CRIMINAL JUSTICE SYSTEM AS AN OBSTACLE TO DEMOCRATIC DEVELOPMENT IN CAMBODIA

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Thesis
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ABSTRACT

Before reaching the non-amendable policy of liberal democracy and pluralism firmly guaranteed by the 1993 constitution, Cambodia experienced civil wars for more than two decades and massacres committed by Khmer Rouge for more than three years. Nonetheless, the process of democratic restoration in Cambodia since 1993, when the UN spent thousands of billion US dollars, has been observed to be remarkably slow.

This study explores the problems of consolidating democracy in Cambodia. The main problem is the non- effectiveness of the criminal justice system (CJS). Cambodia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, and guarantees to respect all the rights enshrined in the Covenant by article 31 of its constitution. The constitution also guarantees the independence of the judiciary (article 128, constitution) and empowers the judiciary to protect those rights of Cambodian citizens. However, to meet the objective of protecting those rights, there is need for an effective criminal justice system. From this viewpoint, the functions of prosecutors and judges are considered the most important.

This thesis argues that the judiciary is not independent or impartial as required by the constitution, and that the department of public prosecution does not independently or impartially perform its duties provided by the law. For these reasons, the rights of Cambodian people are not only violated by law enforcers, but also by justice holders. Thus the lack of the rule of law is an obstacle to democratic development in Cambodia.

Finally, this study recommends that the primary task to promote and sustain the process of democratic development in Cambodia is to achieve the objective of the independent and impartial performance of legal duties by the prosecutors and judges, and put an end to the outstanding culture of impunity. Unless this objective is reached, the violation of Cambodian people's rights will continue and democratic development will be impeded.

KEY WORDS: CRIMINAL JUSTICE SYSTEM / IMPUNITY / DEMOCRATIC DEVELOPMENT / CAMBODIA

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LIST OF ABBREVIATION

AD : Alliance of Democrat
ADHOC : Cambodian Human Rights and Development Association
ANFREL : Asian Network for Free Elections
AC : Appellate Court
BLDP : Buddhist Liberal Democratic Party
CC : Constitutional Council
CCHR : Cambodian Center for Human Rights
CDP : Cambodian Defender Project
CJS : Criminal Justice System
COMFREL : Committee for Free and Fair Elections
CPP : Cambodian People's Party
CSD : Center for Social Development
EL : Election Law
FORUM-ASIA : Asian Forum for Human Rights and Development
FUNCINPEC : Front Uni National pour un Cambodge Independent, Neutre, Pacifique et Cooparatif- (Name of a political party in Cambodia)
IAP Standards : The Standards of the International Association of Prosecutors
ICCPR : International Covenant on Civil and Political Rights
IRI : International Republican Institute
JIOG : Joint International Observation Group
KID : Khmer Institute for Democracy
KNP : Khmer Nation Party
LCA : Law on Commune Administration
LCCE : Law on Commune Council Election
LICADHO : Cambodian League for the Promotion and Defense of Human Rights
LoD : Law on Demonstration
LOFCC : Law on Organization and Functioning of the Constitutional Concouncil

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LIST OF ABBREVIATION (Cont.)

LOFSCM : Law on Organization and Functioning of Supreme Council of Magistracy

MOI : The Ministry of Interior

MOLINAKA : Mouvement de Liberation National du Kampuchea- (Name of a political party in Cambodia)

NA : The National Assembly

NDI : National Democratic Institute

NEC : National Election Commission

PRK : The People's Republic of Kampuchea

SCM : Supreme Council of Magistracy

SC : Supreme Court

SNC : Supreme Council of Cambodia

SOC : The State of Cambodia

SRP : Sam Rainsy Party

SSP : Son San Party

The Agreement : Paris Peace Agreement

The UN Guidelines: The UN Guidelines for Prosecutors

UCD : Union of Cambodian Democrats

UDHR : Universal Declaration of Human Rights

UNCHR : UN Cambodia Human Rights Office

UNTAC : the United Nations Transitional Authority in Cambodia

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CHAPTER I
INTRODUCTION

1.1 Background

Cambodia is also a country having a long history of political culture and changes in different systems. At the same time, its judicial system has also been developed. The history also shows democratic doctrine has rooted in Cambodia through Buddhism and political struggles which brought in Democratic Constitutions of 1947 and 1993. The existing 1993 Constitution provided for the separation of legislative, executive, and judicial powers and the guarantee of the independence and impartiality of the judiciary. Anyway, in current practices, this concept is nothing. And because of that, there is great impact on the process of democratization in Cambodia so far. With political culture of zero-sum game, right to equality before the law or equal protection of the law is not guaranteed which leads to main obstacle to the opposition or minority group in political competition. And because of the non independence of the judiciary, it results in the lack of protection mechanism for the protection of the rights of the people as enshrined in the Constitution such as right to peaceful assembly, creates a culture of impunity- in particular for politically motivated cases- and also causes no check and balance of powers. Finally, all powers are concentrated in the ruling group who governs the country by the system of rule by law or by men, not rule of law.

Again, if we look at the history, Cambodia is a nation going through a political transition. Before gaining independence in 1953, Cambodia had been subsequently reigned by absolute monarchies until 1863, when it became a French protectorate. Still under French protection, democracy was born in Cambodia in 1947 when the country adopted its first constitution, which transformed the age-old absolute monarchy into a constitutional monarchy with multiparty democracy till 1955, when king Norodom Sihanouk, who had just succeeded in his crusade for Cambodia's independence from

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France, abdicated and formed a movement called Sangkum Reastr Nyum (People's Socialist community), which under the banner of "guided democracy," subsumed all political parties (Lao, Mong Hay;1998). In 1970, General Lon Nol toppled Sihanouk by military coup and declared Cambodia as the Khmer Republic, backed by the United States to make war against the spread of communism. The Khmer Rouge defeated the Khmer Republican regime in 1975, assumed power and brutally imposed their brand of radical agrarian communism. In January 1979, Vietnam's troops invaded Cambodia, ousted the Khmer Rouge from power and installed a government of the People's Republic of Kampuchea (PRK), and later changed into the State of Cambodia (SOC). In 1970, Cambodia became involved in civil war for more than two decades until 23 October 1991, when the rival factions reached the Paris Peace Agreement. The United Nations which was given a peace keeping mission sent its civil and military authorities to Cambodia in 1992 and held a general election leading to the formation of a coalition government in 1993.

Cambodia's history tells its people about their elders' struggles for making regime changes, and reflects political ideology from one period to another. So if we look at the history, Cambodian political context was not stable. What are the factors?

According to David P. Chandler (1998), in the aftermath of the UNTAC-brokered elections, the newly established Cambodian government found itself without a political patron for the first time in centuries, although substantial aid from a range of donors continued to pour into the country. Since the 1780s, if not earlier, Cambodia has been harassed, dominated, protected, exploited, and undermined by Thai or Vietnamese regimes, David Chandler (1998) noted, and warned if the French had not imposed their protection in 1863- Cambodia might have disappeared as an independent state with its territory divided into Thai and Vietnamese zones of influences, perhaps by the Mekong. In his essay, David Chandler (1998) has seen the perennial dependence of Cambodian leaders, until very recently, on foreign powers-for instances, some of the protection imposed by Thailand, Vietnam and France between the 1790s and 1953 was sought by the Cambodia's kings; some of it was thrust upon them. This culture has been followed by Cambodian leaders in modern

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times. Fearful of his neighbors and unsympathetic to the United States, prince Sihanouk chose the Soviet Union and China as new Cambodia's patrons. Like him, Lon Nol chose the United States as patron in the 1970s civil war against communist groups backed by Vietnam. To free the country from American and Vietnamese influence, the Khmer Rouge sought much dependence on China to remove Lon Nol in 1975. In the struggle for the liberation of the nation from the Khmer Rouge, the Cambodian People's Party (CPP)- the ruling party in Cambodia today- took, once again, Vietnam as Cambodia's patron to oust the Khmer Rouge from power in January 1979.

Supporting David Chandler's thesis, Brown and Timberman (1998) agreed the persistence of Cambodia's past is applied to the Cambodia of today (Frederick Z. Brown and David G. Timberman; 1998). Brown and Timberman said the roots of the Cambodia's tragedy are to be found in the geography in the Southeast Asia for centuries of national and ethnic rivalry among Khmers, Thais and Vietnamese; and above all in a culture of zero-sum absolutism that refuses to admit the possibility of a "loyal opposition" in political life. David Chandler (1998) also gave similar comments by saying (in the Cambodian political context) a winner-takes-all political culture based on endemic distrust has impeded the development of civil society, stifled free expression, encourage cronyism and violence, and exacerbated people's tendency to distrust and fear those in power. Most Khmers had traditionally associated politics with strong and rich people even they did not have voice in political decision, and there were no legal constraints on the conduct of those at top, David Chandler (1998) noted.

The Cambodian political history has reflected the culture of power centralization of its leaders and their ignorance to Cambodian people's powers and values evident with no attention to people's freedom and respect. Even prince Norodom Sihanouk, who gained the most popularity among the Cambodians for his crusade for national independence from France in 1953 (Cambodia had been colonized by France for 90 years since 1863), put his people's rights away by undermining the democratic spirit enshrined in the 1947 constitution, which

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guaranteed the respect for human rights and rule of law. When Sihanouk took power in 1955, he paid little attention to laws that impeded his power and rode roughshod over the constitution (David Chandler, 1998).

Given Cambodia's history, it should not come as a surprise that reestablishing and strengthening the commitment of Cambodia's political leaders to human rights and rule of law in a long-term struggle. Under the Paris Peace Accords Cambodia was to respect human rights as enshrined in the Universal Declaration of Human Rights and other international instruments on human rights. This obligation was reaffirmed in the 1993 constitution by article 31.

Like the 1947 constitution, the 1993 constitution has an entire chapter devoted to human rights. But unlike the 1947 constitution, the 1993 constitution recognizes that the disregard for human rights in Cambodia has resulted in the country's holocaust. (Lao, Mong Hay; 1998). Pluralistic liberal democracy is enshrined in the current constitution, and this provision on the political system can not be amended. In the protection and promotion of human rights to sustain the policy on democracy, the constitution states that the judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the Cambodian citizens.

As seen in the history of Cambodia's political culture, over the last century Cambodians have been ruled by a central and authoritarian French colonial administration, by autocratic monarch, and by an even more centralized and authoritarian communist system- in those periods the Cambodian people were subjects to the king and serfs of the local potentates or rulers.

This history explains the rigid, uncompromising, and dictatorial attitude of many of the current political elite. While these leaders may have compassion (in the form of pity felt by a person in superior position for a person in an inferior position) for the Cambodian people, they have little or no tolerance for any views or ideas that differ from their own or might challenge their position of authority. Lao, Mong Hay (1998) noted that given the absence of a tradition of tolerance, for the ruling elite the

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notion of national reconciliation means submission to their rule rather than compromise.

Perhaps, a result of this tradition, not long after the adoption of the democratic constitution in 1993, there were charges that democracy and human rights were Western values and could not fit in Cambodian culture, and there was the 1997 bloody contest for power between both ruling parties- CPP and FUNCINPEC- then two largest political groupings in Cambodia. Although normally patterns in the ruling coalition since 1993, these two political parties had continued to view politics as a zero-sum game, wherein whatever one gained the other lost. Because of that they had remained fierce rivals, and each has sought advantage over the other rather than cooperation and compromise.

Since the 1997 bloody coup, the winner Hun Sen, then Second Prime Minister and Deputy President of the CPP has governed the country alone by more centralization of power in his hands and party. For example, he appointed Foreign Minister Ung Huot as first Prime Minister replacing FUNCINPEC President Prince Norodom Ranariddh who had been ousted from power. That, appointment, constitutionally had to be made by the king, but he bypassed the monarch. Hun Sen and his party have become the monopoly holder of power in Cambodia.

The judiciary supposed to be independent of other government branches and perform a key role in guaranteeing human rights stated in the 1993 constitution is also influenced by the executive power. It is evident with the executive dominance over the judiciary in terms of the functioning of judge appointment and the Supreme Council of Magistracy (SCM), which has main duty to guarantee the independence of the judiciary. Since yet procedure of judge appointment introduced so far, the majority of the current judges were observed admitted by the pre 1993 government. Before 1993, Cambodia was ruled by communist regime- one party-ruling system. Therefore, the then judges were selected from the party and appointed by the competent authority officials of the same party. The background of Cambodian judiciary and the selection procedure of justice officials shall be discussed in Chapter V (Section 5-2).

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If we look at the members of the SCM, according to the 1994 law on the organization and functioning of SCM, there are nine members: King is the president of the council, and other members- the Minister of Justice, the President of the Supreme Court, the Prosecutor-General of the Supreme Court, the President of the Appellate Court, the Prosecutor-General of the Appellate Court, and other three judges elected by their colleagues (judges). So except the king, not only the minister of justice but also other members of SCM are influenced by the executive branch. Article 21 of the constitution provides for the king shall sign decree (Kret) appointing, transferring or removing judges upon the recommendation of the SCM; and the drafts of decrees shall be prepared and submitted by the minister of justice (1994 SCM Law, article 11). Through the Kret drafted by the minister of justice, the government may influence over other SCM members. Besides the king and the minister of justice, other members of the SCM are judges. If we look at the history of Cambodian justice system, judges, (judge means sitting judges and standing judges- prosecutors), appointed by pre and post 1993 governments belong to or are strongly biased with the ruling party/parties. This shall be further discussed in Chapter V.

As already mentioned, the Paris Peace Agreement is the starting point of the reintroduction of democracy in Cambodia after the end of long lasting civil wars. Tasks provided by the Agreement, the UN Transitional Authority in Cambodia (UNTAC), which had main mission to keep peace and to hold free and fair parliamentary election in this nation, initially introduced a legal mechanism (called: Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period or UNTAC Penal Code) on 10 September 1992. The mechanism has required judges to be independent and guaranteed individual rights, including political freedom of speech (article 1 & 28).

Every Khmer citizen has to respect and can freely exercise liberal democracy and UN-standard human rights enshrined in the constitution since the article 49 of the constitution emphasizes that every Khmer citizen shall respect the Constitution and laws. To guarantee this respect, the article 39 of the Constitution stressed Khmer citizens shall have rights to denounce, make complains or file complaints against any

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breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of the complaints and claims shall be under the competence of the courts. Thus it is found that the Cambodian judiciary has a vital role in guaranteeing democratic performance since, as reaffirmation, the article 128 says the judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens, and it shall cover all law suits including administrative ones.

1.2 Statement of Problem

Though the 1993 Constitution has required Cambodia to follow the policy of liberal democracy and pluralism, the enforcement of the policy is still in question. Although people's rights enshrined in the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and in other international human rights standards are guaranteed and protected by the Constitution in Cambodia, the violations of human rights in this nation are still the main problems throughout the country. For many criminal cases of human rights violations, perpetrators have not been seen to be brought to justice. It is believed that was resulted from the non effectiveness of the criminal justice system in this country.

According to the 1993 Constitution (article 128), the judiciary shall be independent, and guarantee and protect the rights and freedoms of the citizens. However, in practice, the judiciary is not independent and impartial. Not only the judges are not independent and impartial, but also the prosecutors don't independently and impartially perform their legal duties and the SCM, whose duties to guarantee the judicial independence by taking disciplinary actions against delinquent judges or prosecutors, is so weak and influenced by the executive or the ruling party.

These are the main problems of Cambodia's Criminal Justice System as a whole. So far, these problems have not been explained, and no comprehensive set of strategies for overcoming them have been identified.

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Thus it is significant for this study to diagnose the problems of the justice system and how the problems impact on the process of democratic development in this country. There are many concerns and suggestions raised by human rights groups and democratic advocates in this regard, but, as far as I am aware, no in-depth study of the issue has been carried out in an academic context in Cambodia and no one has explored the issue in depth by making concrete and critical analyses on certain points that I raised in the objectives of this study.

1.3 Objectives of the study

The purpose of this study is to investigate the impact of the Cambodia's Criminal Justice System functioning on democratic development in Cambodia. In conformity with the purpose, the study has the following objectives:

- to examine the role of the CJS in relation to democratic development as envisaged in international laws and in Cambodian Constitution;
- to analyze how the function of the current CJS of Cambodia retards process of democratic development in the country; and
- to identify how the CJS can be reformed in order to make a stronger contribution to democratic development.

1.4 Research questions

To meet the said objectives, the key research questions are as follows:

1. how are Cambodian judges, prosecutors or key senior justice officials selected, and how does the selection procedure influence the effectiveness of the functions of the CJS?
2. in what ways and by which groups is the function of CJS compromised?
3. how does the function of the current CJS impact on democratic development in Cambodia?
4. how can the CJS contribute to and sustain democratic development in Cambodia? How can the CJS be reformed to make a greater contribution to democratic development in Cambodia?

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1.5 Scope of study

To narrow down and specify the problems concerning this topic, I have more focused on the works of prosecutors and judges dealing with politically motivated cases occurred since 1992 when the UN transitional authority arrived in this kingdom, and duties of the concerned institution such as Supreme Council of Magistracy (SCM) included in the component of the Criminal Justice System (CJS) of Cambodia. This study has concentrated on the civil courts rather than the military court. It is not the study on the interpretation of laws and nor the in-depth analysis of criminal process of the Cambodian justice system, but on the duties and functions of the above-said institution and officials- the SCM, prosecutors and judges.

The exercise of political rights which is protected by International Convention on Civil and Political Rights (ICCPR) has been actively disseminated in Cambodia since 1992, when many campaigns were made by UN agencies, national and international NGOs, political parties for encouraging and promoting people to enjoy the rights. Cambodia ratified the ICCPR in 1992.

The study, thus, looks at some issues resulted from the abuses of authority and power by prosecutors and judges seriously violating human rights- particularly civil and political rights- considered as the disruption of democratic development in Cambodia.

1.6 Significance of research

The result of the study will contribute to drawing more public attention to connection of the functioning of the criminal justice system with the process of democratic development. It will also be additional knowledge of understanding certain specific points resulted from the non effectiveness of the CJS as impact on democratic development and another contribution to being a basis for consideration to continuously strengthen democracy in Cambodia.

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It will mainly contribute knowledge to the following groups: Cambodian policy makers and politicians, concerned foreign donors, concerned NGOs who are working to promote human rights and proper law enforcement in Cambodia, academics and students.

1.7 Research methodology

Qualitative research method is mainly used in this study. The study was based primarily on documentary research supplemented by exploratory in-depth interviews.

(i) Documentary Research

The documentary research was conducted to identify the general concepts of democracy, the rule of law, and the criminal justice system, to show the importance of effectiveness of criminal justice system in democratic societies in order to guarantee the sustainable process of democracy. International legal bindings are also used to introduce a standard of a need for independent judiciary and ensuring an effective system for justice in criminal processes. Specifically, the literature is reviewed to reflect political culture of Cambodia, and the pattern of political development in this nation.

Certain findings are derived from NGO, government, and donor reports to describe the background of Cambodian judiciary, the current process of criminal justice system in Cambodia, and the problems of justice. Based on the findings, some cases are raised to illustrate the core problems of justice in Cambodia. Relevant texts of international and national laws applicable in Cambodia are mainly interpreted to measure the assessment on the activities of key justice holders and to diagnose the problems of finding justice. The combination of literature reviews specifically related to Cambodia's political context, the findings and laws are studied to make analyses on the main problems of Cambodia's criminal justice system and, because of those problems, how the system influence over the process of democratic development in this kingdom.

As it is the main tool, the researcher regularly used it to verify and clarify the information given by interviewees, and to support the analyses. The supportive

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references such as books, reports, statements, etc. were searched for through online websites, academic libraries, NGO/government libraries, reports and other necessary documents of NGOs, government, and international institutions.

(ii) In-Depth Interviews

The interviews conducted in this study, the researcher used a “grand tour question”, for instance, “May you tell me about……..;” (Fetterman,1989). Using this method, the researcher started with first question reflecting the opinions of the interviewees and flowed subsequent questions to clarify those opinions. For instances, “What is your idea about the current criminal justice system of Cambodia? Why do think so? Do you think how the system impacts on democratic development in Cambodia? Why? Do you have any proof to prove your argument?”

The interviews were used to seek the views of academics, legal experts and other sources who are working on and familiar with this field. Evidence given by the interviewees to support the opinions benefited the researcher in the analysis. All interviews were only conducted in Phnom Penh- the capital of the kingdom of Cambodia. The reason for selecting Phnom Penh as the area of conducting interviews is that it is the capital and most of experts, key institutions and NGOs are based there. For example, the Appellate and Supreme courts are located in Phnom Penh. On the other hand, this research covered the issues of criminal justice system at national level as a whole. The interviews were conducted individually and separately. The names of the interviewees as described below are listed in the Appendix A.

A. Interviews with legal experts

Three legal experts working in different NGOs were interviewed. Each, respectively, worked for (at the time of interview) the Cambodian Center for Human Rights (CCHR) in charge of education (and the former legal advisor to the National Assembly of Cambodia), for the Center for Social Development (CSD) in charge of legal unit (and the former president of the Khmer Institute for Democracy “KID”), and for the Cambodian Defender Project (CDP) in charge of legal technical unit and lawyer- a member of the Bar Association of the Kingdom of Cambodia. The

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interviews with these experts were conducted to gain academic ideas, legal interpretation on relevant articles, and to understand the flaws in existing laws and the need for additional legal articles or procedures and mechanism for the guarantee of justice in contribution to democratic promotion.

B. Interviews with NGO leaders

Three NGO leaders who have experiences more than ten years in leading the organizations working on the field of this research were interviewed. The three organizations are LICADHO, ADHOC, and CDP (Cambodian Defender Project). LICADHO (French acronym, but stands for Cambodian League for the Promotion and Defense of Human Rights) and ADHOC (French acronym, but stands for the Cambodian Human Rights and Development Association) have worked on the areas of human rights promotion and protection in Cambodia for more than ten years. For the similar duration of works in Cambodia, the CDP is an NGO providing legal/lawyer services with free of charge to victims of human rights violations. The interviews with these NGO leaders were made to explore their actual experiences in human rights protection, proceedings of cases at law courts, and their observation over the behaviors of judges and prosecutors when they dealt with politically motivated cases. The interviews also introduced certain examples of cases for the researcher to use as references to proving the current practices of Cambodian prosecutors and judges, the outsider influences over them.

C. Interviews with prosecutor, judges, and government officials

Because of the bureaucracy problem, the researcher was not able to interview one prosecutor attached to and one judge of each level of the Cambodian courts with three levels- Provincial/Municipal, Appellate, and Supreme courts. As planned, the researcher wished to ask for interviews with three prosecutors and three judges at the Phnom Penh municipal court, the Appellate court, and the Supreme Court. However, the researcher had access to the Attorney General (and the former minister of justice) and a judge of the Supreme Court, a judge of the Appellate court. In response to the researcher's requested letter dated October 24, 2004, on November

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11, 2004 the president of the Phnom Penh municipal court told the researcher to ask the ministry of justice for such interview. With the government officials, the researcher was given an opportunity to interview the General Secretary of the Royal School for Judges and Prosecutors and the assistant to the Secretary of the Supreme Council of Magistracy.

The interviews were conducted to realize the backgrounds of interviewees, how they were selected to hold the positions, their working procedures and daily works, what kind of limitations they or their institutions faced.

(iii) Procedure for In-Depth Interview and Analysis

Interview

Before conducting the interview, the researcher beforehand contacted with the target person asked for appointment of interviews. The contacts were made through phone calls, emails, written letters, in accordance to the different requirements of the prospective interviewees or their institutions. With prosecutors, judges and government officials, the researcher had to visit their administrative offices first to ask the staff how they should to ask for appointment of interviews. There were distinct procedures. For examples, the Municipal and Appellate courts and the secretariat of Supreme Council of Magistracy asked for a written letter with the attachment of references in advanced, as for the Supreme Court and the Royal School for Judges and Prosecutors just asked for references such as the faculty letter and made appointment. At that stage (when appointment contacts made), the researcher introduced himself, the objectives of the study and the purposes of the interview. The interviewees chose the time and place of interview. Interviews were conducted at the working offices of interviewees and at restaurants where the interviewees suggested for them feeling comfortable.

Since the interview was in-depth interview and the target interviewees are the persons with high qualification of education and good experiences in this area, the unexpected questions related to the topic of this study were prompted at the meeting without being informed in advance. However, before each interview started, once

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again the researcher made short introduction of name, background, the objective of the study, and tried to create friendly atmosphere with the interviewees. At the beginning of interview, the interviewees were also informed that the researcher would fully respect their rights requested and they may not answer any questions they are not happy with. Generally, the researcher used a tape recorder to record the interviews; anyway the recorder was not used when requested by the interviewee(s).

Analysis

As mentioned above, the analysis of this study bases on the documentary data. Literature reviews, the findings derived from NGO and other source reports and from certain necessary documents, and relevant laws are the combination of ingredients based on which the analysis has been made. However, the relevant laws applicable are the most important instruments used to assess the influences of the executive over the key justice holders and the passiveness of criminal justice system through the findings of the performance of prosecutors and judges. Depended on such performance of prosecutors and judges, literature reviews on democratic exercises of rights and feelings of Cambodian voters, and the results of subsequent elections, the impact of the non-effectiveness of criminal justice system on the democratic development in Cambodia is analyzed. Certain criminal cases raised are not the case studies for this research, but are cited as the examples to illustrate the functioning of the current judiciary and to analyze the binding obligations of the judiciary in relation to those cases. Those cases are the examples to show the facts supporting each argument of this study.

Therefore, all information obtained by interviews was a guide for the researcher to search for relevant documents for clarification. For instance, the information about prosecutors and judges selected based on the quotas shared among the ruling parties was clarified by a document(dated 12 January 1998) appointing prosecutors and judges, following a ruling party’s letter (dated 9 December 1994) proposing candidates.

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1.8 Trustworthiness

As a human rights student, the researcher has strong sympathy for the double Cambodian victims of both human rights violations and maltreatment of key justice holders such as prosecutors and judges, and strong commitment to sharing ideas in contribution to the promotion of democracy in Cambodia. With this purpose, the researcher has tried an effort to make analysis based on the facts and keep thinking about the practical ideas by considering personal responsibility for this writing as first priority. Because of this hard work, the research hopes this research can be a material assisting policy makers or other concerned parties in doing activities to promote the rule of law and democracy in Cambodia, and also a contribution to drawing their attention to the realization of the importance of human rights respect as a basis guaranteeing the rule of law which sustains democratic development. Then the role of the judiciary will be seen as more importance in democratic society.

In order to avoid the misinterpretation of the information obtained during doing this research and writing, the researcher was in the neutral position to verify the information with other official documents of NGOs, donors, the government and other trusted sources. All analyses have been made based on the findings derived from credible documents officially released in public.

However, the researcher acknowledges that there might be unintentional mistakes and has tried to be aware at all times and welcomes all comments on this study.

1.9 Ethical issues

During the collection of data, the researcher showed or attached the assigning letter issued by the Office of Human Rights, Faculty of Graduate Studies- Mahidol University- where the researcher studies to the contact persons or authorities benefiting this research. At the time starting interviews, the interviews were informed to feel free if they are not satisfactory to answer any questions or they wanted any

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conditions for the researcher such as record off or name not mentioned. The interviewees and document providers were also informed of their right to secrecy fully respected by the researcher and that the information and documents would be only used for the objective of this study, not released to other sources such as media.

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CHAPTER II
DEMOCRACY AND THE RULE OF LAW

With the adoption of the policy of liberal democracy and pluralism, the Constitution also stated Cambodian people are the master of powers (article 51) and enjoy democratic rights as enshrined in UN Charter, UDHR, ICCPR, and other international covenants which the state ratified (article 31), and these rights are protected and guaranteed by the judiciary (article 128). Under these articles, Cambodia should be the state of rule of law and its democracy should be strong as core principles of democracy are guaranteed by the Constitution. On the contrary, as mentioned in Chapter One, Section 1-1, in fact these articles are not effectively implemented. This will be further discussed in the last Chapter.

However, this Chapter raises certain main principles of democracy and their important contribution to strengthening democracy, and from this discussion it will be seen the problems of democracy in the present context of Cambodia in the last Chapter where there is absence of these core principles and the reasons of the absence.

2.1 Core Principles of Democracy

By the 430 B.C., ancient Greek democracy had been developed and reached at a stage that a popular assembly of men ruled Athens (Nalini Rajan, 2002). Among the core principles of democracy, people's sovereignty is one. Based on the principle, that is a long history of democratic development. Through the history, democracy has been developed in different forms and more practical and logical. Democratic development has been changed from the rule by men to the rule by the people, and from governance by all persons in the society like the past Athens' politics to governance by a group representing citizens in a society.

In democratic societies despite the fact that all citizens in a society can't share all positions in the government cabinet, but it has been recognized they are the masters

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of powers since the democratic government have to be formed by popular elections in free and fair environment. According to Anthony Arblarster (1994), Mill viewed the basic democratic principle that as far as possible the people should govern themselves. However, the way by which the people govern the country is their influence. The people have a right to controlling influence over public decisions and decision makers- that is called the principle of popular control; (Beetham, 1998). People's votes are needed to legalize the powers and authorities of the governors to rule and lead a country. With such legitimacy, the governors have absolute power to ensure the enforcement of adopted laws. Nevertheless, to obtain the legitimacy the governors need popular supports through votes. As, in democratic societies, the election winners will govern the country and it is necessary for politicians to make election contest in order to win the elections, so citizens should have influence the governors. Barber (1984) also thought strong democracy should be only shaped by citizens' influence. So the government formed by popular votes must be the government influenced by the people and does everything for the people. Abraham Lincoln, a contemporary of Mill, gave a pithy definition of democracy as "government of the people, by the people and for the people" (Kambhampati S. SASTRY; 2002). Anyway, people will lose influence when the rulers or governors ignore or devalue popular sovereignty. Then the rulers do whatever they want without caring about the governed, and the governed who lose interests will feel unfair. That causes a conflict of interests between two main groups- the governors and the governed. These two groups will try to protect their respective interests. Then the governors will impose more suppression on the governed and, countering that, the governed more gather and express the loss of confidence in the ruling. At the last, the governors will lose popular support, and the governed will votes for another. Democratic government is based on the will of the people, expressed regularly through free and fair elections (Cherif Bassiouni, 1998). Through popular sovereignty, it is a mean that people have power to influence or control the governors.

It was understood on all sides that democracy meant, too lesser or greater degree, popular power, popular sovereignty, popular participation, (Arblaster, 1994). People's participation is also considered one among the key principles of democracy.

