

Legal Development in Cambodia before and after Japanese Assistance

Presented by NOP Kanharith¹

Welcome to Cambodia. Today remarks the fifth year of the enforcement of the Civil Code and ninth year of the enforcement of the Code of Civil Procedure of Cambodia. Thanks to the generous support of the Japanese government and people for their contribution to making these fundamental laws come into existence. If compared to the Civil Code of Japan promulgated in 1898 with long history and experience of enforcement, it is undeniably true that the topic of Civil Code is still new for Cambodians and enforcement of this Code is still in the development stage.

One of the challenges for joint working group composed of Cambodian and Japanese legal experts in charge of codification, I would like to highlight in this article, is that before the codification, there have been several specific laws adopted under the support of foreign donors having different laws and legal systems. These laws are still in place and in force and must be taken into consideration for codification. Meanwhile, French government also took part in adoption of the criminal code and code of criminal procedure. However, this article only provides an overview on the legal development in Cambodia before and after support of Japanese people.

Before codification

Cambodia was ruled under the kingship with applied local customary, social and religious norms and from 1863 until 1953 it was subject to French protectorate/colonialism for almost a century.² In 1920, Cambodia adopted its first Civil Code, which was heavily influenced by the Napoleonic Code of 1804. In 1947, Cambodian adopted and promulgated its first written Constitution, which was the combination of traditional and modern constitutionalism, namely the kingship, royal instructions and religion, a limited government, civil and political rights and due process of law.³ On 9th November 1953, Cambodia finally won independence from France.

After the Government of the Khmer Republic came to power by means of military force through the coup d'états in March 1970; the second Constitution of Cambodia was promulgated on 10 May 1972 replacing the Constitution of 1947. The second Constitution was adopted with the influence of the French Constitution of the Fifth Republic and the U.S. Constitution with liberal democratic system of presidential government.⁴ During this period, the Civil Code of 1920 remained in force. The first Labor Code of Cambodia was adopted in 1972; however, its enforcement seemed to face troublesome due to social and political chaos during the time.

The collapse of the Khmer Republic in 1975 led Cambodia to another regime and Cambodia had its third Constitution that was promulgated on 5 January 1976 and officially named Cambodia as “Democratic Kampuchea” and known as Pol Pot Regime. However, during this period, the principles of socialist constitution remained only in the text and were not ever put in practice. From 17 April 1975 to 7 January 1979, Cambodian people were living under genocide regime, which had the right to decide the life and death of everyone. All pre-existing laws and legal

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² Hor Peng, et al., Introduction to Cambodian Law, at 31-32 (2012), available at http://www.kas.de/wf/doc/kas_31083-1522-1-30.pdf?120720080906.

³ *Id.* at 33

⁴ *Id.* at 35

systems were destroyed and those who were educated in law or other fields, such as teachers and medical doctors, were killed. The Civil Code of 1920 and Labor Code of 1972 were not used during the Pol Pot regime.

After the collapse of the Pol Pot regime in 1979, Cambodia entered a period involving the rebuilding of everything.⁵ On 9 July 1981, the fourth Constitution of Cambodia was promulgated and officially named Cambodia as “People Republic of Kampuchea”. This Constitution was adopted based on the socialist constitution. On 28 October 1988, the government of People Republic of Kampuchea adopted Decree Law No. 38 concerning the contracts and other liabilities. On 26 July 1989 the Law on Marriage and Family was adopted. There were many administrative rules and circulations adopted to cope with the situation at the time.

The end of cold war and demand for national reconciliation led to the amendment of the Constitution of 1981 and consequently the fifth Constitution of Cambodia was promulgated on 20 May 1989 and officially named Cambodia as “State of Cambodia”. This Constitution changed the economic system from a system of economic planning to a free market system.⁶ To gradually realize the free market economy, the State of Cambodia started to grant the citizens full right to possess, use and inherit the land in 1989.⁷ In 1992, Land Law and the second Labor Code of Cambodia were adopted.

Please note that the collapse of Pol Pot Regime did not bring peace to the whole nation until the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, which was signed in Paris in the present of United Nations on 23 October 1991. From 1991 to 1993, Cambodia was in a transitional period⁸ to build new government under temporary control of the Supreme National Council of Cambodia (SNC) which was the unique legitimate and source of authority and under the support of the United Nations Transitional Authority in Cambodia (UNTAC) which was established by United Nations Security Council. During this period, SNC adopted the Provisions dated 10 September 1992 relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period.

On 24 September 1993, a new Constitution was promulgated based on six basic principles required in Annex 5 of the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict. (1) The constitution is the supreme law. (2) The constitution protects human rights. (3) The constitution declares Cambodia’s status as a sovereign, independent and neutral State, and the national unity of Cambodian people. (4) The constitution states that Cambodia will follow a system of liberal democracy, on the basis of pluralism. (5) An independent judiciary will be established, empowered to enforce the rights provided under the constitution. (6) The constitution will be adopted by a two-thirds majority of the members of the constituent assembly.

The Constitution, article 56, provides that “ the Kingdom of Cambodia implements the market economy system.” To realize the market economy, the Constitution recognizes and protects the rights to ownership of the citizens (Article 44) and the right to freely sell and exchange their own products (Article 60). The obligation to sell products to the State or the appropriation, even

⁵ Dolores A. Donovan, “Cambodia: Building a Legal System from Scratch,” *International Lawyer (ABA)* 27 (1993).

