienna and declared in the Vienna Declaration of Programme for Action to provide for, *inter alia* - "an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments ....." in their respective states. In addition to international standards, regional standards should not be overlooked. In the Asian context, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995) adopted by thirty-two regional chief justices is an additional source for standards in Asia.

While modern constitutions provide for an independent judiciary, often, for various reasons, difficulties are encountered in the implementation process. Countries in transition, where there are financial and human resource constraints, often find application of the international and regional standards burdensome. While some use these constraints as an excuse to resist such application, there are others who's concern is genuine. These countries need all possible understanding and assistance from the international

community to progressively achieve these standards while inculcating the values of judicial independence in the process.

Finally, a sound independent justice system cannot be achieved without providing a political environment respectful of all the basic constitutional values for good government. These values include accountability and transparency in all public institutions, including private institutions and corporations dealing with the public. It is only within such a governmental structure that an independent judiciary can function effectively. It is therefore essential that when structuring an independent justice system other constitutional institutions are given attention and are provided for, including provisions for an independent legal profession, efficient and trustworthy enforcement and prosecutorial agencies, a free press and respect for constructive non-governmental organisations.

Dato' Param Cumaraswamy
Special Rapporteur on the Independence of Judges and Lawyers

INTRODUCTION

This book examines the nature of the Cambodian legal system. Some people assume that a civil law system (the French system) exists in Cambodia. The basic thesis of this book, however, is that it is the socialist system of justice that is found in this country.

Since the Paris Agreement and the intervention of the United Nations Transitional Authority for Cambodia many attempts have been made by the State and international agencies to bring about a transformation of the system. Given the devastation suffered by Cambodia which is far beyond any human can imagine, the impact of such attempts for change is considerable.

However, such impact has remained peripheral rather than substantial. The reasons for this, in my view, are that the assumptions on which such work has proceeded have been conflicted with the actual historical development of the Cambodian legal system from 1975 to 1993. This book attempts to demonstrate some aspects of that conflict.

The development of the legal system has an enormous significance to the political development of Cambodia. The working of the Constitution of Cambodia, adopted in September 1993, has been virtually made impossible due to the contradictions arising from the legal system. Sometimes it is argued that political change must precede any change in the legal system. However, it can be argued with equal plausibility that political change in Cambodia is at a dead end due to lack of a legal mechanism to effect such change.

The quick fix approach to Cambodian political and legal system has already proved futile. On the other hand, attempts to return to the pre-Khmer Roudge, French- Sihanouk era is also impossible as Pol Pot's "wipe out the past policy" was so complete. Only programmes with a long term perpective for reforms can break though the anarchy which has produced a peculiar form of authoritarianism in Cambodia.

This book consists of essays on the findings at a consultation on the judiciary in Cambodia and several papers related to the theme.

I must express my gratitude to Justice Michael Kirby who has provided a foreword for this book. His contribution to the discussion on the Cambodian legal system is very extensive and important. I thank the editor of Phnom Penh Post and the journal of the Centre for Independence of Judges and Lawyers (CIJL) for the papers reproduced from their publications. This publication would not have been possible, without the support of Lone Høgel of the DanChurchAid. I must also thank many people, mostly the Cambodians themselves, who have managed to keep up a lively discussion on the issue despite the dismal situation that they continue to face in their country. The sorts of contradictions they face are similar to those that are found in the writings of Alexander Solzhenitzin.

The complexities involved in the Cambodian legal system constantly remind me of one sinister character, Andrei Vyshinsky, Joseph Stalin's prosecutor who distorted legal principles to provide a semblance of legitimacy for the totalitarian State. His imprint still remains in this once happy country that is trying to rise from the ashes of destruction caused by Stalin's disciples. In essence, achieving change in the legal system of Cambodia is to exorcise the ghost of Vyshinsky out of the Cambodian soil.

Basil Fernando

Hong Kong SAR

3 July 1998

PART I

SEMINAR ON
CAMBODIAN JUDICIARY

14-20 MARCH 1998

HONG KONG

STATEMENT & RECOMMENDATIONS
THE REPORT AND THE SEMINAR PAPERS

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2. Criminal law and civil law mixed-up
3. Problems relating to the independence of judiciary
4. Circulars of Ministry of Justice
5. The role of the lawyer
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THE STATEMENT AND RECOMMENDATIONS OF THE PARTICIPANTS

PREAMBLE

The Constitution of the Kingdom of Cambodia was promulgated on 24 September 1993. The time has now come to review the implementation of the highest law of the land and to make recommendations for making progress in achieving the objectives of the Constitution.

Article 1 of the Constitution states that the Kingdom of Cambodia shall be ruled "according to the Constitution and to the principles of liberal democracy and pluralism." Thus, the principles of liberal democracy and pluralism are part of the law of the land in Cambodia. Furthermore, under Article 134, the system of liberal and pluralistic democracy cannot be revised. Thus, the principles of liberal democracy and pluralism are an irrevocable part of Cambodian law and provide the foundation for its legal system.

Moreover, since liberal democracy is the foundation of the legal system, it is implied that all notions, conceptions and practices inconsistent with it have necessarily been abrogated and nullified by the very promulgation of the Constitution of the Kingdom of Cambodia.

However, notions, conceptions and practices of an earlier era do not practically come to an end by mere adoption of new notions, conceptions and proposed practices. Conscious attempts must be made to repudiate the past and to implement the principles enshrined in the Constitution. Such conscious action implies attempts by the people to understand the Constitution and the deliberate attempts made by them to develop means to implement it.

I. Checks and Balances and the Independence of the Judiciary (As Guaranteed by the Constitution of 1993)

A. Constitutional Provisions

In its Preamble, the Constitution of Cambodia of 1993 spells out clearly that the country's system of government is a "pluralistic liberal democracy guaranteeing human rights, respect for the law and having high responsibility for the nation's future destiny of moving towards perpetual progress, development, prosperity and glory."

As Article 51 stipulates, the "Cambodian people are the masters of their own destiny. All powers belong to the people." The Cambodian people "exercise these powers through the National Assembly, the Royal Government and the Judiciary." The same article stipulates further that the "legislative, executive and judiciary powers shall be separate." The Constitution, however, provides for more than these three branches of government. These are the king, the Supreme Council of the Magistracy, the Constitutional Council and the National Congress.

The Cambodian people elect the National Assembly every five years through "a free, universal, equal, direct and secret ballot (Articles 76 and 78). The National Assembly gives its vote of confidence to the government or votes the government out of office (Articles 98 and 100).

The National Assembly follows up and oversees government actions through its adoption of bills, budgets and programmes proposed by the government and through its questions to the prime minister and ministers.

The National Assembly has exclusive powers to legislate (Article 90). The Constitutional Council can check the powers of the Assembly through the examination of the constitutionality of the laws it has enacted (Article 117).

The king appoints a dignitary to form a government; and once this government gets the vote of confidence from the National Assembly, he appoints the prime minister and members of the government (Article 19 and 100).

The government has executive powers (Article 99). Either collectively as a government or individually, ministers are responsible to the National Assembly (Article 102).

The king ensures the proper execution of public powers (Article 9).

The judiciary can check government actions through its adjudication of administrative cases brought to the courts of law (Article 109) as citizens have the right to make complaints or file claims against any breach of the law by state and social organs or by members of such organs (Article 38).

For its part, the government can propose to the king to dissolve the National Assembly when the Assembly votes a motion of censure twice within 12 months (Article 78).

The Constitutional Council safeguards respect for the Constitution, interprets the Constitution and laws (Article 117). It ensures the constitutionality of laws and decisions made by state organs (Article 131).

The National Congress, where the people meet to hear reports on the situation of the country, raises issues and makes requests for their resolution to the state authority (Article. 128). It can check the powers of that authority.

The Constitution stipulates clearly the independence of the judiciary (Article 109) and has other provisions to ensure its independence. Moreover, the judiciary has exclusive judicial power (Article 111). This power is granted to the Supreme Court and other courts (Article 109). The king guarantees its independence and has the assistance of the Supreme Council of the Magistracy in this matter (Article 113). Judges are appointed by the king at the recommendation of the Supreme Council of the Magistracy (Article 21). They have a separate statute regulating their employment, ranks and discipline (Article 116). Judges cannot be dismissed except through disciplinary actions taken by the Supreme Council of the Magistracy.

The powers of prosecution rest with the Department of Public Prosecution (Article 112). Public prosecutors have a separate statute regulating their employment, ranks and discipline (Article 116).

The Constitution guarantees fair trials in a court of law, and confessions obtained by physical or mental force are not admissible as evidence of guilt (Article 38).

Furthermore, criminal laws and procedures initiated by the United Nations Transitional Authority in Cambodia (UNTAC) in 1992 and the State of Cambodia (SoC) Criminal Procedure Law and the SoC law on the organisation of the court system, both passed in early 1993, have adequate provisions to ensure fair trials.

B. PRACTICE

In practice, there are no checks and balances and no separation of powers, and the judiciary is not independent. The Constitutional Council does not exist yet nor does the National Congress. The Supreme Court of the Magistracy includes the minister of justice (from the executive branch) as vice chairman and has only convened once. In reality, it is not functioning yet.

The king is not willing to exercise all of the constitutional powers he has, such as the power to ensure the independence of the judiciary. He is content "to reign but not rule"!

The National Assembly has become mainly a rubber stamp for the government. Only a few MPs have dared to take issue with the government, and they are overwhelmed by the rest who are either scared or are obliged to tow the party line.

The judiciary is still dominated by judges appointed by the Communist Party and by rules and procedures befitting the communist regime. Judges lack professional training and are under the control of the minister of justice who can still take disciplinary actions against judges regardless of the existence of the Supreme Council of the Magistracy.

Public prosecutors are also under the tutelage of the minister of justice. The concept of investigations is still based on confessions made by the accused to the police. Investigating judges, whose job it is to supervise police investigations, exercise the powers of both public prosecutors and judges. Judgements are decided before actual trials.

C. RECOMMENDATIONS

1. There is a need to take measures to ensure that practices are as prescribed by the Constitution and existing laws.
2. All institutions provided for in the Constitution should be established and should function according to the Constitution.
3. All should recognise that only the National Assembly has legislative powers. Decisions by the other branches of government, other state institutions and organs are not laws. All should also recognise that only the judiciary has judicial powers, that the other branches of government and other state institutions and organs have no such powers (the Constitutional Council has powers to adjudicate conflicts concerning the general elections) and that there should be no interference from the government

in the judicial powers of the judiciary.

4. The Supreme Court and other courts should be recognised as having exclusive judicial powers. The Supreme Court should have final powers of appeal and should have powers to adjudicate human rights cases.

5. The Ministry of Justice should be in charge of administrative affairs, provide support for the proper functioning of all courts and should expand these courts to meet the needs of the people at the least convenience to them.

6. A Department of Public Prosecution should be established as an independent ministry, independent both from the Ministry of Justice and from the Ministry of Interior. Investigating judges should work for this ministry.

7. A law on evidence and other laws need to be adopted to define investigation procedures and trial procedures to guarantee the presumption of innocence and to ensure fair trials. A Law Commission should be created to draft laws for the government and for the National Assembly. Its immediate task is to compile all exiting laws and adopt U.N. standards and harmonise them in a consistent way so as to form a code.

8. Judicial police officers, public prosecutors, lawyers and judges should be further equipped ethically and professionally to have fair trials and to render justice to both victims and their assailants.

II. The Separation of Powers under the Cambodian Constitution

A. General Principles

The Constitution envisages the establishment of a liberal democratic system and structure . No liberal democratic system and structure will be possible, however, without a separation of powers between the executive and the legislature, between the legislature and the judiciary and between the executive and the judiciary. The Constitution of Cambodia provides for such separation of power.

B. The Executive

Though the king is the head of the government, the important principle is that he "shall reign but shall not govern" (Article 7). This provision can never be amended (Article 17).

Therefore, the question is, Who governs? The answer is in Article 99: "The Council of Ministers is the Royal Government of Cambodia." But the members of the Royal Government shall be collectively responsible to the National Assembly (Article 102), and every member of the Royal Government shall be individually responsible to the prime minister and the assembly for his or her own conduct. While the executive may execute and implement the laws made by the National Assembly, there is no provision in the Constitution enabling the executive to make any law as such.

Therefore, if any minister or executive branch member purport to make any law or any sublaws or decrees, all such laws or subdecrees should be considered as unconstitutional. Similarly, if any minister or any other individual make any amendment of the law on their own, such an amendment is unconstitutional and null and void.

C. The Legislature

Under the Constitution, the National Assembly is the legislative body. Under Article 90, the "Assembly shall be the only organ to hold legislative power. This power shall not be transferable to any other organ or individual." This categorical assertion in the Constitution rules out any other institution or individual making any laws. In other words, it is only laws that are adopted by the National Assembly that the king is required to promulgate. Therefore, if any minister or any other individual or body has purported to make any law, this law will be unconstitutional.

However, there could be a delegation of power to any minister or any government authority to make rules under any law passed by the National Assembly; but in all such cases, it is necessary that all such rules should be approved by the National Assembly. Therefore, if there are any rules made by the government or any department and if these rules are not approved by the National Assembly, all such rules should be considered unconstitutional. The power to make rules, being a delegated power, has to be exercised strictly in accordance with the law passed by the Assembly and not otherwise.

D. The Judiciary

Under Article 109, judicial power has been recognised as an independent power. Further, under Article 111, judicial power shall not be granted to the legislative or executive branches. Thus, under the Constitution, it is the judiciary, and the judiciary alone, that can exercise judicial powers. The judiciary includes the Supreme Court and the lower courts of all sectors and at all levels. It means that in the matter of the administration

of justice no other organ of the State can interfere. Therefore, if the Ministry of Justice or any official, such as the prosecutor, interferes in the administration of justice, all such acts are unconstitutional.

One important feature of the Constitution is that even the executive has no role to play in the appointment of judges or in the transfer or removal of judges. That power has been given to the Supreme Council of the Magistracy, which is an independent body - independent from even the executive (Article 115).

The only function assigned to the Department of Public Prosecution is the right to file criminal cases.

If there is any interference in the administration of justice by the executive or by any department, this interference is unconstitutional.

Under Article 113, the king shall be the guarantor of the independence of the judiciary. This is a power specially appearing in Chapter IX and not in Chapter II. In other words, the king is not bound to listen to the executive when it comes to the question of guaranteeing the independence of the judiciary. This power can be exercised by the king on his own.

Therefore, the people and all concerned in the independence of the judiciary can urge upon the king to take all steps which are necessary to guarantee the independence of the judiciary. The king is duty bound to take steps in this regard. This is the only way to have the rule of law and not any rule of men.

III. The Supreme Court

The Constitution has enshrined the liberal democratic principle of the independence of the judiciary. It further states that "the authority of the judiciary shall be granted to the Supreme Court." Thus, like in all liberal democracies, the Constitution has envisaged that the Supreme Court of Cambodia is the most powerful court in the country. Article 109 states that "the judicial power shall be an independent power." It is the Supreme Court that must ensure this independence. Therefore, it is essential that the people should have access to the Supreme Court. The people can have access to the Supreme Court only when the Supreme Court has public hearings. The Supreme Court must make itself available to accept lawsuits filed by the people. There is an urgent need for the Supreme Court to take action on this matter and, thus, exercise its judicial power.

Article 31 of the Constitution recognises the human rights of all people living in Cambodia. This is written on the basis of the Paris Agreements

which stipulated that an enforceable Bill of Rights should be a part of the Constitution of Cambodia. This was included to prevent a return to past practices and a desire to restore all of the rights lost during the destruction caused under the Khmer Rouge regime. However, the Bill of Rights contained in the Constitution has no provisions for enforcing the rights recognised under the Constitution.

The protection of constitutionally recognised rights is the duty of the Supreme Court. The Supreme Court must make facilities available to the people to come before it through petitions, and it must hear these petitions. The procedures for making such petitions can be made under the Supreme Court's rules. The Supreme Court can make the necessary provisions for these rules under its inherent powers. The lack of such rules act as a fundamental impediment against the enforcement of human rights. If constitutionally recognised rights are not to remain a dead letter, as they are now, the Supreme Court must make the rules which regulate the procedures under which people can come before it and have their grievances redressed.

The Supreme Court is also the highest court of appeal in the land. The Supreme Court must make rules for the receipt of all applications of appeals and for hearing and disposal of such appeals in public. In all cases, lawyers must be allowed to be present and to argue on behalf of their clients . The Supreme Court must give their judgements in writing. Such judgements must be considered public documents, and the public should have access to these documents.

The rules under which the Supreme Court functions must be uniform for all cases of a similar nature. To accept special arrangements made by the government for the hearing of special cases or to delegate its powers to other bodies would be an express violation of the Constitution as the Constitution places judicial power entirely in judiciary.

IV. Department of Public Prosecution

A. Law

Article 112 of the Constitution of the Kingdom of Cambodia states: "Only the Department of Public Prosecution shall have the right to file criminal suits."

According to this article, the Department of Public Prosecution has rights and a responsibility to investigate crimes and file criminal suits. Therefore, the Department of Public Prosecution shall decide on its own to investigate and prosecute a case.

B. Facts

According to the Law of Establishment of the Courts and the Law on Criminal Procedure of the SoC of 1993, the General Public Prosecutor Department and other public prosecutor offices attached to other courts are independent. The general public prosecutor attached to the Supreme Court has no power to supervise or control the other public prosecutors attached with other courts, including the general public prosecutor attached to the Court of Appeal. In practice, every general public prosecutor and other public prosecutors are directly under the supervision of the Ministry of Justice.

According to the Law on Criminal Procedure of 1993, the public prosecutor cannot investigate cases, and only investigating judges can investigate cases. Therefore, the following consequences occur:

- The public prosecutor does nothing in criminal investigations; he or she does only what the investigating judge shows him or her in the dossier;
- The minister of justice can interfere with the public prosecutor's affairs easily;
- In one case, the police did their work in only 48 hours;
- The police tend not to do their job properly because they depend on the investigating judge, and thus, if the investigating judge cannot find enough evidence and the accused is acquitted, it is the fault of the investigating judge;
- The trial judge can be easily biased because he or she is of the same rank as the prosecutor who has concluded that there is enough evidence to go to trial, so much so that the trial judge presumes that the defendant is guilty;
- The police have skills in investigation, but they have no power and not enough time to complete their investigation.

C. Demands

1. The public prosecutor's office shall be separated and far from the court.
2. The police and public prosecutor have power to investigate crimes.
3. The public prosecutor shall have the power to order or advise the police to find more evidence during the criminal investigation.
4. The public prosecutor shall be independent from the executive branch. It

shall have a separate budget.

5. The public prosecutor shall be appointed by the king in accordance with the recommendation of the Supreme Council of Magistracy (Article 115).

6. The investigation shall end with the beginning of the trial.

7. The burden of proof rests with the public prosecutor, and he or she has the duty to produce the evidence at the trial.

8. The post of investigating judge shall be abolished (the term "assistant public prosecutor" [or other words in Khmer], who receive the same training as the public prosecutor, can be used to replace the post of investigating judge and to assist the public prosecutor in their investigations.)

9. The public prosecutor shall be recruited from among the lawyers who have at least five years of experience in legal practice and who have been trained as a public prosecutor for at least one additional year.

10. The Department of Public Prosecution shall be organised in only one institution and divided into branches. The Department of Public Prosecution shall be chaired by a general public prosecutor, who shall bave the power to supervise all public prosecutors in the country.

11. The Ministry of Justice shall have no power to control the affairs of the public prosecutors.

12. The current system of an independent public prosecutor attached to every court shall be abolished. The Department of Public Prosecution should be organised as a hierarchical organisation, such as the Department of General Prosecutor, Department of Provincial or Municipal Prosecutor, etc. Such departments exist in many countries, and technical assistance from these countries may be obtained in reforming this institution. What is essential is to abandon the socialist model of prosecutions on which the existing model is based.

13. The public prosecutor shall function according to traditions established in a liberal democracy and on no occasion shall the prosecutor be allowed to discuss the judgements of pending cases with the judiciary.

V. Criminal Investigations in Cambodia

Laws and procedures relating to criminal investigations and the administration of criminal justice are found in two acts, the Criminal Law and Procedure Act of 1992 and the Law of Procedure Act of 1993. A noticeable factor in practice is that criminal investigations are not conducted as stipu-

lated in these two acts.

The two law enforcement agencies which investigate crimes - the judicial police and military police - do so according to practices and methods which existed during the period from 1979 to 1992 before the enactment of these procedural laws.

The approach to criminal investigations is influenced by the concept of investigations operative in a politically motivated communist legal structure where the predominant interest is the protection of the State as against the liberties of an individual. In a totalitarian state with its secret police and secret courts, what is administered is not law but orders and executive decrees with the view to get affirmative answers. In other words, the purpose is to get confessions.

In Cambodia from 1979 to 1992, police investigations, the prosecution of alleged crimes and trials in people's courts were conducted with the same perspective. Even after the promulgation of the 1993 Constitution and the criminal procedure codes mentioned above, criminal investigations into crimes, followed by prosecutions and trials, adhered to the same rationale of a totalitarian state, thus, nullifying the notion of fair investigations and concepts of liberal democracy enshrined in the Constitution. The judicial police, military police, investigating judges, prosecutors and trial judges in making investigations, instituting prosecutions and hearing trials could not depart from the old practices to which they were accustomed and psychologically orientated. Even three years after the enactment of the Constitution and the criminal procedure laws, neither the judges or law enforcement officers could break away from their mode of operation despite the training and teaching programmes to which they were exposed. Rather, law enforcement officers, prosecutors and judges have acted as collaborators with a common design to convict suspects on the basis of confessions extracted from the suspects while they are in the custody of the judicial police or military police. This practice is quite contrary to the concept of investigations into crimes under liberal democracies.

In reality, the concept of investigation does not exist within a socialist system. In such a system, the emphasis is on the confession. In the socialist trial, the confession is the technique by which all liability is fixed. The investigators, the prosecutor and the judge collaborate in gaining and perfecting a confession in a manner that the conviction of the accused becomes socially convincing. The concept of a criminal trial in a liberal democracy is entirely different.

Therefore, it is necessary to examine and understand the approach adopted by law enforcement officers in investigating crimes in liberal democracies. The concept of criminal investigation under such a system absorbs a wide range of concepts involving rules of evidence, constitutional law and proper procedures. The first principle on which an investigating officer commences their investigation and proceeds to arrest a suspect is to observe whether there is sufficient evidence available following information about a crime. Only if there is sufficient evidence gathered after an independent investigation will the officer arrest a suspect, if it is an offence for which a person may be arrested without a warrant. The principle behind the arrest of a suspect and proceeding to charge him or her is the availability of evidence where a conviction is more likely than not.

Contrary to the practice which prevails among the military police and judicial police in Cambodia, the first thing that an investigating officer who arrests a suspect in a liberal democracy does is to question him or her under caution. To question a suspect under caution means that, before a suspect is subjected to interrogation, he or she is cautioned by the officer that the suspect may remain silent in answer to the charge if he or she so wishes. This right is recognised under the Cambodian Constitution to which the International Covenant on Civil and Political Rights (ICCPR) has been incorporated. Furthermore, soon after arrest, the suspect should be informed of the reasons for their arrest even where such reasons are obvious.

In some countries where liberal democracies prevail, there are also codes of conduct which police officers have to follow in conducting an investigation of a crime. Consequently, after their arrest, a suspect should be informed that there is such a code of conduct and that he or she has the right to read it, and a copy must be provided to them upon request. The suspect shall also be informed of their right to mention the name of a person who should be informed of their arrest and also of their right to a lawyer. In addition, if a police officer arrests a person on suspicion of committing a crime, such suspicion should be based on reasonable objective grounds.

To prevent police officers from gathering evidence against a suspect in an unfair manner, the following prohibitions are spelled out in these codes, and these codes are considered as a concise guide to the proper conduct of criminal investigations:

- When an investigation is conducted in breach of the provisions of these codes of conduct, not only is the evidence so gathered excluded but the concerned police officer is subjected to an inquiry;

- If any evidence is gathered by any other illegal means, this evidence is also excluded;
- Even if any incriminating object or article is gathered from the possession of the suspect or found at the scene of the crime, such articles are excluded as inadmissible evidence;
- If any evidence obtained has an adverse effect on the fairness of the proceedings, this evidence ought not to be admitted.

Furthermore, the manner in which the following powers of an investigating officer may be excised are comprehensively spelled out:

- The power to search a member of the public;
- The power to search the premises of a suspect to find any evidence of a crime;
- The power to arrest a suspect;
- The power to detain a suspect and the manner of treatment and questioning of a suspect at the police station;
- The identification of a suspect;
- The seizure of property found on a property or premises; and
- The procurement of body samples.

The most common pre-trial faults, identified in order to guarantee the integrity of the administration of criminal justice, the control of police investigations and to promote the ethical orientation of the police and their investigations, are as follows:

- The concoction or falsification of evidence by police officers;
- The non-disclosure of evidence in favour of the accused; and
- Oppressive conduct by the police with or without actual violence.

VI. The Administration of Criminal Justice in Cambodia

From the time a suspect is initially questioned by the police until a final judgement is given regarding his or her case by a court, the administration of criminal justice passes through three clear and distinct stages with different perspectives.

However, under the prevailing practices in Cambodia regarding the investigation of criminals, which can be traced back to the period from 1978 to 1992, these three stages are not seen, and the actors of all these stages, namely, investigatory officers, prosecutors, investigating judges and trial judges, act as collaborators with one distinct perspective - to arrest a suspect, obtain a confession and convict or release the person. Thus, the three stages are reduced to one combined process and is directed to convict a person on the basis of a confession obtained by physical violence, mental torture or by other illegal means even though the Cambodian Constitution prohibits any form of physical or mental violence.

This approach and mode of operation was clearly exhibited in no uncertain terms in a trial in Phnom Penh Municipal Court recently involving Srun Vong Vannak. According to the law, the police can detain the accused only for 48 hours; but in many cases, the police detain the accused for 10 to 20 days, such as in the case of Vannak for the alleged murder of the brother-in-law of Second Prime Minister Hun Sen in which the defendant was detained for 20 days for questioning. In this case, the police arrested Vannak in secret, and the family did not know where he was detained after his arrest. Consequently, the family of the defendant requested the U.N. Human Rights Centre to assist them in looking for him. Twenty days later he was found in Phnom Penh. This secret arrest and detention violates Article 10 of the UNTAC Law of 1993. After the information of his arrest became public, the police sent the dossier to the public prosecutor to charge him. According to reports from lawyers present at the public prosecutor's office, the public prosecutor asked him, "Can you answer by yourself?" Then the public prosecutor charged him based on the police dossier and sent his dossier to the investigating judge to investigate the case. During the investigation of the investigating judge, despite the accused's strong protest that he was tortured to obtain a confession and showing evidence on his body of injuries resulting from torture, the investigating judge ignored this and refused to send him to the doctor for an examination despite his requests to do so. Instead the investigating judge charged him. The judge excused himself by saying that in the civil law system a lawyer is not allowed to introduce evidence freely and that the judge can accept only the evidence introduced in accordance with the law and proper procedures. He said that it was a civil law system and not a common law system that permits the lawyers to present the evidence. (It is a common practice in Cambodia to use civil law as a synonym for socialist law which does not allow any liberties to the suspects.)

A conscious, concentrated and committed awareness campaign to be

led by Cambodian lawyers, individually and as a body within courts and outside courts, urging peoples' participation is imminent today. The exposure of this illegal and unlawful alliance among law enforcement officers, prosecutors and judges should be a central theme of this campaign.

It is apparent that the replacement of illegally obtained confessions as a mode of proof by general principles and rules and practices of law of evidence as recognised and followed in courts of other jurisdictions has become indispensable.

In addition, a concentrated effort has to be taken to realign and re-establish the judicial police and military police, prosecutors and trial judges respectively on the basis of the three distinct stages in the process of the administration of criminal justice with different perspectives, namely, to initiate investigations of a crime, to commence and to institute criminal proceedings and to hold fair and impartial trials.