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As the democratic governments are created based on the popular votes, or in another word, people have influence over the government through regular votes, the government must be accountable to the voters otherwise it will lose powers. In his argument on democracy, Beetham (1998) said it is from the citizens that democratic governments receive their authorization, and it is to the citizens that they remain accountable and responsive, both directly and through the mediating organs of parliament and public opinion. To realize such accountability and response, there is a need for an assessment on the activities of the elected government. Thus people are required to observe or monitor the execution of the government and to be aware of political process in the country. So people should have right to participation in public affairs or meetings, and right to expression to their government. In 1948, this right was introduced in the international framework of human rights concept. UDHR states everyone has right to take part in the government of his country, directly or through freely chosen representatives (article 21(1)) and in 1966, ICCPR, which emphasizes on civil and political rights, stresses every citizen, shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives (article 26 (a)). If this right is prevented, people would live in a closed society and government do whatever it wants. Then the people become the slaves of the government and that is not the democratic government. In the contrary, popular participation is crucial for political form of democracy since people make decision to vote for candidate(s) based on their acceptance whether the elected serve and protect their benefits. Indicators of assessment on the acceptance are behaviors, activities, or actions of the candidates- how they are accountable to principles for the benefits of the people and the nation. There is necessary need for people's participation in challenging and monitoring the elected's activities otherwise the voters can't make right decisions to vote because through the challenging voters can hear the responses from the elected and through the monitoring they can measure the actions of the elected. Thwilwadee Bureekul explained in carrying out political reform to achieve full democracy, political participation is often featured as one of the key issues on the agenda, and the strong point of democracy is that it promotes the participation of all actors and provides the possibility of solving conflicts through dialogues rather than by force of arms; (Thwilwadee Bureekul, 2004). Thus to sustain

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a strong democracy, there must be participation, and participation means that there must be involvement or concern with the political process by the citizens who elect representatives/leaders, monitor the activities of the government, and check its powers. For instance, in order to effectively check the executive powers, people can participate in politics through the exercise of freedom of speech to provide a rational reflective debate on issues affecting citizen, rights to peaceful assembly or to form pressure groups such as associations or unions to influence the government or to join the opposition to impose pressure on the ruling.

Whereas the influence and participation of the people are crucial in democratic societies to check and balance the powers of the ruling, the principle of equality is also a foundation to sustain democracy. When the majority rules the country, the principle of equality before the law is needed to protect the rights of the minority as democracy is a political form for all. Democracy attempts to satisfy the will of the majority without sacrificing the minorities (Victor Massuh, 1998). Thus democracy is a tool not to marginalize or upset any group or anyone by favouring the other. For example, with free and fair competition for regular elections the political group which wins the majority rules the country and the others have to accept the result and still have chance to do better jobs in order to gain more support for next elections. So both the winner and the loser must be satisfied with the result of the elections. In the contrary, if the election is not held in free and fair environment, the winner must be happy with the result and the loser must be disappointed. Then conflict happens as the fairness or justice is demanded.

To avoid such conflict, free and fair environment is vitally needed for democratic competition. In term of free environment, individual or group should freely exercise their rights (to choice, decision, participation, etc. without fear or intimidation). Whereas regarding fair environment, individual should have equal access or opportunity for democratic competition, for instance, during election campaign. Consistent with this concept, article 1 of UDHR said, "All human beings are born free and equal in dignity and rights." Therefore, freedom and equality in dignity- fairness- are two main things needed for the promotion and sustainability of

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democracy since these two things enable people to freely and fairly perform their democratic rights. From this point of view, equal opportunity should be guaranteed and available for all people in democratic societies. For instance, elections do not necessarily ensure that everyone in society will be happy, well-off, or treated well; but at least they give everyone equal opportunity to have a say in public affairs.

In 1963, President John F. Kennedy remarked, "Not everyone child has an equal talent.....or equal motivation. But they should have equal rights to develop their talent and....to make something of themselves." Nardo continued perhaps, therefore, a somewhat accurate, or at least workable, definition for democracy would be: a government, which guarantees equal opportunity for every one through free elections of leaders and fair written laws. (Don Nardo, 1994)

When equal opportunity needs to be guaranteed, equal access for individuals to legal protection is vital. That means equal protection of the laws otherwise individual rights are crushed. For instance, without equal protection of the laws, individuals belonging to the winning group would be well treated whereas the other suffered discrimination because political bias. If so, this is not consistent with the concept saying that "democracy is a political form for all," and also with the doctrine of human rights. Article 7 of the UDHR said, "All are equal before the law and are entitled without any discrimination to equal protection of the law. ..." A violation would occur, for example, if a state prohibited an individual from entering into an employment contract because he or she was a member of a particular race. Therefore the laws must treat an individual with the same manner as others in similar conditions and circumstances. It is seen, without discrimination or bias, both the winner and the loser or the ruling and the opposition are equally protected. That's a need for the rule of law.

2.2 The Rule of Law

Justice Scalia argued explicitly that the rule of law is no more than the law of rules. Philosophers, such as Friedrich Hayek and Josep Raz, made the same assumption that the rule of law means that the government is bound by rules fixed and

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announced beforehand; (George P. Flectcher, 1996). In a democracy an elected representative participates in the making of laws but is still bound by the law; once promulgated, the law is supreme, not those who made the law; Representative can participate in changing a law, but until it is changed they, along with everyone else, must obey it; It is meaningful if a good law is properly enforced and respected; (Asian Center for Democratic Governance; 2001). Since democracy is a political form of majority rule, but minority not excluded, Inter-Parliamentary Council mentioned in the Universal Declaration on Democracy that democracy is founded on the primacy of the law and the exercise of human rights, by stressing, in a democratic state, no one is above the law and all are equal before the law. (Inter-Parliamentary Union, 1998)

If people's sovereignty and rights mean just "a vote," nothing more than that, then the elected government probably assumes all powers, is too strong and becomes absolute authoritarian. In the contrary, if the elected government is nothing more than a legitimate representative working under the authorities rested with the people since all powers are not transferred after elections, then the government is too weak, or impossibly, to rule a country- leading to social anarchy since a country will be ruled by all. Of course, democracy is a political form for all, but not all the society members have the same duties. In stead, all the society members have different duties and different levels of responsibilities. Thus there must be a balance of powers between the governor and the governed. The meaning of this power balance has to be defined by common rules- or laws accepted by all. That would mean all are in one system set or principles determined by law. So all citizens of the society are protected by the same system or principles or it can be said in another word members of the society have equal access or opportunity to benefit from the system or principles.

Anyway, rules or laws can't be accepted unless they are made by or for all. Moreover, it is absolutely impossible for everyone in a country to make laws applied to others or all as everyone naturally has their own perception whereas the other doesn't. Instead of making laws by themselves, it would be better when all the citizens can involve in making laws through their representatives passing regular elections. In contrast, in making laws, the elected should create an equal access or opportunity for

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voters to be involved in that process otherwise the laws made only represent the will of one group, not of the other. If so, it will be not the law for all and that law can't be used to guarantee or protect justice in the society as it is the law satisfactorily accepted by a group which had access to involvement, but not voluntarily accepted by the other which didn't have such access. Because of this perception, the principles of participation and equality are seen to be so important to make a law. If everyone has equal access to be involved in making a law such as getting accurate information that why the law should be made or why it is useful and sharing ideas/views on the points, then the law adopted would be accepted by all the society members even though some failed in involvement in making the law but it is clear for them to know they had the access. So it is fair for all.

Nevertheless, even law is made based on due process, it is not the meaning of the rule of law unless the law is properly enforced. Non-proper enforcement of law is an act of law violation and inconsistent with the idea advocated by scholars that the rule of law would mean the law is supreme or no one is above the law.

As in democratic system, the separation of three mainly branches of the government is commonly introduced. The legislation makes law, the judiciary guarantees and protects law, and the executive government enforces law. Cherif Bassiouni (1998) stated historical experience reveals that democracy cannot be attained without a system of government, which divides powers among three co-equal branches each with certain prerogatives of power, and where the role of the judiciary is to channel power-related conflicts through a legal process, which uses agreed legal reasoning to interpret and apply pre-existing law. The contemporary doctrine of separation of powers has its origins in the struggles between legislative bodies and monarch in Western Europe. John Locke and Montesquieu were the two eminent proponents of this doctrine, exerting tremendous influence in the eighteen century, especially Montesquieu. According to Montesquieu, any combination of the legislative, executive or judicial powers will lead to a system with an inherent tendency towards tyranny; (Lung-chu Chen, 2001).

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Hence when law is made with due process, the judicial branch should be strong enough to guarantee the respect of law otherwise law is useless or meaningless. It is a need for the independent and impartial judiciary. Lung-chu Chen (2001, 75-88) affirmed that central to the rule of law is independence of the judiciary- that means, in essence, the preservation of a separate institution of government that can adjudicate cases or controversies impartially. Anyway, the judicial independence should not be interpreted as the untouchable or absolute power of the judiciary which is able to have special privilege to create injustice in the society. That would be a danger for the rule of law. Even, in democratic societies, the separation of powers is seen to be a key foundation of democracy, this separation should not be understood as the way by which each institution has to be independent of each other. Meaningfully, the separation of powers should be meant by check and balance of powers. According to the Federalists, the concept of separation of powers can not be understood separately from the concept of checks and balances. Separation of power does not mean a complete separation and absolute demarcation between different branches of the government. A complete separation will make the government chaotic, unworkable, and potentially dangerous. This is why separation of power has to be combined with checks and balances; (IKEGWUOHA; 2003). By the system of checks and balances, each branch of the government can be kept to hold accountabilities stated by the adopted laws. Beetham (1998) said the task of parliament is not only to approve proposals for legislation and taxation on behalf of the electorate, but also keep the policies and action of the executive under the continuous scrutiny; and they require sufficient powers and independence to do this effectively.

The separation of powers provides a system of shared power known as checks and balances. Each of these branches has certain powers, and each of these powers is limited, or checked, by another branch. For example, according to the current American Constitution, the President appoints judges and departmental secretaries. But the Senate must approve these appointments. The Congress can pass a law, but the President can veto it. The Supreme Court can rule a law to be unconstitutional, but the Congress, with the Senate, can amend the Constitution.

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Thus, to have the rule of law, first the law should be made for all with due process. In addition, there is really need for the strongly independent and impartial judiciary, and also the separation of powers with the doctrine of checks and balances. With the rule of law, citizens of the society are able to have equal access to their social participation and equal protection of the law- leading to the guarantee and protection of human dignity as the principle of equality before the law is assured. So it is seen the rule of law is the strong basis to guarantee and protect the basic principles of democracy as discussed in this Chapter and to sustain democratic development.

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CHAPTER III
DEMOCRACY IN CAMBODIA

The objective of this Chapter is going to show the political behavior of Cambodian elites who, for powers, repeatedly ignore democratic principles and the consequences of that culture leads to political conflicts, intimidation or violence. This still happens in the current context of Cambodian politics and is seen also a problem of democratic development, which will be further discussed in the last Chapter. However, as combination, this Chapter will also introduce the brief history of Cambodian democracy and road to the adoption of a democratic Constitution in 1993 and its development afterward.

3.1 Brief History of Cambodian Democracy

Lao, Mong Hay (1998) pointed out that democratic values have Cambodian origins, in Buddhism, Cambodian literature, and even folk stories. If we go through Cambodian history, Buddhism has had influence in this society, and the Buddhist teachings are basically egalitarian and democratic. Since the initial centuries of recorded Cambodian history, Buddhism has entered into the Kingdom and gained root and has become the official religion as the 1993 constitution provides for (article 43) Buddhism is the state religion.

Lao, Mong Hay (1998) noted:

> The process of modern democracy in Cambodia began in 1946, when some democratic rights were granted to the Cambodian people. Political parties were formed and election of a national assembly was held in that year- following that the Constitution of Cambodia was adopted in 1947, when the liberal democracy was enshrined in the Constitution. However, the democracy has been interrupted since 1965, when king Norodom Sihanouk abdicated, occupied the helm of Cambodian politics, and replaced liberal

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democracy system by a one-party system of the government under what, Lao called, the cloak of "guided democracy," and civil wars started in 1970.

Among the nations, probably Cambodia is also one on which the changes in the world politics had the greater impact. The end of the cold war, or, especially, the collapse of the former Soviet Union in late 1980s played a part in the end of Vietnam-backed communist regime in Cambodia. Frederick (1998: 13-31) noted that the collapse of the Soviet Union and end of the cold war precipitated a negotiated end to the war in Cambodia. A peace agreement held in Paris of France (called Paris Peace Agreement/Accord) was reached by all the four Cambodian warring factions.

The Agreement was seen to be the foundation paving way for restoring democracy in Cambodia. Under article 2(1) and 6 of the Agreement, the United Nations was empowered to establish the United Nations Transitional Authority in Cambodia (UNTAC) to guarantee the implementation of the agreement, including the task of organizing free and fair elections. It was the first national election after the end of Cambodia's civil wars lasting for more than two decades. Doyle (1998) observed that the peace operation of UNTAC in Cambodia that culminated in the May 1993 elections was widely hailed as one of the UN's peacekeeping successes. Some scholars described the 1993 elections as the free and fair competitions among Cambodian politicians and as the courage of Cambodian voters who turned out. Lao, Mong Hay (1998) said in 1993 the Cambodian people bravely participated in free and fair elections organized by UNTAC.

The Paris Agreement was also seen to be a strong basis, based on that a democratic system has been built in Cambodia. Certain prerequisites were introduced in the Agreement for the construction of the new Constitution of Cambodia. In Appendix 5 of the Accords, Provision 2 provides that the guarantee of respect for human rights consistent with the Universal Declaration of Human Rights and other international agreement on human rights will be enshrined in the new constitution of Cambodia. Provision 4 of the Appendix also confirms the new Cambodian

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constitution shall include the declaration of Cambodia to adopt the policy of liberal democracy and pluralism.

Like Lao (1998), Pol (1998: 157-193) observed that in 1993, under the auspices of the UNTAC, more than four million Cambodian voters elected 120 representatives to form a Constituent Assembly which adopted a constitution, returning Cambodia to Constitutional monarchy. Article 1 of the 1993 constitution of Cambodia stipulates "Cambodia is a Kingdom with a King who shall rule according to the Constitution and to the principles of liberal democracy and pluralism." Perhaps because of the past experiences that Cambodia has gone through sufferings, tragedy, and changes in political systems, even in very extremist communists of Khmer Rouge regime, the said political system in the current constitution is prevented from any amendment. Article 153 says, "any revision or amendment affecting the system of liberal and pluralistic democracy and the regime of Constitutional Monarchy shall be prohibited."

3.2 Democratic Transition in Cambodia (From 1993)

The fruits of UN-sponsored general elections in Cambodia in 1993 have paved a way for building this nation into a state of rule of law, respect for human rights, and democracy- all of these rooted in its new constitution adopted by the elected members in 1993 after more than two decades of civil war. The adoption of the 1993 constitution transformed the earlier Constituent Assembly to the Legislative/National Assembly and a coalition government was formed. In addition, the Constitution can be seen as the strongest basis keeping Cambodia on democratic track and preventing the return of civil war. However, Cambodia should have many challenges to go through some forms of transitions toward democracy- the consolidation of rule of law and the respect for human rights.

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Power Sharing

During the 1993 elections organized by UNTAC, there were 20 political parties in Cambodia and four political parties have seats in the National Assembly (Pol, Ham; 1998). The election result announced by UNTAC showed that FUNCINPEC (Front Uni National pour un Cambodge Independent, Neutre, Pacifique et Cooparatif) won 58 seats, CPP (Cambodian People's Party) 51, BLDP (Buddhist Liberal Democratic Party) 10, and MOLINAKA (Mouvement de Liberation National du Kampuchea) 1.

That was the first time, after the civil war, for Cambodian people who have opportunities for exercising their political rights with, relatively, free environment through political participation and votes. The election result was seen the basis on which Cambodian democratization was made.

Anyway, as Brown (1998) noted, the (election) results were a shock to the incumbent CPP, which had expected to win, and an astounding display of courage on the part of Cambodian people; UNTAC chief Akashi rejected the CPP's charges of fraud and, on June 10, 1993, declared the elections were fair and free; the CPP refused to accept defeat. A secession attempt in early June by eight eastern provinces had to be quashed by the UN, Brown (1998) continued.

Provided by the Paris Peace Accords in Annex 3 (Provision 1) on election, the number of the Constitutional Assembly members who should be elected is 120. Whereas the provision says the Constitutional Assembly had to complete the draft of a new constitution and make adoption to form a new government, the Provision 6 of Annex 5 (on the Principles of a new Constitution of Cambodia) of the Agreements provides for the need of two-third majority of the Constitutional Assembly members to adopt the constitution.

Thus if CPP continued to reject the election results, and refused to join the coalition government, the formation of the new government would have been

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deadlocked. However, an agreement between the two big parties- FUNCINPEC and CPP- broke the deadlock. Finally, a new coalition government was formed with co-prime ministers- Prince Norodom Ranariddh, FUNCINPEC President, as the first Prime Minister and Hun Sen, Deputy President of CPP, as second. Pol (1998) mentioned the division (or sharing of equal) power between Prince Norodom Ranariddh (FUNCINPEC) and Hun Sen (CPP) as first and second Prime Ministers, respectively, came from a compromise between the two political parties holding the most seats in the legislative body.

Grant Curtis (1998) described the power sharing as follows:

> Ministerial portfolios were divided between FUNCINPEC and the CPP with one ministry (Information) allocated to BLDP, but co-ministers from both parties headed the ministries of Defense and Interior/National Security. In a uniquely Cambodian fashion, such power sharing was extended to the senior level of each ministry, with the appointment of a vice minister from the party other than that represented by the minister (the ministries of Defense and Interior had two vice ministers, one from each party). Although there was a certain political logic to this division of power, bi-party power sharing was extended even further through the appointment of two "undersecretaries of state" for each ministry, each from the two winning parties, so as to effect- in theory- a kind of parity. The power-sharing formula was used for senior appointments in the Council of Ministers and also was extended to the provincial level with the appointment of a governor, a first vice governor from the competing party, and two additional vice governors (one from each of the winning parties) to form a provincial management team.

The formula of power sharing chosen by Khmer politicians was seen to be an effective way to solve the problems in face when the CPP denied the election results, and there was a need of two-third majority among the elected to create a new constitution and government. Some academics and politicians saw that as a gesture of "National Reconciliation". In contrast, certain scholars observed it is hard to have a culture of compromise in Cambodian political context. Among the scholars, Lao

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(1998) has observed until the end of the Second World War Cambodian rulers used the chakrawatti system to rule their country; this system was characterized by the concentration of power in the hands of one absolute ruler who tolerated no opinions different from his own. In the reflection of Cambodian politics since 1993, Lao (1998) noted the two parties (FUNCINPEC and the CPP) have continued to view politics as a "zero sum" game, wherein if one gains the other loses. That is seen to be resulted from the lack of commitment of Cambodian elites to democratic principles. For example, the Paris Agreement requires two-third majority for the adoption of the new Constitution leading to the establishment of the new government in 1993. However, then the two main parties (FUNCINPEC and the CPP)- even agreed on the Paris principle- still could not work together because each attempted to dominate or eliminate the other as it was seen in July 1997 when both launched military contest. David W. Ashley (1998) went deeper than the thoughts of value of peace, reconciliation or democracy. He made an assessment on an end to Cambodia civil wars that the factions agreed to the Paris Accords not because they were suddenly convinced of the values of peace and reconciliation but because- under heavy foreign pressure and with military victory out of reach- they had no choice; likewise, they took part in the 1993 election not necessarily because of any enthusiasm for democracy; rather they hoped to achieved objectives (power or legitimacy) through the ballot box that they had failed to achieve on the battlefield. The lack of mutual trust and loyalty, and the fullness of ambition with powers and interests led to strong competition, even in unfair or unjust way, that led to the demise of the coalition. In fact, the coalition government should be dead at the beginning since a partner showed no acceptance of the political games. As consequences, it had just survived for a while and waited for death. At the FUNCIPEC congress of March 1996- the first time Prince Ranariddh addressed a nationwide meeting of FUNCINPEC activists since the 1993 elections- Ranariddh finally expressed his party's frustrations at the unequal nature of the coalition; he especially criticized the CPP's alleged refusal to share power at the district level (David W. Ashley; 1998). That expression was thought to be the truth of internal confrontation inside the coalition partners, and also to encourage FUNCINPEC activists to make more efforts in favor of the party since the power sharing at district level should benefit them who work at the localities. Finally, a

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bloody coup was launched on 5-6 July 1997, when the first Prime Minister-FUNCINPEC President- was ousted and the country was ruled by Second Prime Minister (CPP) alone. This resulted in blame for UNTAC failure. Grant Curtis (1998) mentioned that UNTAC should have devoted much more effort to helping the Cambodians develop a new and distinctly "Khmer" form of consensual politics through efforts directed toward the art of compromise, including improved negotiation techniques for "national reconciliation."

The July coup reflected a backward step of democratic building in Cambodia. National and international communities gathered to condemn the action and make efforts to bring democracy back. Brown (1998) pointed out that:

> ASEAN, which has the most direct interests in Cambodia's membership in the regional grouping, formed an ad hoc "troika," to launch a diplomatic initiative intended to persuade Hun Sen to reconcile with Ranariddh and to free and fair election. With strong US urging, international financial institutions suspended loans to Cambodia. UN decided to leave Cambodia's seat vacant at the opening of the General Assembly in October (1997).

Democratic Restoration and Conflict Resolution

Lao (1998) stated since the July coup the government and the National Assembly no longer reflect the will, wishes, and aspiration of the Cambodian people as expressed in the 1993 elections; the state organs were almost completely under the control of Hun Sen and the CPP, the losers in the last elections.

With the great efforts of the international community, Hun Sen promised to restore democracy through free and fair elections scheduled for May 1998. At the meeting with a delegation of FORUM-ASIA at his residence in Phnom Penh on 5 August 1997, Hun Sen said, "the government will try to normalize everything to prepare for general election in May 1998. It will not stop the election. The National Assembly has to do the same efforts in order to adopt all-important laws: the electoral law and party law. The election would be meaningless if it could not be held in a free

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and fair atmosphere. Cambodia is not a country like Myanmar. We want the 1998 election to be free from intimidation and done in democratic process and acceptable to everyone." (FORUM-ASIA, 1997).

Following the 5-6 July coup, there were many serious human rights violations reported by national and international human rights groups. Several opposition members, including parliamentarians, took refuge abroad and some others missing and dead in the country. UN Cambodia Human Rights Office (UNCHR) reported- during and after fighting- there were at least 40 confirmed death including the execution of at least six top FUNCINPEC military and officials (FORUM-ASIA, 1997). The report stated that other FUNCINPEC generals escaped, and hundreds of persons affiliated with FUNCINPEC and other parties left the country, including 14 known members of parliament and 5 leaders of the opposition party. On January 15, 1998, Cambodia's leading dissident, Sam Rainsy, opposition party leader, returned home after living in exile abroad following the coup; meanwhile, a group of seven supporters of Prince Ranariddh arrived to observe the political situation towards the possible return of the exiled prince; (ANFREL, 1999).

While there were several reports on human rights abuses in the country and the exile of opposition leaders and parliamentarians, Laws on Political Party and Election Laws were subsequently adopted by the National Assembly on October 28 and December 19, and promulgated by the Head of State on November 18 and December 26, respectively, in 1997. By the Election Law, the National Assembly formed the National Election Commission (NEC) with its main roles and duties to organize and guarantee free and fair upcoming elections and make decisions on electoral conflicts. Thus the establishment of that election arbitrator was seen not fair for the opposition in such circumstances. Despite several high FUNCINPEC officials- including members of the NA and ministers still in the country after the 5-6 July event, it was noted by Lao (1998) that it had disintegrated and some of its members had allied with CPP. ANFREL (1999) noted the Election Law was approved by the National Assembly despite the absence of an effective opposition party to the ruling CPP.

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Based on 1997 Election Law (article 13), NEC should be composed of 11 appointed members: A chairman and a Deputy Chairman selected among Khmer figures who have political and working experiences, two Khmer citizens who have right to vote as members, each from elected parties as members (as mentioned earlier, four parties were elected in the 1993 elections), two senior officials of the Ministry of Interior (MOI) as members, and another member selected among local NGO representatives. One thing, as noted by Lao (1998) above, the representatives of the elected parties were influenced by the CPP of Hun Sen since at the time of the adoption of Election Law and the formation of the NEC all powers were concentrated in and the Assembly dominated by Hun Sen or his party. Thus although the EL requires the NEC members to resign for the members of political parties (if they are), but through their appointment they have to be influenced by the ruling party. According to the appointment procedure mentioned in article 13 of 1997 EL, the Chairman, the Vice-Chairman and other members of the NEC shall be appointed by the Royal Decree at least nine (9) months prior to the day of the election, on a motion of the Council of Ministers approved by an absolute majority vote of the National Assembly; And the MOI shall submit the names of the proposed members of the NEC to the Council of Ministers for approval at least eleven (11) months prior to the day of the election.

So the government may guide the NEC, even article 12 of the EL said NEC was an independent and neutral body in its competence and though article 126 of the EL provides for the punishment of NEC members by monetary penalty or/and by dismissal, if they breached article 12 of the EL. However, it is not clear that who or which institution is empowered to take action if any NEC member breaches the article 126 of the EL whereas there is no written procedure stated in this law or others.

Constitution Council (CC) which is the top body whose decision on constitutionality or on election disputes is final was also established at the absence of the opposition in the Nation Assembly. Law on Organization and Functioning of the CC (LOFCC) was adopted by the NA on 19 March 1998 and promulgated by the Head of State on 8 April 1998. According the date, the adoption was made in the first

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mandate of the existing NA considered under the control of the CPP and after the July coup. Based on article 3 of the LOFCC, ANFREL (1999) reported, on May 8, 1998 the NA voted to place 3 of its members loyal to Hun Sen's powerful political party on the CC; three other members were to be chosen by the king; and 3 more by the Supreme Council of Magistracy (SCM); members of parliament (MP) loyal to Ranariddh- (the royalist party president) -expressed outrage after the vote, which came just two days after Hun Sen assured the prince that at least one of the MPs on the body would come from his FUNCINPEC party.

Based on Law on Organization and Functioning of SCM (LOFSCM), among the nine members of SCM, three should be elected among Cambodian judges. Stated when it came into effective, article 20 of this law empowered the minister of justice with the agreement of the president of the Supreme Court (SC) to proposed three judges for king's official appointment to be the transitional members of SCM when the judge election required by the article 4 of the LOFSCM could be organized. The office term of three judges transitionally appointed will be automatically ended when the new members elected. The three appointed judges should be influenced by the CPP since the position of the then minister of justice was the CPP quota in the power-sharing system.

As stated in the constitution, the king is the chairman of the SCM. However, it had been seen the king transferred the role to CPP president Chea Sim. In his recommendation, to the leaders of the elected parties on December 15, 2003, on the reform of SCM, Sok, Sam Oeun- Executive Director of the Cambodian Defenders Project (CDP)- suggested that the king should assign any figure with at least 10-year experiences in judge, prosecutor, or lawyer as the chairman of the SCM on half of his majesty, that would, according to him, be better than delegating this important role to Chea Sim- the Speaker of the Senate (Sok, Sam Oeun, 2003). Therefore, other three members of the CC selected by the SCM should also belong to the CPP, since at least five SCM members- the acting chairman representing the king, the minister of justice and three appointed judges- were from the CPP. ANFREL (1999) reported on June 12, 1998- more than one month before the second-term election day- "the CC, which is mandated to rule on Constitutional and Electoral Disputes and thus has a crucial role

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to play in election, selected the former supreme court president Chan Sok as its president". So the CC was controlled by the CPP since the three members elected by the NA and other three selected by the SCM were influenced by it.

The situation approaching the 26-July (at the beginning scheduled for May) election was controversial when the fighting between solders loyal to FUNINPEC and the CPP were still going on in some places along the Cambodian-Thai border areas. On January 23, 1998 Hun Sen rejected any suggestion to negotiate a cease-fire with deposed co-premier Prince Norodom Ranariddh, and on February 26, 1998 Hun Sen warned that Prince Ranariddh, who was still in Thailand, still had to surmount several charges before he will be allowed to participate in the election (ANFREL, 1999).

There were serious doubts of credibility of the coming elections and fears among the international groups and Cambodian people. On June 17, 1998 King Sihanouk appealed to Cambodians not to fear intimidation in voting next month, as Hun Sen renewed his commitment to a free and fair election. On July 11, 1998 the National Democratic Institute (NDI) and International Republican Institute (IRI) said the pre-election assessment found "systematic and widespread political intimidation and violence have affected the ability of the opposition parties to fairly compete in the campaign." NDI and IRI had refused to participate in the JIOG (Joint International Observation Group), which represented 34 countries including the EU which was the largest single foreign donor to the estimated $27 million cost of the election. Among distinct images of threats and intimidation, ANFREL-, which monitored the situation in 18 of Cambodian 24 provinces-, noted ten people killed during election campaign, 7 people killed by violence in Anlong Veng on polling day, and 5 people injured by grenade blast in Kampong Thom. (ANFREL, 1999)

As experienced in civil wars for more than twenty years, democracy could not be brought to Cambodia through bullets. These have reflected the perceptions of the Khmer warring factions and international community that witnessed with the Paris international conference on Cambodian issue resolution in 1991- when the Peace Accords was achieved to transform the conflicts from guns to ballots. The United

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Nations composed of 15,000 peacekeeping troops and police and 7,000 civil workers- with the operation cost of US$ 2 billion- brought peace and democracy to the war-torn nation via the called free and fair elections in May 1993 (FORUM-ASIA, 1997). So, again, to solve the conflicts starting from July 1997, both international community and Khmer factions-, which, with international pressure, had no choice because of any international support-, surely returned to elections. UN and international community would lose huge amount of money spent and show a big shame of failure in its mission in 1992 and 1993. The UN Secretary-General Kofi Anan had taken a strong stand with regard to international observation of the 1998 elections indicated that the UN saw the UNTAC experience as a significant precedent for peace keeping- if the UN was seen to fail in Cambodia, could it be expected to succeed elsewhere? (Frederick Z. Brown, 1998). On June 18, 1998 financial assistance for the UNDP Trust Fund was announce following ASEAN decision to send 75 observers for the elections (ANFREL, 1999). As mentioned earlier, the opposition representatives- including top leaders- had returned from the exile and visited Cambodia to monitor the situation, what Lao, Mong Hay (1998) called to test the water.

At last stop, all factions joined the elections organized by the NEC on July 26, 1998. Referring to competitive elections in 1993 and bloody coup in 1997, David W. Ashley (1998) noted:

> To work, the game of democratic politics required certain agreed rules. It demands a degree of mutual trust that all sides will play by those rules and a level of confidence that- win or lose- each party's most fundamental interests will be protected. It requires basic recognition of the legitimacy of one's competitors. In summary it must have a certain institutions, traditions, and values that will serve to facilitate the political will of the victors while guaranteeing the legitimate rights of the losers. None of these were present in Cambodia.

Again, as David W. Ashley observed, democracy could not be brought simply by the elections. Strong protests led by opposition parities were held against the election results announced by the NEC, showing that, among the 122 seats, the CPP won 64, FUNCINPEC 43, and SRP (Sam Rainsy Party) 15. Shown by ANFREL

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(1999), the NEC rejected opposition parties' 800 complaints on irregularities and fraud, and seat-allocation formula and CC-, which were accused by the opposition the two bodies, weighted the CPP. In a press release dated 1 September 1998, ANFREL said:

> The arbitrary decision not to hear the 800 complaints of various cases of violations of election law renders the results even more doubtful and put both NEC and CC's credibility and reputation in question. This is aggravated by the NEC's arbitrary decision to use the Jefferson formula, which obviously would allocate more seats to the ruling party. This decision was done without due process and transparency and is seen as an easy solution for ruling party's bid to get a majority.

The protest led to political turmoil and serious human rights violations prevail in the country since the government violently cracked down on demonstrators. The National Assembly could not start to convene for months as the opposition refused to accept the election results and boycott to join the meeting if the NEC and CC didn't properly solve the issues.

Reported by the UN Cambodia Office of the High Commissioner for Human Rights (UNCOHCHR) between August 20-October 288 1998: At least 34 people were killed in August and September; Seventy-seven people- including 18 monks and nuns, are known to have received medical treatment for injuries sustained during the suppressing of protests; Sixteen people sustained gunshot wounds, including two monks; Fifty-three people, including four monks, have not been seen since the demonstrators were dispersed. On September 7, 1998, King Norodom Sihanouk sent a letter to Hun Sen suggesting the government not to use violence to "crack down on monks and lay people" because the use of the gun contravenes Buddhist principles; and on the same day, UN Secretary General Kofi Annan expressed "deep concern" about the developments in Cambodia. ANFREL (1999).

It was not easy to plant democratic seeds on a land where her people lacked democratic culture, compromise and mutual trust in competition. Peace and

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democracy could not be realized unless the competitive factions enjoy their own interests. Back to civil wars, David W. Ashley (1998) made analysis that by the early 1990s the conflict in Cambodia was not, at bottom, a fight over ethnic, social, or ideological differences but rather a struggle for power among factions- FUNCINPEC, the CPP and the Khmer Rouge.

The analysis can be true when the repeated conflicts and resolutions on Cambodian issues- examples, in 1993, 1997 and 1998, were made based on parties' member positions. The post-election crisis in 1998 was halted when a preliminary agreement was reached, ending a three-month long deadlock; Hun Sen and Ranariddh signed a treaty, leaving the sole premiership to Hun Sen and the house speakership to Ranariddh; outgoing speaker Chea Sim would be chairman of the Senate- to be created through amending the constitution (ANFREL, 1999). The agreement between Ranariddh and Hun Sen has left the issues complained the opposition parties- FUNCINPEC and SRP- unresolved.

Democracy Still on Track, But With Conditions: Elections and Compromises

Chapter 13 of the Cambodian Constitution emphasizes the administration of the country. Article 145 stipulated the territory of the kingdom of Cambodia is administratively divided into provinces and city, province split into district, and district into communes; city into Khan (equal level to district), Khan into Sangkat (equal level to commune). (Note: Khan and Sangkat are Khmer words used instead of the words- district and commune in the city, respectively).

It was remarked as an advanced step toward democratic progress in Cambodia that, with the Cambodian dream of promoting and strengthening democracy in this nation, two laws- Law on Commune Administration (LCA) and Law on Commune Council Election (LCCE)- were made and promulgated on the same day, March 19, 2001. Article 1 of LCA states this law is aimed to govern all communes/sangkats in the kingdom of Cambodia by the power-decentralization policy, article 4 stipulates powers of commune/sangkat leadership are derived from universal, free, fair, just,

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equal, direct and secret votes in the commune/sangkat. Provided by this law, the commune council is the local assembly in the commune and the council which elected by the people in its territory should enjoy legislative and executive powers in the administration of its commune (article 5).

LCCE provided authority to the NEC to organize the upcoming commune council election. Based on article of LCA, the number of commune council ranks from 5 to 7 in accordance with the amount of population in each commune/sangkat. Article 7 says the management and the administration of voter lists, and the administration of the commune council election is the competence of the NEC established by the Election Law (EL).

The long-waiting commune council elections were held on February 3, 2002. The election results showed the CPP dominated. Among all commune chiefs, CPP won 1,598 communes, SRP won 13, and FUNICINPEC won 10 (NDI, 2002).

The organization of the 2002 commune elections provided the Cambodian people with good opportunity for the selection of their local representatives and it was the first time in Cambodian history for the people to exercise their power at the grassroots level. The grassroots democracy should be strengthened since the council members are to be elected in every five year, and they can't be accused, arrested, detained or imprisoned because of expressing their opinions at the council meeting (article 11 and 24, LCA).

However, there are still certain limitations on the promotion of power decentralization and democracy at the grassroots. Under article 15 of the LCA and article 21 of the LCCE, the election should be held using a proportional representation system. Under this system, according to article 21 of the LCCE says the members of the Commune Council are selected from the candidate lists of the parties elected in the Commune Council elections. In addition to this, based on a provision of the article 16 of LCA, Commune Council member may lose Commune Council membership if his/her membership is lost from the party. Thus these approved Commune Council members represent their parties rather than the people. The Commune Council is also

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influenced by the MOI since the NEC members appointed, as raised above, are biased towards the ruling party- the CPP- and the government.

Once again, Cambodia should be proud that it has been able to run elections by itself for three times since 1993 election organized and supervised by the United Nations. The third term of the parliamentary elections was held on July 27, 2003. According to the election result announced by NEC on September 6, 2003, the CPP won 73, FUNCINPEC 26, and SRP 24. For this election, human rights violations were not as serious as the previous ones. ANFREL (2003) noted that this relatively peaceful and calm situation had a great impact on the voters, the party activists and supporters and on the public. It continued that its observers at Prey Veng, Kandal and Takeo provinces met with supporters of the opposition parties who expressed their satisfaction that they felt free to campaign for their respective parties.

However, ANFREL (2003) noted that threat and intimidation were very effective tools since the last two elections, and such tactics were used again for this election. In many villages, CPP(the ruling party) supporters outnumbered opposition parties' supporters; and thus, those who supported the ruling party and were backed up by the local authorities were intimidating the pro opposition. In March, 2003 the Committee for Free and Fair Elections (COMFREL)- a local election monitoring NGO- reported the result of the registration for the 2003 election was worse than in the past elections. It continued that about 400,000 eligible voters did not register because of complicated registration process coupled with an implementation of the process. On July 18, 2003 (approaching the polling day) Human rights Watch released its report and said that CPP was using "more sophisticated forms of intimidation." (ANFREL, 2003).

The NEC for 1998 election was slightly shifted by the new election law (EL) promulgated on 17 September. Based on the law, besides a small change in legal word and the number of NEC members, nothing was reformed- including the procedure of NEC member appointment (article 7). The new NEC was formed to supervise and run parliamentary election in July 2003.

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ANFREL (2003) noted, in the process of the discussion to reform the NEC, NGOs and put several proposals forward. A partisan committee with equal representative from each of the three major (elected) parties was proposed by FUNCINPEC and SRP, while the CPP proposed five persons with experiences in politics as qualification and NGOs a non-partisan committee. In the end both CPP and FUNCINPEC agreed on a formula in which three people come from CPP and two from FUNCINPEC. On July 2, 2003, about three weeks before the election, a UN human rights envoy released a report in which he criticized the NEC and law enforcement officials for not investigating fully reports of voter intimidation, election-related violence, and vote buying. (ANFREL, 2003).

Anyway, FUNCINPEC, which was not satisfied with the election results, started criticizing the NEC, which was established, also, based this party's earlier agreement. Both FUNCINPEC and SRP formed an alliance- called Alliance of Democrat (AD)- to refuse to accept the results and accused NEC of favoring the CPP. The refusal caused political conflicts leading almost to one-year stalemate. Even the election results rejected by AD, but on July 30, 2003 Sam Rainsy- opposition leader- proposed to form a three-party coalition government; and although agreement on the new NEC formation, but on August 19, 2003, 14 SRP and 31 FUNCINPEC parliamentarians signed a petition demanding a reshuffle of the NEC (ANFREL, 2003). These can be reflection of a culture of struggle for power rather than democracy as the demand of competitors did not insist on democratic reformation.

The repeated pattern was seen again when the first and second winning parties formed a coalition government. Before the agreement, on August 11, 2003 FUNCINPEC Deputy Secretary General Nhiek Bun Chhay sent a letter to the CC, asking to invalidate the results of the election (ANFREL, 2003). FUNCINPEC reached an agreement with the CPP on position sharing to form a coalition government, which has been strongly criticized by the public that the formation was unconstitutional. Under the Cambodian constitution, stated above, with the agreement of the two vice presidents of the NA on the its president's request, the king shall designate a dignitary from among the representatives of the (first) winning to form the

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form the royal government, and the designated representative shall presents the cabinet to the NA to ask for a vote of confidence (article 119). Anyway, the establishement of the new government following the 2003 election results was criticized not consistent with the procedure set forth in the constitution; and however the CPP and FUNCINPEC formed a nominal coalition government, but the CPP dominates the government.

3.3 Political Institutions of Cambodia

It is stipulated in article 51 of the Cambodian constitution that powers are separated between legislative, executive and judicial institutions: the Parliament (National Assembly and Senate), the Royal Government, and the Judiciary.

The discussions about the parliament and the government below are based on the Constitution amended by March, 1999 as it had some changes by early 2006 from the formation of the government by two-third majority of the NA members to the simple majority of more than 50%.

Parliament

The Cambodian parliament is bicameral consisting of the National Assembly and the Senate.

The National Assembly

The National Assembly (NA) is a legislative chamber composed of at least 120 representatives (Constitution, article 76) who are elected every five years through free, equal, and secret votes. Under this article, Khmer nationals from birth, at least 25 years old have the right to run for the elections.

The first general election was held in May 1993 under the supervision of the United Transitional Authority in Cambodia (UNTAC) leading to the establishment of this Constitution in September 1993 and followed by the formation of the NA and new government. The second and third parliamentary elections were held on 26 July 1998

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and 27 July 2003, subsequently- run by a Cambodian organization, the National Election Commission (NEC) established under the Election Law adopted on 26 December 1997 and amended on 17 September 2002.

NA members with parliamentary immunity are not only the representatives of the electorate in his/her constituency but of the Khmer nationals as a whole (article 77 of the constitution). Thus the representatives should be accountable to all Cambodian citizens, or in another word, the deputies should be influenced by the citizens who are able to monitor their activities, especially during the session. According to the constitution (article 88), NA meetings should be held in public. With the parliamentary immunity, the deputies are strongly protected by the Constitution during the performance of their activities. Article of 80 of the Constitution stated "No Assembly member shall member shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his(her) duties."

Through the adoption of laws, the NA is able to check and balance the powers of the judiciary and the government. Furthermore, provided by the Constitution the NA should have enough authority to check the activities of the executive on behalf of the voters. Article 89 of the constitution says with the request of at least one-tenth of all members, NA can invite a high ranking official to clarify important special issues. In addition to this section, another article (96) of the Constitution says representatives can deliver written questions to the government via the NA president. Answers can be made in written or in oral by a minister or a group of ministers depending on issues mentioned in the questions; Or if the issues related to general politics of the government, the prime minister should make answers. It is also mentioned in this article, NA takes one day a week for the question time. In legal framework, NA can monitor the executive acts and impose pressure on it in some ways. Article 94 of the Constitution authorizes the NA to establish various necessary commissions, and, in accordance to article 97, the commissions can invite any minister to clarify issue under his/her responsibilities.

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The government should be strongly influenced by the NA since the deputies have authority to remove the government and its members. Article 98, the assembly shall dismiss a member or members of the royal government or the whole cabinet by the adoption of a motion of censure by 2/3 majority of the entire assembly. The motion of censure shall be proposed to the assembly by at least 30 assembly members in order for the entire assembly to decide. Furthermore, any vote of confidence and non-confidence in the royal government members must be passed by a two-third majority of NA members (article 90 and 98). According to article 126 of the constitution, the Assembly has right to impeach the government members and each member of the Royal Government shall be liable for punishment for any crime or misdemeanor that he/she has committed in his/her duty. In such cases and when he/she has committed serious offenses in his/her duty, the Assembly shall decide to file charges against him/her with the competent court. Based on this article, The Assembly shall decide on such matters through a secret vote by a simple majority thereof.

The Senate

Like the Assembly, the Senate is also the organ to hold legislative power (Constitution; article 99). The number of Senate members, with 6-year legislative term (article 102), is half of the entire members of the National Assembly (article 99). For the second mandate of the National Assembly (or the first term of the Senate), the current senators are 61- all of them were appointed, two by the king and other by the elected parties in accordance with the percentage of the seats that each party had the Assembly seats. For the future senators, article 100 of the constitution said two Senate members shall be appointed by the king, other two elected by comparative majority of the Assembly members' votes, and the rest will be non-universally elected. According to the Constitution, article 79 and 103, the mandates of Assembly and Senate shall be incompatible with the holding of any active public function and of any membership in other institutions stated in the constitution, except when the Assembly or Senate member(s) is (are) required to serve in the Royal government. Constitutional Council, Supreme Council of Magistracy, National Election Commission, Supreme Council of National Defense are the institutions addressed in the constitution. In addition, the

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article 103 also says the Senate mandate is incompatible with the holding of function as members of the National Assembly.

Nonetheless, article 113 of the constitution provides that the Senate just examines and gives opinions on draft laws and proposed bills, which is already been firstly adopted by the National Assembly, and on various issues sent to it by the Assembly. Under this article, it can be seen the different authority between the National Assembly and the Senate whereas the former has authority to adopt laws and the later doesn't. Instead of authority to adopt laws, the Senate has authority only to make recommendations on draft laws or proposed bills sent to it by the National Assembly, which is a relatively powerful legislative body, and the Senate is like a consulting institution of legislation. Article 113 continued, "if the Senate requests to ratify on that draft law or proposed bill, the Assembly shall immediately consider it for the second time. The National Assembly shall consider and decide only on any provision or any point that are requested by the Senate to rectify, by abrogating the whole text or retaining some of its parts…. When considering on a draft law or proposed bill for the second time, the National Assembly shall adopt by method of open vote and with a simple majority…Any draft law or proposed bill which have been already decided as above, shall be promulgated." Under Cambodian procedure written in the Constitution, any draft law or proposed bill rejected by the Senate and passed the second adoption by the National Assembly, the draft law or proposed bill will not be needed to send to the Senate again before the promulgation. Furthermore, the Constitution tasks the Senate to coordinate works of the government and the National Assembly (article 112 of the Constitution).

Unlike the National Assembly, the Senate doesn't have authority to vote for the appointment of the Prime Minister and the cabinet members as provided in article 119 of the Constitution or vote for confidence or non confidence in the Royal Government members as stated by article 90 and 98 of the Constitution.

However, provided by article 116 of the constitution, the Senate and NA can hold a joint congress to solve important issues of the nation. But the determination of

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the important issues and the organization procedure of the congress shall be written in a law that will be established (article 117, constitution). Anyway, if there is differences resulted from legal interpretation, the Constitutional Council (CC) is the top body to end the disputes- including ones related to the elections of NA and Senate (Constitution, article 136). There will be more discussion about the CC in Section 5-2.

Government

The article 118 of the Constitution says the Council of Ministers is the Royal Government of the Kingdom of Cambodia; The Council of Ministers shall be led by one Prime Minister assisted by Deputy Prime Ministers, and by State Ministers, Ministers, and State Secretaries who are its members. The National Assembly establishes the Royal Government of Cambodia, (Constitution, article 119).

Cambodian political system is parliamentary that authorizes the first winning party to lead the government. The formation of the government is based on article 119 of the constitution. At the recommendation of the President and with the agreement of both Vice-Presidents of the Assembly, the King shall designate a dignitary from among the representatives of the winning party to form a Royal Government. This designate dignitary shall lead his colleagues, members of the Assembly or political parties represented in the Assembly who are to be placed various positions in the Royal Government, to ask for a vote of confidence from the Assembly. After the Assembly has given its vote of confidence, the King shall issue a Royal Decree (Kret) appoint the entire Council of Ministers.

The cabinet members are prevented from doing professional activities or holding public position. Article 120 of the constitution provides for that by saying the functions of members of the Royal Government shall be incompatible with professional activities in trade or industry and with the holding of any position in the public service. When the Assembly members elected by people are said to be responsible for their activities to voters, article 121 stresses members of the Royal Government shall be collectively responsible to the Assembly for the overall policy of the Royal government. The article continues each member of the Royal government shall be individually responsible to the Prime Minister and the Assembly for his/her own conduct.

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CHAPTER IV
CRIMINAL JUSTICE SYSTEM IN DEMOCRATIC SOCIETY

This Chapter explores the meaning of the judicial independence and the assurance of the independence based on certain specific factors such as the procedures for selection and promotion of justice holders, and other necessary to keep them effectively perform their binding duties. In addition, there is also a study how to ensure the effectiveness of criminal justice system in democratic societies. The arguments on these issues in this Chapter can be a basis of the discussion in the last Chapter about the function of the current criminal justice system of Cambodia and the impact of its performance on the process of democracy in Cambodia. Before going straight to the point, there will also an introduction of the background and structure of the Cambodian judiciary by the end of this Chapter.

4.1 Need For Independent Judiciary

So it is seen, among states- democratic or non democratic- that there is a common recognition of the judicial independence and its importance. Martin Lee (2001) noted, "So if you look at China, dissidents are now given a trial. And when the Americans try to intervene and say that these persons have not committed any offence, they say that they have already given these guys a trial and this is a decision of the court and we can not intervene."

The first principle stated in the 1985 Basic Principles of the Judiciary, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted that "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution of the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary" (UN Basic Principles on the Independence of the Judiciary). Anyway, what does judicial independence mean? And how should independence be assured?

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Judicial independence means a judiciary that is insulated from undue political interference and influence, a judiciary that applies law with impartiality and decides cases on the basis of what is right and just, not what is popular, and a judiciary that protects the ordinary citizens from politicians, big or oppressive government and occasionally from each other (Lung-chu Chen, 2001).

Therefore, the basic function of the judiciary is to protect the rights of the citizens or prevent the violation by the government. So, according to UN Basic Principles on the Independence of the Judiciary, there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision; (and so) the judiciary shall decide matters before them impartially on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason. In short, Dorothy Osterhout (2005) said "an independent judiciary is one that is free from the influence of political or social pressures."

Ensuring the independence of the judiciary, Montesquieu's concept was the separation of the powers among the three main branches- legislative, executive and judicial bodies- of the government. This proves the attempt to prevent the judiciary from pressure by outside influences of other branches. That concept was interpreted not totally independent or separated from each other, but as checks and balances. Total separation of the judicial power is not possible in the real world; In many countries, the Executive Government appoints judges; The legislature provides for their salaries and pension and funds the activities of courts (Michael Kirby, 1998).

It is agreed among scholars that the system of checks and balances can sustain the independence of the judiciary. Like the system of checks and balances of which it is a part, the judiciary is designed to maintain a dynamic equilibrium among contending forces (John A. Ferejohn, 2005). It is seen that the system of checks and balances is vital for the protection of justice. Without this system, the independence can't guarantee the impartiality of the judge who can manipulate his/her judicial role to discriminate individuals or groups for own interests. For example, if judges are

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absolutely independent from other branches, they may be free from being exposed to any disciplinary actions for their misconduct. Then the meaning of the separation of powers is defined by checks and balances of powers and the independent judiciary is meant by referring to the independent and impartial performances of judges in accordance to approved laws. Article 2 of the Universal Charter of the Judge states "Judicial independence must be ensured by law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary" (Universal Charter of the Judge). Thus the independence of the judiciary helps promote the independence of judges, and, vice versa, the independence of judges can help sustain and strengthen the independence of the judiciary. An independent judiciary means that its judges must make decisions based solely on the facts of a case and the applicable law, not on popular opinions polls or surveys, or the views of special interest groups (Ronald T.Y. Moon, 2003).

The independence and impartiality of judges are essential since their role is to protect and preserve justice. Article 1 of the Universal Charter of the Judge pointed out the independence of the judge by stating "Judges shall in all their work ensure the rights of everyone to a fair trial; They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them; the independence of the judge is indispensable to impartial justice under the law and it is indivisible".

However, we must ask how can judges perform jobs to meet the independent criterion mentioned above? Or what measures are to be used to guarantee the independence of the judges?

In relation to the independence of judges, it is seen there are some important things such as the appointment/selection and procedure, promotion procedure, tenure

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of office, removal, remuneration, that can contribute to the promotion of the independence of judges.

Different countries choose varying ways to appoint, re-appoint, or promote the judiciary. The process can involve the Legislature, Executive, the Judiciary itself, and, in some countries, representatives of the practicing legal profession or civil society. In the United States, some jurisdictions go so far as to elect their judges (TI Source Book, 2000).

As argued above, the judges are understood to have crucial role in judicial decision on cases brought to them at law courts. Thus, in addition to the promotion of independence and impartiality, the quality of judges' capacity is important. The capable judges can make decisions based on existing laws independently more than those who are not since the latter need advice or consultation from others. On the other hand, lack of capacity, judges may be reluctant or not clear in making decisions and may lose public confidence. So judges should be selected based on qualifications otherwise they are exposed to dependence of other sources. Individuals selected for judicial office must have integrity, ability, and appropriate training and qualifications in the field of law (TI Source Book, 2000). The Principle 10 of the UN Basic Principles on the Independence of the Judiciary stressed that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law.

In order to have qualified judges, the selection method should be based on a principle of impartiality. With the lack of impartiality, the selection process is subject to bias with any group. The selection process should not discriminate against a person on the grounds of race, ethnic origin, sex, religion, political or other opinion, national or social origin, property, birth or status (TI Source Book, 2000). However, in the UN Basic Principles, there is an exception that is not considered discriminatory. The Principle 10 continued that:

> Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be

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> no discrimination against a person on the grounds of race, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

When a proper procedure of the judge selection is wanted, a good mechanism should be established to make sure the method can be followed. The Universal Charter of the Judge (article 9) states "The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Whereas this is not ensured in other ways, which are rooted in established and proven tradition, selection should be carried out by an independent body, including substantial judicial representation."

The independent body can be a good mechanism for the selection of judges since its decision is not made under influences of any institution. If any group influences the decision, the body making it is not called independent. The independent body should mean the impartial one with responsibility. In some countries like the United States, as described in section 4-1 above, judges are nominated by the president and appointed by the Senate, and in other systems judges are elected. Nevertheless, the US Senate is commonly believed it's independent of the US President as senators directly elected by Americans, and- for the system electing judges- if the election body is not independent, the election result is meaningless. Therefore, any way of appointing or selecting judges is not the most or absolutely important, but the independent and impartial procedure is needed to contribute to the independence of the judges.

With view to the guarantee of the independence of the judge, the way of judge promotion is another contribution. The promotion is an incentive. The promotion can encourage judges to better their performance of duties and please them with their achievements of justice protection. So the promotion should impartially be made with the basis of individual's achievements. The promotion of judges should be based on objective factor- particularly ability, integrity and experience; promotion should be

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openly seen as a reward for outstanding professional competence, and never as a kickback for dubious decisions favoring the Executive (TI Source Book, 2000). These are obviously valued by the Seventh United Nations Congress on the Prevention of the Crime and the Treatment of Offenders on the promotion criterion adopted in the Basic Principle on the Independence of the Judiciary (Principle 13). Capacity of the fields on which individuals working is thought of an essential contributor to those individuals' independent decision making. If judges don't have confidence in decision making because of poor capacity, they may need advice from their colleagues, especially from superior ones. At such situation, the decisions made dependent on or are biased to the advisors, and advisors surely have influences over the decision makers. In the performance of the central role of decision-making, a member of a court or tribunal will not be independent if he or she can be directed by a superior colleague on how to decide a matter (Michael Kirby, 1998). From this point of view, the independence of judges from each other is needed in contribution to the promotion of judicial independence. One aspect of judicial independence, which often overlooked is that judges must also be independent from each other (Michael Kirby, 1998). Again, the Universal Charter of the Judge (article 2) specialized the role of judge in judicial independence that the judge, as holder of judicial office, must be able to exercise judicial powers independently from other judges. Thus besides the issue of capacity taken into account that the promotion of judge should be seen based on the practical experiences or capacity, it should not be seen as the gift of their superior otherwise the judge promoted is not independent from his/her superior.

Nevertheless, both the ways of appointing and promoting judges are crucial for the contribution to the guarantee of the judicial independent. That would be the ways seen as neutrality and impartiality, and accepted by the public. The ways in which judges are appointed and subsequently promoted are crucial to their independence; They must not be seen as political appointees, but solely rather for their competence and political neutrality; The public must be confident that judges are chosen on merit and for their individual integrity and ability, and not for partisanship (TI Source Book, 2000). There have been a lot of discussions on how or what mechanism to guarantee the independence of the judiciary. With this objective, some countries established a

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mechanism to impose punishment on judges whose actions contravene accepted principles.

Certain elements in relation to judges such as permanency of tenure, dismissal, and fix remuneration should also be the key points for the guarantee of the judicial independence. Permanency of tenure should be meant that judges are appointed and have a permanent tenure until they have to retire at the age written in law. The principle of the "permanency" of the Judiciary, with no removal from office other than for just cause and by due process, and their security of tenure at the age of retirement (as determined by written law), is an important safeguard of the Rule of Law (TI Source Book, 2000). Challenging the effective dismissal of nine judges of the Accident Compensation Tribunal of Victoria (a state of Australia) when that Tribunal was abolished in 1992, Justice Kirby said that, "Judicial members must be safeguarded in their security of tenure; Otherwise an important feature of our independent judiciary will be eroded, as it has been in Victoria" (Michael Kirby, 1995). As office tenure is said to be fundamental for the judicial independence, again, a specific term of office and the prevention of outside interference in or influences over advantages of justice holders is necessary. Judges or other members of a tribunal need not be appointed for life or be unimpeachable, but they must be appointed or elected for a long period of time (at least several years) and may not be subject to directives or in some other manner dependent on other State organs in the exercise of their office (Michael Kirby, 1998). The past Chief Justice of Australia Sir Gerard Brennan noted shortly before his retirement "judicial independence is at risk when future appointment or security of tenure is within the gift of the Executive"; They should be free from inducements and protected by tenure which is fundamental guarantee of the real independence (International Bar Association, 1998).

Whereas the office tenure should be taken into account in the effort for the guarantee of the judicial independence, the establishment of a reliable mechanism to secure that tenure is needed. As discussed above, the life tenure is not absolutely required but a specific period of time of the tenure should be clearly stated in a binding procedure. A judge must be appointed for life or for such other period and

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conditions, that the judicial independence is not endangered (Universal Charter of the Judge, article 8). The first requirement of judicial independence enshrined in the UN Basic Principles on the Independence of the Judiciary (Principle 1) is that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. Although this provision doesn't mention about the office tenure of the judiciary, it reflected the obligation of the state, which should be bound by adopted law. So the office tenure that can be the fundamental guarantee of the judicial independence should be particularly stated in a written law. The UN Basic Principle on the Independence of the Judiciary (Principle 11 & 12) pointed out that the term of office of judges and age of retirement shall be adequately secured by law; Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

As the office tenure of judges is needed to guarantee judicial independence then should judges be free from punishment or office removal until the expiry mandated? Regarding this question, it can be referred to the above discussion on the separation of powers. The meaning of independent power is not beyond the sense of checks and balances. From that point of view, the independence of judges with secured office term doesn't mean judges free from their accountabilities as judicial holders. But the grounds for dismissing judges as measures for punishment for any misconduct should be clearly stated in written laws. For instance, judges can only be dismissed on the grounds have proved misbehavior or incapacity and can only be dismissed by a competent authority.

The removal of a judge is a serious matter. It can't be permitted to occur simply, but rather it should be in accordance with clearly defined and appropriate procedures in which the remaining judiciary plays a part. It is also essential that the courts have appropriate jurisdiction to hear cases involving allegations of official misconduct. If not, removal of a judge can undermine the concept of judicial independence (TI Source Book, 2000). There is a need for a clear and appropriate procedures of punishing judges who misbehave otherwise no indicator is used for measurement of that misconduct. The Universal Charter of the Judge (article 8)

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emphasized that a judge can not be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure. But what should the appropriate procedure be?

Certain elaborate criterion should be clearly defined in a binding framework. In regard to this, the UN Basic Principles on Independence of the Judiciary raised some points as follows:

> * A charge or complaint made against a judge in his/her judicial and professional
>
> Capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
>
> * Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.
>
> * All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
>
> * Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of legislature in impeachment or similar proceedings.

Judicial remuneration is also a crucial issue taken into account when talking about the independence of judges. This needs constant vigilance in relation to salary, pensions and other benefits of office. Since the financial advantage is also considered a crucial impact on judicial independence, in terms of the concept of checks and balances of powers it is seen in some countries the executive government appoints judges whereas the legislature provides for their salaries and pensions.

It is implicit in the concept of judicial independence that provision is made for adequate remuneration, and that a judge's right to remuneration not be altered to his or her disadvantage. If judges are not confident that their tenure of office, or their remuneration, is secure, clearly their independence is threatened (TI Source Book,

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2000). It is generally believed the financial interference may have an adverse impact on the independence of judges.

Concerning financial benefits, the Universal Charter of the Judge (article 13) specified that the judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges' work and must not be reduced during his or her judicial service. To secure true financial independence is not needed only for the judges but for administration of the judiciary as well.

There has been a tendency for countries to empower their judiciary to manage the courts and an operational budget provided by the state. A political figure is formally responsible for the budget to the legislature, which approved the funds. This approach was endorsed the fifty independent countries of the Commonwealth in 1993, whose law ministers noted that to provide judiciaries with their own budgets "both bolstered the independence of the courts and placed the judiciary in a position to maximize the efficiency with which the courts operate" (TI Source Book, 2000).

By the way, all of these said above should be apparently, again, defined in law. The UN Basic Principles on the Independence of the Judiciary (Principle 11) provided for the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. To be more important, it is considered that judges should be given freedom of expression and association as others to protect their interests and check with eventually excessive use of power by institutions concerned, such as disciplinary body. The UN Basic Principles on the Independence of the Judiciary (Principle 8 & 9) said "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Judges shall be free to form and join

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association of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence."

Thus, in conclusion, for judge selection, appointment, promotion, punishment or remuneration, there has to be a binding transparent procedure established and implemented by independent and impartial body or bodies. For instance in the US system: all federal judges are appointed by the president, confirmed by the US Senate, and serve for life. There is only one way under the Constitution that federal judges can be removed: The US House of Representatives can vote to impeach any federal judge for "treason, bribery or other high crimes or misdemeanors." The judge is then tried by the Senate (Bill of Rights in Action). With the independence of the body/bodies and impartial performance based on criterion adopted in the Principle 10 of the UN Basic Principle on the Independence of the Judiciary, it can ensure a transparent procedure and fair decision making.

4.2 Ensuring Effective Function Of Criminal Justice System In Democratic Societies

Human rights are fundamental rights- they are "universal, indivisible and inter-dependent and inter-related" as the Vienna Declaration in 1993 affirmed; It is appropriate that they should be protected and, significantly, by something as equally fundamental as the rule of law; (Nicholas Cowdery, 2005). The Preamble to the Universal Declaration of Human Rights (1948) states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." That is a need for the guarantee of the rule of law. The Universal Declaration on Democracy (Principle 17th.) said, "Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors for the rule of law on which democracy is founded."