The separation of other stages from the trial stage is achieved only if a trial in court can be conducted within a comprehensive and systematic framework, provided for judicial inquiry (trial) on the basis of rules and principles recognised and approved in other jurisdictions which would prevent judges from the capricious and arbitrary holding of trials, collaborating with military police, judicial police and prosecutors.

VII. THE MINISTRY OF JUSTICE

After the promulgation of the Constitution, Cambodia now is a liberal democracy. In liberal democracies, ministries of justice only assist with the administration of the judicial system and have no powers over any judicial aspects of the system or prosecutions. Article 109 of the Cambodian Constitution states that "the judicial power shall be an independent power." It further specifies in Article 111 that "judicial power shall not be granted to the legislative or executive branches." Regarding prosecutions, Article 112 plainly states that "only the Department of Public Prosecution shall have the right to file criminal suits." From these provisions, it is very clear that the Ministry of Justice should not exercise any form of jurisdiction over the exercise of judicial power and over the filing and conduct of public prosecutions.

The situation which prevailed before 1993 was different, however. Under that arrangement, the Ministry of Justice had much power and occupied a central role as the system of justice then prevailing gave a prominent role to the ministry. The judges, in fact, played a subordinate role. For

instance, the appointment, transfer and dismissal of judges and public prosecutors of the provincial and municipal courts and of the Appeal Court could be done through a decree in accordance with the suggestion of the Ministry of Justice. At that time, there was no separation of power between the branches of government because Cambodia was ruled by a socialist dictatorship.

In addition to the factor of the socialist system of justice, there was also the practical difficulties of finding enough qualified judges after the tremendous destruction caused by the Pol Pot regime. Under these circumstances, during the 1980s, the Ministry of Justice virtually controlled the judiciary. It was admitted that even many judgements were written at the Ministry of Justice. Moreover, all draft laws of other ministries had to be reviewed by the Ministry of Justice before being sent to the National Assembly for passage.

It must be admitted that due to a barrage of criticism during the early period of UNTAC's involvement in the country the Ministry of Justice has taken several steps to reduce its role. In public statements, the ministry has tried to stress that it does not intend to interfere in the judicial process. However, in spite of this, it is a common experience in Cambodia today that the ministry still exercises a strong influence.

The influence of the ministry is often exercised through circulars issued by the ministry which have the effect of law. This has been justified on the basis of a lack of law. For example, the Eight Point Program introduced recently allows judges to increase the sentences for some offences over those stipulated in the law. Thus, these circulars have had the effect of amending the existing laws, and judges are expected to respect these circulars as law. This practice though violates the principle laid down in the Constitution that only the legislature can make laws.

As noted above, the Constitution states clearly in Chapter 9 about the power of the judiciary and the other two branches. Therefore, the Ministry of Justice, which is a member of the executive branch, cannot interfere in the affairs of the judiciary as stated in Articles 109 and 111 of the Constitution. The Ministry of Justice shall provide, however, for the training of judges and court clerks. The appointment, transfer and removal of clerks are also still the duties of the Ministry of Justice.

The Ministry of Justice though has no power to interfere with the judgement of the judges. It is only the judges who have such power. In practice, however, the Ministry of Justice still controls the courts, even though the courts are protected by the Constitution. In political cases, the influence

of the Ministry of Justice is even more manifest. Recently, the Ministry of Justice suspended three judges of the Appeal Court.

Whatever the reasons for such practices, the Constitution has ended their legitimacy. The continuance of the old system can only take place in contravention of the Constitution. After 1993 and the passage of a new Constitution that recognises the principles of liberal democracy and pluralism, the Ministry of Justice can only involve itself in the administration of the courts.

Thus, one of the primary reqnirements in complying with the Cambodian Constitution is to reduce the powers of the ministry to administrative matters, such as the specification of building codes for courthouses; the provision of physical facilities, such as computers, fans, etc., for the courts; providing staff, other than the judges, for the courts; and administrative matters involving salaries. Disciplinary matters relating to the judiciary, however, are entirely a matter left to the High Council of Magistracy by the Constitution. On this matter, the Ministry of Justice should neither have power nor influence. To solve the above problems, these recommendations are offered:

- Clearly define the duties and functions of the Ministry of Justice based on the Constitution;
- Support a strong and independent Snpreme Council of Magistracy;
- Educate the people and government officers about the separation of power and democracy; and
- Restrict the interference of the Ministry of Jnstice with the functions of judges.

VIII. The Role of Lawyers in the Present Cambodian Situation

No rule of law is possible in any country unless lawyers play a major role. In Cambodia, where there is a breakdown of the legal system, it is all the more necessary that lawyers should take a leading part. It is not enough if a country has a good Constitution. It is necessary that the ideals of the Constitution shonld be translated in real terms so that people may realise the benefits of their Constitution. A constitution though is always a matter of laws and interpretation. Who can best interpret the law if not lawyers?

The present Constitution of Cambodia contains very many provisions of a liberal democracy which are not found in many other functioning demo-

cratic countries. However, the people have not yet realised the importance of their Constitution. Thus, the country's lawyers should undertake the activities outlined below so that the policies, principles and programmes under the Constitution are all made to work for the benefit of the citizens of Cambodia.

a. Lawyers should study the Constitution thoroughly and, if possible, study other comparative constitutions - perhaps in the library of the Law College. There are many provisions in the Constitution of Cambodia which are similar to other constitutions. Lawyers should find out how these provisions have been interpreted by the courts in other countries. They should then see whether similar meanings can be given to the provisions under the Cambodian Constitution.

b. Lawyers should also study the existing laws. If any laws or any provision under the law is found to be contrary to the Constitution, lawyers should take up these contentious legal issues and try to convince the judges that these laws or provisions cannot be enforced.

c. Whenever the court does anything which is contrary to the law or to any provision of the Constitution, lawyers should not hesitate to make an objection before the judge.

d. If the judge refuses to take note of any such objection, lawyers should put that objection in writing and hand it to the court. The judge may overrule the objection, but the objection will be on the record, which will help the party when the matter is appealed.

e. Lawyers should not be afraid of judges or prosecutors because they are, in a sense, officers of the court and are only assisting the judge in coming to the right conclusion.

f. Justice is what the judge does, but justice will not be done if lawyers do not assist the judge.

g. The most important principle of justice is the right to be heard. Very often a client who is poor, because of a lack of knowledge and because of poverty, is unable to express themselves. It is here that lawyers should assert themselves and tell the court that they represent their client and that they shall be heard before any judgement is given.

h. Lawyers also have a duty to organise seminars and workshops for ordinary people and to explain to them the country's legal provisions and constitutional principles. In other words, they have a duty to educate the public on law and legal matters.

i. A good lawyer can be a friend, philosopher and guide to all those who live around them.

j. Whenever any injustice takes place, and if there is no legal remedy provided for such injustice, do not hesitate to complain to all constitutional authorities, such as the king, the prime minister or the president of the National Assembly. Similarly, if the law is deficient, write articles in the press, draw the attention of the public to the issue and suggest how the situation can be changed by enacting a suitable law.

k. The profession of a lawyer is autonomous and independent.

l. A lawyer is involved in serving justice, including following up and participating in the drafting of laws and in providing legal advise by writing legal papers. Presently, however, the Ministry of Justice does not allow lawyers to participate in these matters.

m. Under the law, a lawyer can represent any client with the client's consent. Only the client has the right to grant or withdraw such consent. To deny a lawyer the right to represent a client amounts to the denial of the client's right to be heard. This is a fundamental contraction of the rules of natural justice and the rule of law. Once the lawyer has obtained the consent of their client, the court is duty bound to recognise their presence for the purpose of representing their client. The prevailing practice in Cambodia which requires a lawyer to be recognised by the court each time they appear in court is a fundamental violation of the lawyer's rights. The court has no discretion on this matter. A court cannot stop a lawyer from representing or defending their client.

n. Lawyers can appear in many types of cases - civil, commercial, administrative, labour, social disputes, and in all judicial proceedings. No distinction must be made on the basis of particular offences. Lawyers have the right to represent their clients and to defend them in cases relating to any offences. Therefore, the prevailing practice which discourages the appearance of lawyers in some types of offences is contrary to the rights of the legal profession. A lawyer has a right to represent clients in civil cases and the right to defend clients in criminal cases.

o. According to the Bar Statute of Cambodia passed on 22 August 1995, the duties of lawyers are narrowly limited. The Bar Statute should be amended and brought into conformity with the practices that prevail in liberal democracies in relation to the professional liberties and duties of lawyers.

p. The Bar Statute allows judges with at least five years in practice to be a

lawyer, but lawyers cannot be judges. This should be amended to allow lawyers with the required number of years of practice to be eligible to become judges.

q. The Bar Statute should be amended so that lawyers shall have equal rights with those of judges. According to this law, the disputes between lawyers shall be sent to the general prosecutor attached to the Appeal Court for consideration.

IX. The Law and the Poor

Cambodia suffers from the catastrophe wrought by 20 years of war. The war destroyed properties, infrastructure and made many people poor. The poor have no chance to get an education. Consequently, there are many uneducated people. Poverty also leads to crimes. Moreover, poverty is a factor relating to corruption, but the poor themselves suffer more than others.

According to Article 31 of the Constitution, the Kingdom of Cambodia shall recognise and respect human rights as stipulated in the United Nations human rights instruments. Every Khmer citizen shall be equal before the law, enjoying the same rights, freedoms and fulfilling the same obligations. Therefore, the State shall also recognise the rights and freedom of poor people.

Concerning lawsuits, both criminal and civil, the poor and vulnerable people need lawyers to assist them. The U.N. human rights instruments, Article 10 of UNTAC law and Articles 75 and 79 of the Criminal Procedure Law of the SoC of 1993 recognise the right to counsel; but in practice, judges, the police and prosecutors - in short, the State - have a different concept. The State leaves the poor themselves to protect their rights and does not recognise it has the duty to do so.

In Cambodia, there are now several legal aid non-governmental organisations (NGOs), such as the legal aid department of the bar association, the Cambodia Defenders Project and Legal Aid of Cambodia which provide free legal assistance to the poor, but there are still problems in interpreting the Bar Statute.

For example, Article 29 of the Bar Association of Cambodia states: "The bar fund is derived from dues paid by all members and other contributions. A special account shall be established in this fund for providing income to lawyers who defend poor people." This is sometimes interpreted to mean that only the bar is allowed to find funds, and others are not allowed to provide legal service to the poor. However, the provision of legal assist-

ance to the poor should not be limited in this manner. Respect for the professional rights of lawyers and the rights of the poor requires respect for freedom of association for the defence of the rights of the poor. In many countries, there are now very developed strategies to provide legal aid. Lawyers in many countries have developed several ways to assist the poor to have access to the courts. In India, the law relating to social action litigation has also been developed. Cambodia can learn a great deal from all of these practices.

A. Recommendations

In this light, the following recommendations are made:

- The police, public prosecutors and judges shall inform the accused of their right to counsel;
- The police, public prosecutors and judges shall advise all poor clients of the availability of legal aid organisations;
- The accused shall have access to a lawyer immediately after they are arrested;
- The State shall guarantee the right to counsel for poor people;
- The State, including the bar association, shall allow any person or any lawyer to form legal aid NGOs freely and shall allow them to find funds on their own to provide legal services to the poor.

X. Civil and Criminal Trials

A trial of a civil case is different from a trial of a criminal case. A civil case is decided on the basis of a balance of probabilities. The test is whose case between two parties is more probable. On the other hand, in a criminal trial, the prosecution has to prove the case beyond a reasonable doubt. It is not enough that the case may be true. Rather, it must be true. Between "may be true" and "must be true," there is a world of difference.

A criminal trial is always between the State and the accused. In a civil case, however, it is generally between two private parties. Even if the State is a party to a civil case, it is treated like any other private party.

In a criminal case, the accused is presumed to be innocent until the prosecution proves the case beyond a reasonable doubt. There is no such presumption in favour of any party in a civil case.

In a criminal trial, the prosecution has to collect sufficient evidence

to prove the charge against the accused. It is only when the prosecution discharges its burden of proof that the accused has to consider whether he or she should present any evidence. In other words, if the prosecution fails to discharge its burden, the accused has no obligation to present any evidence. On the other hand, in a civil case, both parties will have to present evidence to prove their respective contentions. If any party fails to present evidence, that party fails in a civil suit.

In a civil case, if the plaintiff appears but the defendant fails to appear, even after receiving the writ of summons, the case can be decided ex parte. If, however, on the day of the hearing, the defendant appears but the plaintiff remains absent without any reason, the plaintiff 's suit will be dismissed.

A civil suit can be decided on the basis of admissions made by one party as against the other; but in a criminal case, since the accused is not bound to speak, there is no question of the case being decided on admissions, for admission is essentially a confession. In a criminal case, a confession cannot be the basis of a conviction. Even if a confession can be taken into account, it can only be one piece of evidence. In the absence of other evidence, no accused can be convicted on the basis of a confession alone. These differences are necessary because in a criminal case the question is one of life and liberty of a citizen - not so in a civil case.

XI. The Constitution and Organic Laws

In answer to the question of why the Constitution of Cambodia remains inoperative despite its good provisions, it has been pointed out that the making of organic laws was postponed at the time that Constitution was drafted and since then these organic laws have not been enacted. This is used as an excuse to postpone the implementation of the Constitution. For example, despite the Constitution's recognition of the Supreme Court, there is no possibility to make any application to the Supreme Court. People have no access to the Supreme Court. The absence of organic laws make many other laws, including the Constitution, inoperative.

Why did this happen? In May 1993, Cambodia faced the issue of having a legitimate government as soon as possible. The Paris Agreements required the newly elected members of the National Assembly to draft a Constitution. Between May to September 1993, the Assembly worked on this. To write the organic laws would have taken much more time. Thus, these were postponed for the future.

XII. NOT ENOUGH LAWS

Even after 1993, some socialist laws are still enforced, and the socialist concepts still exist in society. The National Assembly passed many laws, but they are still not enough. According to the Constitution, we need many organic laws so that the state institutions can function legally and effectively.

For the judiciary, even if Cambodia has enacted some laws, such as the law on the Supreme Council of Magistracy, there is a need to pass more laws, such as the Law on the Judge, Law on the Public Prosecutor and the new Law on the Organisation of the Courts. It is better to have different kinds of courts, such as the Felony Court, Commercial Court and Administrative Court.

There is also a need for a new Criminal Procedure Law which describes clearly the duty of the judicial police and military police. More laws are also needed, such as forensic laws, civil laws and, more specifically, the Law of Evidence, Law on the National Congress and Law on Association. The National Assembly is working slowly. There is also a need for the Constitutional Council to immediately interpret the law.

XIII. RECOMMENDATIONS

1. All institutions mentioned in the Constitution must be established forthwith and should function according to the Constitution. These institutions are the Supreme Court and other courts, the Constitutional Council, the Supreme Council of Magistracy and the National Congress.

2. The powers vested by the Constitution in the three separate branches of the State -the executive, the legislative and judiciary - should be recognised and enforced.

3. The Supreme Court should begin public hearings and lay down the rules of the courts and should use its inherent powers to protect the Constitution; the Supreme Court is the guarantor of the human rights contained in the Constitution.

4. The Ministry of Justice should not exercise any legislative or executive powers either directly or indirectly. Furthermore, it should not excise any power over judges or prosecutors. Rather, its powers should be limited to administrative matters, such as the administration of salaries, the maintenance of buildings and the provision of making other facilities available for the smooth functioning of the courts.

5. An independent Department of Public Prosecution should be established

in line with such departments in liberal democracies.

6. All impunities against the prosecution of crimes should be abolished.

7. All constitutional provisions forbidding the admission of confessions in court should be strictly enforced.

8. The U.N. codes of conduct regarding law enforcement officers recognised under UNTAC law should be strictly enforced. A code of conduct relating to the proper conduct of criminal investigations found in other liberal democracies should be introduced.

9. The role of lawyers should be recognised, and no restrictions should be placed on the legal practice of lawyers. All prevailing practices that limit the role of lawyers should be abolished. The lawyers' rights to access to their clients should not be limited in any manner. The right of representation should be a matter left exclusively to the client and their lawyer. Moreover, the Bar Council should be an independent and autonomous professional institution. The Bar Council should act in a manner similar to such institutions in other liberal democracies.

10. The right of the accused to be heard is an absolute right. The prevailing practices in Cambodia denying or limiting this right should be abolished. The right to be heard should be given a similar interpretation as those recognised in other jurisdictions following a liberal democratic tradition.

11. The rights of the accused, from the moment of arrest to the making of a final decision by the court, should be respected according to the Constitution.

12. The criminal trial should be based on the presumption of innocence. All prevailing practices denying this presumption should be scrutinised and abrogated. The prevailing practice of show trials is based on the denial of this presumption.

13. The trial procedure must be laid down in detail.

14. The dossiers made by the police and the prosecutor should be treated as having no evidentiary value. Only the evidence presented in court should be considered by the judge to form the basis of their judgement. Furthermore, all of the evidence must be presented in open court in the presence of both parties.

15. The judgement must be given by the trial judge who heard the case, and it must be given in writing. The judgement must contain the facts and

the law relating to the case and the reasons by which the judge arrived at the conclusion. It must deal with the arguments put forward by both parties.

16. There should be no secret negotiations and deliberations between the judge and the parties or their lawyers. The prevailing practice of such discussions and deliberations should be abolished. Such negotiations should be considered as grave forms of misconduct and an abuse of judicial process warranting dismissal.

17. The role of the investigating judge in the Cambodian context has been very negative. This post needs to be abrogated. The term "investigating judge" should not be confused with its counterpart in the French system. The Cambodian investigating judge has a similar function as a prosecutor general in the Soviet legal system. This function was introduced to Cambodia in 1981 when the court system was re-established with the help of Vietnamese experts. With the introduction of the 1993 Constitution based on liberal democracy, this institution should be considered as having been abolished. (The provisions of UNTAC law on this matter was based on a misconception that the term "investigating judge" had similar meaning in Cambodia as it did in French law).

18. The non-enforcement of orders of courts should be treated as contempt of court and should be punishable.

19. All people must have easy access to the courts, and litigation costs must not be excessive. The poor in particular should have adequate legal aid. The provision of legal aid is primarily a responsibility of the government. In the peculiar circumstances of Cambodia, lawyers' organisations granting legal aid must be encouraged, and lawyers must be allowed to organise themselves to facilitate free legal assistance.

20. Civil law and criminal law are two distinctively different fields, and the prevailing practice in Cambodia to mix up the two should be abolished.

XIV. A Plea to the United Nations and International Community

After five years since the promulgation of the Cambodian Constitution, the basic provisions of the Constitution have not yet been implemented. The Paris Agreements under which UNTAC functioned have specific provisions for the creation and implementation of a liberal democratic constitution. Thus, the international community has a special obligation to the peo-

ple and the government of Cambodia to assist in bringing about the legal reforms required to implement the Constitution. Thus, we call upon the United Nations and the international community to encourage and assist the Cambodian government to bring about the necessary reforms spelled out in this statement. We particularly call upon United Nations High Commissioner for Human Rights Mary Robinson to provide through the Cambodian office of the U.N. Human Rights Centre competent people able to grant technical assistance to bring about these changes and for the U. N. special representative for human rights in Cambodia, Thomas Hammerburg, to monitor these reforms. We request the international community to invest in the implementation of legal reforms in Cambodia in order to guarantee democracy and the rule of law in Cambodia so that the suffering of its people may end.

2

PROCEEDINGS OF THE SEMINAR

INDEPENDENCE OF JUDICIARY

A Lecture by Justice H. Suresh

WHAT DO WE MEAN BY INDEPENDENCE OF THE JUDICIARY?

What we mean by independence of the judiciary is the ability of judges to act without fear or favour.

What are the factors that cause fear in the minds of judges? The fear can be caused by the government or the litigants. The government means any of the authorities of the government. The litigants mean the parties to a case or their agents (e.g. Mafia).

Who seeks favours? It can be the government or the litigants.

We should have judges who are neither fearful nor willing to grant favours to any one. We must be able to select such persons. For that there should be rules prescribing the qualifications for judges. Such qualifications are that:

A. A person has to practise as a lawyer for several years before becoming a judge, for example, several years in practice before becoming a judge in

a lower court or several years of experience as a judge in a lower court before becoming a judge in higher courts.

B. It also means educational qualifications on law.

C. A certification of integrity - integrity, intelligence and industry (meaning hard-working) are essential qualities of a judge.

D. He should not be a member of a political party. This implies that if a person has been a member of a political party before he is appointed as a judge, he should resign from that party before taking up the position. He should also give up all links with political parties. (In the particular circumstances of Cambodia, this is even more important.)

E. A judge should have a clear record. This means that he should bear a proper moral character and no criminal record.

How Are Judges Appointed?

It is the government that appoints judges. The important issue is that how the government appoints them. Here, the situation of appointments to lower courts may be different from that to higher courts.

Appointments to Lower Courts:

These may be done on the recommendations of judges of the higher courts. The higher court judges may sit on committees that select the lower court judges and request the government to appoint these judges.

Appointments to Higher Courts:

The chief justice makes the recommendations for appointments to higher courts. In India for appointments to higher courts (the Supreme Court and the High Court) must be done in consultation with the chief justice. What does "in consultation" mean? Does it mean just casual consultation, meaning informal discussions with the chief justice? The Indian Supreme Court has held that it does not mean casual consultation, but that these appointments must be done with the consent of the chief justice. The purpose of this requirement is to ensure that the judges are free from the government.

Other Conditions to Ensure Independence of Judges

Fixed tenure: which implies that the terms of employment must be fixed by contract or the law. In India the age of retirement in lower courts is 58 years, the High Court 62 years and the Supreme Court 65 years. In some countries there is no fixed retirement age.

Judges should be removed only for proven misconduct. For complaints against lower court judges, the inquiries must be conducted by the higher court judges, and their recommendations must be made known to the government. Such inquiries must be conducted in a proper manner with full respect to the rules of natural justice and with full freedom to the judge involved to participate and defend himself or herself.

The removal of higher court and Supreme Court judges can be done only by way of passing an impeachment motion in the National Assembly. Before this there must be a serious charge and a proper inquiry into such a charge. Then a motion must be moved and be passed by a two-thirds majority.

Judges' conduct cannot be discussed in the National Assembly except on the occasion of such an impeachment motion.

The service condition of judges should be good. This includes salary and benefits. And these conditions should not be subject to unfavourable changes.

These are the means by which the freedom of judges is ensured.

How to Prevent Judges Acting in Favour

1. All persons to a case must be heard in the open, and the public should be able to hear the cases.
2. Both parties must be heard, and all hearings must be done in the presence of each other.
3. The judgement in each case must state the reasons on which such judgement is based. In giving such judgements a judge is bound by the decisions of the higher courts that delivered on similar issues of law and facts.
4. No judgement may be reversed except by way of judgement of a higher court through an appeal.

5. No one can take the law into their own hands.

6. An order given by a court must be carried out, and no authority can be allowed to resist such compliance. Those who do not comply must be charged with contempt of court, which is an offence.

7. No judge must be made liable for any action for any decisions that he has made as a judge. This safeguard against action applies both during his tenure in office and afterwards.

Questions and Answers

1. *Q.* What is the meaning of "judicial precedence"?

1. *A.* Every offence must be proved on the basis of evidence. The court should set out in writing the reasons showing how the court comes to its findings, which means how the case has been proved. There may be legal terms that needed to be explained. The lower courts must accept the explanations (interpretations) given by the higher courts.

2. *Q.* What is the meaning of a "public hearing?" Are there exceptions to the rule?

2. *A.* There are very few exceptions involving rare instances, for example, the evidence of a victim of rape, where privacy is involved. Even in such instances the lawyers of both parties must be present. It is the judge who must decide whether such a request for privacy must be granted.

3. *Q.* The need to be present in court - what happens if a person is in jail?

3. *A.* When a case is heard against a prisoner he/she should be present. If the victim does not come it is not possible to prove a case. What is said to police officers is not evidence. All witnesses must be available for cross-examinations regarding the evidence they have given. If the victim suffers from illness or accident, the case may be postponed. If the witness is very old or if she/he is very sick and unable to move, the court may appoint a commission to go to where the witness is and record the evidence. In this instance the lawyers who represent both parties must be allowed to be present when such evidence is recorded and be allowed to ask questions.

4. *Q.* In Cambodia, if a prisoner is in jail, a case must be heard and finished in six months. So what happens if a witness does not come to court?

4. *A.* If a witness does not come and if the prosecutor thinks it is necessary to get him or her, the prosecutor may apply for a warrant to bring the

witness to court forcibly.

5. *Q.* What may be an example of misconduct on the part of a judge?

5. *A.* For example, taking bribes.

6. *Q.* A judgement must be based on law. If there are two conflicting laws, what happens?

6. *A.* The judge may apply to higher court for clarification of the issue, or he may himself resolve as to which law should be followed.

7. *Q.* When under special circumstances higher court judges may select lower court judges for reasons other than competence, for example, due to corruption or political loyalty, what would happen to the independence of the judiciary? Is it not better for the Council of Magistracy to make the appointments?

7. *A.* It depends. What really matters is the way that ensures independence of judges and their proper selections without being under the pressure of the government. Furthermore, while it may be a right policy at this moment to consider the King as the guarantor of the independence of the judiciary, in the long run it may be necessary to reconsider this policy. In this context a matter of crucial importance is the role of the Ministry of Justice on appointment of judges. The Ministry of Justice is a part of the government, and the government is made up of a political party. It is the party influence on appointment of judges that must be resisted.

8. *Q.* How do you bring up a good judiciary when you are in situation like Cambodia with few (if any) experienced judges?

8. *A.* Even in a territory like Hong Kong, non-Chinese judges have been appointed to judicial positions. One reason is that while there are competent Hong Kong lawyers, many may not want to be judges. So the Basic Law has allowed for the appointment of non-Chinese judges. At the moment there is a ratio of four to one. One of the reasons for this is to keep the faith of the international business community on the independence of the judges. Brunei too allows foreign judges to come and hear cases in appeal courts. There are some African countries that do the same.

9. The problem of Cambodia is that some people do not respect the law. They are used to the system of socialist law, and they prefer the socialist approach. On the other hand, there are problems from the police. The police take bribes and do not execute the warrants. Furthermore, people do not want to be witnesses. They lose money and time and see no profit

in the exercise. The people do not believe that the court could find justice for the people. For example, one policeman made a fake statement to gain benefit for his relative. Later, an investigator found this out. The court summoned the police officer. He did not come. The court issued a warrant but the police officer still did not come. In addition, judges too are members of political parties. So they cannot act independently when the interests of party members are involved. The example is the Ho Soc case. He was killed in military premises, but no action was taken.

The Cambodian Constitution has laid down the principle of the independence of the judiciary. However, the Constitutional Council, which was created by the Constitution, has not been set up. This makes things difficult. If this Council exists, we could complain to this Council. Furthermore, we should complain to the King and the National Assembly. According to Article 113 of the Constitution, the King shall be the guarantor of the Constitution. And the Council of Magistracy shall assist the King on this matter. The Council of Magistracy has now been appointed.

Interpretation of Laws

Is this the sole function of the Constitutional Council? In a liberal democracy this cannot be so. The most important institution for interpretation of law is the Supreme Court. That is what Cambodia lacks.

The present Supreme Court of Cambodia was created on 1 July 1984. It was under a socialist set-up. Its function was determined under the socialist structure. Under the operation of Section 139 of the present Constitution (the Constitution of September 1993), the Supreme Court appointed in 1984 should be regarded as abrogated. The 1993 Constitution is a liberal democratic Constitution. The Paris agreement has clearly laid down the principle of adopting a liberal democratic Constitution.

The basic illegalities involved in the present situation need to be faced.