UDHR (article 10) is read "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his

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rights and obligations and of any criminal charges." A similar sentence is also mentioned in ICCPR. Thus the obligation of the states which are committed to UDHR and bound by ICCPR is the establishment of an effective Criminal Justice System (CJS) where victims of criminal charges can access to justice, and where human rights in general and rule of law can be guaranteed.

The preamble of the UN Guidelines noted that "whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime." Thus to achieve the objective of the effectiveness, certain factors should be taken into account.

The public prosecution or prosecutors have to be independent. Parliamentary Assembly, Council of Europe, addressed in Recommendation Rec(2000)19 that "public prosecutors should be excluded from any judicial role," (Aleksandar Arabajiev, 2003); and in Recommendation 1604 (2003) that "furthermore, respect for democracy and the rule of law require an effective separation of state powers, in particular between the public prosecutors (whether as administrative agent of the executive or of the legislature) on the one hand, and the judiciary on the other," (Recommendation 1604 (2003)). It is practical since the prosecutors or public prosecution whose role to supervise the execution of the court decisions, as mentioned above. So if the office of public prosecution is not independent of the judiciary, how prosecutors can make appeal against the judicial decisions when they find the decisions are not fair. UN Guidelines said, "the office of prosecutors shall be strictly separated from judicial functions." Beyond this independence as such, the office of the public prosecution should be also independent of the police since the prosecutors' authority is to make decisions on whether to prosecute the accused based on evidence provided by police who conducted an investigation. So the prosecutors can't make such decisions fairly or order police to continue investigation if the evidence is not enough unless the prosecutors are independent of the police. Aleksandar Arabadjiev (2003) noted the recommendation of Parliamentary of Council of Europe on the role of the public prosecutor in a democratic society governed by the rule of law that it is

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necessary that responsibility for prosecutions should lie with a body separate from and independent of the police. As discussed above, justice is not for the victims or the accused- but for both. Therefore, the execution of prosecution by the prosecutors has to be fair based on reliable evidence because the prosecution is the starting point by which conflicting sides have access to justice. Justice is an ideal that requires strict adherence to the principles of fairness and impartiality (Stuart James Whitley, 2005). Prosecutors are also considered to be independent of other or political influences. Provision 2.1 of the IAP Standards provided for "The use of prosecutorial discretion, when permitted in a particular in a jurisdiction, should be exercised independently and be free from political interference." Prosecutors can not prosecute any accused involved in political crime- for instance the cases of politically motivated or attempted murders- even there are reliable evidences if they face political threats. If so, it is not only for the cases as such, but other cases as well prosecutors can't make proper prosecutions when they are directed, guided or influenced by political power. Then any prosecution made has to satisfy persons who have political power. That may lead prosecutors to make political compromises by reducing the scope of prosecution or sometimes not making prosecution. The IAP Standards continued they (prosecutors) should be entitled to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. With prosecutorial authority, prosecutors should be firmly stick on responsibility for fair prosecution and brave to challenge undue influences. The UN Guidelines (Provision 15) read that "Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences."

In addition to the independence, the impartiality of the prosecutors is another contribution- considered- to the effective criminal justice system. As stated in the preamble of the UN Guidelines, the crucial role of the prosecutors in the administration justice can contribute to fair and equitable criminal justice. That can be

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done with the need of the impartial role of prosecutors. Another challenge is taken into account- how should the impartial prosecutors be?

The IAP Standards stated that:

> Prosecutors shall perform their duties without fear, favor or prejudice. In particular they shall: carry our their functions carefully; remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity; have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; in accordance with local law or the requirements of fair trial, seek to ensure that all necessary and reasonable inquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect; always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

The UN Guidelines (Provision 13,b) stated prosecutors shall protect public interest, and the IAP Standards (Provision 4.2,d) addressed that (for the role in criminal proceedings), prosecutors will always act in the public interests. As the meaning of justice is for both the victims and the accused as mentioned above, and prosecutors should play role in criminal proceedings to represent public interests, hence the impartial role of prosecutors is so crucial for the guarantee of fairness and equitability in the criminal justice process.

These are the kinds of how the independence and impartiality of prosecutors should be. But it is more important to know that how can these be practical?

Prosecutors are to be capable of knowledge and ability to make right decisions otherwise they will find intervention in their performance. It needs a credible procedure of selection or recruitment of prosecutors based on certain requirements that meet the objective. The preamble of the UN Guidelines noted it is essential to ensure

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that the prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions.

As contribution to the objective, prosecutors with qualifications and independent performance should be promoted. The promotion should be made for the objective of encouraging prosecutors to work independently and impartially. If not so, prosecutors will be influenced and biased with those who promote them because the promotion is a kind of benefits and honor of individuals. Like recruitment procedure, that would need a neutral mechanism for the promotion. Prosecutors shall be entitled to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedure (IAP Standards, Provision 6).

So before starting work, prosecutors should freely express their consent to the conditions of service set before hand. Those conditions should be set forth in a written procedure. With free expression and written conditions, that would be a basis for job performance and a principle guaranteeing benefits of both sides. The UN Guidelines (Provision 6) said reasonable conditions of service of prosecutors, adequate remuneration and, where law or published rules or regulations shall set out applicable tenure, pension and age of retirement.

All of these should be the obligations of states to make sure all necessary procedures or mechanisms are established. For example, states shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. The authorities shall physically protect prosecutors and their families when their personal safety is threatened as a result of the discharge of prosecutorial functions (UN Guidelines Provision 5).

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Prosecutors have also to face disciplinary actions when they perform duties outside professional requirements enshrined in binding materials. The disciplinary actions should be taken for a purpose of keeping prosecutors impartially perform duties provided for by law, but for a threat to their independence or impartiality. Without disciplinary action, prosecutors may use excessive independent authority. On the contrary, without checking procedure, disciplinary body may overrule the principles of the independence and impartiality of prosecutors. In response to this viewpoint, it is seen that freedom of expression and association are vital for prosecutors. UN Guidelines (Provision 8) stressed on this point that "prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. …". In conformity, IAP Standards also pointed out that "prosecutors shall be entitled to form and join professional associations or other organizations to represents their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which contrary to professional standards or ethics."

How to Ensure Effectiveness of Criminal Justice System in Democratic Societies

There is no doubt that the rule of law is important for sustaining democracy. Sir Ninian Stephen (former justice of the High Court of Australia and former Australian Governor General) in his 1999 Annual Lawyers' Lecture for the St James Ethics Centre in Sydney said: "Maintaining the rule of law is the true basis of democratic society. Without it, democracy is a misleading and empty phrase." (Nicholas Cowdery, 2005)

However, the effective protection of the rule of law is seen as the responsibility of the judiciary. J.S Verma affirmed that the rule of law is the bedrock of democracy, and the primary responsibility for implementation of the rule of law lies with the judiciary (Asian Center for Democratic Governance, 2001). Since the implementation of the rule of law implies laws are equally applied to people without discrimination. Nicholas Cowdery (2005) noted that:

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It is necessary to state that the rule of law does not mean "rule by law (that is, so long as there is a law on the subject, the rule of law is operating); the rule of the ruler; or law and order or related notions of authority." A clue to it's meaning would be given by the addition of just one word to the phrase: "the just rule of law." Justice requires the importation of principles that arise under other labels, such as peace, freedom, democracy and fairness. Such principles are echoed in the rule of law and are supported by it.

As stated in the ICCPR (article 26), all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. As noted in Section 2-1 above, the concept of equality is further explained that equality before the law means that the making of a law every person is to be treated equally, and that equal protection of the law means that in applying or enforcing a law already made, there should be no differentiation except on rational and justifiable basis. In the guarantee of this principle of equality, it is addressed in the ICCPR that there is need for the independent and impartial judiciary established by law.

Independent and impartial judiciary can provide fair hearing to parties concerned, and make decision based on available evidences based on which public prosecution prosecuted (for criminal crime) and on laws made and adopted by legislature. In democratic countries where the rule of law respected, the executive authority is obliged to execute that judicial decision. So, for criminal crime, justice for people can be brought by an effective criminal justice system composed of all of these branches.

So it is necessary to get law enforcement done by the respective responsibility of those institutions (involved in criminal justice system), which are accountable for the public, otherwise there is no effectiveness of criminal justice system. J.S. Verma continued that accountability is an essential part of the rule of law (Asian Center for Democratic Governance, 2001). That would be needed an effective procedure for working process of the bodies concerned with checks and balances, for keeping them to hold their accountabilities, enshrined in law. As discussed above, the system of

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checks and balances of powers among the judiciary, executive body, and legislature in Section 4-1; and procedure for the guarantee of the independence and impartiality of judiciary and mechanism for its accountability in Section 4-2; are raised.

However, it needs further discussion about the relationship between the role of prosecutors and police or executive authority in criminal cases. As mentioned earlier, apart from their responsibility to dispose criminal cases for prosecution, prosecutors in some countries play some important roles in criminal investigation, whereas others have an overall responsibility over investigation, and while some others have a limited role in carrying out investigation. However, despite the said country such as Germany where prosecutors lead investigations and the police are only investigatory body of the prosecution office, prosecutors still depend on the police in conducting investigations.

Even though prosecutors must be independent and impartial as mention earlier in this Section, but in some systems non-prosecutorial authorities have right to instructions. However, the instructions should not destroy the independence of the prosecutors. The IAP Standards (Provision 2-2) stated:

If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be transparent; consistent with lawful Authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

In addition to the mechanisms and the systems of the checks and balances said above, it needs a clear, fair and transparent procedures of work and specific responsibilities of each body concerned, and these must be enshrined in just law.

Based on the argument on the study of effectiveness of criminal justice system in this Section, now it is a look at the specific case of Cambodia. However, prior to going deeply through the criminal justice system of Cambodia, that would be better to explore the background of justice system of this country.

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History and Criminal Justice System of Cambodia

The first head of state of Cambodia was a queen who ruled the country in the first century (Pol, Ham; 1998). Cambodia had gone through regimes of absolute monarchy for centuries when all powers concentrated in the queen or king who considered himself/herself as the God ruling the kingdom. Judicial power, including others, were preserved and exercised by the queen or king who made final decisions on various issues in the country. Beatrice BALIVET (2003) affirmed king, also as judicial holder, representing the God held all powers; And, every day, he gave royal hearings to civil servants and citizens to inform him of small or serious problems for resolutions and interventions; King was the judge of the royal members, of his senior officials, and the highest judge of the country.[1]

It would be hard for Cambodian people to reach king. Thus access to justice provided by king maybe was not normally done for all kinds of people who had disputes. That required exceptional mechanisms for their dispute resolution. It is seen in Cambodian culture of informal procedure of dispute resolution in its history since the past until the present. Key, Neam (1998) noted, aside from the legal mechanisms, Cambodian people often resort to traditional dispute resolution. Beatrice BALIVET (2003) also noted that the ways of people finding resolution through the extra-judicial procedures are reconciliation, royal hearing, and arbitration. Koy, Neam (1998) affirmed:

Reconciliation has been frequently used in many parts of the country until the present day. If disputes are not very serious, parties often submit them to elderly people, or other respected or prominent persons in their villages or communes for reconciliation. The royal hearing is an extra-judicial forum where citizens could submit their civil disputes to the king for settlement. Generally, parties to a contract agree in a specific clause to dispute settlement by a neutral, impartial arbitrator, based on the evidence and arguments provided by both parties. The parties choose the arbitrator. The decision of the arbitrator, or award, has the same legal effect as a court judgment.

[1] It is unofficial translation from Khmer language.

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Cambodia had become as a protectorate of France for almost a century since 1863. It was remarked that Cambodian justice system was greatly reformed during that colonial era. However, at the earliest stage of the colonial period, there was nothing changed in Cambodian justice system. The treaty of 1863 established Cambodia as a protectorate of France, through which France was in charge of international relations, while Cambodia enjoyed internal autonomy (Koy, Neam; 1998). In similarity, the 1863 treaty recognized and guarantee to keep Cambodia's existing dispute-resolution system, but, B'eatrice BALIVET (2003) observed, an article said "Cambodian king agrees to reform all kinds of the judiciary which the (French) Republic Government realized it will be useful for the future."

However, it is recognized that Cambodian justice system has been much changed and strongly influenced by French system. Koy, Neam (1998) continued that Convention of 1884 conferred full powers on French protectorate authorities to undertake judicial and administrative reforms, and Beatrice BALIVET (2003) added French influences in Cambodia is proved by the use of Civil Law system and the promulgation of 1938 Civil Code by which French and Cambodian judicial systems were the same; and that system was followed until 1975, when Khmer Rouge regime completely destroyed the judiciary. From a legal profession of some 400-600 people prior to 1975, some ten remained in the country five years later (World Bank, 2004). It was a very big step backward for Cambodia in terms of the justice system as there was no court and legal professionals were almost killed. Cambodia became independent of France in 1953 and the development of its justice system was promptly dismantled only few years under the Khmer Rouge’s ruling from April 1975 to January 1979. During that dark period, it was noted by Stuart Coghill (2000) that there were neither written laws nor courts; one writer has described the situation as a complete “legal vacuum”. These are the burdens of the Khmer Rouge’s successor to reconstruct the Cambodian justice system.

After the collapse of the Khmer Rouge in 1979, Cambodian justice system was reestablished by the new Vietnam-backed government- the People's Republic of Kampuchea (PRK). Stuart Coghill (2000) pointed out that as a result (of the Khmer Rouge’s destruction), Cambodia was faced with a severe shortage of lawyers and

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trained legal personnel that continues to the present. Evan Gottesmann (2002) was quoted the 1980s saw an effort to rebuild judicial system, drawing on teachers and others to fill the posts of judges and prosecutors (World Bank, 2004). In regards to human resources, Cambodia has faced strong hardship to restore the criminal justice system. World Bank (2004) reported till today it remains largely devoid of legal talent; only one in six of Cambodia's 117 judges have a law degree, and only one of the nine Supreme Court judges; only 10% of public prosecutors have a law degree. In addition to the issue of human resources, Cambodian criminal justice system has been also painted by political ideology. It should be noted that post-1979 Cambodia was ruled by the Vietnam-backed communist regime- one party system. As noted by Stuart Coghill (2000), justice in post-1979 Cambodia was heavily "politicized"; the courts, prosecutors and judges were viewed as instrument of the ruling party; the army and police played a dominant role in the administration of "justice"; but what was administered in this system was not "law" but party orders and executive decrees. All of these above still shade and shape the current practices of criminal justice officials of Cambodia as it is functioning under the guidance of the ruling party- Cambodian People's Party (CPP) which, backed and installed by communist Vietnam, has governed Cambodia since 1979 when the Khmer Rouge regime was toppled. Present Prime Minister Hun Sen- Vice Chairman of the party- assisted by Vietnamese advisors, was also appointed as Foreign Minister in 1979, promoted to be Deputy Prime Minister in 1981 and Prime Minister in 1985 (Harish C. Metha, 1999). According to Basil Fernando (1998), nothing had changed in the functioning of Cambodian criminal justice system even after the formation of newly elected government in 1993 as UNTAC decided to keep the existing structure of old communist judiciary. Since Cambodia was ruled by communist Vietnam-backed one-party system of the CPP, then most of the judges/prosecutors appointed by the regime in 1980s must be selected among those who were active in the party. So because of the existing structure of pre-1993 communist judiciary still in place and continuing to be strong in power in the government even after 1993, the ruling party (CPP) of Prime Minister Hun Sen is able to handle judges and prosecutors and controls the justice system as a whole. More details about this will be discussed in the next chapter.

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Regarding legal structure development, Beatrice BALIVET (2003) observed that:

By early 1980, there were three laws made to reorganize the justice system. It was one-level court (at provincial/municipal level), and until the 1985 the Supreme Court was established.

So from early 1980 to 1985, it seemed that the provincial/municipal courts were regarded as courts of the first and last resort since there was no higher court for appeal. Koy, Neam (1998) noted "the judgments of the provincial and municipal courts at that time were final and binding. Even then, however, the judgments rendered by these courts were reviewed by the Ministry of Justice[2] and, if found to be erroneous, referred for a final decision by the Council of State[3]. The Supreme Court established assumed the responsibility of the Council of State- which has no longer exist as a state institution since the adoption of the new Constitution in 1993- with respect to judicial affairs."

The absence of the higher court during that time probably resulted from the lack of human resources and political will. As noted above, during the Khmer Rouge regime, millions of Cambodians- including legislators, prosecutors, judges, lawyers, law professors, and law students- were killed by the group as result of deprivation caused by the implementation of the Khmer Rouge ideology, and the country structures were almost completely destroyed. Cambodian people were mobilized to live in concentration camps and forced to work hard in farming with serious starvation, and judicial system was totally destroyed by the so called killing-field regime. Dolores A. Donovan (1993) affirmed that because the government (PRK), like many socialist regimes, devalued law, it was slow to rebuild the legal system generally and to restore legal education in particular. In general, judiciary in the socialist system is seen to be politicized as all mechanisms, not only the judiciary, are established by the party ruling the country. Thus, decisions of judges- much or less- have to be in conformity with the guidelines or policies of the party or laws made by and for the

[2] Article 18, Law on the Organization of the Court and Prosecution Department, promulgated by Decree No. 02, 10 February 1982.
[3] The Council of State was an organization representing the PRK and the Standing Body of the National Assembly.

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party. And, for sure, such decisions, other than party lines, do not value legal professionalism at all.

In 1992, at the presence of the United Transitional Authority in Cambodia (UNTAC), Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the transitional period (UNTAC Penal Code) was promulgated. The preamble of the establishment of this law said UNTAC had been given responsibilities, pursuant to Article 6 and 16 of the (Paris Peace) Agreement and Section B and E of Annex1, for direct control and supervision in the areas of maintenance of law and order, protection of human rights, law enforcement, and judicial process. Article 4 of the law provided for the establishment of the Appellate Court. According to Koy, Neam (1998), the Appellate Court still did not exist until 1994, when it resulted in three tiers of courts in Cambodia: Provincial/Municipal Court (first instance), the Appellate Court, and the Supreme Court. However, particularly, it can be seen the adoption of the new UNTAC Penal Code led to the completion of the three-level courts in Cambodia and, since then, has provided relatively broader access to the right to appeal in Cambodian jurisdiction. Since the reestablishment of the Cambodian justice system in 1980s, after the fall of Khmer Rouge regime, Dolores A. Donovan (1993) expressed doubt that "it is not clear at this writing whether the majority of judges in Cambodia have any understanding at all of the concept of an independent judiciary; ……can it be said with certainty that there are sitting judges, educated under the old regime, who are even familiar with the concept of judicial independence." In this regards, it is clear the UNTAC Code has introduced such concept with clear definition. Article 1(2) said, "the judiciary must be independent of the executive and legislative authorities and of any political party."

The Supreme Council of Magistracy (SCM), which has role in assisting the king in the matter of guaranteeing the independence of the judiciary, is required to be established by the Constitution. Article 134 said an organic law, which shall determine its composition and function, shall establish the SCM. Under this article, Cambodia has obligation to establish a necessary body- the SCM- to guarantee the independence of the judiciary. In 1994, the SCM was established by the adoption of the Law on the

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Organization and the Functioning of the Supreme Council of Magistracy in December. However, it was not functional until December 1997, when its first meeting was held.[4]

The Cambodian constitution empowers the judiciary to exercise judicial power over all kinds of issues lodged. Article 128 (para. 3& 4) says the judicial power shall cover all lawsuits, including administrative ones; the authority of the judiciary shall be granted to the Supreme Court and to the lower courts of all sectors and levels. Meanwhile the constitution also specified the authority of the public prosecution. Article 131 states only the Department of the Public Prosecution shall have the right to file criminal suits.

Organization and Jurisdiction

For a summary of the structure of the courts, please see Appendix B.

1. Supreme Council of Magistracy

One of the main duties of the Supreme Council is to ensure the smooth functioning of the judiciary. In this regard, the Supreme Council has the duty to decide and propose to the King the appointment, transfer, secondment, leave of absence, delineation of duties, and dismissal of judges and prosecutors. The Council of Discipline (composed of members of the Supreme Council itself), presided over by the President and Prosecutor-General of the Supreme Court, takes disciplinary actions against judges and prosecutors. Decisions on these actions are rendered at a meeting of the Council, which is not attended by either the King or the Minister of Justice. Disciplinary actions against Supreme Court judges or prosecutor-General attached to the Supreme Court, on the other hand, is decided by a Council meeting chaired by the King or his representative. Decisions of the Council of Discipline are final and binding. (LOFSCM, 1994)

[4] Annual Report on the Activities of the SCM in 2003, published by the SCM Secretariat.

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2. Ministry of Justice

During the period of the PRK, the Ministry of Justice had a strong involvement with the judicial system, including its administrative affairs. It had to approve nominations of the president of provincial/municipal courts and the prosecutors attached to those courts proposed by the provincial/municipal People's Revolutionary Committees (governing body of a province or municipality) before they were appointed by the Council of Ministers. The appointments of Vice-Presidents, judges and deputy prosecutors attached to the courts by the Provincial People's Revolutionary Committees also to be approved by the Ministry of Justice. (Koy, Neam; 1998)

Later on it was seen the government on April 7, 2000 approved a Sub Decree on Organization and Functioning of the Ministry of Justice. In that Sub-Decree, certain duties and responsibilities of the Ministry of Justice were mentioned in relation to the judiciary. With those tasks, the ministry has to participate in the protection of the independence of judges, to guarantee justice for individuals before the law, to organize and inspect administrative process of hearings, to ensure the functioning of courts and the offices of prosecution and laws available for these institutions.[5]

3. Supreme Court

The People's Supreme Court was established by the Law on the Organization of the People's Supreme Court and General Prosecution attached to the People's Supreme Court (LOPSCGP), promulgated in July 1985 during the PRK. Though the court was established in that year, but, Koy (1998) observed it wasn't until December 1994 it became fully functioning. Under the UNTAC Penal Code (1992), the name of the People's Supreme Court has been changed into the Supreme Court. Koy, Neam (1998) summarized that the main functions of the Supreme Court during the PRK period were: 1/ trial as the first and last resort of cases that the law placed under its jurisdiction, 2/ trial of the appealed cases of the President of the People's Supreme Court, or of the Prosecutor-General attached to this court, against the judgements of

[5] Government's Official Document, No. 19 Or Nor Kror Bor Kor, Dated April 7, 2000.

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the People's Supreme Court's Chamber, Provincial/Municipal Courts, or Military Court, 3/ reviewed judgements of cases involving capital punishment before being submitted to the Council of State for final decision, and 4/ supervision and monitoring of the work of the Provincial/Municipal/Military courts.

Addressed in the UNTAC Penal Code (article 5), UNTAC agreed to keep the existence of the current Supreme Court (established by the PRK) with the wishes of the Party "State of Cambodia (SOC)", but required it be improved. The Code addressed certain functions: a/ it exercises judicial review of the law; b/ it reviews appellate judgements on petition by the Attorney General, the convicted party, the intervening party or by their counsel within a period of two months from the day judgment is pronounced in the Appellate Court if the accused is present for sentencing; an additional fifteen days are added to this period if the judgment was rendered in absentia; c/ it may send cases back to an Appellate Court and, if that court does not conform to its judgment, the Attorney General, the condemned party, the intervening party, or their counsel may resubmit the case to the Supreme Court within two months of the judgement under the same conditions mentioned under the sub paragraph (b) above. The Supreme Court may then render a final decision on both the law and the facts.

Stated in the Law on Criminal Procedure (LCP) promulgated by the SOC on January 29, 1993, article 207 said, "The Supreme Court renders decisions on the law, not on the facts. Nevertheless, it also renders decisions on the facts in the case of the second appeal to the Supreme Court in the condition specified (in this law). The decision of the Supreme Court is sovereign which means no remedy at law, except the appeal for revision in a certain cases restrictively provided by law." Article 208 mentioned "The Supreme Court, judging penal as well as civil cases, shall have a president of the supreme jurisdiction, assisted by four judges, one representative from the prosecution's office, and a clerk. One vice-president will replace his/her absence or preoccupation."

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It is suspected that it may be confused the role of the Cambodian Supreme Court with that of its common law counterpart, which has the power to review legislative acts, executive regulations, and make its own case laws. The Cambodian Supreme Court has no such power. It can only apply the laws made by the legislature. (Koy, Neam; 1998)

4. Appellate Court

As mentioned earlier, the Appellate Court was established after the promulgation of UNTAC Penal Code in 1992. However, there is only one article provided for the court with short description. Article 4, from paragraph 2 to 5, says: Appellate Courts are composed of three judges and one prosecutor, appointed, promoted and dismissed by the existing administrative structure, under the supervision of UNTAC; Alternate judges may be appointed in the same way to replace judges who disqualify themselves due to a conflict of interest or capacity; Any intervening party, prosecutor or the accused may appeals decisions of trial courts within a period of two months from the day judgement is pronounced in court if the accused is present, an additional fifteen days are added to this period if the judgement was rendered in absentia; Appellate Courts judge both law and fact.

Mentioned in the Law on Criminal Procedure (LCP) promulgated by the SOC, article 156 is read, "The Appeal Court is located in Phnom Penh. The competence of the Appeal Court covers the entire territory of the State of Cambodia," and article 157 said "In the penal cases as well as in the others, the Appeal Court has competence for the appeal against all decisions made by the military court, the provincial or municipal court, as well as those made by the public prosecutor department of these inferior courts." Article 158 continued, "During the judgement, the appeal court shall be composed of three judges- one of which is the president- a representative of the prosecutor office, and a clerk."

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5. Courts of First Instance

The court of first instance is the lowest court, which includes the provincial/municipal or military courts as any objection of the judgements of theses courts can be appealed to the Appellate Courts as mentioned above. Provincial/municipal court's jurisdiction covers a particular geographical area where the court is located. It is stated in the LCP, article 96, that:

In each province or municipality there exists one court of which the territorial Jurisdiction covers all territory of the province or municipality. As a "criminal tribunal", the provincial or municipal court has competence of all kinds of criminal cases. To be valid by constitution, the criminal court, as well as civil court, requires the presence of a judge, an assistant prosecutor and the assistance of the court clerk. The judge may be the president, the vice-president or the magistrate of the court.

Shortly mentioned in the 1992 UNTAC Penal Code about the components and functions of the provincial/municipal courts, article 3 (para. 2) says trial courts are composed of a judge and a prosecutor, and these courts have general jurisdiction over the application of these rules, as well as laws and other norms in force in their respective jurisdictions.

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CHAPTER V
NON EFFECTIVENESS OF THE CRIMINAL JUSTICE SYSTEM AND THE THREAT TO DEMOCRACY IN CAMBODIA

This Chapter is going to discuss about the current judiciary of Cambodia, its practices, the problems of applicable criminal laws, and the impact of the functioning of the current criminal justice system on democracy in Cambodia. The functioning of the Criminal Justice System (CJS) is discussed by looking at the independence of Supreme Council of Magistracy, judges and the impartiality of prosecutors. In combination of discussion about whether the current CJS is effectively functioning, there is also a study of existing criminal laws/procedures of Cambodia. Gaining from the study of the functioning of the CJS, there will be analyses about the impact of the functioning of the CJS on democratic development in Cambodia by looking at political behavior of Cambodian elites having trend of eliminating opposition, the problems of human rights violations- right to peaceful assembly and right to justice- and the lack of checks and balances of powers of the government.

5.1 Study of Incumbent Criminal Justice System

Since Cambodia became a nation adopting liberal democracy and pluralism under the 1993 Constitution, it has faced a lot of criticisms for failure to reorganize of an independent, impartial judiciary and effective criminal justice system. Both the national and international communities have many concerns about the non-effectiveness resulted of the main players in the justice system.

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Selection Procedure

(i) Members of the Supreme Council of Magistracy (SCM)

Currently there are no procedures for the selection of SCM members. According to article 13 (para. 2) of the Constitution, the SCM will be chaired by the king. LOFSCM adopted in 1994 determined the composition of the SMC with nine members, including the king. Article 2 of LOFSCM said, "The SCM shall have compositions as follows: the King of Cambodia as chairman; Minister of Justice, Chief of Supreme Court (SC), General Prosecutor to the SC, Chief of Appeal Court (AP), General Prosecutor to the AP, and three judges elected by the judges, as members." Based on this article, except the three judges, other five (king not included) serve as ex-officio members of the SCM- leading to the six members, including the king, automatically members of this body. The law provides for the election of the three judges among all judges of Cambodia. Thus there is need for the procedure of the election. However, article 21 of the LOFSCM said, "the preparation for the vote to elect judges as members of the SCM must be done, after the a Law on Statute Judges is coming into force, and upon the appointment of judges into the cadre of judges has been proceeded." Anyway, as the law and procedure mentioned in article 21 of the LOFSCM is not existed yet so far, the vote to elect the three judges as members of the SCM has not been able to be held. However, article 20 of the LOFSCM authorized the minister of justice to request the king to appoint three judges as temporary members.

As now the SCM is under function with nine members as required by the LOFSCM, that means the three judges were already appointed, but it is still uncertain that based on what criteria or procedure that the three judges were requested by the minister of justice for the king's appointment.

(ii) Prosecutors and Judges

As described in the last Section, after the collapse the Khmer Rouge regime in 1979, Cambodia had been ruled by Vietnam-backed communist regime of one-party

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system from 1979-1992, and faced the lack of human resources as a small number of legal professionals survived the Khmer Rouge's massacre. The communist party ruling the country during 1980s lacked not only the procedure for the selection of prosecutors or judges but also the human resources of legal professionals. So when a country, in communist system, was ruled by one ruling party, the judiciary had to be controlled by the party. Then prosecutors or judges had to be selected from the members of the party, and- more or less- they must be active members or trusted by the party leaders. Thus the prosecutors or judges appointed by the 19980s communist government had to belong to the CPP- the then- and now- ruling party.

Even with the arrival of UNTAC in 1992, no procedures for the selection of prosecutors and judges were introduced, except for a few words mentioned in the 1992 Penal Code- saying, "(article 1, para.2) …Persons selected for the judicial functions must be honest and competent, and (article 3, para.1). …Judges shall be appointed by the existing administrative structure, under the supervision of UNTAC". So if there were any prosecutors or judges selected during the UNTAC period, it also was not clear how the prosecutors or judges were selected. Without a clear and credible procedure, bias in the selection was likely influenced by the existing administrative structure, which still controlled the judiciary. Basil Fernando (1998) cited a case of killing two political activists to prove the strong perception of the then government that the justice holders must work under the strict supervision of the executive. Basil Fernando (1998) pointed out that "…. In the cases of Em Chann and Than Theoun filed by UNTAC prosecutors at the Municipal Court of Phnom Penh, the Minister of Justice 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 judgments."

After the adoption of the 1993 Constitution, the selection of prosecutors and judges has been considered the duty of the SMC when article 134 (para.3) of the Constitution is read, "the SMC shall make proposals to the king on the appointment of judges and prosecutors to all courts." This duty is repeated by the LOFSCM, article 11 which said, "the SCM shall decide and raise its recommendation to his Majesty the

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king about the appointment of all judges and prosecutors." The Royal Decree, dated 28 May 2001, on the establishment and functions of the Secretariat of the SMC also did not provide for the selection procedure. Therefore, it is still unclear how prosecutors and judges have been appointed since the approval of LOFSCM in 1994 and the establishment of its secretariat in 2001. It is clearer if we look at the activity reports the SMC.

According to the annual report of the SMC in 2003, the SMC held its first meeting on 3 December 1997 and subsequently following the meeting. In its 8th. meeting on 20 January 2003, the SMC members agreed on the inclusion of the request of appointment of 10 judges, by the royalist party, FUNCINPEC, and by a deputy of a department of the ministry of justice, as one of the agenda for the next meeting. The proposal for the appointment of the 10 judges was rejected by the SCM at its 9th. meeting on 26 May 2003. Absorbed from the report, it is understood there is uncertainty that who or what institution should have authority to propose candidates and by what procedure, and based on what criterion the SCM considers and makes decision on such matter. Thus, the opportunity for candidates to be proposed for the appointment of judges or prosecutors is based on individual or personal affiliation.

In reality, whereas there is no clear and credible procedure, the selection of prosecutors or judges has been seen to follow the old system- the appointment made by the party in power. In addition to the above-said findings, another example can be cited to show that party-affiliation is basis for appointment. For example, Mr. Uk Vithun, who is serving the position of General Prosecutor to the Supreme Court, was the former Minister of Justice. Amnesty International (2002) reported that on December 7, 1999, then Minister of Justice Uk Vithun suspended from the duty the President of the Phnom Penh Municipal Court and its Chief Prosecutor, because of the allegations made against them of corruption. Based on the proportional system of elections in Cambodia and going through the mandates of the government since the first elections in 1993, the ministerial positions are the party quotas. Thus, surely, the appointment of ex-minister of justice Uk Vithun was made because of his political affiliation with any ruling party. For additional proof, the royalist FUNCIPEC party,

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which won majority in the 1993 elections and formed a coalition government with its partner- the CPP- sent a list of its 17 members to the Minister of Justice with a request for appointing them as judges. Those named in the letter, dated 9 December 1994, signed by FUNCINPEC Secretary General Norodom Sirivudh, are seen at least two of them- Mr. Nget Sarat and Mr. Chan Hourn- appointed by the 12-January-1998 Royal Decree as judges of Municipal Court and Koh Kong Court, respectively.

Supreme Council of Magistracy (SCM): Neither Independence Nor Impartial

Judicial functions enshrined in the UNTAC Penal Code said, "judges and prosecutors both are magistrates (article 2). Chapter XI "about the Judiciary", written in the Cambodian Constitution, principally determines (in separate articles) the guarantee of the independence and impartiality of the judiciary, and the duties and authorities of the judges, prosecutors and the SCM to work on the objective. With that written binding, the SCM is seen as a key and top body of judicial supervision. It is a constitutional body tasked by the constitution to assist the king in the guarantee and protection of the independence of the judiciary (article 132 of the Constitution). To achieve the objective of guaranteeing the independence of the judiciary, article 11 of LOFSCM (Law on the Organization and Functioning of the SCM) said the SCM's main duties are to take disciplinary actions against delinquent judges and prosecutors and to appoint and promote them. Hence the effective functioning of the SCM is thought to ensure the effectiveness of the criminal justice system of Cambodia.

Anyway, it is observed that the SCM, so far, still fail in performing its constitutional tasks that leads to serious concerns among the public about the non effectiveness of criminal justice system in the kingdom. The non effectiveness is believed to result from the lack of its independence and impartiality. Activists have blamed the state for repeatedly failing in reforming this body. ADHOC (2004) reported: SCM reform has been identified for some times as one of the key areas for successful legal and judicial reform. Criticism is largely levied towards to composition of the SCM, with the possibility of political influence; and current members not

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regarded as impartial. This is a major obstacle to attaining an independent body and independence for the courts.

So if we look at the composition of the current SCM's members, as mentioned above, the nine- except the King- can be said their positions are attributed to political association. The SCM membership of the minister of justice is surely biased with the government or the ruling party. The present chief of the Supreme Court (SC), Mr. Dith Munty- as one of the SCM member- is the 7th. member of the Permanent Committee, a top body composed of 7 members of the ruling party (CPP)[1]. Based on the meaning of the judicial independence defined in UNTAC Penal Code (article 1, para.2) "as quoted above: the judiciary must be independent…of any political party." Thus the current membership of Dith Munty in the CPP violates the Code and that means Supreme Court President Dith Munty is apparently influenced by the ruling party or the executive. In addition to this, as mentioned earlier, Attorney General Uk Vithun- another of the SCM member- also belongs to the ruling party or in another word he is certainly biased with his party or influenced by the government which his party is a part. Then, according to this argument, three members of the SCM- Minister of Justice, President of the Supreme Court, and Prosecutor General to the Supreme Court- who are already seen not to be independent or impartial.

So now it is a look at other five SCM members- the Prosecutor General to and the President of the Appellate Court, and the three judges who needed to be elected.

Since the 1993, Cambodia has been ruled by a coalition government of two major parties- the royalist party (FUNCINPEC) which once won the majority in the first mandate of the government and the communist party (CPP) which the first winning party in the subsequent terms. Experiencing the history of Cambodia's political culture, as cited in Section 3-2, Cambodian elite appears to be power-hungry. This was clearly shown with the political crises in 1993, 1997, and 1998 and 2003. In 1993, the election loser, CPP, refused to join a coalition government with the winner,

[1] Cambodian People's Party, Permanent Committee; http://www.thecpp.org/page.php?=permanent.htm; Accessed: September 9, 2005.

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FUNCINPEC, and threatened to form autonomous zone in eastern Cambodia if it could not obtain 50% of power sharing (as discussed in Section1-1). The 1997 bloody coup was resulted from the power contest among the ruling parties (FUNCINPEC and CPP) as discussed in the Section 1-1 above and from the realization of unfairness of power sharing. At the party congress of March 1996- the first time Prince Ranariddh, the party President, addressed a nationwide meeting of FUNCINPEC activists since the 1993 election- Ranariddh finally expressed his party's frustrations at the unequal nature of the coalition (David W. Ashley, 1998). Similar to the situation of 1998, the formation of the new government after the 27-Jyly-2003 elections was stuck because of the opposition parties (FUNCINPEC and SRP), which formed an opposition alliance) denied the election results and accused for fraud and irregularities. However, immediately later the political deadlock was ended when FUNCINPEC- leaving SRP- reached agreement with the CPP on power sharing. ANFREL (2003) reported:

> On August 11, 2003 Funcinpec Deputy Secretary General Nhiek Bun Chhay sent a letter to the Constitutional Council (CC), asking to invalidate the result of the election. On August 18, 2003 Funcinpec and SRP criticized the CC for being politically biased, and on August 19, 2003, 14 SRP and 31 Funcinpec parliamentarians signed a petition demanding a reshuffle of NEC.

However, the political issue was solved in July 2004, when the coalition government was formed by the CPP and Funcinpec- which previously wrote to the CC, asking to invalidate the election result but finally left its opposition partner (SRP) off shore.

This is the pattern of political culture of Cambodian elites. It should, once again, noted that these two main parties have ruled Cambodia since the 1993. With the importance of the judicial power covering all lawsuits including administrative ones and the sole duty of the Department of the Public Prosecution to make prosecution as enshrined in the Constitution (article 128&131), the ruling must not allow this power fallen into anyone's hand that should be dangerous for them. It is also evident with the discussion of the selection procedure of the judges and prosecutors above in this section. In addition to this political culture, the judicial system of the old regime of

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communist is still existing as affirmed by Basil Fernando (1998) that 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 (1992), the pre-UNTAC court structure still continues without any changes.

Thus with the assumption based on the pattern of Khmer political culture, the history of the current Cambodian justice system and the unchangeable court structure, it can be assumed that the present President of and General Prosecutor to the Appellate Court are, of course, appointed under the auspices of the party/ies in power. So they are, supposedly, influenced by the ruling party/ies or the executive.

For the three judges for the current mandate as mentioned at the beginning of this section, they are surely influenced by the executive branch or the ruling party as they were requested by the Minister of Justice to the King for appointment. It can be argued that it is a false assumption of saying that the three judges are influenced by the Minister of Justice because of his request for the King's appointment. However, based on the experiences of Cambodian political culture and the current context as already mentioned, it is too hard to say they are independent and impartial.

In conclusion, excluding the king, other eight members of the SCM are surely biased with the ruling or the executive branch. This leads to the lack of the independence and impartiality of the SCM as a whole.

Among others, the following examples are cited to show the lack of independent and impartial functioning of the SCM. On March 2, 2005, Phnom Penh police authorities called for punishment of four municipal court officials- including two judges- accusing them of taking bribes in exchange for the illegal release of six suspected criminals; Municipal Police Commissioner Heng Pov said (at a news conference) that judges Kong Sarith and Ham Mengse, and deputy prosecutors Khut Sopheang and Siem Sok Aun could face charges of receiving bribes, corruption and

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acting as accomplices to a crime[2]. Following that statement, the SCM suspended judges Ham Mengse and Kong Sarith, and the Ministry of Justice suspended deputy prosecutors Siem Sok Aun and Khut Sopheang, after Prime Minister Hun Sen pledged to clamp down on corruption within the judiciary with his an iron fist[3].

All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct (Principle 19, UN Basic Principles on the Independence of the Judiciary). Anyway, for Cambodia, there is no such standard introduced. However, the SCM should, at least, conduct a comprehensive investigation before the suspension of the job of both judges above rather than just following the police report. Because the role of the SCM is not only to punish delinquent judges and prosecutors but to protect them as well for the objective of judicial independence as stated in Cambodian laws.

Like the case of former minister of justice Uk Vithun suspending the president Phnom Penh Municipal court and its chief prosecutor in 1999 (as mentioned earlier in this section, the SCM should have reaction against the ministry of justice taking action against prosecutors Siem Sok Aun and Khut Sopheang because it was not the duty of the ministry. With the constitutional role in guaranteeing the independence of the judiciary (article 132, 133), the SCM is authorized by the LOFSCM (article 11) to take disciplinary actions against judges or prosecutors who behave misconduct. It is clear that, for the above-said case, the suspension of the accused prosecutors by the Ministry of Justice is a violation of the function of the SCM stated by the article 11 of the LOFSCM. Therefore, with the role to protect the independence and impartiality of the judiciary provided by laws, the SCM should protect the judicial independence of the outside interferences such as the actions of the Ministry of Justice. Letting the executive freely interferes in the judiciary, the SCM is weak and does not independently and impartially perform its jobs.

In late 2003, the Special Representative of the UN Secretary-General for Human Rights in Cambodia urged for the reform of the SCM. In his report to the

[2] The Cambodia Daily, Thursday, March 3, 2005.
[3] The Cambodia Daily (English and Khmer Newspaper), Monday, March 7, 2005.

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Sixtieth Session of the Commission on Human Rights, Peter Leuprecht said, "the Supreme Council of Magistracy is in need of restructuring if it is to become an independent and effective body and ensure judicial independence. ..."[4] The government also admitted that the independence of the SCM is essential for the guarantee of the judicial independence and neutrality, and that there is a need for the protection of the SCM independence. The Royal Government shall respect and promote the independence and neutrality of the judicial system as stated in the Constitution and thus the independence of the SCM shall be rigorously upheld and protected (Royal Government of Cambodia, The Rectangular Strategy, 2004).

Prosecutors and Judges: Neither Independent Nor Impartial

Article 1 (pra. 1) of the UNTAC Penal Code said "…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." Article 2 provided for "Judges and prosecutors both are magistrates. Only judges may adjudicate. Prosecutors are responsible for penal actions, which only they may initiate. They file indictments in court and in all other forums provided for in this text. The Attorney General pleads before the Supreme Court in the interest of the law, reviews the legality of indictments by provincial prosecutors, and organizes and supervises their work."

Under the present Cambodian Constitution, article 129 stated, "Trials shall be conducted in the name of the Khmer citizens in accordance with the legal procedures and laws in force. Only judges shall have the right to adjudicate. A judge shall fulfil this duty with strict respect for the laws, wholeheartedly and conscientiously." Article 131 said "Only the Department of the Public Prosecution shall have the right to file criminal suits."

[4] Report of the Special Representative, Peter Leuprecht, to the 6th. Session of the Commission on Human Rights, 19 December 2003.

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Under these articles, judges and prosecutors have full authority to process criminal cases in the framework of laws. They must impartially perform duties based on the binding laws. As mentioned above, article 128 of the Constitution stressed that the judicial power shall be independent. Thus the prosecutors and the judges have to be independent of executive interference in their duties of law enforcement.

Anyway, the Cambodian judges and prosecutors are commonly accused of failing in the impartial performance of their legal duties and are biased with certain influences resulted from political pressure or corruption. As discussed earlier in the section of the selection procedure, prosecutors and judges are surely influenced by the executive or not impartial in terms of law enforcement. It is proved with the action taken by the Ministry of Justice to suspend two prosecutors of municipal Phnom Penh court in March 2005 as cited above. That was a true violation of the law since such action was not the duty of the government but the job of the SCM whose role is to protect and promote judicial independence.

In addition to the lack of judicial independence from the executive interference, the lack of impartiality of prosecutors and judges is also resulted from corruption. Supplemented with concerns raised by NGOs, Cambodian government has repeatedly accused prosecutors and judges of corruption. Referring to the above discussion, in December 1999 the Ministry of Justice suspended the president Phnom Penh municipal court and its chief prosecutor, and in March 2005 both the SCM and the Ministry of Justice suspended two judges and two prosecutors of the same court, because of the accusation for corruption. It is not an argument about law enforcement, but referring to actions against judicial corruption taken by the government and the SCM citied above is a proof showing that corruption is rooted in the judiciary. Late 2003, the Special Representative of the UN Secretary-General for Human Rights in Cambodia, in his report to the Sixtieth Session of the Commission on Human Rights, Peter Leuprecht said, "… Creative measures must address the issue of judicial corruption, the reality of executive interference with the judiciary and insufficient

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institutional checks on the power of the executive."[5] It should be also noted that against the judicial corruption in Cambodia, a peaceful protest was held in Phnom Penh in front of the National Assembly on March 30, 1997, and several demonstrators were killed and injured because of grenade attacks. According to Amnesty International USA (2002), at least 16 people are known to have died and over a hundred were injured, many of them seriously. Amnesty International (1997) noted that the demonstration was called by the leadership of the KNP (now changed into SRP- Sam Rainsy Party), to demand a reorganization of the Cambodia's judicial system. Anyway, judicial corruption can be resulted from certain factors such as report made by World Bank (2004) that prosecutors and judges are poorly paid. However, this section is not subject to make analysis on why and how the corruption happened, but it is just an analysis based on findings to prove that there is judicial corruption.

For the incident such as the grenade attacks, under the existing Cambodian Criminal Laws, the prosecutors had to immediately conduct investigation to bring perpetrators to justice (See Appendix C, Chart: Action By Prosecutor). However, in fact, the prosecutors failed to perform its duties provided by laws. Amnesty International USA (2002) expressed concern that none of the investigations which have been carried out into the March 1997 grenade attack have been made public, nor have they resulted in those responsible being brought to justice; And early February 2004, SRP leader Sam Rainsy filed a lawsuit at court against Cambodian Prime Minister Hun Sen accused of implicating the case.[6] According to Law on Criminal Procedure, article 3 says, "The penal action is for the purpose of condemning all acts disrupting social order and breaching the peace and the offences provided by law in force. Therefore, public actions strive to prevent these offences from re-occurring by imposing on offenders punishments provided by law"; And article 8 states "The exercise of penal action and putting it into process are the responsibilities of the prosecution department." Being supplementary, based on 1992 UNTAC Penal Code, "what are crimes" are defined in the Title IV- Crimes. Among those, murder and

[5] Report of the Special Representative, Peter Leuprecht, to the 6th. Session of the Commission on Human Rights, 19 December 2003.
[6] The Cambodia Daily, Monday, March 1, 2004.

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injury are included. So the grenade attack on the peaceful demonstrators was seen as action of commission of crimes. Under the articles 3 and 8 as described above, it is the responsibility of prosecutor to initiate public action in order to bring perpetrator(s) to justice. Thus the absence of making public actions is a violation of laws and shows the lack of impartiality of the prosecutors to enforce adopted laws. Provision 3 of IAP Standards emphasized that "Prosecutors shall perform their duties without fear, favor or prejudice. In particular, they shall carry out their functions impartiality."

Other examples can be cited to reveal other failure of Cambodian prosecutors and judges in legal applications.

The most famous victim is Tat Marina, the alleged mistress of Svay Sitha- an Under Secretary of State of the Cabinet and adviser to Prime Minister Hun Sen. The once beautiful teenage model and Karaoke singer was attacked by a woman and five men in early December, 1999 while she was eating a bowl of rice soup; Her assailants pinned her to the ground, knocked her unconscious and poured at least two liters of acid over her head and back; (Dominic Faulder, 2000). The document continued:

> Soon after the attack, the district police chief identified the prime suspects as Khuon Sophal, the wife of Svay Sitha-Under Secretary of State of the Council of Minister- and two bodyguards. In late December, 2000, a municipal court judge issued an arrest warrant for Khuon Sopha; But Khuon Sophal remained at large and the two bodyguards who allegedly accompanied her remained unidentified with no warrants for their arrest. Lek Vannak, the municipality's justice police chief, said that "he believes Khuon Sophaln is in the capital under someone's protection.

This case, until today, is still cited by human rights groups as an instance of impunity in Cambodia. The accused Khuon Sophal was prosecuted and charged but not arrested and tried, and her accomplice- two bodyguards were not charged (according to the report above). Article 69 of UNTAC Code 1992 is read "whoever has provided the means by which an offence is committed, or facilitates commission of the offence shall be considered an accomplice and punished with the same

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punishment applicable to the principal offender." Thus the prosecutors should also take penal actions against the two bodyguards. That failure showed prosecutors don't perform his/her duties provided by laws.

Based on article 90 of the 1993 Criminal Law, Khuon Sophal may be free of charge if the investigating judge thinks the act doesn't constitute a felony, a misdemeanor, a minor offense, or the charge on the accused offender is not sufficiently substantiated by evidence. Nevertheless, according to Koy, Neam (1998), an arrest warrant is used in the search for arrest of a suspect who has absconded and disobeyed the Writ of Habius and Citation. The 1993 Criminal Law clearly mentioned, "the investigating judge cannot make any investigative acts if he/she did not received the introductive charge from the representative of the prosecution office; (article 69, para.1)" (See Appendix D, Chart: Investigation By Investigating Judges). So the investigative activities of judges have to follow the prosecutor's introduction or charges. It was clear that Khuon Sophal was the identified person accused by the prosecutor. The fact that Khuon Sophal didn't appear at court following the judge's letters to make her accusation meant she tried to escape from being responsible for the involvement in the crime. If not, she would not allow this accusation publicly disseminated- resulting in the affect of the reputation of her family and, particularly, her husband serving a high position in the government. That can be proved her case is out of binding by article 90 of the 1993 Criminal Law as mentioned above or said- in other words- the investigating judge had enough and strong evidence to charge her. So the assumption is that she committed offense. If so, article 41 of the UNTAC Code said, "para.1: Anyone who voluntarily strikes another resulting in injury leading to permanent disability or temporary disability lasting six months, is guilty of battery and shall be liable to a punishment of one to five years in prison." For this case, the victim's wound because of two-liter acid pouring is the fact.

Anyway, There may be an argument that, of course the prosecutor already prosecuted Khuon Sophal, but she still has freedom because she paid on bail as article 65 of the 1993 criminal law said, "If the presiding judge thinks that the accused maybe temporarily released, with or without bail, he/she shall decide on this issue before

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examining the merit. He/she will act the same way if the accused requests it in writing." If this article was used, however, finally the accused Khuon Sophal must be tried, at least, under article 41 of the UNTAC Penal Code. Article 65 of the 1993 criminal law only refers to the temporary release (or for a pre-trial period), not to the freedom from trial and punishment for the offender. (See Appendix E, Chart: Pre-Trial Detention)

So the problem with this case is that the accused has been free from trial. As human rights groups have repeatedly cited this as reference to the impunity and the lack of judicial independence and impartiality, it specifically illustrated the weakness of the criminal justice system of Cambodia.

In comparison to the example of Khuon Sophal's case, at the Kossamak (a hospital in Phnom Penh), Horn Heang, 28, spends most of his day with a dirty rag covering what remains of his face. A few months ago, his common-law wife of twelve years, Nang, 30, threw acid over him. "She was angry because he was divorcing her," explained Heang's father. Nang has been imprisoned for 15 years; (Dominic Faulder, 2000). There is difference in the judicial application of Cambodian system. Faulder (2000) observed that Khuon Sophal, the wife of Svay Sitha, has been charged in the attack; But unlike Heang's wife, she has not been arrested.

Article 7 of the 1993 Criminal Law says, "Public action may not be settled by any arrangement." Thus, crime committed by Khuon Sophal- the wife of government's high-position government official- can't be tolerated or modified. Under the law, she has to be brought to justice. Article 31 of the Cambodian Constitution says "Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status," and article 128 provided that the judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens. Therefore, law should be equally applied to Nang and Sophal in accordance with the scope of their respective offences. Different application by the courts to both offenders cited is shown the partiality of the judiciary

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and the violation of Cambodian constitution- article 31, and of article 7 of UDHR (recognized by article 31 of the Constitution) and article 26 of ICCPR (ratified by Cambodia in 1992) providing for right to be equal before the law and equal protection of the law.

These two examples illustrated judges did not partially and impartially perform their judicial duties.

Obviously, through the arguments and discussions above, Cambodian prosecutors and judges have shown weaknesses in their judicial performances by the lack of independence and impartiality.

Flaws In Existing Applicable Laws

Two Criminal Laws are today applicable in Cambodia. One is Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during Transitional Period (in short UNTAC Penal Code) promulgated by UNTAC in 1992, and the other is Law on Criminal Procedure enacted in 1993 by the State of Cambodia (former communist government- SOC). There is some debate about the validity of both laws. On the one hand it is stated that the former was valid only during the transitional period when Cambodia was supervised by the UNTAC, while on the other it is stated that it is still valid until a new law is adopted by the elected Assembly to replace it. According to its preamble"……..the judicial procedures which must be put in place in order to ensure their effective application during the transitional period,..". The transitional period is defined by article 1 of the Paris Peace Agreement (or Agreement) that "The transitional period means the time at the beginning of this Agreement coming into force and ended with the formation of the Constituent Assembly through free and fair elections organized and confirmed by the United Nations that the Assembly becomes the Legislative body and after that the new government was to be established." The last statement affirms the Agreement that it came into force by October 23, 1991. So the 1992 UNTAC Penal Code should be valid only from October 1991 to September 1993 when the Legislative/National

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Assembly and the new government were formed. However, the last paragraph of this law's preamble states, "..the following provisions relating to the judiciary, and criminal law and procedure applicable in Cambodia during the transitional period, and solemnly calls upon all Cambodian parties to apply them in good faith until such time as the Legislative Assembly resulting from the elections amends them or adopts new legislation in this area." If this paragraph is taken into consideration, the UNTAC Penal Code is still valid until it is amended or a new one adopted to replace it. About the later adopted by the SOC in 1993 can be argued that it is invalid since at the time of the law adoption only Supreme Council of Cambodia (SNC) legally represented this nation. Provided by article 3 of the Agreement, SNC is the legal body and a sole power representing the sovereignty, independence, and unity of Cambodia during the transitional period. However, the National Assembly of the SOC adopted the law on 29 January 1993- when the transitional period lasted. It can also be argued that the 1993 law is valid based on the present Constitution, article 158 says, "Laws and standard documents in Cambodia that safeguard state properties, rights, freedom and legitimate private properties and in conformity with the national interests, shall continue to be effective until altered or abrogated by new texts, except those provisions that are contrary to the spirit of this Constitution." The argument in favor of this law can be affirmed that it is consistent with the spirit of this Constitution, whereas the con can argue that the policy enshrined in this Constitution is Liberal Democracy and Pluralism. So the 1993 law adopted by communist regime (SOC) only represented the spirit of the communism. However, both UNTAC Penal Code (1992) and SOC Law on Criminal Procedures (1993) are still applicable in Cambodia so far.

As stated in the Constitution, Cambodia adopted a policy of liberal democracy and pluralism, judicial power shall be independent power (article 128), and judicial power shall not be granted to the legislative or executive branches (article 130). From these articles, the judiciary can check power with the legislative and executive branches and the other two bodies can't interfere in the judicial affairs. In addition to this, only the Department of the Public Prosecution shall have right to file criminal suits (131). By this article, it means the Department of Public Prosecution can independently perform its authorities provided by laws. Since the Ministry of Justice

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is an institution of the government, it has no power over the public prosecution offices or prosecutors. Anyway, as the 1993 Law on Criminal Procedure (hereinafter referred as to the 1993 Criminal Law) still applicable, its article 55- "….In case where the committed crime or misdemeanor is exceptionally serious, the prosecutor shall inform immediately the general prosecutor at the Appeal Court and the Minister of Justice. The prosecutor shall carry out the instruction he/she receives from them in this matter. In case where the prosecutor is unavailable because of the sickness or other reason, the assistant prosecutor (by the original Khmer content: assistant prosecutor is called Deputy Prosecutor) shall be in charge in his/her place. If there are many assistant/deputy prosecutors, the oldest one who is in senior rank shall replace the prosecutor. If there is no assistant/deputy prosecutor, the Minister of Justice shall decide immediately any judge to replace the prosecutor. ….." This point is incompatible with the Constitution as through this article 55 the ministry of justice can enjoy right to file criminal suits via its influence over the department of public prosecution. Under article 55, the Ministry of Justice has power over the public prosecutors, and by which the government is able to interfere in the judicial power through the Ministry of Justice. It happened in 1995, when the Minister of Justice issued a ""Directive" to instruct prosecutors at provincial/municipal and military courts and the court presidents on prosecution procedures for being applied by the department of public prosecution.[7] The Directive is still applicable as effective law until today.

On the other side, the 1992 UNTAC Penal Code, article 2 says, "…The Attorney General pleads before the Supreme Court in the interest of the law, reviews the legality of indictments by provincial prosecutors, and organizes and supervises their work." Based on this article, it means the Attorney General/General Prosecutor supervises all prosecutors at provincial/municipal prosecutors or all the provincial/municipal prosecution offices are under the supervision of the department of general prosecutor of the Supreme Court. Anyway, article 8 of the 1993 Criminal

[7] The document of the Ministry of Justice: Directive signed by the Minister of Justice on March 3, 1995.

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Law says, "…. In principle, at the prosecution department[8], the deputy general prosecutor and prosecutor perform their duties on behalf and under the responsibilities of the general prosecutor, whether or not in his/her presence. At the municipal and provincial prosecution department, the deputy prosecutor performs his/her duties on behalf and under the responsibilities of the prosecutor, whether or not in his/her presence." If based on this article, it seems that each municipal/provincial prosecution office is independent of the department of the general prosecutor. Thus both articles are in conflict. Except few articles raised here, both 1992 UNTAC Penal Code and 1993 Criminal Law fail to clearly define the management line of the offices/departments of the public prosecution. But, by now, they are considered to be under the supervision of the ministry of justice.

Provided by article 8 of the 1993 Criminal Law, the exercise of penal action and putting it into process are the responsibilities of the prosecution department/office and deputy (general) prosecutor has to work on behalf and under the responsibilities of his/her chief at any time. Here, it is seen prosecution authority and duty are centralized and concentrated into the hands of chief prosecutor or general prosecutor at respective court. Thus, it depends on chief prosecutor/general prosecutor who decides whether to make prosecution or take penal action, and whom of his/her colleagues that case should be delegated to. It is not the problem if the chiefs are independent and impartial based on the adopted laws. But it is contrary if it is applied in the context Cambodia today when the judiciary is weak and not independent nor impartial. So this centralized system would be an obstacle to the flow of works and give opportunity to the chief to impose pressure on their colleagues.

Article 7 of the 1993 Criminal Law says, "Public action may not be settled by any arrangement. The court of respective jurisdiction provided in further articles, when seized upon knowledge of any penal infraction, shall decide on the case. The non-compliance to this principle shall consider as a miscarriage of justice and punishable of a disciplinary measure or imprisonment from 6 days to one month." It seems this article is a mechanism to keep prosecutors accountable to their duties. It

[8] Prosecution Department here maybe refers to the General Prosecutor's, not clearly said in the law

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would mean prosecutors can make any excuse to keep complaints without proceedings. Anyway, they are able to manipulate the suspension of proceedings as long as for 2 moths, whereas article 59 of this law says, "Once the complaint, denunciation or report have been received, if the prosecutor thinks that it does not constitute a penal offense, he/she shall file that case without processing and with his/her remark written on that complaint denunciation or report and also on order register. In that case, the prosecutor shall inform the plaintiff on his/her decision within a period not longer than 2 months starting from the date he/she received the complaint. The plaintiff may appeal his/her decision to Appeal Court. …" Hence, for such case, if the chief prosecutor or a prosecutor- who works under the guidance of the chief- at a provincial/municipal court deliberately doesn't want to proceed the case, the complainant may appeal against the prosecutor. The problem is that if the appeal court is biased with its colleagues, the last resort of the complainant opposing the prosecutor has to go the SCM, which is the sole body authorized by law to punish delinquent prosecutors/judges, but there is no written procedure for submitting complains to this top body.

In accordance with article 11 of the LOFSCM, the delinquent prosecutors/judges may face disciplinary actions imposed by the SCM. However, the law doesn't say anything about the procedure of complaints against judicial officials who misconduct. Without this procedure, it is not clear whether any individual or plaintiff may file lawsuit against delinquent judicial officials at the SCM. In the case of prosecutor, deputy prosecutor(s) or prosecutors at each court may not file complaints against their superior, even though they know their superior is acting wrongly. This is impossible because the chief prosecutor is the person who delegates works to them, and the other, it is also impossible because they are colleagues. So if individual in general or the complainants can't directly file complains at the SCM against the supposedly delinquent prosecutor who deliberately ignore the proceedings of the plaintiff's case, it is too hard for the SCM to get complains filed by prosecutors against other their colleagues- especially their superior. It was evident with the case of the suspension of two deputy prosecutors of Phnom Penh Municipal Court by the Ministry of Justice in early March 2005, as described above. When the Municipal

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Police Commissioner accused the two deputy prosecutors of corruption and they were suspended from duties, the chief prosecutor also faced the same punishment. It was clearly seen that they- chief prosecutors and prosecutors- together committed the same misconduct. Here it is another flaw in the Cambodia's criminal laws.