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4. Sok Sam Oeun, lawyer, executive director of the Cambodian Defend ers' Project (CDP)
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THE SUPREME COURT IN A LIBERAL DEMOCRACY

Lecture by Justice H. Suresh

WHY DO WE NEED A SUPREME COURT?

When we think of an "appeals court," we do not automatically think of a supreme court. There can be appeal courts other than a supreme court. In America, there is a three tier system of courts, a trial, an appeal and a supreme court. But the supreme court in both the United States and India function as both constitutional courts and as courts of final appeal.

The need for a supreme court arises from the separation of powers. The role of the supreme court is to deal with conflicts between a people and their government that arise in the process of ruling. This power of the court, to resolve conflicts between the people and the government by legal interpretation, is the "rule of law." The basic concept of the "rule of man", as opposed to the rule of law, is that there is no such separation, and that the person who makes the law, the government, also interprets it.

Constitutional questions arise in the conflictive situations, that is, when there are conflicts between the State and the people. When there is such a conflict, who is there to decide? If it is the government that is allowed to decide, then it is one of the interested parties out of the two that is allowed to decide.

A constitution is expected to set out the organisational principles of society. When the State makes law it has to ensure that the laws it seeks to pass are not in conflict with the organisational principles of the society that laid down in the constitution. The belief of the lawmaker that such law is not in conflict with the constitution is subjective. Some authority must judge the law's constitutionality. (This also applies to the government decisions as well as actions.) It is the supreme court that has the duty to do this. In socialist

countries there is no such separation of powers. This is a fundamental difference between a liberal democracy and a socialist state.

The State has the ultimate power to amend the constitution in the appropriate manner prescribed by the constitution.

In Cambodia, the Constitution has made provision for a Supreme Court and a Constitutional Council. The powers of the Constitutional Council are limited. It could look into the constitutionality of a law before (Article 121) or after its promulgation (Article 122). Though it can also decide on the constitutionality of government decisions, no provision has been made as how to do it. As under Article 139, laws that existed prior to the Constitution continue to exist unless they are contrary to the spirit of the Constitution. The UNTAC law on criminal procedure and the SoC law (February 1993) regarding the organisation of the judiciary may be considered as operative. The UNTAC law recognises the power of the Supreme Court for judicial review.

One basic problem that arises is that in post-Pol-Pot Cambodia, the Supreme Court that existed was a socialist court and not one that recognised the liberal democracy. Since this court continues to exist after the promulgation of the new Constitution, it may be presumed that it functions under the new Constitution, which has laid down the basic organisational principle of the Cambodian society is a liberal democracy. From this one may conclude that the Supreme Court is obliged to repudiate its former mandate under a socialist set-up, and that it is required to function on the basis of liberal democratic principles.

On this basis of functioning under the basic organisation principle laid down in the Constitution, the Supreme Court is under obligation to provide remedy to the people relating to matters arising from conflicts with the State. The principle that where there is a right there must be a remedy applies. Therefore, the Supreme Court of Cambodia has the following obligations:

1. To provide for public hearings on petitions made by the people. This implies that it is under obligation to entertain public petitions. The King as the guarantor of the Constitution is under constitutional duty to ensure such public hearings.

2. When entertaining the public petitions the Court must act according to the principles recognised for such hearings.

PART II

OTHER PAPERS ON THE CAMBODIAN LEGAL SYSTEM SINCE 1980

3

THE ORIGIN OF THE PRESENT POLITICAL, SOCIAL AND LEGAL SYSTEM OF CAMBODIA AS A REVOLUTIONARY RUPTURE WITH THE PAST

The attempt to see a continuity in the political changes that have taken place in Cambodia since its independence has led several observers to underestimate the revolutionary impact of the period beginning with the capture of power by the Khmer Rouge and ending, theoretically speaking, with the signing of the Paris Agreements.

If the proneness to violence is used as the test of revolutionary change, then "modern Cambodian politics may be seen as a succession of brutal changes, involving merciless replacement of ruling elites."[1] From this point of view, the overthrow of the Sihanouk regime by Lon Nol will differ from

[1] Thion, Serge, "The Patterns of Cambodian Politics quoted," from *The Cambodian Constitutions (1953 -1993)*, collected and introduced by Raoul M. Jennar, White Lotus, Bangkok , Thailand, 1995.

the Khmer Rouge takeover only quantitatively but not qualitatively.

However, a socialist revolution is not a mere replacement of one elite by another. It involves a total transformation of the political and social fabric of a country. The change that takes place is a substantive one. Once such a transformation takes place, the return to the status quo involves a fundamental and substantive change in the political and social fabric.

A theoretician will naturally feel more comfortable in dealing with a situation of continuity rather than of revolutionary change. Naturally most of the constitutional laws deal with situations of continuity even after periods of disruptions. Even the change from feudalism to capitalism has many aspects of continuity. Often centuries pass before such transformation is completed.

It is also easy to dismiss people like Pol Pot as nothing more than barbarians if one uses the extent of violence they used as their only distinguishing characteristic when comparing then to others who used violence to a lesser degree to achieve political change. However, while in other instances violence was directed towards eliminating and silencing dissent, Pol Pol's violence was directed towards the extermination of all forms of social classes who were denied the right of existence. Such extermination was not purely motivated by revenge or fear, but primarily by a revolutionary theory which saw such violence as socially inevitable in implanting new political and social norms and changing the political and social fabric of Cambodia.

From a more practical point of view, the continuity theory blurs the actual continuity between the two socialist regimes, i.e. the Khmer Rouge and the regime that followed which was backed by the socialist regime of Vietnam. The forces that defeated the Khmer Rouge did not see their victory as a return to pre-1975 times. They positively saw themselves as true socialists saving the revolution from the hands of the Pol Pot clique who were under the influence of the Chinese and were therefore destroying the revolution. The preamble[2] to the Constitution of the People's Republic of Cambodia (1979-1989) is a clear affirmation of the socialist principles and the loyalty of the new regime to these principles.

> "**Preamble**
>
> Throughout thousands of years, the Kampuchean people have struggled to build and defend their country of which the Angkor civilization is the proof and the pride. But they never enjoyed

[2] The People's Republic of Kampuchea (1979-1989)

the fruits of their labour and could not develop their traditions, their pure national culture and their humanitarian and peaceful nature under the oppressive yoke of regimes of slavery, feudalism and imperialism.

At the end of the nineteenth century, the French colonialists committed aggression against our country and against Vietnam and Laos, seizing them and transforming them into colonies. Finding themselves in the same situation and closely uniting their forces with those of the Vietnamese and Lao peoples, our people have since struggled against the common enemy. The struggle of our people and of the Vietnamese and the Lao peoples constituted an active contribution to the common struggles of the world's peoples against imperialism and colonialism. Meanwhile, U.S. imperialism-ringleader and policeman of world imperialism-employed all kinds of manoeuvres, from interference to armed aggression, with the intention of placing the administrative yoke of American-style neocolonialism on the entire Indochinese peninsula. Once again our people rose and struggled against the American aggressors. At the beginning of 1975, with close cooperation from Vietnamese and Lao forces, our people waged repeated offensives and scored successive victories over the U.S. imperialists and their lackeys. These victories of the three Indochinese peoples in the struggle against U.S. imperialism marked the victory of an era of struggle against neocolonialism in the world.

After 17 April 1975, our people should have been able to live in peace, independence and freedom to rebuild their country. But the Pol Pot-Ieng Sary-Khieu Samphan clique agreed to become the lackeys of the Beijing expansionist and hegemonist leaders. In the four years that they were in power, this clique destroyed all the revolutionary gains, massacred millions of innocent people, trampled all fundamental human rights and abolished all the economic, social and cultural foundations of our splendid Kampuchea. It continued to bow down to and follow the orders of the reactionaries in the Chinese leading circle, to send armies to commit aggression against Vietnam's borders and to massacre the fraternal neighbours who have shared with us the same trenches and, together with us, won brilliant victories in the struggle against U.S. imperialism.

Faced with the danger of genocide and the loss of territory to the

Chinese reactionaries, our people had as their only choice for survival to abolish the barbarous Pol Pot-Ieng Sary-Khieu Samphan regime. Thanks to the clearsighted political line of the party, the close unity within the FUNSK [Front Uni National de Sauvetage du Kampuchea], the sincere assistance of the people and army of Vietnam, and the support of the fraternal socialist countries and peace-loving countries in the world, our people definitively overthrew the genocidal regime on 7 January 1979. The peoples' state power was organized and the KPRC quickly administered the entire territory. This shining victory opened a new chapter in our history and gave our people independence, freedom, democracy and the right to be masters of their true destiny in order to rebuild our beloved Kampuchea according to our legitimate aspirations. The Chinese expansionists and hegemonists in Beijing, acting in collusion with U.S. imperialism and other powers, are undertaking to destroy the revolution of our country. But the situation in Kampuchea is irreversible. Our people will certainly triumph. The enemy is doomed to failure.

The history of our peoples' struggle, crowned with victories, has clearly proven the truth that the entire people, enlightened by the party's correct political line, united as one, heroically struggling in unity and close co-operation with the Vietnamese and Lao peoples and other peoples of the fraternal socialist countries, and enjoying the approval and support of the peace- and justice-loving peoples in the world, are a powerful force for achieving victory.

The PRK Constitution is the result of the long struggles replete with difficulties and sufferings of our people. It reflects the will and objective of our entire people to firmly defend national independence and to build the fatherland, which is gradually advancing toward socialism. Our people, united as one and holding high the banners of patriotism and proletarian internationalist solidarity, scrupulously implement the present Constitution and are determined to record victories in building an independent, peaceful, free and happy Kampuchea.

All for the higher interests of the fatherland and the happiness of the people.

Long life to the PRK!"

Revolutions need to be judged not purely from their starting point, that is, from the point of view of how they come to power. Perhaps even more important is how revolutions continue to keep power and how they do their business. By the time a socialist revolution took place in Cambodia (1975), as well as by the time the People's Republic of Cambodia took over power, the socialist theory was a global theory that had developed with at least six decades of actual experience. There was a vast network of connections in the socialist block, despite many differences among the regimes which were members of that network. The common theoretical framework among them was a very elaborate one, determining such issues as the basic apparatus of power, the nature of education for the leaders from the top to the grassroots, the nature of the institutions in the society and the like.

Thus a completely new political ideology and a system of practices were introduced to Cambodia from 1975-1989. They were alien to the hitherto existing culture of Cambodia, as they were alien to every other culture into which they were introduced. Those who introduced them might have thought that this new culture would be the culture of the future. What interests us for the present is that, every norm and practice introduced during this time were completely new to Cambodia.

From the point of view of constitutional law, this absence of continuity is of primary importance. What happened in Cambodia from 1975 to, at least, 1989 was the change of the ground norm - the basic norm - of society. Trying to interpret this period from the viewpoint of the liberal constitutional law principles is to lose sight of the meaning of these times altogether. What is more is that such interpretations do not help to understand the present and lead to an underestimation of difficulties involved in achieving the goals of the Paris Agreements and the Constitution of the Royal Government of Cambodia promulgated in September 1993.

The view that "the 1993 Constitution acknowledges the re-establishment of the order existing under Constitution in force in 1953"[3] may be right purely from an abstract point of view. At least 13 years of socialist practices combined with the ruthless extermination of those who had a memory of the old society has ensured that for sometime the interpretation of the Constitution will take place within a set of meanings which is familiar to that of the socialist framework. The direct practical consequence is that the institutional practices and the mindset of that 13 years will continue irrespective

[3] Jennar, Raoul M., *The Cambodian Constitutions (1953-1993)*, White Lotus, Bangkok, Thailand, 1995

of the new norms that have been accepted theoretically.

Legal reforms involving a return to liberal democracy from a socialist regime involves conscious repudiation of these practices and of its mindset. The mere adoption of liberal democratic norm results only in burying what is beneath the surface.

Measuring history purely from the point of view of violence has also given rise to theories regarding the peculiar nature of the Khmer mind, which is often characterised as more prone to violence. Such mystical qualities are used to explain away the failures since the Paris Agreements to introduce at least some degree of liberal democracy. All these contribute to avoid a serious study of the recent years of Cambodian history as part of the attempt to understand the immediate problems of the Cambodian politics and society. As the Soviet archives have been opened to provide source materials for the study of socialist practices of this century, as many Chinese socialists since the 1980s have engaged in a review of their history and as the history of Vietnamese socialism becomes more openly discussed, more materials are becoming available for the study of Cambodia's recent past. These are much more reliable sources than peculiar qualities attributed to the Khmer mind. Such attributions are quite common among some Western writers not only regarding the Khmer people but also about Asians in general. It is in fact the old images of natives that are revived this way. "They" are not like "us" sort of talk.

Revolutions create their own breeds of mentors and teachers. This is more so in socialist revolutions, as socialist revolutionaries believe in the unity of theory and practice. It may be nerve-racking to realize that the Cambodian genocide was carried out on the basis of a theory as understood by the Khmer Rouge leaders. It may be even more difficult to digest the fact that the reorganization of society after 1979 too was carried out according to the instruction from mentors from Vietnam. However, recent discussions with older members of the bureaucracy, judiciary, police and military reveal a vast amount of information of how Vietnamese experts (sometimes even Russian, East German and Hungarian experts) were their guiding lights in the eighties. Original texts of some of the Cambodian laws written in Vietnamese in the eighties still exist. These facts further belie the attempt to attribute the resistance of the present-day elite of Cambodia to liberal democracy as something that they have inherited and something that they have been taught and acquired.

[4] Ibid.

This conception of extraordinary uniqueness of the Cambodians leads such observers to warn others that "the weakness of the written word should be pointed out to those wishing to study the implementation of these six constitutions in a country where an agreement made in customary form is more binding than a contract enumerating the obligation of parties in writing."[4] This could be said of any Asian country, for that matter of any non-Western society. However, if from this one were to conclude that constitutions would mean nothing more than scraps of paper in Cambodia, or pure declarations of intent, one loses sight of the modernisation processes which have been going on in Asia in general and Cambodia in particular. There being constant amendments to constitutions do not negate the intrinsic value attached to a constitution, either. The number of amendments to the Indian Constitution is seen more as an indication of the vitality of the Constitution in a fast-evolving society.

The assumption behind such statements as the one quoted above is that Cambodians are politically unsophisticated people incapable of thinking in any way other than through patron-client relationships. Such an assumption ignores the history of popular movements in Cambodia that finally led to the formation of a powerful communist party. The formation of a communist party was a result of the political awakening of the people, which was not harnessed by a democratic leadership. The very fact of the king's decision to abandon the throne and to contest in elections as a leader of a party showed how deep the political undercurrents in the country were. Like the Bolsheviks who rode on the currents of popular protests to ultimately produce the type of society created by Joseph Stalin, the Khmer Rouge too was welcomed to Phnom Penh by people as an alternative to the unhappy political situation that the Cambodian people faced. A few years later, a much-weakened population welcomed the Vietnamese-backed troops in the same way. It is in the midst of these active events of a population facing the modern day problems that the meaning of Cambodian history, including the meaning of their important documents, should be sought directly, rather than through the mirror of something called the ancient civilization and ancient traditions. No country in Asia is more uprooted from their ancient history than Cambodia. The brutal pruning done by the Khmer Rouge and continued by the implantation of a new system of administration under the Vietnamese guidance have forced Cambodia out of its past. What needs to be resolved are the problems created by these modern historical events themselves. In this, Cambodia is no different from other socialist countries that had collapsed, ending the Cold War. Perhaps one major difference is that while in many of these countries there are leaders

aware of these contradictions and are fighting hard to change, in Cambodia the tendency is to defend the past practices of the system and for all practical reasons to resist changes.

4

UNDERSTANDING CAMBODIA AS A POST-REVOLUTIONARY SOCIETY

The approaches undertaken by several groups and individuals to understanding Cambodia vary considerably. One is to treat it as a country that has been affected by war and civil conflict and therefore has experienced considerable instability. This approach will stress the need for peace, reconciliation and reconstruction. Another approach treats Cambodia as a post-colonial society with similar problems as other post-colonial societies in terms of defining its identity and reconstructing its economic, social, and political institutions to meet current needs. The third approach, which is suggested in this paper, is to treat Cambodia as a post-revolutionary society with unique problems of reconstruction, which relate to the nature and the content of the attempted revolution by the Pol Pot regime.

On many issues, these three approaches may overlap. However, the differences of the three approaches would be mainly on the aspects of identifying problems affecting the nation and developing solutions. The first approach stresses political factors such as negotiations and understanding between parties, the need for greater material assistance from the international community and the building of democratic institutions. This approach

is likely to focus on the reconstruction of institutions and practices that existed prior to the post-Pol Pot period as soon as possible. The second approach is likely to stress learning from the experiences of other countries in Asia and Africa that have been struggling to build their countries and shape their post-colonial identities. This approach will stress recreating traditional approaches (pre-colonial customs etc.) in rebuilding the institutions of the countries. The symposium organized by the UNTAC's Electoral Component, prior to the election in May 1993, proceed on this approach. However, the nature of the revolution that was ruthlessly attempted in Cambodia makes the application of experiences of other countries in Asia and Africa relating to the transition from colonialism to independence and the reliance on traditional approaches unrealistic.

The approach of treating Cambodia as a post-revolutionary society stresses the following factors: the ruthlessness of the Pol Pot revolution and its lasting impact on Cambodian society (not merely the aspect of trauma and suffering that it caused to individuals and families) and the subsequent influence of the Vietnamese socialist revolutions particularly in the eighties. Due to the two factors mentioned above, the following aspects have become prominently visible factors in Cambodia, i.e. the loss of memory of the pre-revolutionary social institutions and practices; a new memory of social habits, procedures and practices (This new memory, however, has been theoretically displaced with the acceptance of a market economy and liberal democracy as the foundations of Cambodian social life after the elections by the signatories of the Paris Agreements and the makers of the new Cambodian Constitution.) and a host of other problems that result in giving a new content to the age-old traditions which in Cambodia are centered around the Royalty, Buddhism, family and land.

The Shift From Humanitarian Assistance to Social Reconstruction

In the eighties, humanitarian assistance to Cambodia from the United Nations, Western countries and international NGOs was given on the basis that the country and its people had been hit by a great tragedy. This tragedy is described as the worst human cataclysm of the twentieth century, with regard to the number of lives lost and people displaced. Naturally, at that stage, the nature of the future of Cambodian society was not a prime consideration. During the negotiation and the signing of the Paris Agreements, the pre-occupations were to find basic areas of agreement between the warring factions and to provide for an internationally supervised election as a means of establishing a legitimate government. While the immense prob-

lems that this country may face might have become apparent at that time, at least in broad terms, it seemed natural to leave these problems for the future government to solve. The UNTAC's presence in Cambodia and its attempt to assist Cambodia to reconstruct some of its basic institutions by way of exercising direct control in some "ministries" as allowed by the Paris Agreements supplied a wealth of information about the society, which had been unknown to the Cambodian public as well as the international community. Since the elections and the establishment of the new government, it has been sharply felt that the reconstruction of the post-Pol Pot Cambodia is not an easy task. This is not merely due to lack of resources (material and human), but also due to the nature of society and social institutions created during the Pol Pot revolution, followed by the introduction of a socialist model of administration by the Vietnamese.

Why Cambodia Is Not A Post-colonial Society

There are many characteristics of post-colonial societies despite unique aspects of each such society. The first characteristic is the existence of a large body of laws that relate to various aspects of life, particularly the basic aspects of life, such as basic criminal administration, civil administration, citizenship, immigration, contract law etc. In addition to these, colonial powers usually implant the attitude that societies need to be governed by laws. These laws may sometimes be the recognized customs of the traditional way of life of the people themselves.

However, in Cambodia today there is no such body of identifiable laws in many areas, including those areas most basic for maintaining orderly ways of life even to a minimum degree. Furthermore, the attitude that society needs to be governed by law has also become alien, as the day-to-day orders of the party leaders were "the law" during the Pol Pot period. The Vietnamese approach was not much different, though it was less harsh. The party apparatus administered the country by party decisions which were sometimes disseminated by written decrees or verbal communications passed from the central committee down to communes. During the Vietnamese-guided State of Cambodia period a small body of law modeled after the Vietnamese socialist law was passed by the National Assembly.

Colonial powers usually build administrative structures in the countries they rule, which provide a foundation for newly independent governments to begin their administration. Newly independent states often modify these structures the way they wish, but almost always begin with the old structures used during colonial times.

In Cambodia the situation is different. The Pol Pot revolution wiped out all existing administrative structures in a manner that had not happened in any other country within a period of four years. The structures which were built in certain areas of the country (in other areas there are no structures at all) under the Vietnamese guidance by the PDK or the SoC were socialist structures deeply linked to party rule. These qualities are incompatible with a liberal democracy. Thus, with a liberal democratic style government now in power, there is a vacuum as far as administration is concerned.

Most colonial powers introduced to their colonies a judiciary and encouraged its independence at least in some areas of community life.

The Pol Pot revolution completely destroyed the previous existing judiciary. Thereafter, under Vietnamese guidance, a socialist-style judiciary was introduced. Essentially, the socialist system of judiciary consisted of a court-house in each of Cambodia's provinces. The trial system was one of secret trials held by prosecutors confirmed by a public performance called a "trial," which confirms the verdict arrived at earlier. In this area too there is a vacuum to begin with as the socialist court system is incompatible with the legal systems used in a liberal democratic system.

The colonial powers usually leave behind a number of qualified persons to run the institutions of the post-colonial period. In British colonies such as India, Sri Lanka, Malaysia, etc. this consisted of a considerable section of society. When the French left Cambodia, they left enough persons qualified for the day-to-day running of the administration.

The Pol Pot revolution concentrated on total elimination of the intelligentsia and achieved this in such complete manner as has never happened in any other country within such a short period of time. As a result, the people running the administration in 1992 knew only one type of administration, the one set up under the Vietnamese guidance. This is rather an ironic outcome of the Khmer Rouge revolution, as it had declared Vietnamese as their greatest enemy.

The Place of Tradition in Post-colonial and Post-revolutionary Cambodia

The traditional Cambodian society has three pillars: king, religion and family unit. The French, as the colonial power in the country, compromised with these institutions to the extent that they did not interfere with their interests as being masters. When the French finally gave up the colony, these three institutions still maintained their predominant positions in Khmer

society.

Some political parties in Cambodia did attempt to undermine the monarchy, and as a result the king himself formed a political party in order to retain his power. Under the 1947 Constitution, the King retained a great deal of power, but had to compromise with the democratic institutions.

Pol Pot's revolution did not succeed in wiping out the Royalty. In fact after the initial stage, the king was allowed to live in the country under virtual house arrest. When the revolution was in danger, the king gained even a greater degree of influence. The blow to the Royalty did not come as a direct blow to the king, but by way of destroying the social structures and institutions that supported the king.

During the early period of the Vietnamese-backed Heng Samrin regime, the king joined the resistance but later arrived at a compromise with the State of Cambodia.

Under the new Constitution of Cambodia adopted in September 1993, the power of the king is reduced to be the symbolic head of State, "The King shall reign but not rule." The role of the monarchy clearly demonstrates how dramatically traditional life in Cambodia has changed. While the content of the former social institution has been substantially changed, external aspects of tradition have been restored. Such is the continuing impact of the "wiping out the past policy" of the Pol Pot revolution.

As for the continuity of Buddhism, the situation is similar. Cambodian Buddhism is rooted in the soil and centered around the Sangha. The village temple is the social base of Buddhism. Pol Pot's revolution wiped out the Sangha from village life. The physical extermination of monks and nuns was ruthless. Approximately 25,000 monks were summarily executed or died due to hardships. All monks were defrocked.[1] Repressions were even more ruthless due to the Marxist view that religion would back the counter-revolution. The aspect of physical extermination stopped during the next period, but the Vietnamese socialists were also opposed to Buddhism in principle. The new emergence of monks was slow, and Buddhism was pushed to the periphery. The State of Cambodia made some compromises with the monks and allowed some political patronage to monks living in the city. The SoC also allowed many of the village *Wats* (Buddhist temples) to be rebuilt. The villages, however, were run by communes, and within the village power structure, the temple had no place. While Buddhism as the main psychological,

[1] Mysliwiec, Eva., *Punishing The Poor; The international isolation of Cambodia 1970-1987*, Published by Oxfam, pp. 47.

spiritual and moral force will retain its place in the minds of Khmers, whether they live in Los Angeles, Paris or Cambodia, the temporal power of the *Sasana* (Buddhist organisation) will not attain the same position as that before Pol Pot times. The village life of the earlier times has indeed been wiped out. Religions have the capacity to survive. However, the specific social organization and influence does change under the pressure of massive revolutions.

The great victim of the Pol Pot revolution was the Khmer family. In this respect there are several good studies.

The Effects of the Pol Pot Years and Socialist Period that Followed on the Khmer Society at Large.

The Khmer society has been radically uprooted from the past. All Asian societies go through a period of transition to modern times. However, the pace of change from rural to modern society varies from place to place. The chief reason for change in most places is the urbanization process. Ironically, Cambodia's social uprooting took place in a counter-urbanization process, when the entire population of towns were forcibly pushed to live in rural areas. The result of the total experience is that the link with the past is perceived less as a way to sustain lives. The appeal to return to the roots will not be a convincing solution to the massive instability in the country. The social displacement is such that return to the status quo will be perceived not only as impossible, but also as undesirable. This creates an enormous pull for rapid modernization and for creating a dynamic social administration system, as opposed to the slow rural system of the past.

On the other hand, the only known social experience the people have is that of socialism. They face great difficulties in understanding and conceptualizing liberal democratic ideas and institutions. Parliament, courts and even centralized administration are alien concepts. Even a police force devoted to crime investigation and maintaining law and order are unfamiliar concepts. It was the party that was in charge of these matters. Dealing with day-to-day crime was mostly the function of the commune. The definition of crime itself was based on the socialist conception of property and Marxist class concepts as far as individuals were concerned. Essentially, crimes were defined according to the political strategies to fight back counter-revolution. The definitions of offences are quite different to those in countries following the British or the French models. Criminal or civil trials with an independent judiciary that review evidence are completely alien processes. What people have experienced are verdicts secretly arrived at and publicized during a session called a "trial" by "judges" who are expected to follow

party orders. Though under the new Constitution many new committees, commissions and ministries etc. may be appointed, the working methods of these are likely to be on the basis of the socialist model until it is abandoned consciously.

5

THE SYSTEM OF TRIAL UNDER THE VIETNAMESE - KHMER MODEL (1981-1993)

Under the Khmer Rouge system of justice there was no pretence of conducting a trial. However, documents collected from the *Toul Sleng* prison show that "evidence" was collected against prisoners, particularly in the form of extracting confessions. Usually, these confessions were forcibly extracted from persons who were already politically "condemned" to death, though they often did not know that at the time. Besides these, tens of thousands died due to spontaneous and summary decisions taken by party cadres in various localities. The offenses varied from stealing food, showing any sign of attachment to a religion, picking fruit from a tree, using any indiscreet word that revealed one's past, etc.

The overthrow of the Pol Pot regime by the Vietnamese brought with it the concept of a socialist-style trial, a model already well established in Vietnam. Refugees who fled Vietnam after the fall of Saigon have provided detailed information about the nature of these trials. They are modeled after the socialist trials which began with the notorious Moscow trials staged in

the thirties by Stalin against his opponents, the Left Opposition figures and others.

The first such trial in Cambodia was of Ieng Sary and Pol Pot, who were tried in absence for genocide and crimes against humanity. This famous trial was in fact a piece of political theatre. Beginning with the decree which made this trial possible, several other decrees were passed, which were drafted under the guidance of the Vietnamese. The Vietnamese experts who advised the Cambodian authorities in every field of activity during the eighties were called *Neakchamneanhkar* in Khmer and *Chuyen Gia* in Vietnamese.[1]

A trial under the Vietnamese-Khmer model, which prevails from the eighties up to now, may be divided into the following sequence:

(a) Handing over a dossier by the police to the prosecutor of the relevant provincial court. This dossier consists of police investigations, the most important part of which is the confession by the accused. It may also include other reports and findings by the police.