It is a complicated process of Cambodian Criminal Justice System. The duty of the prosecutors is to get penal actions executed (article 8, 1993 Criminal Law), but they do not have power to conduct serious investigation, because such duty and responsibility fall under the investigating judges. Judiciary police who have skills in investigation have to work under the direct guidance of the prosecutors and under supervision of the general prosecutor of Appeal Court (article 36, 1993 Criminal Law). In accordance with article 13 of UNTAC Penal Code and article 38 of the 1993 Criminal Law, police may decide the detention of suspect(s) for a maximum of 48 hours when the suspects have to be brought to judge, following charges filed by the prosecutor. Under article 60 of the 1993 Criminal Law, if the complaint pertained to the crime or the misdemeanor, the prosecutor shall immediately open a judicial enquiry. This means the prosecutor makes a charge called introductive requisition, which indicates the offense in accordance with law and the person presumed to be responsible for the offense and send it to the investigating judge. Therefore, both police and prosecutor have only 48 hours (if accused arrested) to make initial investigation in one case and after that it will fall under the responsibility of investigating judge. Then police may put there hands down and ignore any progressive development of the case since this is not their responsibility nor the prosecutors'[9], but the investigating judges'. Anyway, the power of calling police to take action belongs to the prosecutors (article 56, 1993 Criminal Law). This is a thing that may happen if police do not want to cooperate with investigating judges. In addition the law said only the judge, if so petitioned by the prosecutor, may decide to keep an accused in prison; the duration of a pre-trial detention must in no case exceeds four months; however upon the decision of a judge setting out the reasons, this period may extended to six months if justified by the requirements of the investigation (article 14, UNTAC

[9] Only fragrant delicto offenses that prosecutors can make serious investigation, but not longer than 48 hours as prosecutor needs to send the arrested and concerned documents to investigating judge. 1993 Criminal Law, article 62

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Penal Code). Thus, if there is not enough evidence resulted from the lack of police's cooperation, the accused must be acquitted. It is the reality in the current practice of the Cambodian criminal justice system. Cambodian judiciary generally detained the accused longer the period allowed by the law. As examples, in February & December 1996, April 1997, the Minister of Justice issued subsequent letters to court presidents and prosecutors throughout the country to demand them immediately deal with cases of detention longer than that period, which it had found out (mentioned earlier in this Section). This slow process may be resulted from complicated procedure of communication between prosecutors and investigating judges. The investigating judge can not make any investigative acts if he/she did not receive the introduction charge from the representative of the prosecution office, and he/she shall investigate only in the area of criminal act specified in the introductive charge from the prosecution office ((article 69&70, 1993 Criminal Law). After a complete investigation and all reliable reports or evidences collected that investigating judge received and thinks these are enough to send the case to the court for trial, he/she can't not do that without prosecutor's consent. According to the procedure, "If the investigating judge thinks that the investigation is complete, the case file shall be kept for the disposal of the accused person's lawyer for 24 hours. After that, the investigating judges shall issue an order of discovery. Then, the file is forwarded to the public prosecutor. Three days after the date of receiving the file, the public prosecutor shall make a charge in writing and refer it back to the investigating judge," …and "If the nature of the crime found is a misdemeanor or felony, the investigating judge shall send the accused person to the provincial/city court after receiving the charge from the public prosecutor" (article 89&92, 1993 Criminal Law). Thus, in one case, prosecutor has to make charge and send to investigating judge for investigation, and the investigating judge has to forward the discovery to the prosecutor for conclusion and re-charge which is referred back to the investigating judge who finally sends the accused to court for trial. So the investigating judge and prosecutor may need a compromise, sometimes, in order to send the accused person to the court for trial. According to this procedure (as mentioned above), police who have skills in investigation operate under the guidance and supervision of prosecutors whose responsibilities, based on the police's findings, to make introductive charge and send to investigating judge within 48 hours. After

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that, the whole process of the case investigation shall be the responsibility of the investigating judges. Judiciary police who should assist the investigating judges in conducting investigation do not work under the supervision of the investigating judges, but under that of prosecutors who do nothing with investigation (if the case is not flagrant delicto), except going through the reports of police and investigating judges. It is the problem of the procedure complicated leading to slow process and hierarchical system. So this is a flaw leading to the slow process because of doubly repeated system of work- back and forth.

Another flaw, it cannot be found out with any article in both Criminal Acts mentioning the remedy for the victim if he/she shall later be found of false accusation by competent authorities. The absence of this lets the accusing parties free from accountabilities. Since Cambodia as a State Party, this is a violation of article 2 of the ICCPR.

Through these discussions, there are some main problems found in the Criminal Justice System of Cambodia. The non-independence and non-effectiveness of the SCM lead to the lack of mechanism guaranteeing the independence of the judiciary. The political interfere by the executive, the non-independence and impartiality of the judges and prosecutors cause a weak judiciary. Then it is added with the lack of good and clear procedures as said above- all of these make the functioning of Cambodian Criminal Justice System not effective and impact on the development of democracy in Cambodia as discussed in the next section.

5.2 Impact of Criminal Justice System Functioning on Democratic Development

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights. This is enshrined and guaranteed in the Cambodian Constitution (article 31).

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Cambodian Politics As Zero Sum Game

Throughout the history of Cambodian politics, a culture of Cambodian elite in their political life is concluded with a common trend annoying or attempting to absolutely eliminate the opposition. Lao, Mong Hay (1998) noted until the end of the Second World War Cambodian rulers used the *chakrawatti* system to rule their country. This system, he explained, was characterized by the concentration of power in the hands of one absolute ruler who tolerated no opinions different from his own. This observation was renewed with the outbreak of political fighting in the capital Phnom Penh in July 1997, when the ruling partners used this mean to solve their problems. Although nominally partners in the ruling coalition since 1993, these two political parties have continued to view politics as a "zero sum" game, wherein if one gains the other loses (Lao, Mong Hay, 1998).No acceptance of a valid role for a political opposition to the government with shadow portfolios. On the other winner wants to take all and will try to eliminate all opposition. With this thought, the other considers one enemy. So those who have different political ideas are not tolerated. Until early 1992, well after the October 1991 (Paris Peace Agreement), there was a release of some 442 political prisoners (Sidney Jones and Dinah Pokempner, 1993). This figured out the fate of political opponents. According to Sidney Jones and Dinah Pokempner (1993), in January 1992, when the SNC agreed to accept the applications for the formation of political groups or parties, political violence were occurred and targeting the dissidents of whom, some were killed, injured, threatened or warned, etc. Some activists also describe this as the consequence of war. Decades of civil war also fostered a practice among government security forces of using extra judicial violence or repression against the political opposition- who were often branded as criminals because they were seen as enemies of the state (Adhoc, Licadho & Human Right Watch, 1999). So those who are not in the straight line with the stronger or the powerful, they face danger or are excluded by the group. The stronger or the leaders have repeatedly applied such philosophy to the weaker or the subordinates. For instance, (in late 1999), Lao, Mong Hay (2004) noted “Three senators were punished for not toeing their party’s lines. They were expelled from their party, the Cambodian People’s Party (CPP), and from the Senate altogether. These senators were exposed to

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more liberal political cultures during their stay respectively in America (for two senators) and in Australia."

Article 35 of the Cambodian Constitution says, "Khmer citizens of either sex shall have the rights to participate actively in the political, economic, social and cultural life of the nation." Therefore, any act aimed to prevent the exercise of political freedoms violates not only this article, but also the UDHR and ICCPR guaranteed by the Constitution and ratified by Cambodia in 1992.

Methe C. & Metha B. (1999) noted the way that the prime minister holds power that:

The passionate chess player who graduated from roadside chessboards to palatial strategies charted his, and his party's, success. He sacrificed an important chess-piece in the 1993 election when he agreed to form a government as a junior partner under the premiership of Ranariddh. From then on he unleashed a series of rapid moves to consolidate himself while wearing down his opponents. First, government critic Sam Rainsy was fired in 1994, and then Funcinpec general-secretary Sirivudh was accused of plotting to kill Hun Sen, and exiled the next year.

Firing Sam Rainsy- an outspoken critic- was seen as a move to silence the dissidents. Pol, Ham (1998) noted that members of parliament must follow the strict instructions of the party leaders or they may be sacked from the party and then from the National Assembly; Sam Rainsy's case is an example. Amnesty International (1997) documented tensions within Cambodia's coalition government surfaced again in October 1994, with the sacking from office of prominent FUNCINPEC Finance Minister Sam Rainsy, after he criticized government for corruption; In May 1995, he was expelled from FUNCINPEC and in June from the National Assembly.

Article 28 of the UNTAC Penal Code stated, "No one may be prosecuted for political opinion, religious convictions, or membership in a race or ethnic group. Penal texts currently in force anywhere in Cambodia may no longer refer to offenses based on opinion or ideology, and are accordingly abrogated." So if Sam Rainsy was sacked because of his criticism of the government, that violated this code, and ICCPR- article

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19(1) says, "everyone shall have the right to hold opinions without interference"- as well. Article 41 of the Constitution emphasized that "Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security." So Sam Rainsy's criticism was just the expression of his thought exercised in compatible with the article 41 of the Constitution and the article 19(1) of the ICCPR. But if his expression infringed upon the rights of other or whatever as mentioned in the article 41 of the Constitution, he would be punished under article 59 (Incitement Leading to the Commission of Crime) and 63 (Defamation and Libel) classified in the UNTAC Penal Code as the offences of misdemeanors. Article 59 says, "Any person who, by speech, shouts or threats made in a public place or meeting or by writings, publications, drawings, engravings, paintings, emblems, films or any other mode of writing, speech, or film that is sold, distributed, offered for sale or displayed in a public place or meeting, or by signs or posters displayed in public or by any other means of audiovisual communication, directly incites one or more persons to commit a crime shall be punished as an accomplice to the crime. This provision also applies if the incitement leads merely to an attempt to commit a crime," and article 63 "(1) Any bad faith allegation or imputation of a given fact which harms the honor of reputation of an individual is a defamation. The original publication or reproduction of the allegation or imputation is punishable, even if it refers to a person who is not explicitly named but whose identity is made evidence from the defamatory speech, shout, threat, writing, printing, sign, poster, or audiovisual dissemination. Any allegation or imputation against a public figure, which the author, the journalist, publisher, editor, or producer know to be false and nevertheless distributes, publishes, writes or circulates with malicious intent, is also a defamation. (2) Any insult, contemptuous remark or abusive language, which does not claim to impute fact, constitutes libel. (3) defamation or libel made by one of the means listed in article 59 shall be punished by imprisonment of eight days to one year, a fine of one million to ten million Riel, or both. …" As discussed in Section 5-2, courts are controlled by the ruling and, in addition to that, there is no political tolerance of Cambodian elites, Sam Rainsy might be brought for trial at courts if he was found of criminal guilty resulted from his expression. Criminal offences as stated

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in the laws cannot be compromised. Public prosecutors may initiate public action, and under article 7 of the 1993 Criminal Law, "Public action may not be settled by any arrangement. …" On the contrary, Sam Rainsy was just expelled from the positions. Hence it means Sam Rainsy did nothing guilty of criminal offences, and so he was just the victim of political behavior of no tolerance for different ideas or of eliminating the opposition. Anyway, in November 1995 Sam Rainsy founded a new political party, *Cheat Khmae* - the Khmer Nation Party (KNP); However, as relations between first Prime Minister Prince Norodom Ranariddh and Second Prime Minister Hun Sen deteriorated throughout 1996, FUNCINPEC and the KNP declared an electoral alliance to contest the planned elections in 1998; (Amnesty International, 1997). Thus, again, if the criticism against the government was found guilty of criminal offences, in the context of Cambodian political culture as mentioned above, Sam Rainsy was not allowed to have freedom to form a political party as such. That showed his expulsion from the position was prompted by political motive to eliminate opponent.

The following examples are cited to illustrate a pattern of political culture eliminating the opponents and courts were used for such purposes. In November (1995), FUNCINPEC Secretary General Norodom Sirivudh was arrested for alleged involvement in an assassination plot against Second Prime Minister Hun Sen; He was held under house arrest for several days before his parliamentary immunity was lifted by the National Assembly and (finally) allowed to exile in France in December while investigation of the case still continued; (U.S. Department of State, 1995).

Article 33 of the Constitution says, "Khmer citizens shall not be deprived of their nationality, exiled or…" So the exile of Sirivudh was a violation of this article. Article 80 of the Constitution stated, "The deputies shall enjoy parliamentary immunity. …….The standing committee of the assembly between sessions shall make the accusation, arrest, or detention of a member of assembly only with the permission of the assembly or, except in case of flagrante delicto. In that committee for decision. …."The meaning of "flagrante delicto" is defined in the article 18 of the UNTAC Penal Code that "Police may arrest anyone found in the act of committing a cognizable offense, in particular: If the suspect is observed committing a crime or

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misdemeanor, or if pursued by a public hew and cry; If the suspect is defined at the scene of crime or misdemeanor by witnesses or the victim; *If the suspect attempts to flee the scene of a crime or misdemeanor*." In the opposite to the last phrase of this article, the accused- Sirivudh- was, according to the report of the US Department of State (1995), allowed to exile by leaving the country where he was accused of committing crime; but later sentenced in absentia for 10 years imprisonment. For this case, the authority didn't need to concern about the accused having attempt to flee the scene of crime (or the country where crime committed) since he was arrested, but instead of detention for trial the accused was allowed to leave the country, and later sentenced in absentia.

So the permission for his exile means Sirivudh did not commit any offense under article 18 (flagrant delicto) as described above. Thus, as he still enjoyed his parliamentary immunity, if the accused was not found of any guilty as described in the article 18 of the UNTAC Penal Code, the act of holding him under house arrest violated the article 80 of the Constitution. This also violated UNTAC Penal Code- "All suspects, indicted and accused persons benefit from the most complete presumption of innocence" (article 25)- and also the ICCPR- "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law" (article 14; 2). But, On contrary, if his accusation was found true, he might be prosecuted and sentenced under the UNTAC Penal Code. Article 31 emphasizes "(1) Anyone who kills or attempts to kill another after premeditating the crime, or by preparing an ambush, or who kills or attempts to kill another person in the course of theft or rape, is guilty of murder, and shall be liable to a punishment of imprisonment for a term of ten to twenty years. (2) Premeditation is the process of conceiving and preparing an attack on another person before the actual execution of the attack. An ambush consists of lying in wait with the intention of committing an act of violence against another person." As prescribed by the 1993 Criminal Law- public action may not be settled by any arrangement (article 7)- Sirivudh had to be imprisoned at least for 10 years in prison (under article 31, UNTAC Penal Code). Therefore, the exile of Sirivudh not only violated the constitution, but also approved he was free of charge under both Criminal Acts of Cambodia. Therefore his accusation was just a trend annoying or eliminating the opponents.

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For this case, if the accused was truly suspected of such criminal guilty, only judge had to decide whether to keep the accused in prison or temporarily released. Judge's decision must be made based on the facts ensuring the temporary release didn't influence the process of investigation and no risk of escape or non-appearance manifested (UNTAC Penal Code, article 14"Pre-Trial Detention"). That means the main objective of pre-trial detention is to prevent the accused from appearance at court when tried. Anyway, the case of Sirivudh contradicted to this as the accused was allowed to exile and, later, tried in absentia. So the solution of exiling politician Sirivudh was a compromise which is not allowed by law (1993 Criminal Law, article 7). In fact, the judiciary should perform its legal duties to protect the accused from being exiled, but for fair trial. The failure in performing judicial duties for this case showed the weakness of the judiciary. Because of such judicial weakness, the opponents are exposed to elimination by the ruling or the powerful. That is an obstacle to the process of democratic development. The following are the discussions about the impacts resulted from the lack of judicial independence and impartiality on elections-retarding democratic development in Cambodia.

As Amnesty International (1997) recorded:

> The Buddhist Liberal Democratic Party (BLDP) also suffered from internal division, and in mid-1995 split into two factions, one led by Mr. Son Sann, and the other by Information Minister Ieng Mouly. The two Prime Ministers recognized Ieng Mouly's faction as the legitimate BLDP and on 9 July 1995 this faction held a party congress at which a new executive committee was elected. Mr. Son Sann and his supporters did not attend the congress and they were not included in the new committee. Mr. Son Sann and five other elected BLDP National Assembly members who supported him were expelled from the Ieng Mouly faction of the BLDP. The Son Sann BLDP faction attempted to hold a party congress in October 1995, but the proceedings were disrupted by grenade attacks.

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Since the judicial power shall cover all lawsuits, including administrative ones, such internal conflict of the BLDP also needs to be brought to courts for judicial rulings. On September 17, 1997, the Municipal Court determined that the Son Sann faction of the Buddhist Liberal Democratic Party (BLDP) could no longer use the BLDP party name or logo (Human Rights Watch, 1998). Observers furthermore noted that after the July-1997 bloody fighting, the judiciary has played broader role benefiting the coup winner- Hun Sen/CPP- to exclude his opponents and to concentrate more powers in his hands. The first move targeted his partner, ousted first Prime Minister Prince Norodom Ranariddh. Human Rights Watch (1998) reported:

> After the coup, Hun Sen moved to consolidate his power through action in the courts and the rump National Assembly. On August 6, 1997, despite the absence of twenty exiled parliamentarians, the National Assembly removed Ranariddh's parliamentary immunity from criminal prosecution and confirmed Hun Sen's choice for a new first prime minister, Foreign Minister Ung Huot, a member of FUNCINPEC. A warrant was subsequently issued for Ranariddh's arrest for allegedly buying and importing illegal weapons in May 1997.

How does the functioning of the non independent and impartial judiciary affect the election results and the process of democratic development in Cambodia?

Through the results of the 1993 elections, there were four parties, which had seats in the National Assembly. The election results, which they accepted, were: FUNCINPEC won 45.47% (58 seats); CPP, 38.22% (51 seats); BLDP, 3.81% (10 seats); Molinaka, 1.37% (1 seat); (Koul Panha, 1998). The consequences of the 5-6 July coup and the more serious human rights abuses after the event, the opposition members had to immediately take exile for safety. First Prime Minister Ranariddh and about twenty FINCINPEC, BLDP (Son San faction), and KNP politicians and members of the National Assembly managed to flee to Thailand; (Frederick Z. Brown & David G. Timberman, 1998). With the absences of the opposition, Hun Sen’s groups manipulated Khmer politics and those aligned with him. Then the role of the judiciary was seen to mainly play in the politics. Like the BLD P, the KNP- the most critical opposition party (FORUM-ASIA, 1997) led by government's prominent critic, Sam Rainsy - was robbed and chaired by the other group of its members. FORUM-ASIA (1997) reported:

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In the last week of July, 1997, Kong Mony convened an extra ordinary party congress of the Khmer Nation Party. In the gathering, he accused Sam Rainsy of being partly responsible for the political instability by aligning with the FUNCINPEC's National United Front (NUF). The congress, attended by about 1,500 people who were reportedly paid to travel to Phnom Penh, elected Kong Mony as the new party president.

So if the Sam Rainsy's faction wanted to maintain the ownership of KNP and oppose the Kong Mony who robbed the party, they could bring the case to courts. But, then the former stayed in exile that could not do so. However, if the former still wanted to claim the KNP as their ownership and complained against the later, they were able to do it by filing lawsuit at the court when they returned back home from the exile. But it might be like the BLDP case as cited above, the courts- known as strongly biased with the ruling or those following the ruling CPP of Hun Sen. Concerning the case of the KNP, for sure, Kong Mony would be, much or less, preferred by Hun Sen having strong influences over the judiciary as he was the one who took off the position of KNP chairmanship from Sam Rainsy, who was strong government critic and dismissed from the Minister of Finance and Member of Parliament few years ago. If so, how did the matter of party breaking disadvantage the Son San faction of the BLDP and the Sam Rainsy faction of the KNP in the incoming elections?

According to Kassie Neou[10] (1998), the schedule of the upcoming parliamentary elections (for the second mandate of the government) was supposed to be held on July 26, 1998. According to Lao (1998), diplomatic efforts had been made to ensure the safe return of the opposition politicians to exercise their political freedom of participation in the upcoming elections. On March 10, 1998, Khmer Nation Party (KNP) headed by Sam Rainsy changed its name to Sam Rainsy Party (SRP), and on March 14, 1998, Son San Party (SSP)- (Son San is the name of the former president of BLDP which, after its internal conflicts, owned by Ieng Mouly faction in favor of Hun Sen)- held its congress, and Son Soubert was elected as the president of the party; (Chronology of Cambodian History, 1995-1999). Now we can see both parties were newly created in term of the names, and they had to prepare for the forthcoming July elections. From March to July, it was about four months for them

[10] Then he was Vice Chairman of the National Election Commission (NEC).

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to build their images and make voters known the new party names and logos as Lao Mong Hay (1998) observed "the opposition parties do not have enough time to organize and prepare themselves for the elections." Thus it should be better if the two groups could be able to handle the old names and logos of the parties which had been already know by too many people. Anyway, if both party leaders struggled through the three-level courts to occupy the party names of BLDP and KNP, it was uncertain how long the judicial processes were and whether they could win if the courts have been not independent and impartial. Beyond this, all of these happened during the absence of the opposition and in a circumstance that they could not be in the country where they could present at courts. For example, the Phnom Penh municipal court ruled the case of the BLDP on September 17, 1997, and according to the procedure the defendant has right to appeal within two months. Under this procedure, the defendant needed to appeal not later than November 17, 1997. However, according to Lao, Mong Hay (1998), an advance team of the Union of Cambodian Democrats (UCD)- a politician group formed by the exiled in Thailand after the coup- (under the UN intervention) returned to Cambodia in December 1997 to "test waters". Thus even though the representative(s) of the Son San BLDP faction were able to return home through UCD mission, it was already too late to make appeal. So the ruling of the municipal court in the case of the BLDP was not fair for the exiled faction.

Time was a problem, but the education level of the voter was also another. Pol, Ham (1998) said, "Most people in Cambodia are uneducated, compared with people in developed countries in Europe and America. This is particularly true of the Cambodians living in remote areas." Of course, in such poor and war-torn county like Cambodia, there must not be many people who had access to education. The electoral system of Cambodia is proportional, with provincial and municipal representation (article 5, 1997 Election Law). With this system, going through three-mandate of parliamentary elections, Cambodia voters are required to secretly tick on the box of the party (with name and logo), which they support. Therefore, more important than the name, the party logo is so crucial for the candidates to do campaign among people who, the most are illiterate. Since they can't read, it is easier for them to remember the party logo. It is also proved with the 1997 Law on Political Parties. Article 11(3) said, "Symbol/logo of a political party shall not be copied or taken from a national symbol

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or picture representing religion, Angkor Wat temple or photo or picture of all Khmer Kings." If it is in the contrary, probably the politicians are so keen on such symbol/logo that would be a good remainder for voters. From this viewpoint, it can be said that both SRP and SSP must, much or a little, lost benefits in the 1998 elections because of the loss of the name and logo of the KNP- publicly known as the most critic of the government- and the name and logo of BLDP- publicly seen through 1993-election participation and the activities of its members in the Assembly- respectively. So if the judiciary is independent and impartial, surely both groups could maintain their publicly known names and logos of the parties.

Even the opposition politicians who exiled were able to return home under the intervention of the United Nations and international community, and the election schedule was approaching, FUNCINPEC President Prince Norodom Ranariddh- sentenced in absentia- was warned not to return home, when many of his colleagues could. On 26 February 1998, Hun Sen warned that Prince Ranariddh, who was in exile in Thailand, still had to summon several charges before he will be allowed to participate in the election (ANFREL, 1999), and King Sihanouk advised Ranariddh to remain in exile until he would receive pardon (Chronology of Cambodian History, 1995-1999). According to the Cambodian constitution, Cambodian King can grant pardon to the convicts. Article 27 is read, "The King shall have the right to partial or complete amnesty." However, on March 19, 1998 the King refused give Ranariddh amnesty without approval from Prime Ministers- Hun Sen and Ung Huot (Chronology of Cambodian History, 1995-1999). The Constitution doesn't say King needs an approval from Prime Minister in order to grant pardon to any convict. If Prince Ranaridh could not be granted amnesty, he was not able to join the elections scheduled for 26 July 1998, nor stood as candidate for the elections. The Law on the Election of the Members of the National Assembly provided for that (article 34). Then Prince Ranaridh was accused of plotting with the outlawed Khmer Rouge to overthrow the government and (his other three senior officials also) charged; the four defendants were ordered to pay $54 million in compensation to the government and victims of the weekend fighting in Phnom Penh last July, the prince and his cabinet reject the verdict outright (ANFREL, 1999), and on March 19, 1998 in Phnom Penh, Justice Minister, Chem Snguon, said that even if granted a pardon, Prince Ranariddh must still pay the

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damages or face arrest if he returns home (Chronology of Cambodian History, 1995-1999). This was seen as an obstacle for the royalist party, FUNCINPEC, to the July election contest, if the prince was prevented from returning back to the country. The absence of the prince would weaken the royalist party as he was the only one considered by the royalists to represent the royalist image of the party, in particular popular former king Sihanouk. Metha C. and Metha B. (1999) described "Sihanouk became the neutral head of state for what, at the time, seemed sound political reasons. Even before the Paris Peace Agreement was signed in 1991, he realized that the post that he would best serve his future political ambition was not as the head of the FUNCINPECT party, which he had created after he was ousted from power, but as the head of state. He could, in a sense, kill two birds with one stone. By vacating the leadership of the political party for his son Ranaridh- who was spitting image of his father- he gambled that his son would lead the party to victory in the elections, and pave the way for him to retake power." It was clear that even Sihanouk also trusted his son Ranariddh who could symbolize him to win the 1993 elections. It has been generally recognized the image and popularity of Sihanouk among Cambodians. (Before 1993 elections), Hun Sen observed Sihanouk's tendency to bamlast his government, but he did not react fearing that a direct confrontation with the (then) prince would be seen by the people as an insult to royalty (Harish C. Metha and Julie B. Metha, 1999). As so far, in the FUNCINPEC headquarter in Phnom Penh, a big statue of Sihanouk has been erected that passers can see from the outside of the compound. As noted by Shawcross (about 1993 elections): "Over most of the country, people had voted for peace, for reconciliation, for Sihanouk, and perhaps above all, for change," (Grant Curtis, 1998). So the image of the king (Sihanouk) is an attractive thing among the voters. As mentioned early in this Section, under 1997 Law on Political Parties, photo of king is not allowed to use as party logo. For this ground, FUNCIPEC has tried to create its royalist image through its president Prince Ranariddh- the son of the king. This can prove that Prince Ranariddh's presence in the country was essential for FUNCINPEC in the 1998 elections. Pol, Halm (1998) noted experience from the 1993 elections indicates that Cambodian voters are not as interested in comparing the programs of the different political parties as they are in the backgrounds of party leaders. Nevertheless, it was observed that the prince's sentences

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by the military court seemed a kind of manipulation, as the last minute he was allowed to return home with free of criminal charges. On March 21, 1998 King Norodom Sihanouk granted a pardon to his son, Prince Ranariddh, (after) the powerful second prime minister Hun Sen said in a letter to the monarch that "Today, after consulting with Acting Head of State of Chea Sim, I beg Your Majesty to pardon Prince Norodom Ranariddh on all counts…and free him from the courts' verdicts" (ANFREL, 1999). It was only about for months for the prince to prepare himself for the elections. This is, again, seen another game of the exclusion of the opposition, through the courts. In October 1997, Minister of Justice Chem Snguon said, "Either we go after 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…,[11]" (Basil Fernsndo, 1998). Therefore, again, if the courts are independent and impartial, Prince Ranariddh would have more time to make preparation for the incoming elections and the election result for his party might be different.

Lack of Protection Mechanism for Right to Peaceful Assembly

The purpose of this section talking about right to peaceful assembly is to focus on the current practice of the right to peaceful demonstration and strike in Cambodia. However, before going into in-depth discussion about the exercises of this right in Cambodian context, there is also a reflection of the role of peaceful assembly in democratic society.

Cherif Bassiouni (1998) said democracy in any of its meanings, requires the existence and free exercises of certain basic individual and group rights without which no democracy, however perceived, can exist. Among the certain basic rights mentioned by Cherif Bassiouni (1998), freedom of expression and assembly is included. As discussed in Chapter II (2.1), in democratic societies, people's participation in elections and public-affair monitoring is necessary, and democratic

[11] The minister spoke October 20, 1997 to Eric Pape of Phnom Penh Post

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governments receive their authorization, and it is to the citizens that they remain accountable and responsive, both directly and through the mediating organs of parliament and public opinion. So since democratic government is born by popular elections, by that way people not only just create the government but also take care of it to make sure the elected government is going on the right path of democracy- that is need for people's participation in monitoring the executive activities to keep the government's accountabilities to the voters. Thus, public opinion is vital as then the government will be informed of what it has done and reflected by the people. That's why freedom of expression is needed in democratic nations otherwise true public opinion can't be expressed. Amnesty International (2006) said, "The peaceful expression of different opinions must be allowed". Anyway, if the elected government ignores things expressed by its people or has no reasonable responses it will disappoint the voters and face the loss of popular support. Nevertheless, if the people do not want such things still continue to be happened in the current mandate of the government, they might find other means to pressure the government or stop the actions of their government. Among other things, right to peaceful protest is a way used to mobilize or gather protesters against the government and it is guaranteed and protected by international standard. Article 21 of ICCPR said: The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others. Peaceful demonstration is seen as a direct way to oppose and challenge any decision or activity of government, and it is important for democracy as it is a direct participation of the people in group in public affairs.

Thus, if the right to peaceful demonstration is useful for democracy, can Cambodia, which is a country whose Constitution adopting the policy of liberal democracy, be a nation where the right can be accepted or freely exercised? The Paris International Conference on Cambodia issue in 1991 declared in the Comprehensive Agreement about the obligation of Cambodia on human rights. All individuals, refugees and displaced persons in Cambodia shall have rights and freedoms enshrined

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in the UDHR and other international covenants on human rights (Article 15, para.1).[12] Article 20 (para.1) of the UDHR said, “Everyone has the right to freedom of peaceful assembly and association.” Cambodia was not a State Party to the ICCPR yet at that time until 1992.

The exercise of this right had been absent in Cambodia since the Khmer Rouge took power in April 1975. Jones & Pokempner (1993) the period immediately before UNTAC’s arrival was marked by a series of attacks on political figures, most notably when, on November 27, 1991, Khmer Rouge leader Khieu Samphan narrowly escaped being lynched by a government-organized mob; It is unclear whether the government anticipated the violent outcome of the demonstration; In denouncing the attack, Prime Minister Hun Sen affirmed for the first time the right of the people to hold non-violent demonstrations. The affirmation declared by Prime Minister at that time was doubted whether he truly supported the exercise of the right of peaceful assembly or the trend to eliminate the opposition.

His position was tested when, on December 17, 1991, hundreds of Phnom Penh residents, many of them students, began demonstrations against government corruption. The police and then soldiers responded by firing on demonstrators. By December 24, eight civilians had died and twenty-six were injured. The government imposed a curfew, banned demonstrations, and subsequently passed legislation allowing the government to ban any demonstration it believes could result in violence. (Jones & Pokempner, 1993)

Law on Demonstration (LoD) with 11 articles was adopted by the National Assembly of the State of Cambodia (SoC) and declared urgent. This law is still effective until today and thought by human activists that it is the main obstacle to the practice of the right to peaceful demonstration and strike in Cambodia.