(b) On the basis of this dossier, the prosecutor continues his investigations.

(c) The advice of the Ministry of Justice or the governor of the province is sought, and a consensus on a verdict is determined.[2]

[1] *KAMPUCHEA - Political Imprisonment and Torture* - Amnesty International report - 1987

[2] Consultations between the court and the Ministry of Justice are not new, but have existed for many years. It is necessary to understand the historical factors behind this in order to be able to advocate reforms in the Cambodian judicial system. Until the establishment of the Supreme Court, the Ministry of Justice acted as the "appeal court" over the provincial courts. This was in part due to the lack of adequate qualified persons to staff superior courts. Even after the establishment of the Supreme Court, the Ministry of Justice exercised control over all courts, including the Supreme Court. The decisions of the Supreme Court could be appealed under the SoC regime to the Legislative Committee of the National Assembly, which was chaired by the vice-minister of justice, and from thereon to the Permanent Committee of the National Assembly. Thus, there was a tradition of judicial subservience to the Ministry of Justice. This tradition created patterns of behaviour, which are difficult to change. For instance, the Supreme Court made the following observation in a report to the National Assembly in 1989: "...the People's Supreme Court.... is not competent to resolve the suits (sic) itself, has only examined them ... so that they may be turned over to the competent organs to be dealt with. This is because we feel that the work of receiving and resolving suits is a matter of ideology. It is not only a matter of expanding and strengthening socialist legality, but is inseparably involved with political problems, viz., it makes the people have a strong faith in our regime." (See *Report on the Activities of the People's Supreme Court During the First Semester of 1989*, presented to the 17th session of the First National Assembly.)

It is also useful to quote the following paragraph from the report of the Supreme Court to the National Assembly in 1991: "Some provincial and municipal people's courts are

(d) Public performance of "the trial." After some ritualized formal steps, the verdict is read. In important cases, State television broadcasts the event to the public.

(e) The Ministry of Justice may vary the verdict whenever it feels.

(f) There is no system for hearing appeals in either Vietnam or Cambodia. Varying of verdicts or sentences is essentially an executive act.

The Paris Agreements and the UNTAC Legal Reforms

Under provisions on civil administration, the Paris Agreements empowered UNTAC to supervise the judicial processes throughout Cambodia. "In consultation with the SNC, UNTAC will supervise other law enforcement and judicial processes throughout Cambodia to the extent necessary to ensure the attainment of these objectives."[3]

UNTAC, in fact, did not exercise this supervisory function, nor were there any officers specifically assigned for this function. However, after a few casual visits to courts and procurers, Mr. Surge Durond started to draft a limited code consisting of penal provisions. The initial draft was developed within a short time and submitted to the four factions. Only a few days were available for their comments. The NADK rejected the draft, the SoC and the FUNCINPEC suggested a few amendments. (A Khmer translation of the draft did not exist at the time.) This code, which is entitled "Provisions Relating To The Judiciary And Criminal Law And Procedure Applicable In Cambodia During The Transitional Period," was adopted by the Supreme National Council on September 10, 1993. This 20-page document attempted to abridge legal provisions on such matters as judicial system (courts, appellate courts, Supreme court, independence of judiciary, police, attorneys, correctional system, etc.); criminal procedure (legal assistance, military tri-

compelled by their provincial and municipal [administrative] committees to report about every aspect of every matter in both criminal and civil cases. If they want to convene hearings, the case file must be taken in and put by them [for approval]. Those which they like and strike their fancy are the ones that are allowed to be opened. Those which don't please them personally get bogged down. This kind of thing is a violation of the stipulations on assignment of duties and the work system of provincial and municipal committees in the 16th Decision of the Center dated 16 May 1986 from the Party Central Committee, in which clear-cut instructions are given with regard to the duties of provincial and municipal committees and the work of courts." See "Report On Actions In Implementation Of Specialized Tasks By The Supreme People's Court During The First Semester Of 1991," presented to the 21st session of the First Term of the National Assembly.

[3] Paris Agreements- Annexure 1-Section-B Article 5(B)

bunals, treatment of detainees, arrest and detention, pre-trial, administrative detention, release of detainees, access to files, arrest without a warrant, arrest based on existence of substantially incriminating evidence, searches, time limits and release for procedural error); trial (camera hearing, evidence, presumption of innocence, judgement, intervention, offenses based on opinion or belief, review of certain trials and statute of limitations); crimes (murder, voluntary manslaughter, rape, robbery, illegal confinement, organized crime, embezzlement by public officials, corruption, illicit traffic in narcotic drugs); misdemeanors (involuntary manslaughter, battery with injury, indecent assault, theft, offenses concerning cultural property, fraud, breach of trust, counterfeit of seals, bank notes, public documents, stamps and trademarks, violation of copy right, forgery of public document, forgery of private, commercial or bank document, receiving of concealing stolen goods, wrong damage to property, arson, bearing or transporting illicit weapons, coercion of witnesses, perjury, infringement of individual rights, bribery, incitement leading to the commission of a crime, incitement not leading to the commission of a crime or misdemeanor, incitement to discrimination, disinformation, defamation and libel, electoral fraud, use of narcotics); punishments (equality of punishments, death penalty, attenuating circumstances and expulsion of minors, complicity, suspended sentences, conditional release, allocation of fines); applications (abrogation of inconsistent rules, international instruments and entry into force).

Article 73 of these provisions abrogated "any texts, provision or written or unwritten rule contrary to the letter and spirit of the present text." Notwithstanding that, all the practices of the Vietnamese-Khmer model remained firmly intact. The Supreme Court remained what it was, never conducting public hearings and only having the rights to read municipal court files and to recommend retrials by the same court. There has not been a single instance in which such rights have been exercised by the court. Judicial review is still an intriguing word to Cambodian judges, and they often want to know what it means. The appeals court was never appointed. Trials were conducted in the same manner as before: secret trial followed by a public performance. None of the provisions of the UNTAC provisional code was applied in practice, except in a few cases relating to the release of some prisoners who were kept for a considerable time without trial (in several instances, more than ten years). These releases took place due to insistence of human rights officers of UNTAC's Human Rights Component.

Reasons for not Implementing UNTAC's Transitional Law

Even a few months after the adoption of the Transitional Law, an official Khmer version was not available. There was an unresolved issue relating to differences in the French and the English versions. There were additions to the text even after it was adopted by the SNC, though these additions were never submitted to the SNC for approval. Thus there was confusion as to the law itself.

A more important reason for non-implementation was that the law itself was too inadequate to be taken seriously. The seventy-five articles of the provisions looked more like a first year law student's notes, and yet were supposed to resolve all the provisions of penal law, criminal procedure, evidence and the judiciary. The text was an amateurish attempt at legal reform.

The drafters did not consider some of the more problematic areas, such as the relationship between courts and police, lower courts and higher courts (which did not function), the nature of trials under socialist system, etc. Police in Cambodia are far more powerful than the courts are. The public perception of courts is that they are powerless and are manipulated by the executive. Widespread allegations of corruption also exist. There is no public confidence in the Cambodian court system. The new text failed to address any of these problems. The Western view that whatever is drafted by the legislature is effective law prevailed. However, in the socialist "law," mere approval by the SNC mattered very little.

UNTAC organized a few two-week seminars to instruct Cambodian judges about the new text. These seminars clearly showed that even the basic concepts introduced by the new texts were alien to the Cambodian judges. The judges expressed considerable confusion relating to what they were supposed to do. The provincial judges consistently expressed the need for guidance. In many provincial courts, things came to a complete standstill.

UNTAC's Admission of Failure of the Provisional Law

When pre-election political violence grew in November and December 1992, the transitional provisions proved to be of very little use in investigating or prosecuting of these cases. Obviously, there were political reasons for non-compliance. However, attempts to get these cases investigated by the authorities showed the widespread practice of non-investigation of

serious crimes, whether they were politically motivated or not. After much public concern was expressed on the level of violence (Prince [now King] Sihanouk even threatened to discontinue further co-operation with UNTAC and the SoC if immediate steps were not taken to stop the violence), UNTAC created its own law, empowering UNTAC police and military to arrest and UNTAC officers to prosecute. Under this new law, four people were arrested, and UNTAC was obliged to bring these detainees to trial. However, attempts to comply with the law showed that it was not possible to expect a fair trial under the existing procedures.

The special representative of the Secretary General for Cambodia, Yasushi Akashi, made further laws on February 3, 1993, to detain these persons until a competent court was identified to try these cases. Even when UNTAC finished its mandate in September 1993, no such court was identified. The February 3 directive was an admission that the UNTAC transitional provisions had failed to alter the existing socialist system of administration of justice.

Law on Criminal Procedure - *Chbap Sday Pee Neeteivitee Prumatoan* - January 29, 1993, Passed by the National Assembly of the State of Cambodia (SoC)

The State of Cambodia passed its own law on criminal procedure on January 29, 1993. The document consisted of 238 articles and was divided into seven chapters. The topics covered general provisions, justice police, provincial public prosecutor department, investigating judge, provincial or municipal tribunals, appeal courts and the Supreme Court.

There have been different views expressed on the nature of this document. It was regarded by some as a supplementary law to the UNTAC transitional provisions. However, others expressed the view that this criminal code was meant to replace the UNTAC transitional law in the State of Cambodia. Doubts have also been expressed about the validity of laws passed by the SoC National Assembly during the transitional period under the Paris Agreements, when the only body that had the legal authority to make such laws was the SNC. Clearly, the SoC did not have the legal power to override or to abrogate a law passed by the SNC.

In actual practice, SoC courts applied some parts of this criminal procedure, such as the provisions on bail which did not exist in the earlier law. A number of people were released pending trial on applications by the

human rights officers of UNTAC and later by Cambodian defenders.

The new institutions envisaged by the criminal procedure code were not created, for example the Justice Police (*Nokobal Yuttethoa*, also sometimes translated as Judiciary Police). In fact, one of the most problematic areas is the co-ordination of the activities between the police and the prosecutors. The police do not initiate inquiries into crimes in many instances. When they do, they settle most cases on their own, without any references to prosecutors or courts. In the few instances that they do, the police consider their inquiries to be over and do not continue inquiries with the prosecutors or the investigating judges as envisaged in the procedure code. The basic aspects of "trials" still follow the Vietnamese model. This became obvious in the case of Ten Seng, the deputy director of Battambang prison, who was arrested by UNTAC police for torturing prisoners. When UNTAC left, the case was handed over to the Cambodian courts. The prisoner was "tried" in November 1993 and was sentenced to a one-year prison term. The pattern of the trial was no different to trials during the SoC trials. One of the judges justified the procedure by stating that the trial was correct according to the earlier law, meaning the law during the SoC period. There had not been a single trial conducted so far outside the SoC model. In short, the legal procedure proposed by this code was not brought to practice except in some areas, such as bail. Even in the area of bail, there are still prisoners who have not been brought to trial after six years of arrest. The forty-eight-hour rule for producing a prisoner before prosecutor is rarely put into practice. The courts have no systems for serving notices, summons or executing warrants. There are no means to enforce such order. However, court orders for further imprisonment are strictly enforced.

Corruption

Besides these problems, there is a general suspicion that police, prosecutors and judges are corrupt. The public confidence in the administration of the justice system is very low.

The Constitution

Article 139 of the Constitution of the Kingdom of Cambodia adopted by the Constitution Assembly on September 21, 1993, states that the laws and standard documents of Cambodia shall continue to be effective until altered or abrogated by new texts, except those provisions that are contrary to the spirit of the Constitution. The Vietnamese-Khmer socialist model of trial is contrary to the spirit of this Constitution, as this system of trial is

contrary to liberal democracy and a free market economy, the two basic pillars of the new Constitution. It may be said that both the UNTAC transitional provisions and the (SoC) criminal procedure code still remain as valid laws. In fact, replies to inquires from provincial courts reveal that these two documents are considered as law by the courts. However, as explained before, the actual practices of courts on essential elements of the criminal justice system remain as they were prior to UNTAC's arrival.

Conclusion

While there has been much interest in reforming the basic criminal administration, there has not been a significant deviation from the Vietnamese-Khmer model which prevailed during the PDK and the SoC regimes. However, now more people involved in the administration of justice are aware of the problem than before, and the defects in the system are admitted quite openly now. In attempting reform, it is necessary to concentrate on essential elements, such as trials. The changes must expressly abrogate unacceptable laws and procedures and not rely on implied abrogation or general clauses on abrogation. The creation of new institutions must accompany new laws, instead of creating laws for non-existing institutions as was done in the instances of UNTAC transitional provisions, as well as the SoC criminal procedure code. The procedures must be detailed enough to be easily understood by all parties (Indian Penal Code and Criminal Procedure Code are examples of such detailed procedures), as there is no satisfactory previous law to fall back on or a system of interpretation of laws, as for example the higher judiciary in most other countries.

6

6.1. THE CENTRAL PLACE OF CONFESSION AT TRIALS UNDER SOCIALIST SYSTEM

by Basil Fernando

Joseph Stalin gave Andrei Vyshinsky the task of formulating new principles of Bolshevik legal procedure. Dzherzhinsky had asked, back in 1918, "What better proof can there be than the accused's confession?" In semi-literate Russia, unaccustomed to the rule of law, the fact that "he admitted it himself" was conclusive. The Boss understood this very well, and all his show trials were based on this "popular principle." Vyshinsky's numerous works are a scholarly exposition of the Boss's ideas: "confession of the accused is the basis of the case for the prosecution;" "the confession of the accused is the empress of proof." Such were the terms in which Vyshinsky formulated the principles of legal procedure in the "land of socialism."[1]

How this actually happened between Vyshinsky and Stalin is described by Arkady Vaksberg in his book Stalin's Prosecutor, Life of Andrei Vyshinsky.[2]

[1] Radzinsky, Edward, *Stalin*, Published by Doubleday,New York,1996, pp. 394

[2] Vaksberg, Arkady, *Stalin's Prosecutor - The Life of Andrei Vyshinsky*, published by Grove Weidenfeld, New York, 1991, pp. 79

Vyshinsky played an even more sinister part in the Pyatakov-Radek trial in January 1937. He paid several visits to Stalin, deftly picking up not only everything the Leader said but also the tone of voice in which he said it. Instead of simply relying on his memory, he jotted these conversations down, and his notes may now be studied in his personal archive. He received instructions on the confessions to be obtained from the accused and the way he was to conduct himself during the trial. So how was he to conduct himself? 'Don't let [the accused] speak too much ... Shut them up ... Don't let them babble.' Stalin personally edited Vyshinsky's speech for the prosecution while the latter, for his part, did the same with the final words of the accused and even the experts' reports. Kari Radek helped the Procurator with particular zeal.' Vyshinsky often dropped by to see him in his prison cell, and the two of them wrote up the trial's 'scenario' and the text of the roles (emphasis is mine).

Arkady Vakserg futher writes:

> "Recent archival research has convincingly shown that on their own initiative Vyshinsky and Ulrikh [Vyshinsky's assistant in some cases] asked Stalin for instructions on how to proceed with various prisoners: 'We deem it necessary to give the death penalty ... to the main accused, and varying prison sentences to the remaining accused. We ask for your instructions. A. Vyshinsky, V. Ulrikh.' A great many inquiries of this sort were made, and the answers they received, though detailed at times and short at others, were always specific."

About the direct involvement of the prosecutor in obtaining confessions the same author writes,

> "The archive materials dismiss another 'mitigating' claim - that Vyshinsky knew what the NKVD [People's Commissariat of Internal Affairs] investigators were up to (the torture, taunts, blackmail, threats, etc.) and even covered up for them, but was still not 'personally' involved in these heinous crimes. Alas, this is not so. It is unlikely that Vyshinsky, a member of a noble Polish family, personally took part in the physical coercion - at any rate, there has been no evidence so far to support this. However, according to the trustworthy testimonies of victims and eye-witnesses, he personally, took part in extorting the necessary statements by threatening to implement the death penalty, to annihilate the victim's family, and to hand the person over to even more brutal sadists. This was how he supervised investigations in his capacity

Andrei Vyshinsky, Joseph Stalin's prosecutor (Photo: UPI/Bettmann, Stalin's Prosecutor*)*

as Procurator-General."

The author sums up the prosecutor's role, thus:

"Strictly speaking, Vyshinsky was himself the principal falsifier. In the most important cases the indictments were compiled by him personally before the 'investigation' was even over, and the drafts were then presented to Stalin so that he could edit them, ascribing to the accused other 'crimes' as he saw fit. Vyshinsky then made the necessary corrections to the indictments, and the investigators adjusted the records of the examinations accordingly, beating out of the victims all the evidence required by Comrade Stalin and Comrade Vyshinsky."

The following is a succinct summary of what trial meant under this system at that time:

"There was no evidence, but the abusive language created a psychological illusion of there being some."

The central importance attached in social theories on trials handed down from the Soviet system to other countries which became socialist later came from the theatre of Moscow "trials," in many of which the main theoretician of this system- Vyshinsky- was a key actor.

6.2. CONFESSION AS A TECHNIQUE OF PROOF IN CRIMINAL PROCEEDINGS

by Terrence Wicremasinghe

Confession is the main technique of proof - of guilt of an accused - in Cambodian courts. This practice has been followed even after 1992 when new procedural laws were adopted and a new constitution was promulgated, which contains an article to the effect that "confession obtained by physical or mental force shall not be admissible as evidence of guilt" (Article 38).

In 1992 under provisions relating to the judiciary and the Criminal Law and Procedure, provincial courts, which were established in 1981 and recognised in 1983, were consolidated and adopted as the court's hierarchy in Cambodia. The same recognition was given under the Law on Criminal Procedure enacted in 1993.

In the system of trials held in those courts independent evidence was not the mode of proof. Confession was the technique of proof. Trials were held to get the confession obtained during police investigation confirmed by the accused at a public hearing.

Under Article 24(3) of the 1992 Criminal Law and Procedure, admissibility of confessions made to law enforcement officers during an investigation is given implicit legal recognition, and thereby the past practice of proving cases by the technique of confessions is promoted under statutory implication. This could not have been the intention of the drafters. Nevertheless, such unintended consequences are inevitable. The salutary provision in Article 24(3) that says "confessions by accused persons are never grounds for convictions unless corroborated by other evidence" has in fact no practical effect. The reasons will be discussed in the text that follows.

This was one of the biggest inexcusable errors committed by the drafters of the 1992 criminal procedural law and was due to their lack of under-

standing of the mechanism, techniques and the jurisprudence behind the system of courts that were functioning before and at the time such laws were introduced in haste.

Further, the intention of the drafters of the Law on Criminal Procedure of 1993 was quite clear and specific that this statute was enacted in the National Council of the State of Cambodia, as opposed to the UNTAC Criminal Law and Procedure, which was adopted in the Supreme National Council.

They deliberately introduced Article 125 that unequivocally recognized without any prohibition, restraint or conditions the reception of confession, whether made to a police officer or otherwise, as evidence to prove a crime.

This statute was adopted months after the adoption of the Criminal Law and Procedure of 1992. Article 125 intended in no uncertain terms to negate the effect of the restraint placed on the absolute reception of confession as evidence.

Having this in mind it is pertinent to discuss the nature and scope of confessions as an item of evidence in other jurisdictions in criminal proceedings.

What is a Confession?

Every confession is an admission. But every admission is not a confession.

As to what makes a confession evidence ordinances and evidence acts in different jurisdictions contain statutory definitions.

In the evidence ordinance in Sri Lanka, yet another Asian country like Cambodia, confession is defined as follows in Section 17(2):

> "A confession is an admission made at anytime by a person accused of an offence stating or suggesting the inference that he committed that offence."

Neither the Criminal Law and Procedure of 1992 nor the Law on Criminal Procedure of 1993 contains a definition of confessions. Article 24(3) of the 1992 law has recognized, as mentioned earlier, by implication confessions as legally acceptable evidence but contains an exclusionary rule prohibiting the reception of confessions obtained under whatever form of duress.

A general definition of a confession applicable to different jurisdictions is cited below:

> "Confession is an admission the words of which expressly or substantially admit guilt or when they are taken together in the context inferentially admit guilt."

The laws of different jurisdictions have placed severe constraints in varying degrees on the reception and proof of confessions.

Sri Lankan courts are barred from admitting in evidence confessions made to police officers and excise officers. So are the confessions made while the accused was in the custody of these officers. Identical prohibitions are found in the Indian evidence act.

In England, subjected to the test of voluntariness, confessions are admissible evidence. However, unlike in Cambodia, prosecution must prove that the confession has been made voluntarily. Only then a confession is admissible.

In the early years of the development of the law of evidence in England, confessions were admitted without any serious questions. However, it was felt later that grave injustice would ensue were the courts allowed the admission of confessions without any check. Attempts were made to protect the accused without the truth being hamstrung. To achieve this object the rule of voluntariness was introduced.

The first authoritative formulation of this principle is found in Rex *v.* Warickshall (1783) as cited below:

> "A confession forced from the mind by flattering of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected."

This principle was given statutory recognition in the Evidence Ordinance of Sri Lanka in Section 24 and took the form of an absolute prohibition under Sections 25(1) (2) and 26. Section 24 states:

> "Confession obtained by any inducement, threat or promise (proceeding from a person in authority) is irrelevant in a criminal proceeding, if at the time the confession was made the accused had reasons to believe that he would gain any advantage or avoid any evil of a temporal nature."

Absolute prohibition is found in Section 25(1): "No confession made to a police officer shall be proved as against a person accused of an offence." Section 26 (1) extends this prohibition to a confession made by any person while he was in the custody of a police officer.

In Hong Kong before a confession is received as evidence in court a preliminary inquiry has to be held to establish the voluntariness of such a confession. Only then it is received in evidence at the trial.

In Australia, a confession is only receivable at the trial as evidence if it is electronically recorded, otherwise barred from leading in evidence.

The drafter of the Indian evidence act, Sir James Stephen, in his introduction to the Evidence Act of 1872 (page 165), emphasized why such a prohibition was introduced: "In order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody in the hope of professional advancement."

The Evidence Act was introduced to many other British colonies in most identical terms.

One must note that when the Indian act was drafted, its drafters introduced changes whenever the English law was considered to be in need of improvement or was thought to be unsuited to the local conditions.

In this sense the Indian and Ceylon statutes were not mere codifications of the English law but involved salutary departures from the English evidentiary rules. Severe restraints and prohibitions found in these two statutes in regard to the admissibility of confessions made during police investigations are clear illustrations of such departures having taken into consideration the criminal investigatory process and the men involved in it - under a colonial setup.

In the Cambodian context, a contrary approach was visible, so far as the drafters of its criminal procedural laws of 1992 and 1993 were concerned. As mentioned in the preceding paragraphs of this text, Article 24(3) of the Criminal Law and Procedure of 1992 has the effect of giving legal recognition to the reception of confessions even made to police officers or made while in their custody. If the accused failed to show the judge that it was extracted under duress prior to the sentencing, giving him notice under Article 24(3), evidence of that confession becomes admissible evidence against him.

Drafters did not take into consideration the local conditions and the criminal justice system that existed in Cambodia at the time this article was introduced to the criminal procedural laws.

Thereby legal sanctity was given to confessions as admissible evidence obtained during police investigations - in a criminal justice system where confessions had become the main technique of proof and independent evi-

dence had no place in proving a case.

Recent cases in the Phnom Penh municipal court amply demonstrate this aspect. In Srun Vong Vannak's case, a confession was extracted from him, according to the accused, by using physical torture. He had injuries. In spite of the accused person's strongest denial of the confession, it was let in as evidence, and the conviction was made on this self-incriminatory evidence obtained according to the accused by using physical duress.

This case together with a series of other cases illustrate the degree of damage done in the administration of criminal justice in Cambodia - where courts are allowed to receive confessions made to police officers or made while in their custody under Article 24(3) by implication.

In the past, once a confession was extracted from a suspect his fate was considered already sealed. Thereafter he had only two alternatives - either to confirm it at the public hearing or to allow the judge to use his discretion (now it is provided by Article 24[3]) and accept the confession and declare its voluntariness and credibility. Even the strongest protest of the accused was tantamount to a confirmation from the judge's point of view. In other words let the accused confirm it by himself, or otherwise let the judge order its confirmation.

This was the pre-1992 criminal justice cult that still continues.

Drafters of the new procedural laws failed to realize the organic link between the pattern of investigation of a crime and the cult of sentence hearing at the time they introduced the new laws.

In Cambodia law enforcement officers form no disciplined police force and are not subjected to effective control. Criminal investigations are left with the military police and the judiciary police. Better to term them as recalcitrant men or miscreants. Under these circumstances the adverse effects of Article 24(3) are more than obvious.

An accused is always at the mercy of any evidence either perjured or oppressively obtained by judiciary police or military police that might be brought against him. Under such circumstances when the technique of proving a case by confessions is promoted by implication under Article 24(3), which is read with Article 42 of the Law on Criminal Procedure of 1993, and allowed to prove the guilt of the accused, then justice becomes an unattainable end for an accused, and always his liberty will be in grave peril.

Drafters also overlooked the nature of judges in whose hands discretion was left to decide as to the voluntariness of a confession. The majority

of those judges in the past still hold office, and they are psychologically trained and always morally inclined to accept the voluntariness and truthfulness of a confession.

They work on the common sense rule that "who knows the truth better than the person who did it." This common sense rational has become a strict disciplinary legal rule with an executive diction in the working pattern of a judge's mind that has used to respond to it for years. Perhaps this rule was used to achieve ends of a system that had a purpose of its own where the liberty and dignity of an individual were negligible. Those judges who carry with them these practices, prejudices and psychological attitudes are not temperamentally and technically qualified to investigate under Article 24(3) the truth of a confession.

Had the conditions of the country and the behavior and practices of policemen investigating crimes been properly addressed and correctly assessed, absolute prohibition on confessions made during police investigations - as admissible evidence - could have been the correct conclusion of the drafters.

Therefore, the logical conclusion one has to reach is the total prohibition of confessions made to police officers or while in their custody - as admissible evidence. It is suggested that Article 24(3) be repealed.

It is further suggested the total replacement of the criminal procedural laws of 1992 and 1993 - even though they contain very positive provisions, which were drafted at random without following a clear scheme and policy and therefore rendering them obnoxious and ineffective.

A discussion on confessions and Article 24(3) necessarily involves a close scrutiny and analysis of Article 42 of the Law on Criminal Procedure of 1993.

Wordings of Article 42 attribute authenticity to the contents of the judiciary police report and make it mandatory for judges to accept its contents as truthful and accurate. One must not forget that the confessions extracted from the accused are also recorded in this report. True that there is a condition to which this rule is subjected. However, the condition contained in this article in effect becomes obnoxious in practice. Article 42 states:

> "Nevertheless the reports of the judiciary police shall be considered as authentic evidence to the contrary when they are drawn up by the officers of the judiciary police. In this case judges shall consider the essence of the report truthful and accurate, as long

as contradictory evidence are not brought up. These contradictory evidence may be freely brought to the judge by all legal means."

This shows the extent to which the justice system that existed at that time influenced the thinking of the drafters of this law.

It also shows further their inability to foresee the dangerous consequences to which the accused in a criminal proceedings were exposed by inserting this article to the criminal procedural laws of Cambodia.

Article 24(3) of the Criminal Law and Procedure of 1992 gave legal sanctity to the technique of proof, through confessions extracted during preliminary criminal investigation by police under the earlier criminal justice system. The police dossier - the scared document on which the accused was convicted in the earlier justice system - was given statutory recognition under Section 42 of the Law on Criminal Procedure of 1993, as the document spoke to the authenticity and truthfulness of what it contained, pertaining to the alleged crime.

These provisions, when read together, are not only repugnant to Article 38 of the Constitution that has recognized the concept of presumption of innocence, but in practice have resulted in reversing the procedure of fair trial intended and effected in re-establishing and consolidating the earlier practices of law enforcement officers and judges referred to in this text above.