The right to strike and to non-violent demonstration is guaranteed by the Cambodian Constitution, which, article 37, says, “The right to strike and non-violent demonstration shall be implemented in the framework of a law.” Whereas there is no

[12] Paris Peace Agreement, 1991, Khmer version.

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new law on this area adopted by the Cambodian National Assembly since 1993 and the 1991 LoD is still applicable, the authorities enforce it if they want to prevent or permit the performance of the right. So far there are some arguments about the validity of the 1991 LoD, which was adopted by the National Assembly of SoC applying the Maxis-communist system modeled from the former Soviet Union to rule the country. That system has a conflict with the policy enshrined the 1993 Constitution, which says, “Cambodia adopts a policy of liberal democracy and pluralism (article 51).” However, article 158 of the Constitution says, “Laws and standard documents in Cambodia that safeguard state properties, rights, freedom and legitimate private properties and in conformity with national interests, shall continue to be effective until altered or abrogated by new texts, except those provisions that are contrary to the spirit of this constitution.” That is not sure whether the 1991 LoD is inconsistent or consistent with the spirit of the Constitution. Only the Constitutional Council is the sole body that has authority to determine the constitutionality of laws.

The 1991 LoD is described as a state instrument restricting rather than protecting the right to strike and peaceful demonstration. Article 1 says, “…meetings of groups or crowds in public places or on public roads, or marching demonstrations which can be detrimental to public tranquility, order or security, are categorically prohibited ”; article 2 (para.3), “Authorities in commune and ward through which a group of demonstrators will march shall be informed at least three days beforehand in writing, which will indicate the surnames, names, addresses and signatures of three of the demonstration’s organizers; objectives; locations; dates; streets; and the number of the people participating in the demonstration”; article 3, “…..if the authorities concerned think that demonstrations have characteristics conducive to causing turmoil, they can ban the demonstration…”

Therefore, the exercise of this right can’t be performed unless the authorities concerned give authorization based on the consideration of the issues of public tranquility, order or security. The meaning of public tranquility, order or security mentioned in this law is too broad and unpredictably interpreted. So, in addition to Cambodia’s political context and culture, it is too hard to get permission from the

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authorities to hold demonstration protesting against the government, for instance, on any issue or public policy. If a demonstration is held without authorization, the authorities shall stop it (LoD, article 4). ADHOC (1999) reported:

> In February 1999, a student organization asked permission to hold a demonstration in favor of an international tribunal for the trial of the former Khmer Rouge leaders. This permission was denied, reportedly because the students had omitted to include a contact address. In the same month, a nation-wide teachers' strike and demonstration for higher salaries was met with several instances of intimidation and threats by authorities in a number of provinces.

The denial of the permission for the students and threats to the teachers as reported by ADHOC above are the violations of ICCPR, "article 21 says: the right of peaceful assembly shall be recognized. No restriction may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order,..", to which Cambodia is a State Party, as both the objectives of the students and the teachers to hold the demonstrations were seen not to be detrimental to public tranquility, order or security.

On the contrary, even demonstration held with the authorities' permission also faced violent disruption. As raised in Section 5-2 above, the March-1997 peaceful demonstration against the judicial corruption was hit by grenade attacks- causing at least 16 dead and over a hundred injured. Concerning the event, justice officials had to take legal actions to prevent such happening. Based article 3 of the 1993 Criminal Law, public actions have to be made to strive to prevent criminal offences from re-occurring by imposing on offenders punishments provided by the law. That is the role and duty of the prosecutors to initiate investigation and make prosecution on the suspect. The failure of the prosecutors in performing their duties in that case as described in the Section 5-2 meant a failure in preventing the repeat of such crime against demonstrators, and also a threat to the exercise of the right to peaceful demonstration or strike.

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Again, great violence happened on the peaceful demonstrators led by the opposition parties protesting against the July election result in 1998. Amnesty International (1998) reported:

> The Ministry of Interior denied permission for a planned march and rally by opposition parties to take place on Sunday 23 August. Eventually, following a late night compromise negotiated with the Ministry of Interior, a rally took place at Phnom Penh's Olympic Stadium. A crowd of 10,000 people attended. The sit-in at the National Assembly began on 24 August 1998. The violent dispersal of protestors began in the evening of 7 September and continued until the leader of FUNCINPEC Prince Norodom Ranariddh's call to supporters to stop the protests on 15 September. Amnesty International is gravely concerned that excessive use of force by the Cambodian authorities, notably the Military Police (also known as the gendarmerie) led to scores of injuries - some serious- and an as yet unconfirmed number of deaths, which may be as high as 20. The organization knows of over 60 people who sought hospital treatment for their injuries, *fourteen of whom had bullet wounds.* At least six people needed treatment for the effects of electric shock batons, wielded by the Military Police.

The government's violent crackdown on the 1998 demonstration was not only a violation of ICCPR (article 21), but on the 1991 LoD that it made and adopted as well. Article 4 (LoD) says, "para.2: After issuing the ban twice, if the demonstrators still adamantly refuse to discontinue their activities, the local authorities shall act to disperse the demonstrators with the use of equipment that does not endanger life." Anyway, the operation of the authorities, as Amnesty International (1998) reported, to stop the demonstration caused a number of people dead and injured, including bullet wounds. Therefore, they offended with the use of equipment endangering life and causing casualties. Article 8 of this law says, "If any officials carrying out his duty at a demonstration commits an offense, causing damage to people property or public property, or causing injury or death to other people, shall be punished according to the law currently in effect, depending on the degree of the offense committed." It is clear that the authorities violently dispersing the 1998 demonstration have to be responsible

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for that and punished. At least they should be punished under 1992 UNTAC Penal Code, article 31 (Murder), article 40 (Involuntary Manslaughter: …carelessness, negligence, inattention or failure to heed regulations involuntarily kills another person..), and article 41 (Battery with injury). That is the duty of the prosecutors to make prosecution or judges to impose punishment on the perpetrators. The absence of taking legal actions by prosecutors or judges in that case reflected their ignorance in enforcing laws dealing with offenses committed or favored by the executive authorities. That was a proof resulted from the lack of judicial independence. Incompetent prosecutors or judges as in this case, who failed to perform their legal duties should be punished by the SCM.

Freedom of the peaceful assembly in Cambodia has been observed to be restricted and deteriorated under the government's manipulation. ADHOC (2003) conducted a survey on the exercise of this right in 2002 among worker unions, associations and student groups. This organization reported: "Requesting permission from authorities or competent officials to stage a demonstration was extremely difficult; most requests were not responded to or were dealt with so tardily, more than three days, contravening the date specified in the Demonstration Law. Permission was often refused, especially for any demonstration or strike that was against the government's policies" (ADHOC, 2003). Anyway, by contrast, security force failed to intervene in the violent anti-Thai riots in Phnom Penh on January 29, 2003, which resulted in the sacking of Thai embassy and Thai businesses; This points to government incitement of mob violence for political gain, together with the use of riots as a pretext to ban further demonstrations in Phnom Penh; (Carolyn Bull). In 2003, the UN Office of Human Rights in Cambodia pointed out:

> Prior to the (election) campaign period, a number of gatherings were not authorized on public order or national security grounds, the details of which were not provided by authorities. In few cases where demonstrations took place without prior authorization, the authorities used excessive force to disperse them. The Special Representative is concerned by the re-emergence of restrictions on freedom of assembly after the end of official campaign period. The small Khmer Front party (KFP) sought to conduct a demonstration in Phnom Penh in August to protest the election results, and

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> was denied permission by the authorities. When gatherings went ahead, police armed with weapons, including electric batons dispersed it and 21 party members were arrested and forced to sign statements that they would not demonstrate again. (UNCOHCHR, 2003)

Again, the authorities violated the LoD (article 4, para.2 and article 8, as decribed above) with the use of equipment such as weapons endangering life. In fact, prosecutors and judges should together take legal actions against the activities of the authorities. Anyway, following 12-February-2004 letter of introductive charge from the representative of the Phnom Penh municipal prosecution office, the municipal court judge issued a warrant of 4 June 2004 to called KFP leaders for appearance at the court on 21 June 2004.[13] That measure was seen as a kind of pressure by the key justice officials on the right to peaceful assembly, and bias in their performance of judicial duties.

It was recorded there were 17 large non-violent demonstrations in 2003. Female garment factory workers held the majority of these demonstrations. 6 of the 17 demonstrations were seriously and violently suppressed by authorities, during which one protestor was shot to death and many other injured. (ADHOC, 2003)

Based on article 55 and 62 of the 1993 Criminal Law as mentioned above, even no complaints received, prosecutors with responsibility to make penal actions have to immediately conduct investigations once the offenses of any crime or flagrant delicto is known. Under these articles, the police authorities that violently stopped the demonstrations as quoted above should be prosecuted and brought to justice. ADHOC (2003) continued that demonstrations were not found to be as large in other provinces or cities as in Phnom Penh, where they were organized whenever protestors felt betrayed by the courts or authorities, and rallied in front of those institutions seeking justice for or release of their arrested representative(s).

[13] Phnom Penh Municipal court, Judge Tan Seng Narong, Warrant No. 3994.., Dated: 4 June 2004.

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With the strong restrictions on the right to peaceful demonstration and strike, the executive can't be held accountable to their people and concentrated on grasping powers. Without the judicial protection, the right is really crushed.

Impunity: Politically Motivated Violence

Speaking to the Phnom Penh Post in October 1997 (as observed above), Minister of Justice Chem Snguon continued, "Justice is not a wild horse- It must be controlled," (Basil Fernando, 1998). If so, nothing surprised when courts apply judicial power in favor of the ruling, and against the other. Impunity is well known in Cambodia, where one justice system been differently applied to different factions. Impunity has remained a major problem. Virtually none of the perpetrators of hundreds of politically-motivated extra judicial killings, incidents of torture, and other abuses committed before and after the 1997 coup and 1998 elections were brought to justice during the year. (Human Rights Watch, 2001)

This has brought about great concerns among the public as it has gone against the principle of equality before the law, and equal protection of the law as enshrined in the Cambodian Constitution and the ICCPR to which Cambodia is a State Party. As the 1991 Paris Peace Agreement put Cambodia on the way to the transition to democracy, political violence and such impunity has been repeatedly raised as concerns.

Provided by article 12 of the Paris Peace Agreement, the Cambodian people shall have rights to determine their own political future through free and fair elections…sponsored by the UN in a neutral political environment[14]. This would be interpreted that voters should be free of fear while they exercise their right of self-determination through ballots, and all Cambodian political parties, legally registered, should have equitable and free access to voters.

[14] Unofficially translated from Khmer language.

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According to Pol, Ham (1998) and Koul, Panha (1998), about 200 people were killed because of political affiliation during the process of the 1993 elections. Basil Fernando (1998) affirmed that:

> When pre-election political violence grew in November and December 1992, (….) attempts to get these cases investigated by the authorities showed the widespread of practice of non-investigation of serious crimes (…….) UNTAC created its own law, arrested and detained four people. However, (….) it was not possible to expect a fair trial under the existing procedure, UNTAC continued to detain the four until a competent court was identified to try these cases. Even when UNTAC finished its mandate in September 1993, no such court was identified.

Here, in addition to the discussion in Section 5-2, the old-court system before and after the UNTAC's period has been unchanged, still applicable and under the control of the ruling group as the Minister of Justice Chem Snguon clearly affirmed above. So prosecutors and judges can do nothing to protect the rights of the victims or the justice if the ruling party or its followers have manipulated the incidents. As described in Section 1-1, key apparatus of the state have been under the control of the ruling CPP. That would be said key power holders or officials belong to a party, and so they must be able to escape from legal actions if they acted in favor of their party.

On February 28, 1996, UN General Assembly adopted a resolution A/RES/50/178 expressing grave concern about the serious violations of human rights and about the reluctance of the Cambodian courts to charge members of the military and other security forces for serious criminal offences; And, repeated on March 3, 1997, The UN General Assembly adopts a resolution A/RES/51/98 expressing concern about the continuing problem of impunity in Cambodia, whereby the courts in several areas are reluctant or unable to charge members of the military, police and other security forces for serious criminal offences; (Chronology of Cambodian History, 1995-1999).

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On 24 July 1998[15] (two days before the polling day), Asian NGOs Monitor Cambodian Election: Express Concern Pre-Election Situation, "Human rights violations such as political killings, disappearances, threats and intimidation and harassment that occurred after the coup in July last year and before and during the campaign period have not been acted upon by the authorities concerned despite the continuous call from various sectors. We would like to join the international community in reiterating the call for the government and law enforcement agencies to investigate, prosecute and punish the perpetrators and for an end to impunity in Cambodia;" (ANFREL, 1999). With respect to election-related violence, the UN (2003) reported "convictions have so far been secured for 10 of the 17 murders and suspicious deaths of political activists that occurred in connection with the 2002 commune elections; however, poorly conducted investigations and prosecutions raise serious questions about the reliability of some of these convictions. In the period between the commune elections in February 2002 and Election Day in July 2003, further 13 murders of special concern, all of activists from the main political parties, were brought to the attention of the UN." On 18 April 2005, UN envoy for Cambodia said, "Impunity had virtually become built into Cambodia's system, leaving allegations of corruption, murders of politicians or activists, and other violence unsolved."[16]

How does the impunity, especially, of political violence impact on the process of democratic development in Cambodia?

Article 1 of the ICCPR said, "All persons have the right of self-determination. By virtue of that right they freely determine their political status …", and article 25 added "Every citizen shall have the right and the opportunity,(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;.." Therefore, any act leads to or is aimed to create political violence or

[15] Press Release
[16] Special Representative of the UN Secretary-General for Human Rights in Cambodia, Peter Leuprecht, who is due to address the annual meeting of the UN Human Rights Commission, told journalists; Geneva.

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to intimidate/threaten voters clearly violates these articles (ICCPR ratified by Cambodia in 1992). Following its preamble which was mentioned "Further convinced that the application of these rules and procedures is necessary to foster a politically neutral climate and to prepare for free and fair election," article 64, the UNTAC Penal Code, says, "Whoever, through intimidation, illicit behavior, or any form of coercion, interfere with the free exercise of electoral rights of a voter or candidate or with the proper functioning of the electoral process is guilty of electoral fraud and shall be liable to a term of imprisonment of one the three years." By this article, violence on or intimidation against voter is the violation of this article and cause non-neutral political environment that leads to the absence of the free and fair elections. Under Cambodian Criminal Acts, those who commit crimes have to be brought to justice through serious investigation and prosecution. Article 3, 1993 Criminal Law, says, "The penal action is for the purpose of condemning all acts disrupting social order and breaching the peace and the offences provided by law in force. Therefore, public actions strive to prevent these offences from re-occurring by imposing on offenders punishments provided by law." By this virtue, if competent or judicial officials let the offenders get away with impunity, it violates this article. On the other hand, the failure in punishing the perpetrators may means endorsing acts disrupting social order or breaching peace and encouraging the perpetrators to commit more criminal offences frightening others. If so, people must live with the preoccupation of fear.

Describing about the 1993 elections organized by UNTAC, like Shawcross-who, as raised above, noted "Over most of the country, people had voted for peace, for reconciliation, for Sihanouk, and, perhaps above all, for change," Koul, Panha (1998) also similarly observed "If we were to observe the feelings of the majority of the people, they were thinking about peace as their ultimate goal in 1993." If looking back to the past of Cambodia, this country had been torn by civil wars until 1991 ended by the Paris Peace Agreement and her people had gone through bitter experiences of brutal massacres by wars and by genocide. Not many survivors could avoid the loss of families or relatives. That would be enough for these people to be afraid of wars and other forms of violence. With these experiences, the 1993 election was the good opportunity for them to secure their lives. It was evident with the voter turnout. Like

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Pol, Ham (1998), Grant Curtis (1998) notes that the UNTAC-sponsored election was held from May 23 to 28, 1993, with a turnout of some 90 percent of registered voters. Back to refer to Shawcross and Koul Panha, among other things, objective of the voters is to stop experiencing violence or for peace.

After the July-1997 coup, the 1998 election was considered the most important mean to restore Cambodia's young democracy brought about by the UN through 1993 elections. The UN Secretary-General Kofi Anan having taken a strong stand with regard to international observation of the 1998 elections indicates that the UN sees the UNTAC experience as a significant precedent for peacekeeping- if the UN is seen to fail in Cambodia, can it be expected to succeed elsewhere? (Frederick Z. Brown & David G. Timberman, 1998). That was expected political environment in the period during the election process would be peaceful, benefiting an organization of free and fair elections.

Anyway, according to ANFREL (1999), there were various forms of threats in relation to the 1998 elections. They were ranging from harassment, intimidation to killings or disappearance, committed by perpetrators- including people in authority. These, in fact, much or less have to affect the process of free and fair elections.

As mentioned earlier, peace is observed as the goal of Cambodian people in general. "We want peace!" thousands of people, mostly monks participated in the traditional peace march in Phnom Penh on 25 July 1998- (one day before the elections), (ANFREL, 1999). In its 2003 report on the democracy and human rights training program (called Community for Democracy) conducted in 176 districts among 185 in total, CCHR (2003) found “war” was used as a tool to threaten voters. Among others, 17 answers of the discussion groups (the same answers more than one is considered as one), in 17 different districts, were expressed by the participants about their concerns over threats that war will ensue if a certain (another) party wins/(the ruling) loses the election (CCHR, 2003). This can show the feelings of, probably almost, Cambodians who scare violence. For example, ANFREL (1999) reported, In Prey Chhor commune (Kampong Cham province), an old man begged not to be asked

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because he was scared; He said three men went to their village and threatened them the night before but they were afraid to tell who those men are. With the same report above, CCHR (2003) is quoted, “79 answers of discussion groups in separate 79 districts referred to the fear that people were threatened or forced to support one party (a hint to the ruling) or not to support others.”

Do these threats or violence affect the electoral process? A simple answer is yes. There were reports of several hundreds of members of opposition parties from at least a dozen provinces fleeing from their villages because of fearing retribution from communes, districts, provincial chiefs, police and the military after actual voting and during and after counting of ballots, (ANFREL, 1999). Naturally, no body wanted to take risk like this. If he/she fled alone, his/her family would face risk, and if he/she fled with the family, difficulty in burden would be increased. So it means those who support the opposition have to be risky of personal life, family life and property. That is an obstacle to a process of free and fair elections.

On the other hand, some forms of threats seemed there was a mechanism ready for creating turmoil situation at a particular circumstance. ANFREL (1999) reported "In Stung Treng (province), threat to disperse and sabotage the election was spread out in some areas; and in Prey Chhor (commune) in Kampong Cham, armed men drove around the villages and threatened the people that if they didn't like the results of the voting, killings would start." Similarly, CCHR (2003) reported voters were frightened that war would happen if the ruling party loses the elections. These are raised to reflect the forms of threats during the election process. This really affects the result of elections. As discussed above, the wishes of the people for elections are to vote for peace. Thus, in addition to low or no education of the majority of Cambodian people, any threat in connection to violence- least or much- has to effectively affect the feeling of voters. According to a survey conducted in 2001, it showed that only fifty percent of the voters who could read or write (The Asia Foundation, 2001). That means the number of voters who could not read or write in 1998 as three years back from 2001 should be more than fifty percent. So it was majority of the voters in 1998,

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when general elections held, who could not read or write. Much or least, the illiterate people are exposed to the fear of threats.

Therefore- with the wish for peace, low education, and great fear resulted from threats- at least among the voters, some voted based on feeling of fear or automatically voted for the ruling party because fear for violence to be happened. Then threat is described as a factor to affect the result of the elections.

The process of 1993 elections also experienced serious violence and impunity happening on politicians and supporters. However, the context was different. The 1993 election was supervised by UNTAC empowered by the Paris Agreement to control all necessary state mechanisms- including civil administration and armed forces- that might affect the process of free and fair elections (article 6, Paris Agreement). According to Grant Curtis (1998), UNTAC had (its own) more than 20,000 international personnel, including 16,000 military and 3,500 civilian police, supplemented by 60,000 locally recruited Khmer staff- with the expenses of more than $US 2.1 billion. Regarding the political violence, UNTAC didn't ignore, but took actions. As grave concerns over the occurrence of serious political violence brought about among the public, according to Basil Fernando (1998), the head of UNTAC issued two subsequent directives dated 6 January 1993 and 3 February 1993, respectively- endorsed by UN Security Council resolution ##810/93- to allow UNTAC civil police and military to arrest and detain anyone who was involved in political violence, disturbing the political environment, and destroying the process of free and fair elections in Cambodia. As described above, UNTAC had arrested and detained certain perpetrators. With the measure, the situation was seen well. The observers have noticed that from February there has been a marked decrease in the attacks on political parties and their members (Basil Fernando, 1998). In the contrary to 1993, the 1998 election was absolutely controlled by the CPP- one of the competitors. "Since the July coup (1997), the government and National Assembly no longer reflect the will, wishes, and aspirations of the Cambodian people as expressed in the 1993 elections; The state organs are almost completely under the control of Hun Sen and the CPP, the losers in the last elections (Lao, Mong Hay; 1998). Witnessed

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with political violence and impunity left from the July coup and supplemented with other violence and impunity during the process of the 1998 elections, voters must be scared. In 1993, voters were also scared but they were warmed by UNTAC presence. In 1998, voters were scared and lived under the control of the powerful CPP of Hun Sen. ANFREL (1999) noted "the impact of the July coup made it practically impossible to come up with a free and fair election. Even they [people] know their rights and dare to assert them, if there are no mechanism to protect them, it would be very difficult for them. Those actually dared to voice out their complaints suffering serious consequences ranging from harassment and intimidation to arrest and in many cases, killing and disappearance." And people also had experience in 1993, when the CPP refused to accept the results of the elections and threatened to establish an "autonomous zone" that could provoke post-election violence in the country. As described by Grant Curtis (1998):

> …. the Cambodian People's Party was not prepared for its narrow defeat at the polls. …. On June 3 (1993), …….the CPP's (leaders) Chea Sim and Hun Sen went to the royal palace and asked Prince Sihanouk to assume absolute powers so as to avoid post-election violence. …. the threat of the secession also underscored the fact that FUNCINPEC lacked the personnel, resources, or experience to effectively assume full administrative control of the country as the election's winning party.

That experience must have worried and frightened the voters. In addition to that lesson, Cambodian leadership also makes their people feel more helpless if they are not on the side with the ruling. (For example), 26 June 1998 Hun Sen hit the campaign trail, telling residents … that ""When you need a school you ask Hun Sen, but when Hun Sen needs your vote and you don't vote for the CPP, then I won't help you next time;" "Even though there is the National Election Commission, the government is still under my rule;" (ANFREL, 1999).

From the political background, it has reflected the strong stance and victory of the CPP insisting to grasp powers- one in 1993 after the elections, and the other in

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1997 after the July coup. Therefore, with the feeling of voting for peace to end war and low education as discussed above, the violence must affect the feeling of 1998 voters who, of course, might vote to avoid repeated violence that may happen after post-elections.

Looking at this, violence is proved to have great impact on the 1998 national election result benefiting the party in power, because the voters, especially the low educated, live in fear or in preoccupation. So, added with the impunity that may incite more violence, the voters had faced more scares. Going back to the 1993 elections, voters' fear was relatively less as perpetrators were arrested, including police officers (Basil Fernando, 1998, as quoted above) and UNTAC was thought of neutral and effective protection body. Thus it was seen, even the CPP controlled Cambodian police and military, it still lost the elections.

The violence and impunity is also seen as impact on the 2003 election process.

During the process of the national elections in 2003, levels of political violence were lower than previous elections, (…) but the murders and intimidation that surrounded the election, particularly in rural Cambodia, and failure to bring those responsible to account are longstanding problems (UN, 2003). Of course, the violence was relatively low during the process of 2003 elections, but the pattern of culture of violence and impunity was repeated. Hence, this pattern, in addition to impunity of crimes before and after 1998 elections, also resulted in scared feeling of voters during the electoral process of the 2003 national elections. FORUM-ASIA (2003) noted the memory of the 1998 national election, which was marred by large-scale political violence and ended with crack down of the demonstrators by the authority, remained vivid in people's mind. As reference to the report of CCHR (2003) quoted above, the same pattern of threats/intimidations, such as post-election war may be happened, were used to frightened voters as did during the 1998 election process. Therefore, with the same ruling system, much or less, violence and impunity must affect the decisions of the 2003 voters.

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According to the results of following elections, the 1998's showed CPP got 64 seats, FUNCINPEC 43, and SRP 15, and about 90 percent of turnout (ANFREL, 1999); in 2003, CPP got 73 seats, FUNCINPEC 26, and SRP 24, (US Department of State, 2004), and about 83% of voter turnout (FORUN-ASIA, 2003). As mentioned above, the results of the 1993 national elections were: FUNCINPEC 58, CPP 51, and BLDP 10, and about 90 percent of turnout.

These figures showed that the percentage of voter turnout was the same between the 1993 and 1998 elections, but decreased by about 7% in 2003.

An argument can be made if violence has real impact on the process of the elections, what the reason that the number of voter turnout is still high. The high percentage of voter turnout in 1993 can be interpreted as it was the first time for Cambodian people to have such opportunity since more than two decades of civil wars, and the election was held by the United Nations that they have never experienced in the history of their life. But, however, the percentage of voter turnout in 1998 was still as high as in the 1993's- 90%, even more violence and impunity happened in addition to the previous ones. That was the second test for the Cambodian voters. It is clearer if we compared the percentage of the 1998 turnout to the third test in the 2003, when the percentage was relatively decreased. Besides this, the percentage of 1998 voter turnout could be also resulted from a form of manipulation of those in line with the ruling. Chea Vannath (1998) pointed out some illegal practices (to gain supporters) include, but not limited to, the following:

> (..) Support through threats, intimidation, and coercion- in one case, for instance, the political party's agent distributed the party's identification card from home to home, whether those citizens want it or not. One housewife said: "they ask if you have the card yet? If not, they will give it to you, and hey said that it is convenient for you to have it to have better cooperation with the authorities. If not, it will be hard on you, and they ask for your thumbprint promising to vote for the party." (…) Forming a collective group- in another case, the practice is to form a collective group of ten members including 2 or 3 core members. They would instruct their core members to recruit new members. The core members also need to follow

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closely anyone who has already join another political party, and/or to track him/her down.

Even there was a decrease in 7% of the 2003 voter turnout, but the percentage was still high. The small percentage of decrease in the number of voter turnout in 2003 might have resulted from various reasons such as technical issue of presenting voter lists on the polling day or the confusion of monks' right to vote. ANFREL (2003) reported, "Considering monks participating in the elections…chief incumbent in Kratie temple in Kratie commune revealed that the Buddhist monks in his temple did not go to register this time because they received information from high ranking monks in Phnom Penh that voting is ethically wrong for Buddhist monks; The chief incumbent further said that even though they did vote in previous elections…". Though the percentage of the voter turnout was still high from one national election to another, it could not be interpreted that it was the reflection of free and fair process of the elections, but, in the opposite, it was the result of threats manipulated. Voters were manipulated to vote for one party through the form of intimidations. If looking at the election results, it is apparently seen the number of seats obtained by the dominating party (CPP) has been increased since the 1993.

Thus the failure in legal actions by criminal justice holders such as prosecutors and judges cause impunity which, in turn, encourage more violence, and violence which directly impact on the feeling of voters has been used to manipulate the voters to express one voice. As the result, it is seen as an effective tool for the dominant party in subsequent elections discussed above.

No Checks and Balances of Powers

Stuart Coghill (2000) affirmed that the idea of separating the powers of government into different branches (parts) will ensure: (1) the establishment and maintenance of political freedom for society; and (2) that the exercise of arbitrary (unfair or unreasonable) government power by anyone person or group of people will be prevented or at least restrained. Cambodia is no different from other democratic

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nations whose democracy incorporates the concept of the separation of powers. The concept is seen as an important element of liberal democracy required by the Constitution, article 51 which says:

> The Kingdom of Cambodia adopts a policy of liberal policy and liberal pluralism. The Cambodian people are the masters of their own country. All powers belong to the people. The people exercise those powers through the National Assembly, the Royal Government, and the Judiciary. The legislative, executive, and the judicial powers shall be separate.

Therefore, the doctrine of the separation of powers as required by article 51 is very important concept common to many, if not all, of the world's democracies. In this manner, consistent with the argument on the concept of checks and balances of powers discussed in Chapter II (2-2), the doctrine of the separation of powers then requires that each of these branches be confined to the exercise of its own function and not be allowed to perform the functions of the other branches.

Anyway, in Cambodian context, though this doctrine is enshrined in its Constitution but in practice it is not applicable. Does it result from the weakness of democratic system and culture or the weakness of the judiciary, or both- democratic system and culture and the judiciary? If so, how can the independent and impartial judiciary make contribution to democratic development in Cambodia in terms of the guarantee of the principle of the separation of power?

Provided for by the Paris Peace Agreement, Annex 3(2) required Cambodia's national elections to be organized based on an electoral system of proportional representation on provincial/municipal basis, and based on the list of candidates proposed by political party. Following this, the Cambodian Constitution, article 76, stipulates, "… Preparation for the election, procedure and electoral process shall be determined by an Electoral Law"- which says, "…. The electoral system shall be proportional, with provincial and municipal representation," (article 5). With this system, it has been thought that parliamentary powers are concentrated in the hands of political party leaders who decide the order number of their party's candidates, from

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up down (first, second,..), in a list forwarded to the competent body of the election organization. On polling day, voters tick the box of the party's name, not of individual candidate, and the number of seats the party obtained shall be distributed to the candidates, respectively, from up down as put in order in the list. Because of this, it was thought the seats belong to the party, and- thus- any parliamentarian who loses membership or removed from his/her own party, he/she automatically loses position from the Houses. The case of parliamentarian Sam Rainsy, removed from the National Assembly in 1995, was an example, as mentioned above (Pol, Ham; 1998). Later on, the Law on the Election of the Members of the National Assembly was first adopted in 1997 and subsequently amended in 1998 and 2002. Article 120 says, "….. A candidate who resigns from his party shall automatically lose his membership in the National Assembly." This paragraph is seen as more pressure on the members of the parliament. In fact- based on this article- unless he/she resigns from his/her own party, he/she still holds the parliamentary position. However, it is suspected whether the party leaders can manipulate the resignation if any member of the parliament dares to challenge the party's policy.

In addition, the formation of the government- led by a dignitary elected as prime minister whose candidate requested by the winning party- requires the two-third adoption of the entire members of the National Assembly. Article 90 of the Constitution says, "….. The Assembly shall pass a vote of confidence in the Royal Government by a 2/3 majority of the entire assembly members," and article 119 stipulates "At the discretion of the President and with the agreement of both Vice-Presidents of the National Assembly, the King shall designate a dignitary from among the representatives of the winning party to form a Royal Government. This designated dignitary shall lead his colleagues, members of the Assembly or political parties, represented in the Assembly who are to be placed various positions in the Royal Government, to ask for a vote of confidence from the Assembly. …" With the government formation by the two-third adoption of the Assembly members, it shows that the number of the Assembly members who vote to form the government can dominate the Assembly as a whole. By the current Constitution (2005), two-third of votes of the Assembly members as a whole can decide all issues. So, at least, two-

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third of the Assembly members are surely not on side with the opposition, but naturally advocate and follow their party- the ruling. Therefore, in the context of political culture of Cambodia- the winner taking all and the governed valuing political patronage, and the fact that majority of people with low education have yet strong participation in exercising democratic rights- it is hard to expect that the legislative can check powers against the executive, even though the former is empowered by the Constitution. From this point of view, only one hope that can be expected to check the government's activities is the judiciary, by which people can exercise their powers. Article 51 of the Constitution stipulates that all powers belong to the people; and the people exercise these powers through the National Assembly/Senate, the Royal Government, and the Judiciary.

Through the judiciary, Cambodian people can check the activities of the government as enshrined in article 39 (the Constitution) which provides for "Khmer citizens shall have the rights to denounce, make complaints or files complaints against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall reside under the competence of courts."

With the judicial independence guaranteed by the Constitution, the judiciary power shall cover all lawsuits including administrative ones; the authority of the judiciary shall be granted to the Supreme Court and to the lower courts of all sectors and levels (article 128), and judicial power shall not be granted to the legislative or executive branches (article 130). Therefore, not the legislative, nor the executive, only the judiciary can adjudicate cases, including administrative ones, brought to it. That is a need for the true independence of the judiciary, and with such independence the very role of the judiciary can act as a brake on the powers of the executive.

However, as discussed above, the most of cases that directly impact on the process of democratic development are criminal offenses, committed by, most of them, the government officials who have never been brought to justice. For instance, offences are committed to intimidate or to interfere with the free exercise of electoral rights of a voter or candidate ….. that bound by article 64 of the UNTAC Penal Code. Such

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offences happened a lot during each election process, and those offences seriously affect the process of free and fair elections, as discussed above. For those cases, people can also exercise their powers to keep the executive to hold accountability by the mean as mentioned in article 39 of the Constitution. But, dealing with criminal offenses, the judiciary can't adjudicate cases without proceedings forwarded to it by the prosecution department. Article 8 (para.1) says, "The exercise of penal action and putting it into process are the responsibilities of the prosecution department," article 52 "Concerning the penal jurisdiction, the prosecutor shall be always the principal party. In that sense, this is the prosecutor files the prosecution in the court, by accusing and asking for the application of the law upon the accused," (1993 Criminal Law). By this mean, the compositions of criminal justice system- prosecutors and judges, especially- are needed to be independent and impartial in performing legal duties, otherwise there is no effective mechanism to check the executive's activities. If prosecutors and judges dare to independently and impartially take legal actions against illegal practices of the state officials, the executive can be kept accountable to the people. If like this, the judiciary can check the executive's activities through adjudication.

For another thing, with the policy of liberal and pluralism enshrined in the Constitution, people exercise their powers through the three branches of the government as referred to above. Except the judiciary, other two- the legislature and the government- are established through the result of popular elections- the Assembly members elected by people's votes and the government formed by the representatives (Cambodian Constitution). Article 76 of the Constitution states "…. the duties shall be elected by a free, universal, equal, direct and secret ballot." Anyway, as discussed in the Section- "Impunity: Politically Motivated Violence"- above, if voters are faced with intimidation or violence to vote for any party, the votes don't reflect their will at all. As a consequence, they can't choose deputies to represent or serve them, and, in turn, the government elected by their representatives also doesn't work to meet the will of the voters. Nevertheless, this can't happen if the prosecutors and judges, with their judicial duties, take actions against perpetrators and put an end to the impunity. Therefore, through the independence and impartiality of prosecutors and judges,

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people can influence the executive by their votes. By that mean, the judiciary can check the executive power through people's influence over elections.

On the other hand, through the Constitutional Council (CC), the judicial branch can also check the power of the executive. The CC is the top body to interpret constitution and to decide on electoral disputes (article 136), and its decision is final (article 142). From these legal frameworks, the CC is the last resort for parties to find justice in the electoral disputes and the top body to guarantee free and fair elections. Thus, its duty in this regard does directly impact on democratic development.

According to Article 137 of the Constitution, "the CC shall consist of nine members with a nine-year term. 1/3 of the members of the Council shall be replaced every three year. 3 members shall be appointed by the king, 3 members by the Assembly, and 3 others by the SCM." Based on the way of selecting members, it is seen the three appointed by the Assembly must not be independent and surely be biased with the ruling party, which dominate the Assembly. Article 8 of the Constitution states "The King of Cambodia shall be a symbol of unity and eternity of the nation. The King shall be the guarantor of the national independence,". As the three appointed by the king symbolizing the unity and independence of the nation, the other three appointed by the SCM are the key to balance between the two groups. As the CC is the top body to interpret constitutionality, through it the SCM can check powers of the Assembly and of the executive as well. However, the CC can't be independent unless the SCM independent. As discussed above, the SCM is not independent. Hence it causes the non-independence of the CC, which really undermines the environment of free and fair elections and can't prevent the violation of the constitution by other branches. That clearly impacts on the democratic process. (For instance), On 18 August 2003, FUNCINPEC and SRP criticized the Constitutional Council for being politically biased (FORUM-ASIA, 2003).

Therefore, it is seen that the lack of the independence and impartiality of the prosecutors, judges and the SCM (as the component of the elements of criminal justice system) also cause the absence in checking and balancing power of the executive.

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CHAPTER VI
CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Since 1993, Cambodian democratic system and policy have been clearly introduced in its Constitution. As a strong foundation for the strength and sustainability of the system and policy, the Constitution also guarantees the practices of human rights enshrined in UDHR and other international conventions such as ICCPR. Such a guarantee enables Cambodian people to enjoy the performances of their rights to participation in political freedoms that is a push for a strong democracy in the country. However, popular participation is not possible unless the exercise of human rights in this kingdom is credibly protected by a strongly independent and impartial judiciary. As discussed in Chapter IV, the basic function of the judiciary is to protect the violation of the rights of the citizens by the government. Hence there is need for an independent and impartial judiciary otherwise the criminal justice system is weak and that would be a danger for democratic development as already discussed in previous Chapters. "…Any state without duly established courts simply ceases to be a state," (Plato, The Laws; "London: Penguin Books, 1975", p.242).

Anyway, as discussed in the last Chapter, current Cambodian judges and prosecutors are not independent, nor impartial. Referring to Chapter IV, even not all, many of them were appointed by Cambodian communist government backed by communist Vietnam before 1993, educated in and influenced by the practices of communist judicial system; and old judicial structures of the communist system still exist even after the 1993 despite the new concept of the judicial independence and impartiality introduced by the new Constitution adopted in that year.

If we look at the history of Cambodian judiciary, according to World Bank (2004), among the 400-600 legal professionals prior to 1975- some 10 remained in the

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country five years later (after the fall of Khmer Rouge regime). So there was very small number of legal professionals left in the country at that time. Because of that, many prosecutors and judges appointed by the communist government during 1980s didn't have legal professional qualifications. Then, in addition to the political system of communism, those prosecutors and judges performed their jobs depending on their instructions and were only a ruling machinery of the state to protect the powers of political leaders. So what those prosecutors and judges experienced and had to learn were to understand the guidelines of the party, follow the guidelines, and have role to follow instructions of the party leadership. That was the practice against the concept of judicial independence and impartiality. Anyway, those prosecutors and judges have been still in positions after 1993, when new government was democratically elected. Since the old system of the courts is still applicable, so those prosecutors and judges still practice the same way they did during communist regime. Hence they not only lack independence and impartiality, but also lack understanding their role to protect the rights of the citizens from violation by the government.

In additional, even after 1993, prosecutors and judges were also appointed based on political party affiliation, and corrupt (as discussed in Chapter IV). Capacity of prosecutors and judges is also a problem. Like 2003 annual reports of the SCM, World Bank also pointed out this problem. According to World Bank (2004), only one in six of Cambodia's 117 have a law degree, and only one of the nine Supreme Court judges; and only 10% of public prosecutors has law degree. Because of such appointment, prosecutors and judges are not independent as they are surely influenced by the ruling party or the executive by which they were appointed. Corruption is a factor causing the prosecutors and judges not impartial because they would make judgment based corruption rather than based on facts. The low capacity of legal professionalism is another cause that leads to the lack of independence and impartiality of the prosecutors and judges because they would need intervention such as instructions or legal advices when they judge cases.

However, if the SCM- whose role to promote and protect the independence and impartiality of the judiciary- is strong and effectively performs its duties, that

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would be a strong mechanism to guarantee the judicial independence and impartiality. With that role, the SCM can prevent the interferences from the outsiders in the judiciary or protect the prosecutors and judges independent from the influences of the executive or political parties. The SCM can also punish the prosecutors and judges who misconduct such as the commission of corruption. Anyway, because of the lack of its independence and impartiality as discussed in Chapter IV, the SCM itself doesn't perform effectively its duties provided by adopted laws, nor protect the independence and impartiality of the prosecutors and judges. The cause of the non independence and impartiality of the SCM is seen as a political motive. As discussed in Chapter V (5-2), because of Cambodian political culture as zero-sum game, the powerful ruling party uses the judiciary as a mean to concentrate or consolidate its powers and also a mean to eliminate or weaken its opposition. By this way, the ruling party has no reason to let the judiciary be independent and impartial. That's why the ruling party needs to firmly control the SCM. We can see a lot of impacts resulted from the non independence and impartiality of the judiciary on the process of democratic development and because of that the ruling party also gains a lot of advantages over its opponents.

The lack of judicial independence and impartiality is the factor for the non effectiveness of the criminal justice system (CJS) in Cambodia. This causes the matters of injustice, intimidation, and violence or human rights violations in the society. But, on the contrary, it should be effective to prevent those issues. As discussed in Chapter V (5-2), the opposition were attempted to eliminate, ousted from the positions, exiled, and weakened by breaking into small groups. These all link to the non effective functioning of the CJS which failed to perform its duties to protect justice for all citizens without prejudice. That was a failure to protect the principle of equality before the law or equal protection of the law. Thus, the powerful always dominate the powerless. In this context, the opposition usually suffered injustice when they faced conflicts with the ruling party which dominates the judiciary. Like the case of 1998 national elections, the opposition lost a lot of opportunity to prepare themselves for the election contest as they faced troubles needed to be solved through the CJS. Because of the lack of independence of the prosecutors and judges who failed to perform their impartial duties, as the result it was unfair for the opposition to

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compete with the ruling in the 1998 elections. Thus, much or least, such functioning of the CJS surely affected the election results of the opposition. Even it didn't impact on the election results, it also violated the democratic principle of equality before the law that should be fair for all sides if they had equal opportunity for the election competition.

Besides this, the non effectiveness of the CJS is also an obstacle to the practices of human rights by the citizens or retards the people's participation, in public affairs, considered a basis to speed up democratic development in the country. Certain examples cited in the Chapter V (5-2) showed the violations of police on the right to peaceful demonstrations and impunity of perpetrators committing criminal offenses on voters. These are the main points limiting or preventing people's participation. If CJS is effective, police breaking laws and other perpetrators should be brought to justice, and then it was seen as a credible mechanism to prevent or stop such criminal offenses and to protect people's rights guaranteed by applicable laws. Even all such offenses could be completely stopped, but at least it is a brake on the commission of the crime and also an incentive of the people who exercised those rights. Limitation on right to peaceful demonstration is an illustration of a pressure on free and direct participation by the people in public affairs of the nation; And the failure of the CJS to bring perpetrators to justice causes impunity and also a real threat to people or voters in making their own decisions of supporting or voting for political party.

The non independence of the judiciary is not only a factor resulting in the failure in guaranteeing and protecting human rights or preventing human rights violation, but also leading to the lack of checks and balances of powers as discussed in the last part of Chapter V. Because of that, all powers- including judicial power- are concentrated in and assumed by the executive. It is a serious impact on democratic development in this country as human rights can't be protected and the separation of powers can't be guaranteed. Any society in which the guarantee of human rights is not assured, nor the separation of powers set forth, has no (legal) constitution; (Declaration of Rights of Man and of the Citizen, 26 August 1789).

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Thus, the non effectiveness of the CJS is an obstacle to democratic development in Cambodia.

6.2 Recommendations

1. Cambodia should have a new criminal law and only one law to replace the existing ones- the 1993 Law on Criminal Procedure of the former State of Cambodia (SoC) and the 1992 Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period of UNTAC. As now there are two criminal laws applicable and both have certain points contradicted between each other. Then there can be interpretation of using any one of them based on interest of prosecutors or judges. Thus, instead of two, one law is a common tool for prosecutors or judges to use as a basis to make judgments of cases brought to them. To make it happen, the Ministry of Justice which has spent many years to draft the new criminal law should speed up finalizing it sent to the Council Ministers of the government for discussion and, the last, submitted the National Assembly for debate and approval. The law should meet the international standards of human rights.

2. The new criminal law should clearly clarify, among other things, the management line of the office/department of the public prosecution, which should not be under the supervision of the Ministry of Justice as now mentioned in the 1993 Criminal Law (article 55). Also, the new law should clearly state the office of the public prosecution as independent and impartial institution to represent and protect the public interests, and the independence and impartiality have to be defined in the law.

3. The current LOFSCM (Law on the Organization and Functioning of the Supreme Council of Magistracy) should be amended. The new LOFSCM should clearly introduce a procedure for the selection of prosecutors and judges, the criterion of candidates for prosecutors and judges, a clear definition of misconducts of prosecutors and judges and the determination of punishment for misconduct,

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procedure for making complaints to the SCM against delinquent prosecutors or judges. The complaining procedure should provide citizens with access to individual communication with the SCM and the personal security of the complainant(s) must be taken into account. This amendment should be initiated by any National Assembly member as article 91 of the Constitution says, “The deputies shall have the right to propose any amendment to the law(s).”

4. The new LOFSCM should clearly state prosecutors or judges who ignore or fail to perform duties required by laws have to be faced with disciplinary action. This should be one among the other misconducts of prosecutors and judges that will be defined by the law. Thus, prosecutors and judges shall be kept accountabilities to the nation. The disciplinary actions must be taken by the independent and impartial SCM and a clear procedure for punishment must be stated in the LOFSCM.

5. To reach the objective of the independence and impartiality of the SCM, the current members of this body and the present procedure of the appointment of the SCM members should be reformed. To maintain the goal, the new LOFSCM should clearly define the criterion of candidates for SCM members and their mandate. The new procedure of the selection of the SCM members should be: Candidates should be proposed by the king and appointed by the simple majority vote of the National Assembly members as a whole. However, the number of candidates proposed by the king should be twice more the actual number of the SCM members. For instance, the actual number of SCM member needed is 9, so the number of the SCM’s members proposed by the king for the approval by the NA should be 18. Because the Constitution states the king shall be the guarantor of the independence of the judiciary and the SCM shall assist the king in this matter, so the king should have the authority to propose the candidates of the SCM members.

6. International donors, in particular certain leading democratic countries like the United Kingdom and the United States, should also play role in guaranteeing the

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judicial independence by convincing Cambodia to have a new criminal law and other concerned laws consistent with international standard, and to reform the LOFSCM and its members. The role of international community played in this area should more important because- according to the economic report- more 50% of the annual budget, Cambodia receives from the international aid.

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APPENDIX

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APPENDIX A

List of Interviewees

No.	Name	Position and Institution	Date of Interview
	Legal Experts		
01	Dr. Lao Mong Hay	Chief of Legal Unit; Center for Social Development (CSD).	
02	Lawyer Suon Visal	Chief Technical Advocate; Cambodian Defenders Project (CDP).	
	NGO Leaders		
03	Dr. Kek Galabru	President; Cambodian League for the Promotion and Defense of Human Rights (LICADHO).	
04	Mr. Thun Saray	President; Cambodian Human Rights and Development Association (ADHOC).	
05	Lawyer Sok Sam Oeun	Executive Director; Cambodian Defender Project (CDP).	
	Judge, Prosecutor, Officials concerned		
06	Mr. Mong Monichariya	Judge; the Supreme Court.	October 26, 2004
07	Mr. Koeut Sekano	General Secretary; Royal School for Judges and Prosecutors.	November 04, 2004
08	Mr. You Bun Leng	Judge; the Appeal Court.	November 22, 2004
09	Mr. Song Sokphearum	Assistant to the Secretary of the Secretariat of the Supreme Council of Magistracy.	November 23, 2004
10	Mr. Uk Vithun	Attorney General at the Supreme Court; and the member of the Supreme Council of Magistracy.	December 03, 2004

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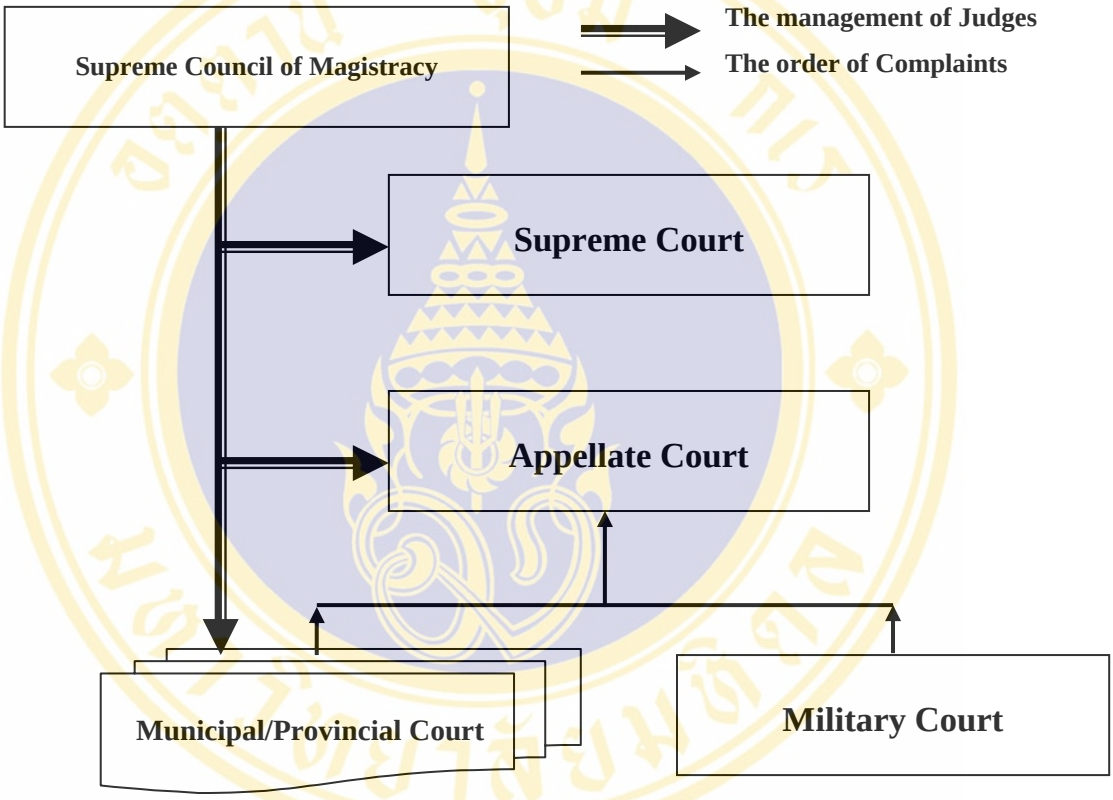
APPENDIX B

(Source: Sok, Sam Eun; 2005)

STRUCTURE OF COURTS



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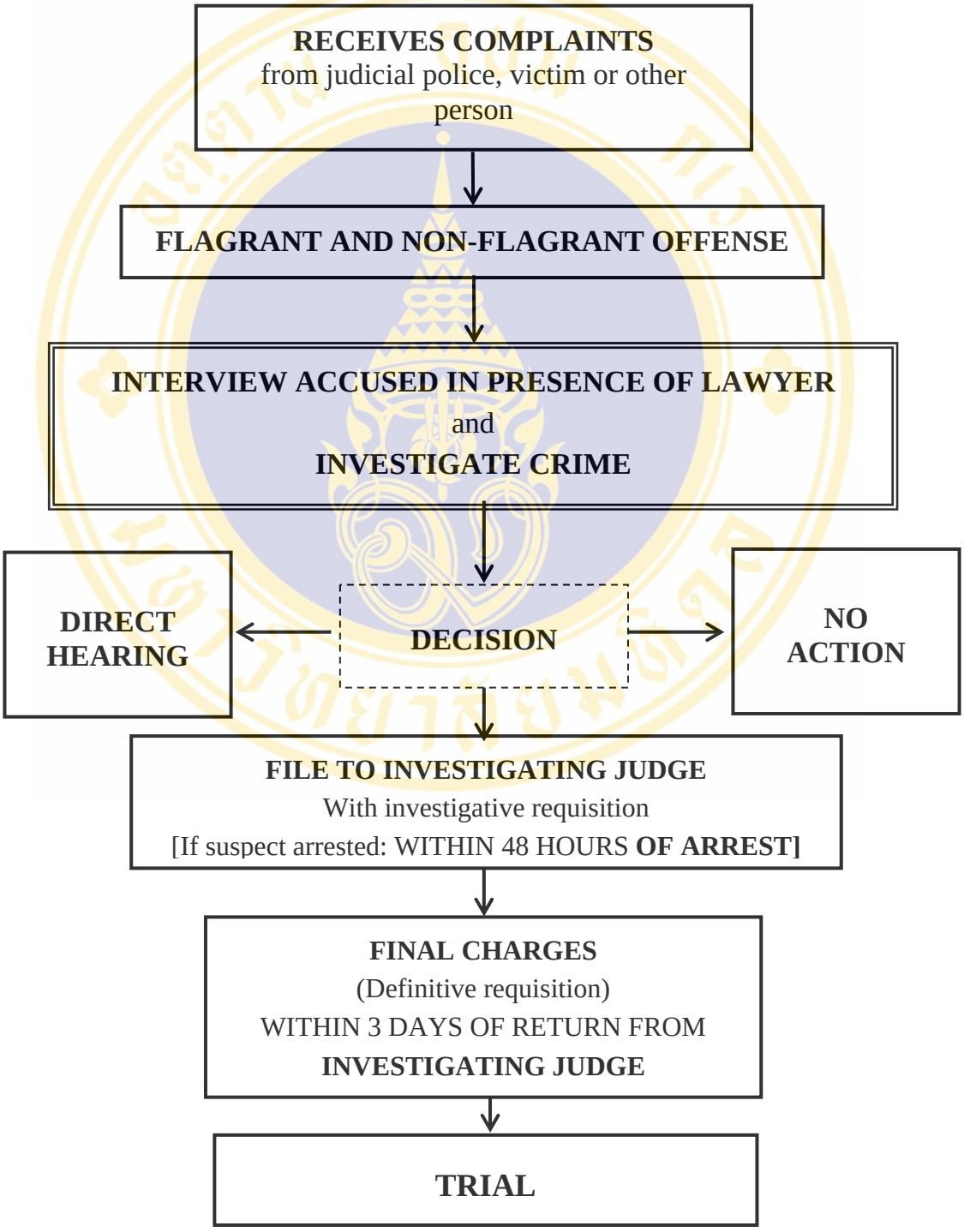
APPENDIX C

(Source: Stuart Coghill, 2000)

ACTION BY PROSECUTOR



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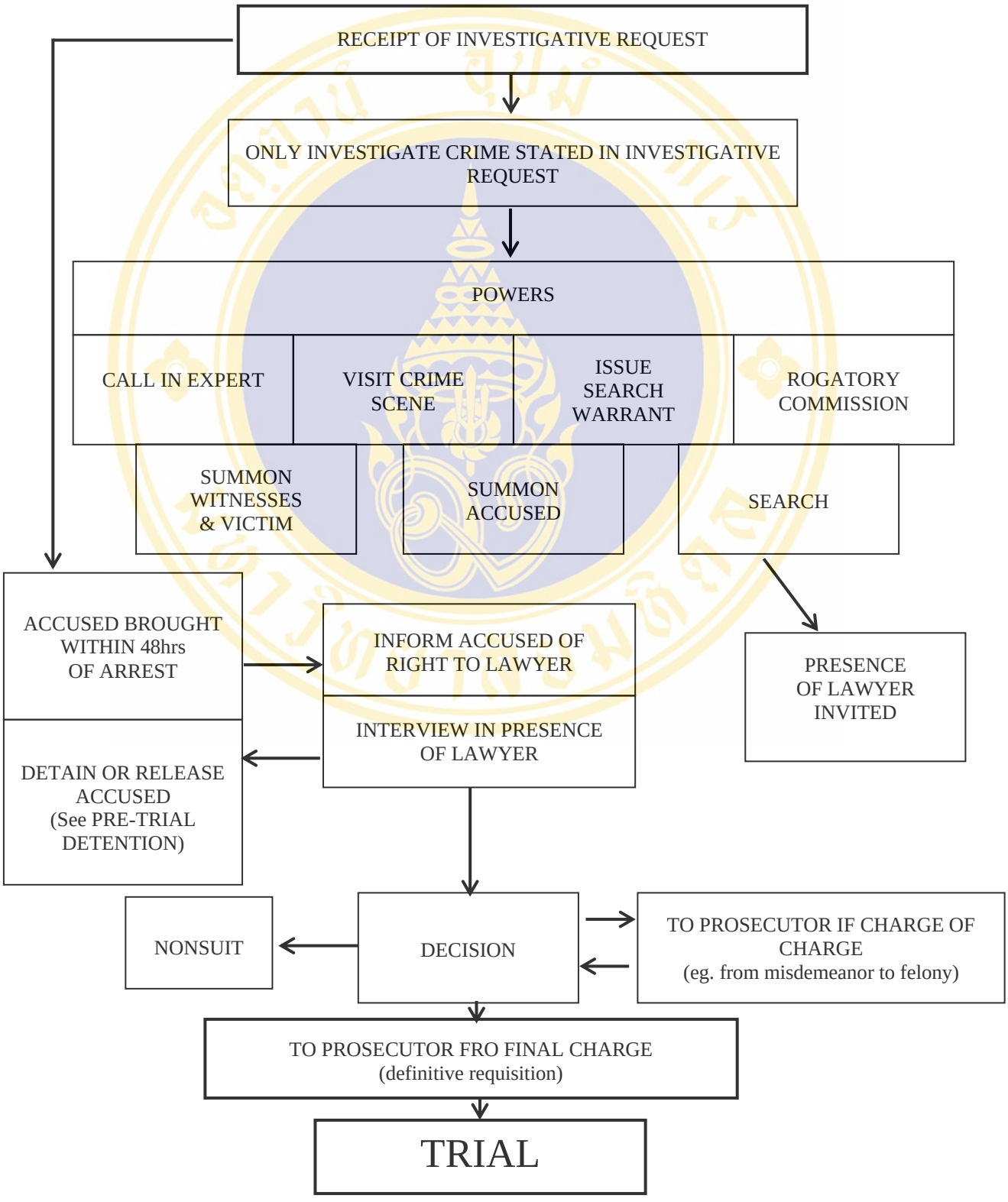
APPENDIX D

(Source: Stuart Coghill, 2000)

INVESTIGATION BY INVESTIGATING JUDGE



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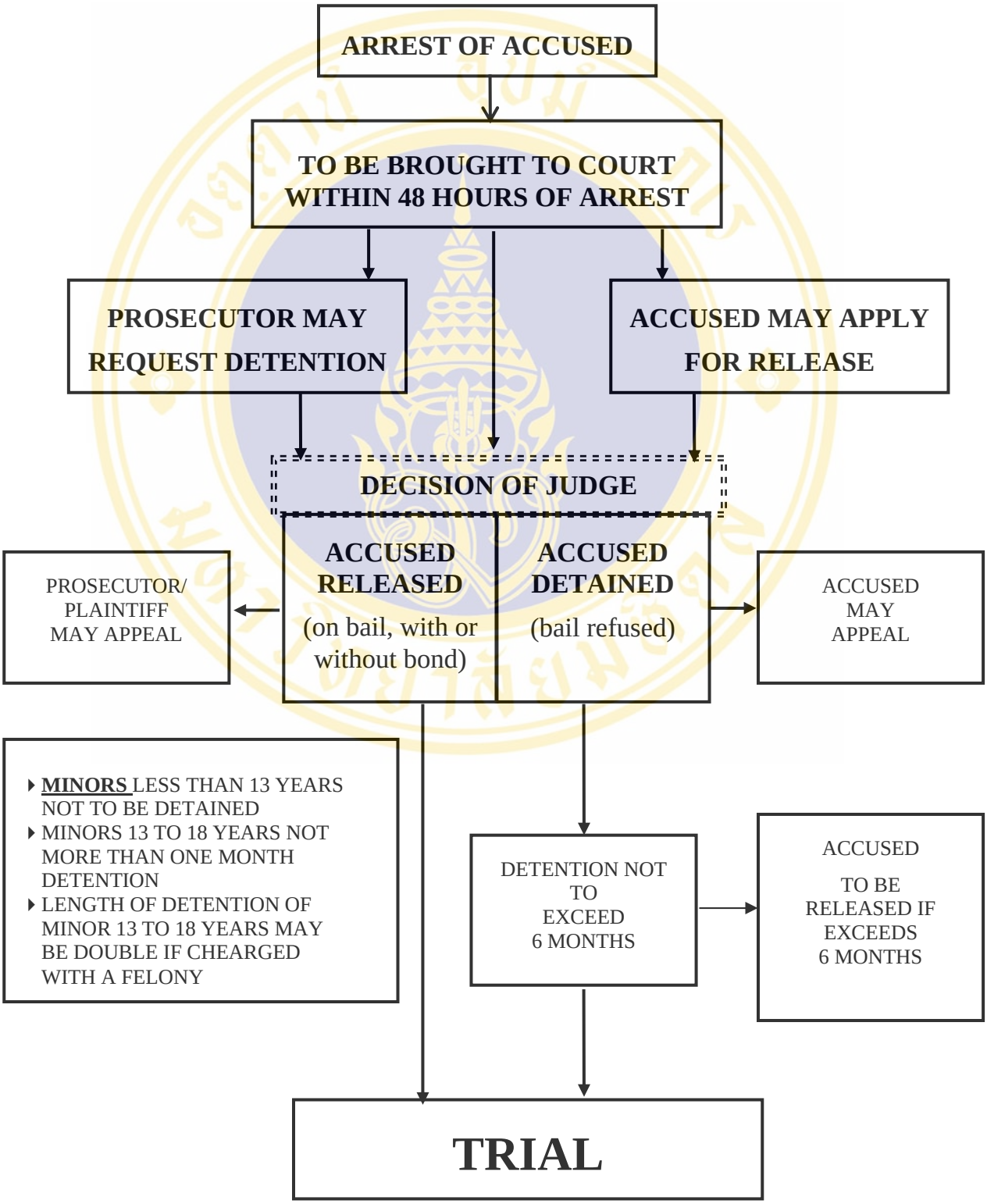
APPENDIX E

(Source: Stuart Coghill, 2000)

PRE-TRIAL DETENTION



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