This is the combined effect of Article 24(3) of the Criminal Law and Procedure of 1992 and Article 42 of the Law on Criminal Procedure of 1993.

To conclude this essay on confessions it is appropriate to emphasize that even in other jurisdictions in Asia, where liberal democracy prevails, severe constraints in varying degrees on the reception and proof of confessions are found in their statutes. As mentioned earlier, in Sri Lanka and India confessions made to police officers or confessions made while in police custody are totally barred as admissible evidence.

Why do Cambodian legislators not follow the same way? The Cambodian conditions and attendant circumstances demand the same.

(Ed. note: Wicremasinghe is a lawyer from Sri Lanka. He has worked as a consultant to the Judges Mentors programme of United Nations Commission on Human Rights and the Asian Human Rights Commission programme in Cambodia.)

7

A Controversy on The Nature of The System of Trials in Cambodia

7.1. 'JUSTICE IS NOT A WILD HORSE - IT MUST BE CONTROLLED'*

To some, he's the biggest apologist for a justice system marred by corruption and manipulated by the government; to others, he's a competent technocrat trying to forge a rule of law. Minister of Justice Chem Snguon spoke October 20 [1997] to Eric Pape of Phnom Penh Post about the judiciary, Srung Vong Vannak's controversial trial, and political killings.

Chem Snguon began his government career as a diplomat loyal to then-Prince Norodom Sihanouk in the 1960s and early 1970s. In 1975, after Pol Pot's Democratic Kampuchea regime took power, Snguon returned to Cambodia from abroad at the invitation of Foreign Minister Ieng Sary. Snguon was imprisoned at Boeng Trabek detention camp until the Vietnamese invasion overthrew Pol Pot. He rallied to the subsequent People's Republic of Kampuchea regime, and later served as Vice-Minister of Justice from 1983 to 1993. Appointed as Minister after the 1993 elections, he is also an MP for Svay Rieng. A long-time CPP member, Snguon was this year appointed to the party's central committee. Aged 71, he is known to be in poor health.

Phnom Penh Post: Will the poor be able to count on free legal protection after the end of the year when the mandate of legal defenders groups runs out, particularly if the Kingdom of Cambodia's Bar Association does not have the funds to take over the job you are giving to them?

Chem Snguon: The Cambodia's Defenders Project [and Legal Aid of Cambodia] are not important for training lawyers, they must pay lawyers for people who don't have the means [to afford a lawyer]. Our idea... is to create a fund for the bar association to defend the poor...

* This article was published in the *Phnom Penh Post*, 7-20 November 1997 issue

Lawyers can't work for a non-governmental organization like that. They must work for the bar.... Aid organizations must respect the law on the bar and the aid must be poured into the bar fund.

[...] Look, the minister of Justice is considered by some organizations as being a difficult minister. In fact, we want to spend aid money with a great deal of attention, no waste and a good result, so that at the end of the day it amounts to something... How do we proceed? We know all the courts, the work, the competency of most judges...we want aid to be targeted well. If you use the money for general training, it isn't effective.

Presently the weakest point of justice lies in the collaboration between the judicial police and the court. This collaboration is not sufficient, or until now, effective. It is because the police listen more to their bosses than the courts. They don't understand their responsibilities. They understand their bosses' orders and not the court's. Firstly, training must make it understood that the judicial police are under the orders of the prosecutors. They must respect the prosecutor at all times. Secondly, both police and judges must be taught investigative procedures. You have heard in the Cambodian press, have you not, of the discontent with the police. The police say they arrest bad people and send them to court, who then release them. But the police don't arrest big fish, only small gang members and [sometimes] they do it when there is not enough proof. They are not precise enough with the facts. When their report arrives at the court without enough evidence, [suspects] must by set free.

The police and the court must be on the same path.

How do you respond to allegations that you reside over a corrupt legal system?

There is corruption. We have found it in Pursat and Takeo. When we checked all the prisoners, we found out that some are missing. In Takeo, 10 prisoners are missing, for example. The cases are being sent to the Supreme Council of Magistracy.

With many judges receiving monthly salaries of $20 or $25 per month, isn't there a great temptation to accept bribes?

What you say is true. When the salary is too low, when the salary only provides four or five days of food for a family, there is a great temptation. Cambodia turns in a vicious cycle, why can't it get out of it? We want to reach a state of law, but to reach that we want justice to be independent and effective. A sufficient salary is necessary for judges, clerks too, but we don't have the means to augment their salaries. We are often criticized about the state of

law, but we are not helped with other problems. Happily, there are honest judges. Corruption is not so great. There is some, but not in great proportions.

[Most of] the people who live in Cambodia have survived the Khmer Rouge era from 1975 to 1979. Life for them at that time was so hard that they can now deal with these difficulties of judges who take some cigarettes or money for their families. [But] go to the court in Svay Rieng. Two judges there asked for 15 days off so they can harvest rice for their families. These judges, in spite of great difficulties, are looking for all honest means by which they can get by.

What are the effects of the millions of dollars in USAID cuts on the creation of a state of law in Cambodia?

America is the first country to push all countries to observe democracy and a state of law. The Court Training Program [was] a valuable program to help the country toward a state of law. If you cut [such programs], you are not helping the country.

Some critics of the judiciary say the courts are under the thumb of the government, others say they are merely afraid to make decisions that might upset the Second Prime Minister. How do you respond?

The Minister of Justice, the government and the legislative power have no right to be involved in the decisions of the court.

Justice is organized on three levels [and] is independent.... If a convict is not in agreement with the court decision, they can ask the Court of Appeals to look at that decision. If they are not content with the Appeals Court decision, the Supreme Court can be asked to oversee the Court of Appeals.

Our Justice Ministry watches from afar, over the provisions of law that the court uses and we check on the application of the provisions to see if it is correct or incorrect.

Last week, I received a complaint letter from the U.N. Center for Human Rights, saying the conviction of three members of the Khmer Nation Party is unfair. Personally, I will not get involved because even I, the Minister of Justice, don't have the right to say the decision is unfair. Only the Appeals Court or the Supreme Court have the right to say that.

You know their story? One person in the KNP was put in charge of finding someone to kill Hun Sen's brother in-law, Kov Samuth. He promised $50,000 for the murder. A moto was bought for the killer. The murder

was committed. The intermediary went to collect money but the person they were to collect from disappeared... They lost confidence in him and became afraid they would disappear as well so that all traces of the murder would be erased. So they went to seek police protection. Police put them in a hotel or an apartment; it was not detention as has been said. They confessed to everything [and] police arrested Vong Vannak.

The [UNCHR] said they were arrested and held secretly in a place that was not a detention center and that there was not enough evidence to convict any of them, especially not Vong Vannak. [But] all three, including Vong Vannak, can contact the Court of Appeals if they are not happy. The minister of Justice does not have the right to get involved.

Many of the people who attended the trial of Srun Vong Vannak said that Phnom Penh Municipal Court Judge Nop Sophon appeared to have made his decision before the trial opened as he spent only 10 minutes writing his decision — less time than he needed to read it. Is this normal?

The judge prepares his decision before the trial opens. Before the case opens, he already has a model. During the trial, issues may be brought up that modify the judge's decision. If the responses to questioning or testimony, are slightly different than expected, the judge will modify the decision for 10 or 15 minutes at the end of the trial. If the events during the trial are very different, he must suspend the trial until a later date. At that time, he will look at additional evidence and write a decision. Judges always make a map of their decision after looking at the [pre-trial] evidence.

But are judges afraid to make a decision they believe will go against Hun Sen's will?

Judges are not afraid of the Prime Minister. He does not have the right to fire, retire or fine judges. It is the Supreme Council of Magistracy [which does]. Judges are afraid of the Supreme Council of Magistracy.

Critics of the legal system say that it is used to effectively eliminate popular political figures who oppose Hun Sen.

Either we go after the people who commit crimes, or we do not. In the case of Prince Ranariddh, do we go after him or not? If we don't, nothing happens. If we do, the court cannot whether to go forward. They must move forward based on the facts, the evidence before they reach their conclusion. In the case of Prince Ranariddh, the government has asked the court to pursue him for the importation of illegal arms, negotiations with the Khmer Rouge outside of the law and for bringing Khmer Rouge forces and weapons to Phnom Penh and other provinces with the intention of overthrowing the

government and seizing power. When there is a complaint before the court, the court investigates. If there is no evidence, he will not be found guilty. If there is proof, he will be convicted.

What progress have you made in investigating the 41 cases of "confirmed" executions in July that are listed in a UN Center for Human Rights report that was given to the co-premiers?

It is the Interior Ministry's job to investigate. At the Ministry of Justice, we received a report from [UN Special Envoy for human rights Thomas] Hammarberg but we can't investigate...the cases of those who were killed. Concerning those who have disappeared — more than 100, according to the report — prosecutors can verify whether they were detained and where they are now. Are they free? Where are they? It is me, the minister of Justice, who asked my prosecutors to find out. In most of the provinces mentioned in the report of Mr. Hammarberg, there are people who were detained for illegal movement of arms. They were stopped, but then freed. There are documents to show the time and place of their release. In Kampong Cham province, all seven people detained were released in the presence of members of [the human rights group] Adhoc.

For the 40 found dead, assassinated, etceteras, we don't have any way for prosecutors to investigate. It is the police who must do that. The report said bodies were found at Pich Nil in Kampong Speu on Route 4...The prosecutor could not get there because the area is unsafe.

But I would like to point out another thing. In such a military event that includes killing, persecution, etceteras, we must compare it to other countries in Africa, for example, where hundreds of thousands are killed. It is hard to know if people were killed during military confrontations or from other things. There is a lot of drug trafficking, commercial business, vengeance in commercial affairs. There is a lot of vengeance.

What about the case of Undersecretary of State for Defense Krouch Yoeum?

Everyone knew Krouch Yoeum and Chao Sambath were killed a few days after July 6.

Everyone in Phnom Penh knew, they just couldn't find their bodies. Krouch Yoeum hadn't done anything. The Council of Ministers regretted it. He was well-respected. Personally, I believe Krouch Yoeum was killed during the military engagement on July 6.

If that is true, why were his hands cut off?

I don't know. It is always sleazy when they kill someone like that and cut off their hands. Why would they cut off his hands?

Some people have suggested it was to prevent the body being identified?

But why did they leave his identity card? It is hard to know. It is possible that [the killing] it is personal vengeance. On the part of the government, I don't think there was a persecution of Funcinpec and its supporters.

How long do you intend to continue as Minister of Justice, given your health and other factors?

I don't think they will replace me. There are only six or seven months until elections. After elections, I don't know. Personally, you know I am passionate about the work of reorganizing justice and the work of making justice independent and efficient. I think it is the most important work of my life. I consecrate my efforts and abilities to this work. We have made great progress, but this progress is very slow because there are many problems to resolve.

The suppression of Article 51 of the Law on Civil Servants remains. [Article 51 requires the permission of government before the courts can prosecute police, military or civil servants, which human rights workers say effectively guarantees impunity to authorities]. An amendment still hasn't been sent to the National Assembly. If we resolve that, it will be a great step.

Another step is that the provincial police and judges understand now that if they commit crimes or misdemeanors, they will go before the court and be convicted because, even if Article 51 is not amended, I have personally made it clear to the Minister of Interior and the Minister of Defense that these people must be convicted if they are guilty of crimes. The Ministry of Interior is now more responsive to the Ministry of Justice's requests. The Ministry of Defense is not moving as fast but I brought up the issue in the presence of the Defense ministers at a recent National Assembly session.

The police and civil servants who have committed crimes and misdemeanors are now brought before the courts. Others now fear the same. That is another step toward human rights.

Some observers have expressed concerns that such prosecutions could be used politically, particularly to attack the remnants of Funcinpec power in the military, provincial governments or the central government?

There are few Funcinpec members in the [provincial government]. Most of the people who the prosecutor's are going after are CPP, 90 percent. We, at the Ministry of Justice, don't want to know if they are CPP, Funcinpec or BLDP. We are only interested in those who commit crimes or misdemeanors. A few months ago, a nephew of [CPP president Chea Sim] illegally brought Vietnamese people into Cambodia. In the Svay Rieng court, he was sentenced to two or three months in prison - Chea Sim's own nephew.

I find that we are advancing but we cannot do it too fast because there are many problems that come from within Cambodian society itself, a society that is disorganized. Since the coup d'état of 1970, it is a society that has suffered a long trajectory of tragedy, especially at the end of the Khmer Rouge regime. People lost their senses and morals. Many lost all morality. Everyone did anything necessary to survive. 'Too bad for the rest, I'm hungry. I'm going to kill to fill my stomach,' that is ingrained in human nature. Then, when our stomachs are full, we want a bicycle. When we get the bicycle, we want a moto. When we get the moto, we want a car. When we get the car, we want to be rich... That is natural. There are many millionaires among this very poor population. It is a spirit of 'every man for himself, too bad for the rest.' Consider the young, the poor youths who see stores full of merchandise: Adidas tennis shoes, motorcycles, cars. That is what leads kids to crime. That and the gangster films on television. There is no culture on television. There are only sex-videos, gangster films, Chinese films... I think Cambodian society is ill, so the organization of good justice progresses slowly. But I want to make a state of law one day or another.

In the Cambodian judicial system, the Minister of Justice has given an example of propriety, along with the undersecretary of state and the department heads. The Ministry of Justice is not corrupt. It is an example for the courts. It is not that they are bad judges, some are, but they are a minority.

The position of the Minister of Justice is to put his efforts, his soul and even his personal health [on the line] to reform and make justice independent and effective. Judges are their own masters. The Minister of Justice never puts his hand in. It is a matter of applying the law. There is a monitor, it is from top to bottom — influenced by the strongman — but there isn't a strongman on the Supreme Council of Magistracy. People say judges are afraid of the Second Prime Minister, they're not. They are afraid of the

Supreme Council of Magistracy.

I would like to mention one other thing: Justice is not a wild horse whose mane can fly in the breeze. It must be controlled and directed with great care.

7.2. 'JUSTICE IN NAME ONLY - NO GENUINE COURTS'*

Minister of Justice Chem Snguon must be credited for making a very clear statement on the nature of Cambodia's trial system in his interview with the *Phnom Penh Post* (7-20 Nov), in which he said the following words:

> "The judge prepares his decision before the trial opens. Before the case opens, he already has a model. During the trials, issues may be brought up that modify the judge's decision. If the responses to questioning or testimony are slightly different than expected, the judge will modify the decision for 10 to 15 minutes at the end of the trial. If the events during the trial are very different, he must suspend the trial until a later date. At that time, lie will look at additional evidence and write a decision. Judges always make a map of their decision after looking at the [pre-trial] evidence."

This is exactly the socialist (Stalinist) concept of trial. Anyone who wants to understand why the Cambodian 'courts' function the way they do ought to try to understand the theory of trial applied in these courts. In a liberal democracy, the theory applied is the very opposite to the one expressed by the Minister of Justice.

Chem Snguon's view used to he expressed in China as "finding Truth from facts." In the 1930s, it was expressed by socialist lawyers such as Andrei Vyshinsky, Stalin's famous prosecutor, who is best known for the Moscow trials in which Stalin's rivals including some of the prominent leaders of the Bolshevik revolution faced the type of trial represented in the Minister's words.

* Following Minister of Justice Chem Snguon's interview in the Phnom Penh Post[7-20 November 1997 issue], Basil Fernando and Terrance Wickremasinghe argue that Cambodia's "courts"-by a liberal democracy's definition, at least-can be called no such thing.

In such "trials," the outcome was predetermined before the trial. In the 1980s when Vietnamese experts introduced the current system of courts to Cambodia, they acted on the basis of their experience and training, which was naturally based on the socialist law. It is quite well known that Vietnamese experts were trained in Eastern Europe.

Even in the West, before the liberal democratic notion of a "fair trial" was developed, there was this model of trial, expressed in the slogan 'First the sentence, then the trial.'

What is missing in the trial model mentioned by Chem Snguon is the concept of evidence. In a liberal democracy, the role of the judge arises from the notion of evidence. To put it generally, this means rules relating to what is admissible as evidence, how such evidence is to be presented in court, how such evidence can be challenged by the accused (or by those who represent them - lawyers), how judges decide on the veracity or otherwise of the evidence presented before him, how judges record the process of reasoning by which they arrived at the judgement (on the facts and the law) and similar matters. All these are involved in deciding the guilt or otherwise of the accused.

When "the judge prepares his decision before the trial opens," the implication is that the fundamental issue of guilt or innocence is already decided, and what could slightly change is the actual punishment.

There are three important conclusions flowing from the very honest exposure of the system made by the Minister of Justice. One is that all trials that have taken place in Cambodia since the making of the new Constitution (September 1993) and ones that will take place till this model of trial is changed are mistrials per se. Secondly, this trial system violates the Cambodian Constitution, as it guarantees a fair trial to all accused persons. Thirdly, so long as this model continues to be used, Cambodia's 'courts' cannot be termed as courts in the way the word is used in common parlance.

The court structure and hierarchy prevalent in Cambodia up to the present were created by the State of Cambodia (SoC) administration in the 1980s and continued up to May 1993. No new court structure was created after the United Nation-supervised elections though it was presumed that the 1993 elections would be a watershed in Cambodian history in introducing democracy to Cambodia. There was no such watershed as far as the courts were concerned.

One has to emphasize this fact of continuity of the court structure of the old order as well as its working mechanism in order to understand the

nature of the judiciary that exists at present. Emphasis on this aspect of continuity is significant in view of the fact that during the period in which the present court structure was formulated and its judges were appointed (1980-1993), the concepts of the supremacy of Parliament, the separation of powers and the independence of the judiciary were unknown in Cambodia, even theoretically.

The significant feature of the courts' structure and hierarchy prior to the arrival of the United Nations Transitional Authority for Cambodia (UNTAC) was that the structure of courts formed an organic part of the executive branch of the government; the courts functioned as an arm of the executive, in which the military played a dominant role.

It has to be noted that in spite of the recognition of the theory of separation of powers and the independence of the judiciary by the Cambodian Constitution and UNTAC Transitional Provisions on Criminal Procedure (September 1992) the pre-UNTAC court structure still continues without any change.

Therefore, at present, courts in Cambodia are not independent from the executive, which remains dominated by the military. As it stands, Cambodia lacks an independent judiciary. It is quite appropriate to conclude that in Cambodia there are no courts and judges as understood in the legal systems in liberal democracies. The issue, therefore, is not one of a weakened judiciary but one of an absence of a judiciary.

This is quite apparent when one observes how courts function and the extent to which the methods and practices of judges in dealing with the procedural rules set out in the UNTAC and SoC laws on criminal procedure are carelessly observed. Deviations and violations in regard to the provisions of criminal procedure are glaringly visible. The judges are, as the Minister of Justice confirms, in the habit of writing their judgement even before the cases are heard. Judges exercise their discretion, not judicially, but arbitrarily, acting on prejudices, preset opinions, extraneous facts and circumstances not established through evidence heard in court. This is more evident in cases where a political element is present and where parties involved in the trial have political affiliations. What makes the process of adjudication even more arbitrary is the fact that judges treat the general principles of the law of evidence as alien and are not sensitive to practices of a free and fair trial. Instead, in judging cases, they adhere to the executive methodologies as strategies to which they are addicted.

To make the situation worse, the militarization of the party controlling the fractured decentralized state machinery has become highly exces-

sive. In this context, in the provinces, the jurisdiction of "courts" is delegated to other people and bodies, and very often legal proceedings of offenses connected with drug trafficking and murder are not even instituted in the "courts."

It is more appropriate to describe Cambodian "judges" as investigators, arbitrators or administrative officers, rather than judges. The judicial role and function is as yet an alien concept in Cambodia and under the present circumstances is likely to remain so for a considerable time. All attempts to re-educate the judges are of little use while they function as a part of the executive and are so physically close to the military. Thus, re-education attempts are intrinsically flawed and artificial.

It is illogical and foolishly optimistic to expect an independent judiciary in this context, especially in a country where civil society is still in its formative stages and lacks democratic institution, such as a multi-party system and a vibrant legislative assembly where public opinions is vigorously reflected.

The problem with the few years of legal reforms in Cambodia since 1993 is that while the basis as communist model of trails and courts has been kept intact, a lot of liberal democratic jargon has been introduced. There is such talk as presumption of innocence and proof beyond reasonable doubt, the right of the accused to remain silent and the like. However, the trail model operates on the basic explained by Chem Snguon, where the judge prepares the decision before the trails opens.

This is the case of appeals too. In the interview, the Minister of Justice speaks several times about the right to appeal to the Appeal Court and the Supreme Court. In fact the Supreme Court of Cambodia does not have any of the functions that a similar court has in a liberal democracy. Even before 1993 its power was limited to the reading of case records after trials. The only action it could take after reading a case record was to request a court to hear a case again. In reality the purpose of reading the judgement of the courts was to ensure that the courts function in a politically correct manner, rather than to ensure an appeal process for parties who may want to show that the original court has arrived at a wrong judgement. Even since 1993 the Supreme Court has not exercised an appellate function.

In any country, and particularly one trying to become a democracy, a strong Supreme Court with appellate and revisionary and supervisory jurisdiction over the lower courts is indispensable for a vibrant and independent judiciary to come into existence. The Supreme Court that exists in Cambodia today is a product of the old order and, therefore, has inherited all of

the characteristic weaknesses and deficiencies of the past. Theoretically and practically the Supreme Court was part of the executive branch, and the control and grip that the executive exercises over the Supreme Court continues to be strong.

The Appeals Court is the new addition to the court system made since 1993. However, the powers and functioning of this court has been curved within the overall framework of a communist court system. The manner of functioning is the same: the judge prepares the decision before appeal opens. At times, what happens is try to get the parties to arrive at some compromise. But the compromise has to be arrived at according to the parameters set out from outside, which may vary according to the political significance of the case or the parties in the case.

The failure to enact a Judicature Act with the promulgation of the 1993 Constitution - to abolish the existing court system and set up a new court hierarchy, with new judges - was a contributing factor which prevented and hampered the establishment of a judiciary with the potential to grow into an independent judiciary, even in a hostile atmosphere.

What is required is a fundamental change to the system of arriving at judgements before trials or appeals. In the context of Cambodia, this requires a colossal change from the political-legal culture of the communist era to a liberal democratic legal culture. To lead such a change, the leaders who initiate the change need to be familiar with the principles and practices of such a legal system. I f the leaders themselves are sunk neck-deep in the old system, how could they be the initiators and inspirers of change?

The statements of the Minister of Justice on the Bar Association also reflect old attitudes. The independence of the legal profession is very much a part of making a proper trial system possible. If judges make judgement before trials, lawyers have no real role. Recent attempts to control the Bar Association are a step backward, and it even takes away the hope of possibility of changes in the future. The function of a Bar Association is to protect the profession from the state and to maintain professional standards by mechanisms controlled by the association on its own initiatives. A Ministry of Justice has no function in this matter. However, under the old system of communist party control of all professional bodies, the independence of professions was only a political slogan devoid of any reality. This seems to be what is happening now, after an initial period when defenders and others engaged in legal aid and training brought a breath of fresh air and created some hope of change. New restrictions on funds to maintain these initiatives is a clear signal that the old system wants to close the door and return

to its old tricks.

Ultimately, all attempts taken by ambitious judicial training programs to establish an independent judiciary with independent judges have been frustrated because of a lack of any real judges in the first place. The court system, with its "judges" who are alien to the notions of a free and fair trial and to the general principles of the law of evidence (and other laws), has continued to function within the same framework dictated by an unfettered executive.

Consequently, the first step towards democracy in Cambodia must be a fundamental rupture with the court system that originated in the 1980s and that has continued up to the present date. The strong local lobby that has sprung up in Cambodia demanding an independent judiciary, as well as international experts and agencies, would do well to concentrate their efforts on this single issue without being diverted into futile ventures, such as election monitoring, judges' training and the like, which will only be frustrated by the current state of the judiciary. All human rights monitoring up to now has not borne much fruit due to the lack of a credible judiciary to try alleged offenders.

[Ed. Note: Terrence Wickremasinghe is a Sri Lankan attorney who worked till recently as a legal consultant to the Judges' Assistance Program conducted by the U.N. Center for Human Rights.]

8

CAMBODIA - THE COURTS AND THE CONSTITUTION: - A POINT OF VIEW -

AN ANALYSIS OF THE INDEPENDENCE OF THE JUDICIARY UNDER THE FORMER CONSTITUTION

The former Constitution of the State of Cambodia was passed by the National Assembly of Cambodia on 30 April 1989.[1] This Constitution does not envisage an independent judiciary. Under Article 48 of the Constitution, the National Assembly has the power to establish and dissolve the People's Supreme Court as well as the right to monitor its activities.[2] Under Article 53, the president of the People's Supreme Court is named among the persons that are entitled to submit draft legislation to the National Assembly. Under Article 79, the functions of the courts are defined as:

(a) to defend the state authority of the people and democratic legality;

(b) to preserve security and social order;

[1] The State of Cambodia is the name given in 1989 to the regime installed by the Vietnamese in 1979.

[2] For the full text of relevant articles of the Constitution of the State of Cambodia, see annex.

(c) to protect public property; and,

(d) to protect the rights, freedoms, life and legitimate interests of citizens.

From the manner in which these functions are stated, it is clear that judicial review of the actions of the executive and of the legislative branches does not fall within the purview of the courts. Though the courts ought to protect the rights, freedoms, life and legitimate interests of the citizens, there does not seem to be any provision empowering the courts to adjudicate cases in which a conflict arises between an organ of the state and an individual. In such an event, the court must defend the state authority. The role of the judiciary, as envisaged in the Constitution, seems a very limited one.

Besides such limitations on the scope of the functions and powers of the judiciary, the functions of courts may be controlled by the National Assembly and the executive by direct monitoring.[3] The Public Prosecutor has the overriding power over courts' judgements, as the Prosecutor General "must ensure that legal proceedings, judgements and the execution of judgements are conducted correctly and in accordance with the law." People's assessors have the right to participate in court proceedings and during a hearing they have the same rights as judges.[4] The Council of State has the right to establish special courts to try special cases.[5] The determination of what is a special case, who will sit as judges in the "special court," what procedure will be followed by the "special court," and what will be the powers of such courts, seems to be left to the executive.

The implication of all of the provisions of the Constitution taken together is that the concept of independence of the judiciary does not form part of the legal structure envisaged in the Constitution of Cambodia. Any serious approach to introducing the independence of the judiciary must necessarily conic to grips with this aspect of the former Constitution of Cambodia. A purely piecemeal approach of introducing new aspects, without addressing this central issue, does not seem capable of achieving a significant result.

ADVISORY FUNCTION

The Human Rights Component of the United Nations Transitional Authority in Cambodia (UNTAC), as well as the U.N. Civil Administration,

[3] Constitution of the State of Cambodia art. 48.

[4] *Id.* at art. 82.

[5] *Id.* at art. 82.

has engaged in observing the judicial process of Cambodia during the transitional period. There is a unanimous view that the concept of the independence of the judiciary is alien to Cambodia despite many declarations affirming adherence to the principle by the State of Cambodia and other signatories to the Paris Agreements. One of the common ways of interfering with the independence of the judiciary is the so-called "advisory function" of the Supreme Court and the Ministry of Justice. In accordance with the existing laws, judges were required before deciding each case, to request the advice of the Supreme Court and/or Ministry of Justice. Such a procedure is not only in contradiction to the basic principles of review, but is a denial of the fundamentals on which the independence of the judiciary is based.

Instead of appellate review, the practice that exists in Cambodia is a review of decisions of judges by the Ministry of Justice. In the recent cases of Em Chann and Than Theoun, filed by the UNTAC Prosecutor, at the Municipal Court of Phnom Penh, the Minister of Justice Uk Bun Chhoeun called the judge of the court and instructed him not to proceed with the cases. In an interview with two UNTAC officers, the Minister explained that it was his role to punish the judges who violate the law by making incorrect judgements. The idea of the judgements being reviewed by appeal courts does not exist. The review of cases by the Supreme Court consists of private readings by the Supreme Court judges of the judgements made by the provincial courts. Where the Supreme Court feels that there is some violation of law or misinterpretation of facts, they may instruct the provincial court to correct its decision. As there is no procedure for public hearing of appeals, and as the judges of the Supreme Court are not required to give reasons why they consider a particular judgement given by the provincial court incorrect, this procedure allows the Ministry of Justice, and any other interested person, to influence the Supreme Court to interfere with the judgements of the Municipal Courts.

Human Rights under the New Constitution for Cambodia

"A Comprehensive Political Settlement of the Cambodia Conflict" provides that the new Constitution will contain a declaration of fundamental rights.[6] This provision has been made as a special measure to assure protection of human rights in the context of Cambodia's tragic recent history. Article 2 then enumerates a list of rights which will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments.

[6] Article 2 of Annex 5.

Article 2 goes on to state that "agreed individuals will be entitled to have courts adjudicate and enforce these rights." What is envisaged in this provision is an enforceable bill of rights. The countries of the region in which such provisions exist are Hong Kong, India and Sri Lanka.

The main issue that an enforceable bill of rights raises is which courts would adjudicate and enforce these rights. The courts, as they exist in Cambodia today, are intrinsically incapable of adjudicating and enforcing such a bill of rights.

In fact, Article 5 of the same Annex envisages discontinuing the system of judiciary and provides that "an independent judiciary will be established, empowered to enforce the rights provided under the Constitution." The establishment of a new system of courts in Cambodia is one of the imperatives mentioned in Article 5, Annex 5, of the "Comprehensive Political Settlement of the Cambodia Conflict."

In the drafting of the new Constitution, one of the primary concerns, therefore, is the establishment of an independent judiciary. For reasons stated above, the establishment of such independence implies the complete displacement of the judicial system that presently exists in Cambodia.

A Constitutional Issue

In most instances, when new constitutions are made, the principle that is followed by the drafters is to retain as much of the former judicial institutions as possible for the sake of continuity. In the instance of Cambodia, however, following that principle would lead to abandoning the principle of the independence of the judiciary for the reasons stated above. What is required in the sphere of the judiciary is a complete rupture with the past. Some academics may not agree with this view on the basis that constitutions should incorporate as much of the local practices and traditions as possible. However, given the specific character of Cambodia, particularly since 1975 when the principle of independence of the judiciary was consciously replaced, the incorporation of local traditions and practices would amount to adoption of the administrative and executive control of the judiciary. Thus, merely borrowing provisions of other constitutions related to the issue of the judiciary will not be an answer to one of the most serious problems facing liberal democracy in Cambodia which the Constitution of the State of Cambodia will follow, according to the Article 4 of Annexure 5.

THE POLICE AND THE JUDICIARY: EXISTING PRACTICE

In reality, the judicial power in Cambodia on criminal matters is mainly exercised by the police. On some matters, it is exercised by the military. While this power is sometimes shared with other administrative authorities, the actual judges of criminal matters in Cambodia are the police.

The police in Cambodia exercise the following powers:

(a) They have the option to initiate an investigation into a crime. Whether the crime is murder, rape or any other matter, the police are not under obligation to investigate all complaints relating to crimes. They do not even have an obligation to record all complaints.

(b) Where police exercise this option, in favour of conducting an investigation, the methods of investigations are entirely optional.

(c) The police may stop any investigation, whenever they wish.

(d) Even after an investigation, whether the case is to be placed before a court is optional.

(e) Where the case is placed before the court, the police dictate the verdict. The function of the court was to "rubber stamp" police verdicts. Thus, very few cases come to court, and in almost all such cases the accused are pronounced guilty. The police never give evidence in court. But the court gives the verdict according to the police dossier.

The achievement of independence of the judiciary in Cambodia lies mainly in the reform of the police, and not merely in the reform of the judiciary. The reform of the police will not be achieved by police education alone; strict definitions of functions and accountability to the courts are essential to any rational functioning of the police.

Till such a reform is achieved, the single most prominent threat to public security would be the police themselves. The branches of police that exercise more sinister functions, such as the secret police, could not be controlled without bringing the entire police under the judicial control of the courts.[7]

[7] From an earlier paper submitted by Basil Fernando to the Human Rights Symposium held in Phnom Penh in November 1992.

Review of Administrative Actions

Cambodian law as it exists now does not provide for any legal procedure to review the decisions made by administrative officers. One could say without exaggeration that administrators enjoy absolute immunity with regard to their official activities. Thus the citizens do not have a right to challenge an administrative decision. Articles 2 and 5 of Annex 5 envisage a situation in which all persons would be subject to judicial actions if they violate human rights provided for under the new Constitution. Thus, completely new legal provisions would have to be designed in order to bring the administrators to justice in Cambodia in terms of Articles 2 and 5 of Annex 5. This also sharply raises the issue of the nature of remedies against administrative actions when human rights are violated by such actions.

It may not be out of place to consider some practical measures that would have to be taken if Articles 2 and 5 of Annex 5 are to be implemented in Cambodia.

(a) It would be imperative to work out in detail the issue of the independence of the judiciary in the new Constitution. To this end, it would be necessary to abolish the judiciary as it exists now, completely. It would be necessary to provide for the appointment and the dismissal of judges in a manner that would not interfere with their independence. The matters related to discipline of judicial officers as well as to the salaries of the judges would have to be dealt with.

(b) As the judges of Cambodia have no experience at all in functioning as an independent body, it would not be possible to achieve a transition without the assistance and active participation of legal experts familiar with the independence of the judiciary. It may be necessary to provide for a transitional period of two to five years in which Cambodian judges will work in close cooperation with foreign legal experts, judges, lawyers and legal drafters. Such experts acting purely as advisors would not suffice as a tradition of independence of the judiciary has to be worked out in actual practice taking place in courts. Mere formal objections to such a move on the basis that this may mar the prestige of the Cambodian courts is no answer to the need for a radical new situation that is envisaged under Articles 2 and 5 of Annex 5.

(c) Considering the need to implement Articles 2 and 5 of Annex 5 through the new Constitution, it would not be out of place to introduce some reforms for the purpose of preparing the ground for a functioning judiciary adhering to the principle of independence of the judiciary in the

"Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period." Drafted by UNTAC and adopted by the Supreme National Council on 10 September 1992, the provisions mention this need for independence of the judiciary. Attempts were made also to train judges to put into effect the said provisions. In the discussions with the judges, however, it became very clear that the whole concept of the independence of the judiciary was alien to them. Some of them even expressed the view that, even if they wanted to be independent, they had no way of making orders against the police or administrative officers as those persons are in fact more powerful than the judiciary. As a result, the "Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period" were virtually ignored by the Cambodian courts. It may be said that at the stage of drafting the said criminal provisions the lack of independence was not fully appreciated. The presumption on which these criminal provisions have been made seems to be that the existing Cambodian courts could be transformed into independent courts by making some alterations in the laws.

(d) During the remaining part of the transitional period, it is advisable to exercise greater supervisory power over the judiciary. Legal experts sitting with judges as advisors, as was done in the Congo in the early 1950s, may be one means of exercising such supervision. Other means, too, would be developed for active supervision of courts for reasons stated above.

Root Causes for the Absence of an Independent Judiciary in Cambodia

Many causes militate against the independence of the judiciary in Cambodia. Among these, the absence of urban society since April 1975, particularly after the evacuation of Phnom Penh and other social centres, the fragile nature of social organization, the nature of wealth and its distribution in recent times, the effect of the civil war, the nature of the social controls by the party, the low pay of civil servants, and the lack of primary prospects for lawyers are some of the factors that would affect a functioning judiciary for some time to come.

A. Effect of the 1975 Evacuations

All urban centres were emptied in April 1975 as part of an attempted radical revolution, which sought a clean break with the past. Whatever this

move would have otherwise achieved, it definitely brought the limited urban life of Cambodia to an end. People returned after 1979 to what once were places which had seen a beginning of urban life, but these places never returned to what they were before 1975. Besides, over a million urban people have died and many hundreds of thousands have fled. The social organization that developed after 1979 in no way encouraged the growth of an independent urban life.

Courts in any society are an integral part of the social organization. Further, courts as we know them today are products of urban life. The total collapse of the social organization of towns has deprived the country of a natnral habitat in which a court system would hive taken root.

It was not only the court system that collapsed during 1975-1979, but also the legal system in general. David Chandler notes that there was no legal system during the PDK[8] rule. Despite some laws and decrees passed by the National Assembly of the State of Cambodia since 1979, there is still no legal system as such in existence in Cambodia.

Hundreds of thousands of Cambodians who lived in the refugee camps did not have any experience of urban life at all. They lived a sort of communal life. As they returned to grass roots in recent years, they had to find their roots in the localities where they were resettled. Most of them returned to an agricultural society, with a little farm land allocated to them. Though these refugees are accustomed to "codes law," which were used to keep discipline in camps, these laws could hardly be compared to a judicial system.

While the radical displacement of the Cambodian population is well documented, the social implications of that process to present-day and future Cambodia has not been carefully assessed. This, too, is perhaps a result of the displacement process itself. Among Cambodians, those who engage in the interpretation of the "past" experience in relation to present-day problems or the future of Cambodia are few. This is largely a result of the extermination of the intellectuals, "those who wore the glasses." Total absence of urban discussion centres of any sort have retarded the interpretation in process.

B. Fragile Nature of Social Organization after 1979

Outside the territories controlled by the State of Cambodia, social organization remained informal. There are no formal procedures controlling

[8] The *Khmer Rouge*, also called Party of Democratic Kampuchea (PDK).

any aspect of social life. Naturally, there does not exist any court at all in these areas.

There are informal methods of dispute settlement, mediated by party leaders and cadres who control the areas. A community leadership in the traditional sense does not exist. The approach of some academics to look for community organizations and leadership would not lead to much due to the very nature of the radical change that was brought about by the displacement and physical exterminations that took place during the PDK regime. In the area controlled by the State of Cambodia, the administrative machinery is still very fragile. As the country was caught up in the civil war, there was hardly any time for spontaneous social organizations. Due to war, social initiatives remained in the hands of the military and the party.

In recent months, when peace brought foreign companies eager for commerce in Cambodia, many new issues, such as company registration, trademark registration and similar matters, have arisen. There are no formal legal institutions, however, within which a commercial dispute may be settled. Banking remains in a fragile state. The need for dispute settlement in the areas of commerce and trade may provide some impetus for broader judicial institutions as well as other forms of arbitration.

c. Civil War

In any country, one of the main victims of the civil war is the courts. During these wars, the Rule of Law is often suspended by the imposition of emergency regulations and other public security laws. Even after 1979, since the civil war continued, Cambodia was run on the basis of public security laws. One of the direct results of this was the emergence of the military and the police as far more important social institutions than those needed in a civil society. This pre-eminence of the military and the police has denigrated the status of the civilian. A concept of civilian rights against the military or the police does not exist at all. The social position of the military and the police has also provided the persons belonging to these institutions - particularly those holding high positions - with many economic opportunities. Their privileged position would be endangered by any attempt to return to civil society. As leaders of the police and the military play a very significant role in decision-making in Cambodian politics, the likelihood of a significant judicial reform empowering an independent judiciary to enquire into activities of the military and the police is most unlikely.

D. Nature of Wealth and its Distribution in Recent Times

The "new rich" of the post-PDK era have combined legal and illegal means to create their wealth. Earnings from smuggling, illegal logging, gem mining and other sales combine with whatever salaries are received from doing various jobs. UNTAC presence has provided the opportunity for affluent persons to earn more merely by way of rents and providing some services such as hotels, eating places, and other businesses.[9] Even these legitimate ways of earning have been accompanied by tax fraud, which is quite common in Cambodia.

The system of enrichment that exists here requires secrecy. Intense resistance is likely to rise in opposition to any encroachment of this privacy, judicial or otherwise.

The income distribution is so discriminatory that the rich may want a system of summary executions and imprisonment without trial, as exists now, particularly for offences such as robbery. Ironically, the movements that represent average citizens do not exist to agitate for legal reform. The non-governmental organization (NGO) movement, while increasing its numbers and producing members of excellent personality, is still in a fragile state.

E. Lack of a Concept of Regulating Society by Way of Law

Post-1975 society is unfamiliar with the concept of laws. Both PDK and the State of Cambodia have this in common. In this present day, Cambodia is different from post-colonial societies, which have inhabited a sense of being ruled by laws made by colonial powers.

The colonial rulers usually leave a volume of laws, relating to almost all aspects of social life. Although some of these laws are abolished or replaced by the new rulers, in interpreting the new rules courts continually refer to the "old" laws. In Cambodia, whatever laws the French left were radically altered in 1975 by the National Army of Democratic Kampuchea (NADK), and the State of Cambodia authorities made no attempt to bring these back after 1979. In fact, the destruction of the old system between 1975-79 was so complete that there was no possibility of reviving it.

Both the NADK and the State of Cambodia ruled by decrees and commands, made orally or in writing. A command-structure exists which inti-

[9] However, a sizeable part of this income has also gone to non-Cambodians, such as Thai nationals.

mately connects the party committees and cells with the administrative structure. Tile standards and norms to which the structure making day-to-day administrative decisions should conform are unwritten at this time.

State of Cambodia authorities have produced some "legislation" since 1979. But this is very limited. With the introduction of a liberal democratic system, most parts of this body of law are also likely to become irrelevant.

Making of a Supreme Court

The "Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period" passed by the Supreme National Council on 10 September 1992 was an attempt to introduce the independence of judiciary to the courts of Cambodia, namely Municipal Courts of the territory controlled by the State of Cambodia and any other courts outside that territory. To date, however, there is no functioning court in other territories. Above these courts there is an institution named the Supreme Court. The said special provisions did not touch the issue of the Supreme Court.

In implementing the special provisions passed by the Supreme National Council on 10 September 1992, many difficulties have arisen, some of which may be summarized in the following questions which are often raised by Cambodians, including some of the judges from the Municipal Courts:

(a) If the police and the military do not accept the authority of the courts, what would the courts do to assert this authority?

The answer to this question in the current circumstances is that the courts cannot do anything about it.

(b) What would the courts do to compel a policeman or a soldier (of any rank) to attend court, as an accused or even as a witness?

The answer in the present circumstances is that the courts cannot do anything to enforce this.

(c) If the police have conducted an investigation, could the court compel such police investigators to attend court and to answer the questions asked in cross-examination by the parties involved in this case?

The answer in the present circumstances is that they cannot enforce this.

(d) If an individual has a grievance against any executive decision taken by any of the departments of authority, would the court have authority to compel such authorities to attend court and to answer the allegations

made against them?

The answer in the present circumstances is that the court has no such authority.

This litany could go on in the same way for aeons, and the answer would always be the same, that is, except in disputes of private individuals, courts in Cambodia can hardly do anything, except when parties decide to abide by court decisions voluntarily.

The question that arises is whether such a situation could be changed by bringing about changes in the lower courts. This is not possible simply because the jurisdictions of the lower courts are very limited. The issue that needs to be dealt with in terms of establishing the independence of the judiciary in Cambodia has to begin with the creation of a strong Supreme Court. The word "strong" here is not used solely to indicate the quality of individuals who, of course, have to be strong to resist the pressure. The strength of the Court must lie in its actual powers and the machinery it has for the enforcement of such powers. Whatever the quality may be of the individuals belonging to an institution, now known as the Supreme Court, this Court does not have the power of a Supreme Court or a machinery for enforcement of its judgements.[10] The function of judicial review and interpretation of the law is performed by the executive, mainly the Ministry of Justice, with or without the mediation of the Supreme Court.

In countries where Supreme Courts have grown out of the internal historical process, they have come up as the ultimate forum of social compromise. However, in many Third World countries, the Constitution and the Supreme Court have been enforced as necessary steps in creating democratic institutions. Due to the lack of an organic link to the society, the Supreme Courts have not always been allowed to perform the function of the ultimate arbitrator in social disputes. If the Supreme Court that is to be set up in Cambodia is to be the ultimate guardian of the Bill of Rights, and is to have the actual powers to act as the final arbitrator in disputes between individuals and the institutions of the State, special steps need to be taken in the very creation of this institution. If the Constitution only formulates the usual provisions, which are associated with the independence of the judiciary, such as the appointment, transfer, dismissal and disciplinary control of the members of the judiciary, the matters related to the salaries and pensions, etc., those would not suffice in the circumstances of Cambodia at present. The purpose of this article is not to go into the details of this

[10] At present, the Supreme Court has no power to make any judgements. It has only the power to send back a case for a re-hearing in the law courts. Thus, the creation of a Supreme Court in Cambodia would have to be started from scratch.

matter, but to raise the fundamental issue that the independence of the judiciary in Cambodia will depend on the nature of the Supreme Court that is to be created and not on judicial reforms of procedure and matters.

The Constitution and the Bill of Rights

What is a genuine Cambodian Constitution? It is one that identifies truly Cambodian problems and suggests ways to solve them. Facing oneself, however, is a hard task for individuals as well as for nations.

Some of the genuine Cambodian problems concerning the judiciary include: summary executions and administrative detention; the inability to prosecute offences committed by the police or military, and to summon police and military personnel as witnesses; executive control over the judiciary; and, the lack of a system of fair trial, and of trained lawyers. There is no proper appeal system, and no Supreme Court with the power of judicial review or of examining the validity and legality of administrative actions.

Coming to terms with this formidable list of problems requires an understanding of the lack of legal provisions ensuring independence, the lack of experienced judges to set an example for future generations of judges, and the lack of crucial resources, such as books and other materials. There is also the fear on the part of Cambodians of acting as independent judges, due to the apprehension that there is no real protection if they assert their independence. The police and the military are at present exercising powers that ought to be exercised only by the judiciary. Furthermore, there is a lack of laws in many spheres of life.

For the new Constitution to tackle these problems, it must include the relevant safeguards and prohibit the exercise of judicial powers by the police and other non-judicial institutions. Also, if Cambodians realize a need for assistance from experienced judges from other countries to assist them in the initial period, provisions could be included in the Constitution to make this possible. There could also be provisions in the Constitution for a legal drafters' office and for a law reform commission.

It may be helpful to think of ways in which the international community could help to establish independent and competent judicial institutions in Cambodia; such assistance may involve funding as well as expert assistance. Attention should be given to international standards to aid in the introduction and implementation of the constitutional provisions relating to the independence of the judiciary.

Special provisions in the Constitution against every form of extra-judicial executions are needed due to the unique experience of mass massacres

in Cambodia. A genuine Cambodian Constitution must take a strong stance on this issue.

On procedural matters relating to the Bill of Rights, access to courts in the instances of violations must be easy, inexpensive and simple, so that the vast rural population of Cambodia would have the benefits of the Bill of Rights. For this purpose, it should become possible to make applications relating to human rights violations in provincial, district and other courts. Procedurally, informal applications should be allowed. In this regard, the experience of social action litigation brought about by the Indian Supreme Court could be usefully adopted.

If the Bill of Rights of the Cambodian Consitution is to resolve some of the problems faced by Cambodians, the drafters must carefully avoid being tricked by allowing public security laws to override the human rights provisions in the Constitution, and by writing elaborate limitations on rights such as freedom of speech, of association, and protection from illegal arrest. The judicial interpretation of the Bill of Rights should not be limited by the inclusion of certain clauses.

Conclusions: Like Ankor Wat

Some people are afraid that a judiciary based on a foreign model would be imposed on Cambodia.

At all costs this should be avoided. At present, the court system in the State of Cambodia is based on the Vietnamese model - a completely foreign model that does not recognize the independence of the judiciary. In other administrative areas there are no courts. There is nothing Cambodian in this situation. In trying to remedy this situation, it would be a tragedy if the Continental (French) or Anglo-Saxon models were imposed. When you borrow models from outside, it does not work. V. S. Naipaul said of India's judicial institutions that "Borrowed institutions worked like borrowed institutions." If the French system were good for Cambodia, then the court system which existed prior to 1975 would have played a significant role to prevent the tragedy that Cambodia experienced. It did not. A court system that cannot help the society to arrive at social compromises is not an authentic court system. So the Cambodians do not have a reason to repeat their past in this respect.

Take Ankor Wat, the magnificent Khmer achievement, as an example. This great world wonder reflects the assimilation of what was best in architecture and art in all neighbouring civilizations of the time. All great mythologies of the region have left eternal footprints there. Yet, it is not a

reproduction of a foreign model. In fact, the synthesis it has created is a model itself. So it should be with the laws and the judicial system. Taking what is good and suitable from whichever system or experience, adjusting and adopting it with great care and craftsmanship, with utmost respect for the Khmer mind and the Khmer sense of dignity and justice, a truly genuine Khmer court system, relevant and useful to 20th and 21st century Cambodia, could be created. In this process, Cambodians have much to learn from the experience of other Asian countries which have developed many ideas throughout history and particularly during this century. These regional experiences may be quite relevant.

Ankor Wat was built over a long period of time. Would the court system take as much time?

I would say no because, in my view, the price for the system has already been paid; in fact, an excessive price has been paid by way of lives and the suffering of the Khmer people. Such a unique experience must necessarily produce extraordinary results. In fact, the greatest resource that Cambodia has at the moment is the trauma the people of this country have gone through and continue to go through. This is the aspect that some people ignore when they say Cambodia will always be in this dismal situation. When the social consciousness is burned to the extent it has been burned in Cambodia, there have to be extraordinary responses from the people when they are given the opportunity to open up. There are too many sceptical and cynical people around. They do not respect the sensitivity of the people of this country who have suffered so much. One cannot stress enough the creative potential of mass trauma of this type.

In terms of time schedule, when should the rebuilding of the court system take place? Well, I say it should have happened yesterday. Let me put it in a different way. When should summary executions stop? When should law be enforced? When should all crimes be prosecuted and the police not have the option to prosecute? When should people be punished only if found guilty after trial? When should judges be free from all pressure when making judgements and not be punished for the decisions they make? etc. The answer is very clear. Remedying the abuses is the first priority in getting out of the social mess Cambodia is in.

The international community must give assurance to Cambodia that it will provide all resources to help Cambodia build its legal system. Resources may involve funds as well as experts, such as judges, prosecutors and drafters, to work hand-in-hand with the Cambodians for a period of time till the judicial institutions could rely upon completely on local resources. I am

sure on this issue; there are many nations that will help with good will. Cambodian political parties, themselves, should make their ideas known on this issue. Persons with imagination will see a moment of great opportunity.

ANNEXURE

Specific articles of the former Constitution of the State of Cambodia that conflict with the concept of independence of the judiciary are as follows:

ARTICLE 48

The National Assembly shall have the following powers:

7. To establish or dissolve the People's Supreme Court and the Office of the Prosecutor-General attached to the People's Supreme Court, ministries or institutions having the rank of ministries, municipalities, precincts, wards, provinces, provincial capitals, districts and communes....

9. To monitor the activities of the Council of State, the Council of Ministers, the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Court....

ARTICLE 53

The Council of State, the Council of Ministers, the President of the National Assembly, the President of the United Front for the Construction and Defence of the Kampuchean Motherland, the Chairman of the Federation of Trade Unions, the Chairman of the Cambodian Youth Association, the Chairman of the Women's Association, the Chairman of the Peasants' Association, the President of the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Court shall have the right to submit draft legislation to the National Assembly.

ARTICLE 57

Members of the National Assembly may question the President and members of the Council of Ministers, the President and members of the Council of State, the President, Vice-President and Secretary-General of the National Assembly, the President of the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Court.

The person questioned must answer during the session of the National Assembly. He shall be deprived of his office if more than one half of the members of

the National Assembly vote in favour of a censure motion.

ARTICLE 60

4. To adopt decrees on the establishment or dissolution of the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Conrt, ministries and institutions having the rank of ministries, municipalities, precincts, wards, provinces, provincial capitals, districts and communes, following a decision by the National Assembly....

ARTICLE 79

The functions of the courts and of the Office of the Prosecutor-General are:

1. To defend the state authority of the people and democratic legality;

2. To preserve public security and social order;

3. To protect public property;

4. To protect the rights, freedoms, life and legitimate interests of citizens.

ARTICLE 80

The People's Courts and the military courts are the judicial organs of the State of Cambodia. The office of the Prosecutor-General attached to the courts shall initiate prosecutions and legal proceedings in accordance with the law and shall ensure that legal proceedings, judgements and the execution of judgements are conducted correctly and in accordance with the law.

In case of necessity, the Council of State may establish special courts to try special cases.

ARTICLE 82

People's assessors shall participate in court proceedings in accordance with the provisions laid down by law. During the hearing, the people's assessors shall have the same right as judges.

The bench shall decide by a majority of votes.

ARTICLE 92

Laws, decree-laws, decrees, sub-decrees, ordinances and decisions passed by the institutions of the People's Republic of Kampuchea that are in conformity with the Constitution of the State of Cambodia shall remain in force until new texts are issued.

Decree-laws and decisions of the People's Revolutionary Council of Kampuchea which have the force of law and are in conformity with the Constitution of the State of Cambodia shall remain in force until new texts are issued.

THE APPENDICES

APPENDIX 1

SEMINAR ON ADMINISTRATION OF JUSTICE - COORDINATION BETWEEN THE COURTS AND THE POLICE

January 11-17 1994
A Report

I. INTRODUCTION

1. The Cambodia Field Office of the U.N. Centre for Human Rights organized this seminar on the administration of justice between January 11-17, 1994, for officials from the ministries of Interior and Justice and the judiciary. The purpose of the seminar was to facilitate coordination between all the officials involved in the administration of justice, by initiating a dialogue. Specially, the seminar aimed at coordinating the functions of the judiciary and the police, by identifying issues and areas that needed reform and recommending appropriate measures to address those issues. This seminar is the first of its kind to be held in Cambodia since the 1993 election.

2. The seminar was prompted by the feedback received by the U.N. Centre for Human Rights from the officials of the ministries concerned, Cambodian NGOs and private individuals, about the actual problems faced by the different actors in the administration of justice. The feedback indicated that major institutional and legal problems existed at the level of implementation and that such problems could be remedied only by a process of dialogue between concerned officials. The lack of such a dialogue was itself a major problem and it prevented the rebuilding of the fragile institutions of Cambodia and the establishment of a liberal democracy based on the rule of law. It is in response to these concerns that the U.N. Centre for Human Rights organized this seminar to begin a dialogue and commence the building of institutions. In doing so, the U.N. Centre was carrying out its mandate under the U.N. Commission on Human Rights Resolution 6/1993.

II. PARTICIPANTS:

The participants consisted of the following:

A. MINISTRY OF JUSTICE:

1. Mr. Heng Chi, Chief of the Appeal Court
2. Mr. Samrith Sophal, Judge, Appeal Court
3. Mr. Kuong Srim, Prosecutor, Appeal Court
4. Mr. Kan Chheun, Prosecutor in Phnom Penh
5. Mr. Yar Sakhan, Judge, Phnoni Penh Municipal Court
6. Mr.Hee Saophie, Judge, Kandal Provincial Court
7. Mr.Cheng Phat, Prosecutor, Kandal Province
8. Mr.You Bunieng, Judge, Appeal Court
9. Mr.Saley Theara, Judge, Appeal Court
10. Mr. Uk Savuth, Judge, Appeal Court
11. Ms. Chem Veyarith, Judge, Appeal Court

B. MINISTRY OF INTERIOR

1. General Mao Chan Dara, Team Leader
2. General Luy Savunn, Vice Team Leader
3. General Thong Lim
4. General So Phan
5. General Top Chong
6. Mr. Duch Son
7. General Ouk Praneth
8. General Sreng Srieng
9. General Hak Vat
10. General Uy Sophoan Dara

C. SUPREME

1. Mr. Chan Sok, Chief Justice
2. Mr. Kim Pon, Deputy General Prosecutor

D. NATIONAL ASSEMBLY

1. H.E. Mr. Kem Sokha, Chairperson, Commission on Human Rights

2. H.E. Mr. Samreth Pech, Member, Commission on Human Rights

E. Observers from the Cambodian Defenders' Association

1. Mr. So Inn, Vice President
2. Mr. Chea Pheng, Vice President

The seminar was hosted/guided by Mr. Basil Fernando, Chief of the Legal Assistance Unit of the UN Centre for Human Rights, Mr. Balakdshnan Rajagopal, Human Rights Officer in the Legal Assistance Unit, and Mr. Kim Po, Interpreter/Resource person.

III. Issues Discussed

1. The seminar opened with a welcome from Mr. Basil Fernando. It was followed by a short speech from the Chief Justice Chan Sok of the Supreme Court, who outlined the changes introduced by UNTAC in the court system and law. He also discussed the existing laws on criminal procedure.
2. The Chief Judge of the Appeals Court Mr. Heng Chi then welcomed the seminar which was organized to improve coordination between ministries. He briefly outlined the legal system and the judiciary before 1970 and commented that the changes since 1992 have been too fast, that the officials have not yet adapted. In particular, he mentioned Decree Law No. 27 which provides for detention according to different rules from the Transitional Provisions or the SoC Procedure Code. Finally, he stressed the importance of implementing Article 36 of the SoC Criminal Procedure Code, according to which, the judiciary police are under the competence of the prosecutors.
3. H.E: Mr. Kem Sokha, Chairperson of the Commission on Human Rights described the work of the Commission in general and commented that the independence of the judiciary under the Constitution, means that the judiciary can not be interfered with, even by the Parliament. He also mentioned that the lack of a functioning Appeal Court seriously limits the remedies under law. Mr. Balakrishnan Rajagopal briefly outlined the objectives and structure of the seminar.
4. Several speakers complained about the insufficiency of laws to deal with crimes. In particular, they complained that the category of offences in the Transitional Provisions was too limited and that it did not include minor offenses (contraventions) and offenses relating to the regulation of

public festivals. The speakers requested the National Assembly and the Royal National Government to draft an appropriate Penal Code for this purpose, keeping in mind the Penal Code before 1970. The Centre's assistance was requested for drafting such a code.

5. Many speakers from the Ministry of Interior expressed their wish to remove misunderstandings between police and courts and to improve relations between the two. But, they argued that the courts must do their part, as a reciprocal gesture. As examples, they suggested that the courts must handle the files faster and hold speedier trials. They argued that the courts must ensure that the problems with the police are settled after discussion and that nobody benefits from merely finding faults. Many speakers from the Ministry of Interior revealed an inability to understand the power of the courts to release accused persons.

6. The discussion also revealed the difficulties created by the ambiguity surrounding criminal procedure in general, and evidence in particular. The speakers called for a revision of the criminal procedure, as it stands now, and also the drafting of a law of evidence. In particular, the police were said to be confused about- the standard of evidence necessary for pre-trial, as opposed to trial, proceedings.

7. The meaning of investigations and the methods used in the two were discussed. The Interior Ministry officials stated that the police need training on such issues. The officials also pointed out that insufficient instructions and training on techniques of investigations and other matters such as record keeping, contribute to unaffordable delays and mistakes. In this context, the coordination between courts and police until trial was emphasized as an important element in the administration of justice. It was pointed out that the courts and police do not cooperate in a systematic way on investigations. The police investigation is completed within 48 hours or at least before the file passes from the prosecutor to the investigating judge. The investigating judge often merely re-records statements. Such a duplicating of functions by different officials, it was acknowledged, results in wastage of time and resources. As a result, a comprehensive examination of the ways and means of improving coordination between the judiciary and the police, in investigations, is necessary. The increased involvement of prosecutors in investigations was underlined as a fundamental and necessary change.

8. The non-investigation and non-prosecution of complaints was mentioned as a structural problem that needed to be addressed. The problem, according to many, was not the lack of legal provisions, but the insuffi-

ciency of implementation. This problem is also to be found in the non-implementation of judicial orders. The deleterious consequences of such inaction on the justice system were discussed. Some members of the Ministry of Interior felt that such problems were not fully substantiated and that the main issue was the increase in crime. The issue of political interference in investigations was also mentioned by an official from the Ministry of Interior.

9. The problems relating to the judiciary could be addressed, according to many speakers, by the full establishment of the judiciary police. Such a measure, it was felt, would address structural problems between the courts and the police. At present, the judiciary suffers from weak or nonexistent enforcement powers due to the fact that the police is not subordinate to the judiciary in their functions. While this was recognized as a problem that is peculiar to Cambodia, given its recent history of institutional disintegration, rule of law cannot prevail under such circumstances. The Government has recognized this and has made efforts to address it. General Mao Chan Dara from the Ministry of Interior explained that the Ministry has a Department of Economic and other Crimes that is divided into 6 sections. Only 4 of those have relations with the courts. At the provincial level, one deputy police chief is responsible for matters relating to the judiciary. Below that, one district deputy and chief of police station are responsible in such a manner. He confirmed that at the provincial level, only two of the branches mentioned in Article 36 of the SoC Code of Criminal Procedure (Criminal and Economic Police and Traffic Police) are organized as judiciary police. As a result, Article 36 is yet to be implemented.

10. The participants expressed concerns at the delay in the full establishment of the Appeals Court. Several speakers pointed out that the delay results in the denial of the available remedies under law and prevents the expeditious reorganization of the judiciary. Chief Judge Heng Chi of the Appeals Court also drew the attention to the obligation to inform accused persons of their right to appeal.

11. Several speakers mentioned the lack of adequate resources as a major problem in the administration of justice. The resource problem is acute in the area of transportation of accused and indicted persons to and from the court, resulting in a violation of their due process rights. The prisons in particular, suffer from this problem. The courts also face this problem during investigations especially, when the investigating judge or the prosecutor is not able to travel to complete enquiries. Such delays

result in denial of speedy trials. The Judge from the Kandal Court, Mr. Hee Saophie pointed out that the budget for the Court includes only office supplies and not the activities of the Court.

12. Mr. So Inn from the Cambodian Defenders' Association discussed the problems faced by accused persons, including the lack of access to legal assistance. He said that the accused persons are not even informed of the reason for their arrest and the right under law, to have access to legal assistance. In response, General Mao Chan Dara from the Ministry of Interior agreed that Mr. So Inn was accurate, but pointed out that there are insufficient or unclear instructions in that area. He requested the authorities to issue instructions to the police to inform accused persons of their rights to legal assistance, and to be informed of the reason for their arrests.

13. On the issue of prisons, the speakers pointed to the large number of detainees without trial as a major problem. This problem had to be urgently addressed by the judiciary in particular. It was also pointed out that most prisons need to be rebuilt and the prison personnel need to be trained. The procuring of international assistance for this purpose was underlined. A delegate from the Ministry of Interior also explained that according to Sub-Decree No. 16 dated 20/12/93, the Department of Prisons has been transferred within the Ministry from the National Security (police) Section to the Interior (civil) Section. On 22/12/93, a seminar was also organized by Ministry of Interior on this issue. Another delegate from the Ministry of Interior recommended that the Department of prisons must be separated from Ministry of Interior and transferred to Ministry of Justice, to prevent criticisms of the police.

14. There was a lengthy discussion of the provisions in the law concerning arrest and detention. The discussion revealed confusion at the level of implementation, concerning the issuing of warrants and the circumstances under which arrests may be made without warrants. In this context, the conflict between Transitional Provisions and SoC Code of Criminal Procedure was pointed out. The participants agreed, however, on the obligation to bring arrested persons before judicial authorities within 48 hours of their arrests. To remove any lingering doubts about the proper application of this rule - such as whether the investigation by the police must be completed within this time, it was considered necessary to have clearer instructions.

15. Other issues discussed included the lack of speedy access to laws and orders by the officials and the public. In some cases, the judges received

copies of relevant orders many months after they were proclaimed. Another issue was the need to train police and judicial officers in new laws and principles. Finally, the lack of medical and forensic facilities and a professional body of experts was mentioned as a problem in effective investigations of cases.

IV CONCLUSIONS AND RECOMMENDATIONS APPROVED:

The conclusions and recommendations are based on the problems and issues identified and discussed by the participants. At the request of the participants, the original schedule of the seminar until 14-01-94, was extended by a half-day session on the morning of 17-01-94. This time was exclusively used to discuss the wording of the conclusions and recommendations. Several paragraphs provoked debate and several amendments were made. The following paragraphs are the final approved version.

1. The participants expressed satisfaction at the organization of the seminar. It was recommended that the U.N. Centre for Human Rights organize more seminars and consultations on the administration of justice. It was felt that such seminars are essential for institution-building.

2. The participants agreed on the need for effective implementation of the independence of the judiciary, enunciated in Article 109 of the Constitution. It was recommended that the National Assembly and the Royal National Government explore all ways and means to achieve that task.

3. The participants agreed that the courts and the police are vital institutions in the administration of justice. They agreed that an effective coordination between the courts and the police is essential to the administration of justice. It was recommended that the National Assembly and the Royal National Government facilitate better coordination between the courts and the police, including by the issuance of guidelines and the establishment of an inter-ministerial working group to study the relevant issues in detail.

4. The participants agreed that there was a need for more laws on the administration of justice, including a penal code, a criminal procedure code and a law of evidence. It was recommended that such laws be drafted as soon as possible. Specifically, it was recommended that a new penal code contain more categories of offenses, including minor offenses, and provisions relating to the regulation of public peace during public functions.

5. The need for speedy dissemination of laws and other orders to the officials involved in the administration of justice in particular, and the people in general, was emphasized. It was recommended that such dissemination be encouraged and supported by the Royal National Government.

6. The participants agreed that lack of material resources was a major problem in the administration of justice. It was recommended that the National Assembly and the Royal National Government endeavor to solve this problem. It was specifically recommended that the needs of the judiciary in fulfilling its tasks be met by appropriate budgetary allocations.

7. The participants agreed upon the need for training the police personnel in the new laws, rules and standards. It was recommended that such training programs be organized by the Ministries of Interior and Justice in cooperation with competent organizations.

8. The need to train judicial personnel was also emphasized. It was recommended that such training have, as its focus, the establishment of an honest and competent core of judicial officers.

9. The participants agreed on the need for a complete and expeditious establishment of the judiciary police, as contemplated under Article 36 of the Criminal Procedure Code of the State of Cambodia. The establishment of judiciary police under the competence of the prosecutor(s), it was felt, is an essential component of the reform of the administration of justice. It was recommended that the National Assembly and the Royal National Government take adequate measures to realize that goal, including by the issuance of a complete set of instructions for the members of the judiciary police.

10. The participants agreed on the need for the speedy functioning of the Appeal Court and the Supreme Court. They recommended that the National Assembly and the Royal National Government take immediate and effective measures to ensure the same.

11. The participants welcomed the transfer of the Department of Prisons within the Ministry of Interior, to the Administrative section, and recommended that the National Assembly and the Royal National Government consider the transfer of the Department of Prisons, to the Ministry of Justice. They recommended that assistance from international and local organizations be procured to rebuild the prisons and train prison personnel, to meet international standards.

12. The participants agreed on the need for better coordination between prosecutors, investigating judges and the police, in investigations. Such coordination, it was felt, is essential for avoiding delays and wastage of resources and for ensuring an effective administration of justice. It was recommended that the relevant authorities explore ways and means of establishing such coordination.

13. The participants agreed that the right to a speedy trial is fundamental to the administration of justice. It was recommended that necessary reforms be undertaken to ensure its realization. Specifically, it was recommended that the courts improve their filing system and adopt administrative reforms, and the police assist the judiciary effectively, including by the speedy investigation of cases and dispatch of dossiers to the prosecutors.

14. The participants agreed that clearer rules and administrative reforms are needed to prevent the non-investigation of complaints and the non-implementation of judicial orders by the police. It was recommended that the National Assembly and the Royal National Government adopt such rules and reforms.

15. The participants agreed on the right of arrested persons to be brought before judicial authorities within 48 hours as stipulated under Article 13 of the Transitional Provisions and Article 47 of the Criminal Procedure Code of the State of Cambodia. They recommended that relevant orders (such as Circular No: 001 dated 20/03/93) be applied by the police and that any further instructions be given to the police on how to effectively implement this provision.

16. The participants agreed that it is a fundamental right for the arrested persons to be informed of the reason for their arrest, and to have access to legal assistance speedily. It was felt that the defenders have an important role to play in this regard. It was recommended that the relevant authorities issue instructions to the police to inform the arrested persons of these rights at the moment of arrest. It was also recommended that the defenders be allowed to function effectively, in accordance with the law.

17. The participants agreed on the need to establish and develop forensic and other scientific facilities and a competent core of forensic and medical professionals, to assist in the administration of justice. The lack of such facilities and professionals, it was felt, seriously hinders investigations of cases. It was recommended that the National Assembly and the Royal National Government take appropriate measures to establish and improve such facilities and core of professionals, including by procuring assistance from local and foreign sources.

UNITED NATIONS PROSECUTIONS IN CAMBODIA

by Basil Fernando

Mr. Yasushi Akashi, Special Representative of the Secretary-General, who heads the United Nations transitional Authority in Cambodia (UNTAC), made a decision on 6 January 1993 allowing the UNTAC Civil Police and UNTAC Military to arrest and detained anyone who is involved in political violence, disturbing the political environment, and destructing the process of a free and fair election in Cambodia. Cambodia is to hold national elections on 23-26 May 1993 for the first time after the country went under the rule of Pol Pot's Democratic Kampuchea Party which is better known outside as the Khmer Rouge. This election is held under the supervision of UNTAC in terms of the *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict*, signed in Paris on 23 October 1991. Mr. Akashi's decision which was issued by way of a directive was endorsed by the United Nations Security Council on 8 March 1993 by Resolution #810/93. The relevant portion of the Security Council Resolution reads as follows:

9. Demands that all Cambodian parties take the necessary measures to put an end to all acts of violence and to all threats and intimidation committed on political or ethnic grounds, and urges all those parties to cooperate with the UNTAC Special Prosecutor's Office in investigations of such acts;

This decision to arrest, detain, and prosecute those who are engaged in pre-election political violence was a controversial decision and was carried out for the first time in the history of peacekeeping by the United Nations. The factor which prompted this decision was the increasing level of violence which was experienced particularly during the months of November and December 1992. This violence included several murders, grenade attacks on political party offices, and other forms of political harassment. UNTAC constantly denounced such political intimidation but that did not bring about a change in the situation.

When political harassments and acts of political violence are reported to UNTAC, the Human Rights Component and the Civil Police investigates into such allegations. The Human Rights Component has the mandate for *"The investigation of human rights complaints, and, where appropriate, corrective action"* in terms of the Paris agreements. This Component has a separate unit for investigation and monitoring of human rights violations. Besides this, provincial human rights officers (PHR0s) who are appointed for each of the provinces also engage in investigations into these violations occurring in their respective provinces. UNTAC Civil Police have units in all districts who work under provincial police commanders. Besides these, there is a Special Task Force of the Civil Police consisting of selected investigators who too engage in investigations into such activities. Joint teams consisting of the human rights officers and of the Civil Police Task Force assisted by the area Civil Police officers, investigate into serious acts of violence such as alleged politically motivated killings. Where possible these teams also seek assistance of the Cambodian police in the respective administrative areas.

These UNTAC investigators gather a considerable amount of evidence relating to the perpetrators of such acts of political violence. However, the attempts to get the police of respective administrative authorities to investigate, to arrest and to prosecute such perpetrators failed. There was no decrease in the level of violence during the months of December 1992 and January 1993.

In these circumstances, many international human rights organisations, and even a number of foreign governments, expressed their concern over the deteriorating situation. The matter was also raised repeatedly at the meetings of the Supreme National Council

The SNC is the highest political body in Cambodia during the pre-election transitional period. A number of political parties in Cambodia, as well as human rights organisations, who during this period fell victims to such attacks, repeatedly protested against this situation. In this background, things were brought to a climax when H.R.H. Prince Norodom Sihanouk, chairman of the SNC, expressed his frustration over the inability to resolve this issue. It was in this climate that Mr. Yasushi Akashi announced the intention of UNTAC to arrest, detain, and prosecute offenders allegedly responsible for such violence. This announcement was followed by his directive bearing number 93/1, dated 6 January 1993, which officially launched the Office of the Special Prosecutor. During the pre-election transitional period, directives issued by the United Nations Special Representative of the Secretary-General in Cambodia have the effect of law.

On 8 January 1993 UNTAC Civil Police in Prey Veng province arrested a local police officer while he was engaged in an attempt to attack a political party office. This first arrest by the UNTAC police received the attention of the international media. A few days later, a local police officer named Em Chann was arrested in Kampot province in relation to a grenade and machine gun attack on a house of a political party member, resulting in the death of one man and his child. The wife of the victim, who narrowly escaped death herself, was able to provide details regarding the attack. In another instance, the UNTAC Civil Police and Human Rights officers who conducted an investigation into the killing of about fifteen persons, including thirteen Vietnamese and the wounding of another fifteen persons, in a village in Kompong Chhnang province, arrested one of the persons an alleged NADK member, who confessed to having participated in this attack on the village which resulted in a massacre. Due to certain legal issues relating to the judicial system which are yet to be resolved, Mr. Yasushi Akashi, by a separate directive dated 3 February 1993, authorised the further detention of the last two suspects in UNTAC custody until these matters are resolved as promptly as possible.

The observers have noticed that from February there has been a marked decrease in the attacks on political parties and their members. However, the ethnic violence still continues and the last recorded incident is of a killing of about 36 Vietnamese in Siem Reap province, where Angkor Wat is situated, on 11 March. This matter is being investigated. At the end of January four persons were recorded to have disappeared after arrest from Battambang, which is one of the more prosperous provinces in Cambodia and where political violence has been markedly high. The UNTAC prosecutor has issued warrants for the arrest of seven military men including a captain, relating to the abduction and disappearance of the four.

Mr. Akashi's directive which arose from a political imperative to resist political violence and to maintain a neutral political environment in which a fair and free election could take place, has not been challenged. In fact, it has been generally acknowledged that such an election should not take place if such violence is not eliminated. The initial argument against this directive was that it exceeds the powers given to UNTAC under the Paris Agreements. However, these formal aspects of the legality of the directive have now been resolved by the United Nations Security Council Resolution #810/93 which has recognised the Office of the Special Prosecutor.

The text of Mr. Akashi's first directive, which is now receiving much international attention, is as follows:

UNTAC will take the initiative:

1. To prosecute cases involving serious human rights violations;
2. For the purpose of such prosecutions, UNTAC will review investigations carried out by all UNTAC components recommending criminal law prosecutions of serious violations of human rights, particularly of officials, police, or military officers of existing administrative structures. UNTAC shall have discretion as to whether cases are taken up for prosecution or not;
3. UNTAC officers, authorised by the Special Representative of the Secretary-General, will have the powers to issue warrants for the arrest and detention of suspects; take appropriate action for protection of witnesses and other persons deemed by UNTAC to require protection; and prosecute cases before the Cambodian trial courts and, where appropriate, before the appellate courts;
4. UNTAC Civil Police and Military will exercise the powers to make arrests and detain suspects for the purposes of such prosecutions;
5. Duly authorised UNTAC officers will he recognised by the judicial apparatus of all existing administrative structures of Cambodia as having jurisdiction to perform all functions necessary in the fulfilment of their duties, and shall have standing to appear before all courts in Cambodia on behalf of UNTAC. All existing administrative structures within Cambodia shall allow access to and use of courts, court resources and prisons wherein persons arrested under this process shall he held.
6. All relevant provisions of the *Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period,* adopted on 10 September 1992, shall be read so as to extend to UNTAC officers all powers necessary for the execution of the tasks and functions referred to in paragraphs 3, 4, and 5 above. In particular, the terms 'prosecutor' shall include duly authorised UNTAC officers and the term 'police' shall include UNTAC Civil Police and Military wherever such terms appear in the said provisions.
7. Any person prosecuted by UNTAC shall be accorded all rights of defense and due process as are provided in the applicable criminal law referred to in paragraph 6 above.

APPENDIX 2

REPORT OF THE CIJL SEMINAR ON JUDICIAL FUNCTIONS AND INDEPENDENCE IN CAMBODIA

Phnom Penh, Cambodia
5-23 July 1993

1. INTRODUCTION

Democratic elections in Cambodia were held in May 1993. These elections, the goal of an elaborate United Nations presence in the country,[1] marked the beginning of a new era in Cambodia. While domestic and international optimism for a peaceful future were high, there was universal acknowledgement that a large amount of reconstruction, institution building, was necessary to transform democratic elections into a democratic society.

After the elections, as UNTAC prepared to pull out, it became increasingly clear exactly what institution building meant. Decades of tragedy have wiped out almost all remnants of fundamental institutions in Cambodia, perhaps most notably, the judiciary. As stated by U.N. Special Representative in Cambodia, Justice Michael Kirby, "The glowing picture of cooperation and support should not disguise the fragile and shattered state of human rights in Cambodia.... It remains a country traumatized by the recent past and threatened by the continuing security problems, which present a constant challenge to the building of a civil society. There are especially serious defects in the institution of justice and the practices affecting due process....."[2]

An independent judiciary is the backbone of any democratic society under the Rule of Law, and this is especially true in Cambodia, where the

[1] In 1992 alone, United Nations Transitional Authority in Cambodia (UNTAC) spent US$ 200 million.

[2] Special Representative of the Secretary-General, Justice Michael Kirby, on the situation of human rights in Cambodia, "Cambodia — Unequalled Suffering; Unique Opportunity," a speech to the UN Commission on Human Rights, 2 March 1994.

success of the transition to democracy hinges upon its establishment. As aptly noted by one commentator, "Few tasks in the area of democratic reform are more important than establishing the independence of the Cambodian judiciary."[3] In his first report, the U.N. Special Representative concluded that the implementation of training programs aimed at the promotion and protection of civil rights and ensuring true independence of the judiciary were priority areas requiring urgent attention.[4]

In this regard, and at the critical juncture following democratic elections, the Centre for the Independence of Judges and Lawyers (CIJL), in cooperation with the Human Rights Component of UNTAC, held a Seminar on Judicial Functions and Independence in Cambodia, from 5 to 23 July 1993.

The Seminar was a three-week training program for fifty-six potential judges of the Supreme Court and Court of Appeal likely to serve under the elected government. The Seminar aimed to lay the groundwork on which to build an impartial Cambodian judiciary, by introducing and illustrating the concept of judicial independence and by continuing the legal education of participants.

II. THE CONTEXT: THE JUDICIARY IN CAMBODIA

While no recap of Cambodia's tragic past is needed,[5] it is important to realize the extent to which it affects the very notion of judicial independence. The judiciary, perhaps even more than any other fundamental institution, has suffered greatly throughout Cambodia's history. Following independence, Cambodia based its legal system on the French colonial system that preceded it. Its existence, however, was short-lived. The civil war, from 1970 to 1975, largely disrupted the functioning of Cambodian civil society. The situation went from bad to tragic with the rise of Democratic Kampuchea (DK), under Pol Pot and the Khmer Rouge. The legal profession was devastated in the DK drive to rid the country of foreign influence, to annihilate

[3] Dolores A. Donovan, *The Cambodian Legal System: An Overview*, 1992.

[4] Report of the Special Representative, Justice Michael Kirby, E.CN.4/1994/73/Add. 1 at 5-6.

[5] See David P. Chandler, *A History of Cambodia* (2nd ed. 1993). For a brief historical overview see Report of the Special Representative, Justice Michael Kirby, E/CN.411994173, at 7-9, quoting Grant Curtis, "Transition to What? Cambodia, UNTAC and the Peace Process," discussion paper, United Nations Research Institute for Social Development (UNRISD), November 1993. See also Daniel Brezniak, The Cambodian Road: An Analysis of the Contemporary Cambodian Situation, a discussion paper prepared for the Australian Section of the International Commission of Jurists (July 1989).

those "who wear glasses." During the DK reign, from April 1975 to January 1979, not only was there no judicial system of any kind in Cambodia, there were very few members of the legal profession in the country alive.

During the succeeding era of the Vietnamese-controlled People's Republic of Kampuchea, and after Vietnamese withdrawal in 1989, of the State of Cambodia (SoC), the re-established legal system followed the socialist model of Vietnam and did not return to its French colonial roots. True to the socialist model, the judiciary was dominated by an omnipotent single branch of government. Until 1988, the Ministry of Justice supervised all facets of the administration of justice and was responsible for- "reviewing all judgments rendered by the courts of first instance for factual and legal correctness, and for equity in sentencing."[6] While in 1988, the function of review of judicial judgments 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.[7] 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.[8]

The Paris Peace Agreements, signed on 23 October 1991, provided that "an independent judiciary will be established, empowered to enforce the rights provided finder the constitution." An independent judiciary was indeed guaranteed by the Cambodian Constitution, which was drafted as the CIJL Seminar took place and later proclaimed in September 1993. The new Constitution states that "the judiciary shall be an independent power."[9]

The legal basis for the independence of the judiciary during the transitional period was provided by the *Provisions relating to the judiciary and criminal law, and procedure*, adopted by the Supreme National Council on 10 September 1992. According to these Provisions:

1. The independence of the judiciary must be guaranteed in accordance with *The Basic Principles on the Independence of the Judiciary*, adopted by the United Nations. Judges must decide in complete impartiality, on the basis of facts which are presented to them, and in accordance with law, refusing any pressure, threat or intimidation, direct or indirect, from any of the parties to a proceeding or any other person.

[6] Donovan at 84.

[7] Id.

[8] Id.

[9] Ch. 9.

2. The judiciary must be independent of the executive and legislative authorities and of any political party. Persons selected for judicial functions must be honest and competent.

3. The principle of the independence of the judiciary entitles and requires judges to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. They must have decent and sufficient material conditions for the exercise of their functions. Judges must receive suitable training and be remunerated adequately to ensure their impartiality and independence.[10]

Despite these provisions, at the time of the CIJL Seminar, the situation of an independent judiciary remained as it had been before the Peace Agreements. The changes on paper were not reflected in reality and the problems facing the Cambodian judiciary were enormous. Problems included, to quote from an article on Cambodia that appeared in this *Yearbook* last year: "summary executions and administrative detention; the inability to prosecute offences committed by the police or military, and to summon police and military personnel as witnesses; executive control over the judiciary; and the lack of a system of fair trial and trained lawyers. There is no proper appeal system, and no Supreme Court with the power of judicial review or of examining the validity and legality of administrative actions."[11] Adding to this list of problems was the lack of both trained judges, without which an independent judiciary cannot exist, and of necessary laws and procedure.

III. THE SEMINAR

It is against this sombre backdrop that the CIJL held its Seminar on Judicial Functions and Independence in Cambodia. Recognizing both the importance and the difficulty of its task, the Seminar aimed to lay the groundwork on which to build an impartial Cambodian judiciary. The three-week Seminar brought together fifty-six potential judges of the Supreme Court and Court of Appeals likely to serve under the newly elected government. Working with members of the present and proposed judiciary of Cambodia, the Seminar introduced international principles of human rights,[12] the in-

[10] Provisions relating to the judiciary and criminal law and procedure applicable in Cambodia during the transitional period at sect. 1, art. 1.

[11] Basil Fernando, "Cambodia. The Court find the Constitution: A Point of View," CIJL Yearbook 65, 84-85 (1993); see also Amnesty International, "Kampuchea: Political Imprisonment and Torture (ASA/23/05/87).

[12] Cambodia is a party to numerous international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; International Convention on the Elimination of

dependence of judges and lawyers, and issues of legal substance and procedure.

PARTICIPANTS, TOPICS AND METHOD OF WORK

When the workshop was first organized, the nominated participants were sponsored by the SoC government. Following the May elections, the CIJL insisted the Seminar be comprised of potential judges nominated by all eligible political factions. Consequently, participants came from varied backgrounds and experiences. While the upper echelon of judges from the preceding regime were present, the majority were not trained legal professionals. Many were teachers who had been chosen by their respective political sponsors after the elections to be judges and magistrates. Most, if not all, participants had received some form of legal education, but from a variety of sources. Participants were asked which legal system they felt had been the predominant frame of reference in the legal education they had received, however long or short - fifteen indicated the French legal system, fourteen the Common Law system, and fourteen the socialist legal system. Participants varied in experience, age, political affiliation, and education. They were united primarily by the desire to learn more about their profession.

Over the three weeks, the CIJL brought seven prominent judges and lawyers representing the world's major legal systems to Phnom Penh to lead the Seminar. The Instructors included: P.N. Bhagwati (former Chief Justice of India; Chairman, CIJL Advisory Board); Marie-José Crespin (Member, *Conseil Constitutional* of Senegal; ICJ Member; CIJL Advisory Board Member); Enoch Dumbutshena (former Chief Justice of Zimbabwe; ICJ Vice President; CIJL Advisory Board Member); Jean Germain (President, Court of Appeal of Paris, France); Michael D. Kirby (President, NSW Court of Australia; Chairman of tile ICJ Executive Committee); Antonio LaVina (Professor of Law, University of the Philippines; Member of Free Legal Assistance Group (FLAG), Philippines); Pablito V. Sanidad (Chairman of FLAG, Philippines, CIJL Advisory Board Member). Mona Rishmawi (CIJL Director), Daniel O'Donnell (Coordinator of the Seminar; former CIJL Director) and Peter Wilborn (CIJL Asst. Legal Officer) organised and participated in the Seminar.

All Forms of Racial Discrimination; International Convention on the Suppression and Punishment of Apartheid; Convention on the Prevention and Punishment of the Crime of Genocide; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Elimination of Discrimination Against Women; Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees.

Each Instructor was chosen for his/her area of expertise, and as a group, they covered a vast area of legal experience and distinction, from human rights lawyer to Supreme Court judge. Over the three weeks, they treated a wide range of criminal, civil and constitution law and procedure in order to further the legal education of the participants and to illustrate flow an independent court functions in different situations. Subjects included, for example, the Rule of Law and the separation of powers, court structure, criminal procedure, appellate court decision making, and judicial review.

As a general rule, and as is illustrated below, the Seminar followed a three-level method of work. The three-level approach was designed to maximise participant involvement, as well as to profit from the varied experiences of the Instructors. First, Instructors gave lectures on specific topics. These lectures were followed by discussion in the plenary group. Second, certain topics were discussed in more detail by participants in smaller groups. The plenary group was divided into three Working Groups which discussed issues and reported on them. Third, Instructors conducted role-play and moot-court exercises to further develop the concepts and issues presented. These exercises played a prominent role in the Seminar because they provided practical examples of the issues examined through lecture and discussion. For many participants, these exercises provided a first glimpse at the workings of a courtroom.

The Seminar was divided into three parts. The first part, Judicial Independence and the Rule of Law, introduced the conceptual framework of an independent judiciary. The Rule of Law, the independence of the judiciary, the separation of powers, court systems and structures, and the respective roles of the judge, prosecutor and lawyer were presented. The second part, Law and Procedure, went into legal provisions and demonstrated how they are implemented by all independent judiciary to protect human rights. The third part, Appeal, Comparative Law and Judicial Review, examined the next step up the judicial ladder and further developed some of the conceptual issues of part one. Of particular focus was the judiciary's function of judicial review of administrative actions. This part also provided a comparative overview of the primary differences between the common law and French legal models. Throughout the three parts of the Seminar, Instructors illustrated how the universal principles of judicial independence are not lofty rhetoric; applied to all stages of the administration of justice, they are the concrete foundation of the Rule of Law and of immediate and practical relevance to Cambodia.

Judicial Independence and the Rule of Law

The rule of Law and an Independent Judiciary, a lecture by Justice Enoch Dumbutshena, opened the Seminar. Sharing the experience of Zimbabwe, which found itself at independence without an effective judiciary, Justice Dumbutshena, showed participants from the outset that their task, although difficult, was not impossible. He went on to list the rights of judges to act free from intimidation and pressure. He continued by stressing the nobility of the profession and the corresponding duty on judges to be courageous and fearless. Independence alone is not enough: "Do your work according to the dictates of your heart and conscience. Justice," he said, "comes from the heart. It is there that it resides."

Justice Dumbutshena's lecture was met with lively discussion, and set the tone for the three weeks that followed. His statement that judges should riot be members of political parties was seized upon as the center of the first day's debate. To many, the statement was difficult to understand; participants were invited to attend the Seminar on the very basis of their political affiliation. Is it possible, some queried, for judges to renounce political affiliation, to bite the proverbial hand that feeds? This discussion led to an introduction to the UN Basic Principles on the Independence of the Judiciary. As stated above, judicial independence is a foreign concept in Cambodia, and is completely unknown in its recent history. Starting from the beginning, using the Basic Principles (available to the participants in Khmer), the concept was presented: "The judiciary shall decide matters before it impartially, on the basis of facts and ill accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[13]

The Seminar moved from this introduction to the issue of the separation of powers. After a lecture and discussion, the plenary broke into three Working Groups in order to examine the concept in closer detail. Each of the three groups was given a branch of government to discuss. The Working Groups drew up reports of their discussions and these reports were read aloud in plenary.

The Seminar found the reports of Working Groups to be an important tool. Participants took pride in preparing and presenting the reports. The reports are also valuable because they give a voice to members of the Cambodian judiciary. In discussing the role of the executive branch, for example, one of the Working Groups summed up the experience of the Cambodian judiciary: "There has been no democracy in this country for the past two decades. The separation of the three powers just occurred ill the structure of

the law, that is to say, in theory, but it was either not implemented or there was no judicial power at all. Moreover, the executive always rises its influence to seriously dominate the judiciary. For instance, police have no limitation of power in detaining an accused person. They never send the accused to court for trial. They arbitrarily arrest, detain and release. If any judge convicts the police's favorite people, tile judge will be physically or psychologically mistreated."[14]

Discussing the role of the judiciary in a civil society, another Working Group went straight to the core problems, stating that "Judicial power must not be submissive to the other two powers, the three must be separate from each other and have different functions. To this end, the constitution must clearly provide for an independent judiciary; judges themselves must have real competence in legal matters and must be courageous; judges must be well paid so that they have a good standard of living; judicial council must be created to administer, nominate, promote, control and defend judges; and the state must have sufficient laws on which judges can base their work."

Another basic topic discussed in the early days of the Seminar was the functions and structures of courts. This session defined courts and mapped out their structure and order. After reaching a general definition of what a court is and of what is to be accomplished in a court, the focus turned to the importance of different, hierarchically ordered, courts. The function of a trial court was presented, and then contrasted with appellate courts. The function of the Supreme Court was discussed, including its power of judicial review of the law. The Seminar followed the framework of courts as provided in the *Provisions relating to the judiciary*.

From there, the Seminar turned to the three actors in the judicial system: lawyers, prosecutors, and judges. Despite the fact that these persons come together to participate in the administration of justice, their respective roles (and corresponding duties, rights, obligations, interests, and goals) are different, and sometimes, opposed. Participants broke into Working Groups, each group examining one of the actors. Once again set in motion by lecture and large group discussion, the Working Groups carried the examination of the issue further, and presented their findings to the whole.

Speaking of defense lawyers, one Working Group stated "We must not forget that the prosecutor is not the representative of the accused person at all. So while seeking justice in front of the courts, for both civil and crimi-

[13] U.N. Basic Principles oil the Independence of the Judiciary, art. 2, G.A. Res. 146, U.N. GAOR, 40th Sess. (1985), reprinted in 25-26 CIJL Bulletin 14 (1990).

[14] Reports of participants are translated from Khmer.

nal cases, defence lawyers are needed. Defenders will defend the interests of their clients, the accused, find in doing so assist in the judge's task to seek justice for both parties in the lawsuit. The right to defense must be clearly stipulated ill the constitution, where it must provide that: "Every person shall have the right to legal defense of his own choosing to protect his own rights and freedom, his honour, his property and his reputation ill front of the court." "Stressing their importance to the administration of justice in Cambodia, it was said that lawyers "make war striving for justice."

Considering tile prosecutor, participants broke its role into three stages. "First, the prosecutor exercises the right to represent the state, and with the co-operation of the police, collects evidence concerning an alleged crime or offense. In this process, the prosecutor must ensure that all evidence is valid and not extracted by unlawful means. Second, the prosecutor must bring the case to trial before an independent judiciary, presenting the charge and making the case on the basis of admissible evidence. Third, after trial, the prosecutor pursues the implementation of the verdict. The prosecutor must also investigate prison conditions to ensure that the human rights of prisoners are respected."

Another Working Group discussed the role of the judiciary. They stated, for example, that, in order to fulfil their function:

- the capacity of judges must be necessarily high in terms of law and morals with the respect of the people;
- judgment and punishment must be based on law. Therefore, it is necessary for judges to respect and firmly implement each stage of legal procedure;
- to avoid partiality, a judge must not be a member of any politi cal party;
- in carrying out his mission to find justice, protect the rights of people, a judge must not discriminate on the basis of race, sex, colour, religion, role, status, or economic situation.

LAW AND PROCEDURE

Having painted the conceptual broad-strokes of judicial independence and the Rule of Law, the Seminar then turned to fill in the spaces with the substance of law and procedure. The goal was to take tile broad principles of roles and functions and apply them to the day-to-day workings of the

legal system. Along the Seminar's path towards introducing judicial independence, the legal education of participants was augmented as well. The basics of law and procedure were presented, with a constant focus on how they relate to an independent judiciary. The Seminar used the legal provisions applicable during the transitional period as its basic legal text.[15]

The essential topic was the Criminal Process and the Rule of Law. Instructors, Judge Marie-Jose Crespin, Prof. Antonio LaVina, and Prof. Pablito Sanidad, lectured on basic principles of criminal law and procedure, including for example, the principle of legality, the elements of a crime, and evidence. At this point in the Seminar, participants actively posed questions and provoked discussion. Far from being the passive students tile CIJL had been told to expect, Seminar participants took lectures as the base, and took full advantage of the Instructors to carry discussion to an interactive and advanced level.

Some participants, having studied the legal provisions of criminal law and procedure governing the transitory period in Cambodia, noticed crucial omissions in the legal provisions no provision, for example, concerning unintentional manslaughter or injury. Participants wondered, and rightly so, how such gaps in the existing law were to be filled. Other difficult and essential questions centered on how the judiciary and the criminal law should treat the question of impunity of individuals alleged to have committed crimes during Cambodia's past. How does the notion of national reconciliation affect judicial independence? Another stream of questions centered oil the role of experts in criminal proceedings. How are they to be paid and chosen?

In this phase of the Seminar, however, the primary method of work shifted from lectures and discussions to practical role-play and moot-court exercises. Although these types of exercises were unfamiliar to participants, they responded enthusiastically to the chance to try out their knowledge and increasing level of expertise. The exercises did not bog down in legal niceties, nor did they require a high degree of legal sophistication. Instructors lectured on the basic issues involved, and then allowed participants to apply them in designed exercises.

The first role-play isolated the issues of the pre-trial rights of the accused. The topic was introduced by Prof. Sanidad, a well-known human rights attorney from the Philippines, and his colleague and compatriot, Prof. LaVina. Using their extensive experience in human rights training,

[15] Provisions relating to the judiciary acid criminal law and procedure applicable in Cambodia during the transitional period.

the two brought the tone to the most practical and direct level. Basing their examples on the laws applicable ill Cambodia during the transitional period, as well as on international human rights law, (all documents were made available in Khmer), pre-trail rights, including the presumption of innocence, the right to remain silent, the freedom from torture, right to counsel, habeas corpus, etc., were discussed. In the role-play exercise, representatives from the three Working Groups, became judge, prosecutor, and defense lawyer and dealt with many of these issues relating to a fact scenario concerning a habeas corpus petition.

The next issue was the rights of the accused during trial. The same method of work was used and effort was made to focus on basic legal issues particularly relevant to the Cambodian experience. The role-play exercise concerning trial procedure and rights raised issues such as the collection of evidence, confession under duress, and the role of the police.

These exercises were then integrated in a moot-court exercise. Participants took a case, based on a fact scenario involving all alleged violation of the *Provisions relating to the judiciary*, to court. Participants were once again divided into three Working Groups. Each Working Group conducted its own trial and was further sub-divided into judiciary, prosecution, and defence teams to prepare for the case. Both prosecution and defence teams interviewed witnesses, followed by consultation among members of the prosecution team regarding criminal charges and witnesses to be presented, and among members of the defence team regarding plea and witnesses to be presented and arguments to be made in court.

The trials of the three Working Groups took place simultaneously, each supervised by an Instructor. The prosecution read the charge, followed by the plea of the defence, and opening statements by both sides. Testimony of prosecution witnesses and subsequent cross-examination was followed by the presentation of the testimony of witnesses for the defense and cross-examination. Both sides were given the opportunity to make closing arguments.

The judges of the three groups presented their verdicts to the plenary session. Two of the groups ruled similarly, in favor of the defendant, the other, led by a senior judge, ruled in favor of the state. This decision sparked extensive discussion and debate.

This section of the Seminar, with its emphasis on practical examples of law and procedure, gave rise to many questions about the day-to-day administration of courts. A session was devoted to a lecture by Mr. Basil

Fernando, Chief, Investigation and Monitoring Unit, UNTAC, on court administration and record-keeping.

Appeal, Comparative Law amid Judicial Review

The third portion of the Seminar was dedicated to an examination of the function of higher courts. Participants of the Seminar were either presently or potentially judges in the Court of Appeal and the Supreme Court of Cambodia. As mentioned above, in Cambodia's recent past, the Ministry of Justice exercised review over trial court decisions. The Seminar focused on the role of the courts to perform this function.

The primary method of work during this portion of the Seminar returned to lecture and subsequent discussion. This format allowed the group to cover the material effectively and Instructors were able to modify their approach in response to the type of questions that were asked. Furthermore, at this point in the Seminar, participants needed no formal framework to get involved; questions were posed by almost all of them.

The first subject that was discussed was the right to appeal and the function of appellate courts. Justice Michael Kirby, President of the Court of Appeal of New South Wales, Australia and Judge Jean Germain, President of the Court of Appeal at Paris, France, examined the issue in both the common law and French legal contexts.

Participants seized upon the opportunity of having judges from both systems before them, taking the issue of comparative law deeper. Appellate court structure and procedure were illustrated in detail by the two Instructors. The discussion went into the differences between the systems, particularly those concerning judicial independence and appeal procedure.

This discussion provided the first opportunity for Cambodian judges, present and potential, to examine and compare the two major legal systems side by side. Roughly the same number of participants claimed each as their primary source of legal education. Some of the older members of the judiciary had some knowledge of the French language and recollection of the French legal system. Younger participants tended to have greater familiarity with the English language and the common law model. The competition between the two models, and the inherent tension between the French and English language, was a sensitive point both in Cambodia in the international community. The Seminar and its Instructors took no position on this question, and strove to provide as much information as possible on each system, as well as on others , including mixed, models, and to respond

to the questions of participants. In fact, the extended examination of comparative legal systems served to better highlight what they have in common, in particular concerning the right of appeal, and, in general, the respect for international human rights law and the independence of the judiciary.

The Seminar's last area of consideration was the role of the Supreme Court and of judicial review. Justice Bhagwati, former Chief Justice of India, lectured on how the Supreme Court function., as a check on the other branches of government to ensure the respect for human rights and the fair administration of justice. Justice Germain added to the issue from the French perspective, elaborating on the role of the *Conseil Constitutional*. Judging from comments by participants, the concept of the judiciary ruling against actions by the executive branch was foreign to Cambodian experience. Participants, for example, highlighted the effective impunity granted to the police. Participants, however, suggested ways in which this will be prevented in the future. The Seminar returned, driven by the discussion, back to where it had begun the absolute necessity for an independent judiciary to uphold and protect the Rule of Law.

Final Declaration of Participants

On 23 July, the Seminar closed. The Closing Ceremony included concluding remarks by representatives of UNTAC and its Human Rights Component, Justice Bhagwati, and Ms. Sam Kanitha, Vice-Minister, Ministry of Justice. The fifty-six Participants made a Final Declaration (attached as Annex One to this report) emphasizing the importance of the complete separation of powers in Cambodia. They stated that the judiciary should be free not only from direct pressure, but from all forms of intimidation, harassment, and persecution. The Final Declaration stressed the importance of the presumption of innocence and that judges should not be members of political parties. In the Final Declaration, the participants also listed their problems and shortcomings, and provided possible ways to remedy them.

IV. CONCLUSIONS

Instructors and outside observers were struck by the high level of energy and dedication of the participants. Over the three weeks, participants of all ages and backgrounds proved to be hard-working and serious. Together, they expressed their steadfast goal to establish an independent judiciary in Cambodia. The Seminar on Judicial Functions and Independence was a successful first step to work together with the Cambodian judiciary to

establish just that. While an enormous amount of work remains to be done,[16] there is no lack of potentially excellent judges in Cambodia.

The priority of the CIJL Seminar was to bring information directly to the men and women who are the present and potential judges of Cambodia. Directly following elections, in the first days of a new Cambodia, the Seminar brought legal expertise to those who will determine the future. The goal was empowerment of the judiciary through information, access and exposure.

This approach is most clear concerning the potential influence of the common law, French and other legal models. Instructors of the Seminar were chosen from among different legal systems, traditions, and backgrounds. The Seminar advocated the importance of Cambodia forming its own legal system drawing on the substance, procedure and language best suited for Cambodia. As illustrated throughout the proceedings, both the common law and French systems offer advantages and drawbacks in light of Cambodian experience. The Seminar strove to give participants a clear understanding of these issues. Overall, the Seminar maintained its emphasis on what these systems have in common - the Rule of Law, the fair administration of justice, and the guarantee of judicial independence.

ANNEXURE ONE

Final Declaration of Participants

of the

Seminar on Judicial Functions and Independence

Phnom Penh, Cambodia
5-23 July 1993

First, we would like to thank His Excellency the Minister of Justice who allowed us to attend the Seminar.

We would also like to thank the Centre for the Independence of Judges and Lawyers (CIJL), and Justice Bhagwati and his colleagues who came to our country to organise this Seminar on Judicial Functions and Independ-

[16] A list of recommend, concerning judicial independence from the Report of the Special Representative, Justice Michael Kirby, E.CN.4/1994/73/Add. 1 at 9-1 1, is reproduced as Annexure Two.

ence.

Excellencies, ladies and gentlemen,

This Seminar takes place at the movement when Cambodia is preparing its new Constitution and is reforming the structure and organisation of its administration. These changes are happening in order to comply with the international standards of democratic countries, to fit with the real situation of our country, to promote the complete respect for human rights. This is the first time in our history that such a Seminar has taken place.

The seminar was conducted over the last three weeks without any disruption and in a very conducive and cooperative climate. We are grateful for the participation of professors from countries such as Zimbabwe, Senegal, Philippines, Australia, France, India, Palestine, and the U.S.A. These professors have so much experience in the fields of laws and of the judiciary, and they came to provide us with information about very important topics that gives necessary advantages to our country during the present circumstances.

All these professors and experts made very clear comments about the separation of powers in countries adopting the democratic system, in which the three powers are completely separate from each other. They stated clearly that judicial power must not be under the control of the other two powers, and absolutely not. The judiciary shall perform independently, without any interference from the other two powers or any pressure, intimidation or interference from any other power. The judiciary must be a uniform system within the statute of the law working only for the judicial power, and which will place it in a position that is irrelevant with a governing body, which is out of its own structure. Every individual judge, in his jurisdiction shall make out his decision based on the provisions of the laws and his own conscientiousness — with neither irritation nor fear, without distinction to social status, color, sex, religion, race. This means by respecting the basic human rights of every person in society.

To make sure that we reach this objective, each individual judge must have the qualities of honesty, fairness, good moral living, truthfulness, wisdom and profound knowledge of the law. Judges must strictly abide to the provisions of law.

All judges must have good living standards with a high salary, and having privilege in their jobs, that means that nobody, no authority apart from the hierarchy of the judiciary authority can remove them from their functions.

The judiciary, and the individual judge, must not be a member of any political party, and must not receive any of its influence or pressure from any such political party. Judges must always apply the principles of presumption of the innocence towards all accused persons until, and if, they are found guilty by the court, where judgement is pronounced. The rights of the defendants must be assured by defence counsel.

All the principles mentioned above are not only our aspiration, but that of Cambodian society as a whole.

But, up until now, the judicial system of Cambodia still meets difficulties. We have not established yet a judicial system which is in compliance with international standards, because our court of appeal exists only on paper. We don't have enough basic material resources, and we still have insufficient judges to set up the above court.

The new constitution of Cambodia is now being drafted. In its articles, all the necessary principles relating to the independence of the judges, the conditions for removing judges from office, the basic human rights must be included. It must also provide for the creation of a bar association to coordinate with the judiciary and to contribute in seeking justice for the society.

Therefore, to reach the goals as cited above, we would like to raise the following proposals. It is requested that the CIJL continues:

- to help Cambodian judges so that they could get their inde pendence and gain their profound knowledge on the subject of law;
- to help in the building of a law center to provide for training judges for the future of the judiciary of Cambodia;
- to arrange for the possibility of Cambodian judges to take study trips and to participate in other seminars about laws and judi ciary in other developing countries in the world;
- to arrange with other international organisations to provide to the Cambodia judiciary the documents of laws and on the ju diciary and other necessary and modern materials and scien tific instruments; and
- to assist in having the Cambodian judiciary recognized by in ternational judges' organisations.

Finally, we would like to thank once again the CIJL and all of its

colleagues for giving their best to help expand our wider knowledge in such a special mission to Cambodia.

Thank you.

ANNEXURE TWO

The report of UN Special Representative on Cambodia, Justice Michael Kirby, included Recommendations concerning the establishment of an indendepent judiciary. They are reproduced here to help focus efforts to assist the legal Profession of Cambodia in the future.

4. Judicial independence and the rule of law

26. A code of judicial practice or other law should be adopted providing the effective assurance of judicial independence and integrity in Cambodia. Such law should provide:

(a) That judges should not consult or have contact with any ministerial official concerning particular cases, except in open court and with the approval of both parties or their representatives. The alleged practice of judges consulting with the Ministry of Justice in private about the determination of cases either before, during or after trial should cease forthwith;

(b) That judges should not accept any gift, present gratuity or benefit of any kind from, or on behalf of, any litigant in their court whether before or after decision. A gift before decision which may influence the decision deprives a party of the fundamental human right to be judged by a manifestly independent and impartial tribunal, and may amount to corruption. A gift after decision, even if it did not influence the decision, may create an impression in the losing party and the community that the judge was influenced by the hope or prospect of such a benefit;

(c) A procedure which is just to the complainant and the judge for the investigation of complaints against judges in respect of the performance of their judicial duties; and

(d) A procedure for the removal from office of judges found, by appropriately stringent standards, to be guilty of corruption or misconduct in a way relevant to their office or found to be suffering from a proved incapacity to perform judicial functions.

27. The present salaries of judges of municipal and provincial courts (reported to be USD 20 per month) are wholly inadequate. They do not provide sufficiently for the sustenance and support of a judge and his/her family. Such low salaries make it almost impossible for judges to be independent. They expose judges to the temptation of corruption and the necessity to rely on gifts, etc. which are incompatible with judicial office. Means should be urgently found to provide judges in Cambodia with salaries and other benefits of office sufficient to remove the exposure of judges to temptations of corruption. Such means would serve to recognize the difficulty and importance of the work of judges in building a society based on the rule of law. Without all incorruptible judiciary, the rule of law will not take root in Cambodia.

28. All Cambodian judges should be supplied, upon appointment, with:

(a) Copies of the Constitution of Cambodia, the international human rights instruments to which Cambodia is a party and other relevant materials, in Khmer and in any United Nations official languages as desired; and

(b) Copies, in Khmer and any United Nations official languages as desired, the relevant principles for the independence of the judiciary, including the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Milan, Italy in 1985 and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985 and the draft declaration on the independence of justice.

29. The Cambodia office of the United Nations Centre for Human Rights should continue to cooperate with the judiciary in the facilitation of:

(a) Translations into Khmer of basic texts, including the above;

(b) Workshops for the instruction and updating of judicial education on basic constitutional and human rights law; and

(c) Supplies to courthouses throughout Cambodia of basic texts and relevant information. The possibility of a human rights newsletter for the judiciary, Government and NGOs should be considered, if funds permit.

30. The judiciary cannot perform its high constitutional function without proper salaries, facilities, equipment, staff and other resources. Judges complained to the Special Representative about the lack of rudimentary resources, including the paper necessary to record judicial decisions. Such provisions should be provided without delay.

31. The recommendation of the seminar on administration of justice for

senior officials nominated by the Ministries of Justice and the Interior, organized by the Cambodian office of the United Nations Centre for Human Rights, 11-17 January 1994, that the courts be given appropriate budgetary allocations for their functions, is strongly endorsed. The Cambodia office of the United Nations Centre for Human Rights should also explore ways in which the equipment and basic facilities available to judges could be improved without delay and make recommendations to this end for a later report by the Special Representative.

32. The Cambodia office of the United Nations Centre for Human Rights, in discussion with the Supreme Council of the Magistracy, once established, should explore with the Ministry of Justice the feasibility of implementing a scheme of judicial mentors. Under such a scheme, judicial officers from other countries with a tradition of incorruptibility and independence could participate as resource persons in judicial chambers. They could also work with relevant ministries, officials involved in the legal system and NGOs, by providing advice and information on analogous solutions from their countries and by drafting legal documents, codes of practice, etc.[17]

[17] Report of the Special Representative, Justice Michael Kirby E.CN.4/1994/73/Add. 1 at 9-11.

Other publications by the author

Sri Lanka: Modernization vs. Militarization - Ethnic Conflict and Labor, published by the Asia Monitor Resource Centre (1991), Hong Kong

Asian Refugees: A Search for Solutions -- a study based on the experiences of Burmese and Sri Lankan Refugees, published by the Christian Conference of Asia - International Affairs (1991), Hong Kong

The Inability to Prosecute: Courts and Human Rights in Cambodia and Sri Lanka, published by the Future Asia Link (1993), Hong Kong

POWER vs. Conscience - the Excommunication of Fr. Tissa Balasuriya, published by the Asian Human Rights Commission (1996), Hong Kong

I challenge anyone to read Mr. Fernando's analysis of the legal scene in Cambodia and to emerge without a sense of frustration, distress and determination to help to put things right. Many of the fundamental constitutional bodies have still not been established because of political wrangling. Still, many of the systems introduced during French colonial rule, inimical to independence of the judiciary, remain in place. Some judges still telephone the Ministry of Justice for guidance on how a case should be determined. Still in operation is the communist system of public prosecutors determined to obtain a confession from the accused at all costs. This is a relic of the autocracy that came to Cambodia with the Vietnamese invasion; although at least the invaders helped to rid the country of the genocide and chaos of the Khmer Rouge. Still, judges, prosecutors and citizens lack modern laws to govern their conduct. The legislative programme of the National Assembly still remains slow and uncertain. Still, the military and some officials can place themselves beyond the effective control of law and the civil power. Still, effective remedies to strike down laws and actions that are inconsistent with the Constitution and fundamental rights, remain imperfect or unavailable. Reports of extra-judicial killings and comments attributed to governmental leaders justifying or even supporting them, still continue to be a source of great anxiety.

- Justice Michael Kirby

The complexities involved in the Cambodian legal system constantly remind me of one sinister character, Andrei Vyshinsky, Joseph Stalin's prosecutor who distorted legal principles to provide a semblance of legitimacy for the totalitarian State. His imprint still remains in this once happy country that is trying to rise from the ashes of destruction caused by Stalin's disciples. In essence, achieving change in the legal system of Cambodia is to exorcise the ghost of Vyshinsky out of the Cambodian soil.

- Basil Fernando

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