⁶ Constitution of Cambodia, art. 56 (1993) (Cambodia)

⁷ Directive No. 03 SNN on the Implementation of the Policy on Management and Use of Land, (1989) (Cambodia).

⁸ Based on Article 1 of the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, the transitional period commenced with the entry into force of this Agreement and terminated when the constituent assembly elected through free and fair elections, organized and certified by the United Nations, has approved the constitution and transformed itself into a legislative assembly, and thereafter a new government has been created. United States Institute of Peace, Agreement on a Comprehensive Political Settlement of the Cambodia Conflict: Paris 23 October 1991 (1992), available at http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/agree_comppol_10231991.pdf.

temporarily, of private riches or possessions by the State is prohibited, except under conditions specially authorized by the law. To guarantee free and fair competition in the market, Article 63 of the Constitution provides that the State must attend to regulating the markets in order to secure a suitable living standard for the citizens. In compliance with the new constitution along with the political and social change, Cambodia adopted the Labor Law on 13 March 1997 and Land Law on 20 July 2001.

During the preparation for membership and after Cambodia's accession to World Trade Organization on 13 October 2004, Cambodian law and legal system have been remarkably developed. For example, Law on Commercial Enterprises was adopted on 17 May 2005 and promulgated with urgent effect. The Commercial Arbitration Law of the Kingdom of Cambodia was adopted on 6 March 2006. Law on Secured Transactions was adopted on 24 May 2007 and promulgated with urgent effect. Law on Insolvency was promulgated with urgent effect on 8 December 2007.

Codification process

After enactment of the Constitution in 1993 that was the outcome of the Paris peace agreement, Cambodian government needed to develop its legal and judicial system towards the liberal democratic society and market economy. Financial and human resources were the concerns. Hence, foreign technical and financial supports in the legal field have been welcomed. Japan started to provide Official Development Assistance (ODA) in 1954 and Japan International Cooperation Agency (JICA) was established in 1974 to carry out the assistance in various fields.⁹ Japanese government began its assistance to Cambodia by provision of training courses in 1996 and dispatched the Japanese experts to Ministry of Justice to conduct general survey to understand the situations of legal and judicial field in 1997.¹⁰ Ministry of Justice requested for technical cooperation in the legal and judicial field to the Japanese government and then a preliminary survey team came to Cambodia to conduct the study on the possibility of assistance.

The project on the technical cooperation in the legal and judicial field started in 1999. The project aims at "supporting human resource development in the legal system of Cambodia by means of providing professional experience to the Cambodia counterpart personnel through bill-drafting improvement of law-enforcement procedures, and enhancement of the knowledge and capacity of the Cambodian judges, prosecutors, attorneys and other judicial officials."¹¹ The main activities of the project includes assistance in (1) drafting the civil code, code of civil procedure, laws and regulation in relation to codes; (2) improving administrative organization of the court and prosecution; (3) training of judges, prosecutors, attorneys and other judicial official (via MOJ); (4) improvement of legal education; and (5) provision of reference information on legal institutions and laws related to market economy.¹²

Before talking briefly about the codification of the codes, it is also important to mention the basic policy with respect for legal assistance operated by JICA. There are two main basis policies developed based on the experience in developing legal system in Japan, namely (1) respect for the ownership of a recipient country and (2) legal assistance that takes root in a recipient country.¹³ Regarding the first policy, the ODA must get involved the government of the

⁹ International Cooperation Department Research and Training Institute Ministry of Justice, ICD NEWS: LAW FOR DEVELOPMENT (2003), available at <http://www.moj.go.jp/content/000111066.pdf>.

¹⁰ Record of Discussions between the Japanese Implementation Survey Team and the Ministry of Justice of the Kingdom of Cambodia on Japanese Technical Cooperation in the Legal and Judicial Field, at 6 (1999), available at <https://www.jica.go.jp/project/cambodia/0701047/04/pdf/materials/02a.pdf>.

¹¹ *Id.* at 7.

¹² *Id.* at 7.

¹³ International Cooperation Department Research and Training Institute Ministry of Justice, *supra* note 9, at 9.

recipient country in the process of legal assistance to get its understanding that the fruit from this ODA belongs to the recipient country. To achieve this objective, prior discussion with the recipient country is necessary and recommendation to the recipient country must consist of (a) provision of alternative, (b) explanation of advantage and disadvantage of these alternative and (c) allowing the recipient country to make its own final decision. With respect to second policy, legal assistance must make sure that development of law corresponds to the actual situation and conditions of the recipient country and at the same time incorporate democracy and free market oriented principles leading the society to what is expected in the laws. To achieve this objective, Japan has adopted the following measures such as (a) prioritization the development of basic laws from a long-term perspective; (b) transfer of legislative technicalities and capacity building through participation, (c) capacity building for legal experts and practitioners; and (d) scholarship for foreign students.

The project of technical assistance in drafting the Civil Code and Code of Civil Procedure started in March 1999. According to Professor Morishima Akio who was chairperson of working group in charge of drafting civil code, two working groups and each composed of 10 members who are scholars, judges, and staff of Research and Training Institute of the Ministry of Justice were established to prepare the proposal for the drafts.¹⁴ The working group members traveled to Phnom Penh to hold a workshop with judges, officials of the Ministry of Justice and other ministries of Cambodia and examined the translation from Japanese to Khmer language. They aimed to draft the codes, which are acceptable by the Cambodian people through creation and amendment of the draft code by adjusting with opinions of people in the legal profession and of judges who were knowledgeable about the real situations and conditions of Cambodian society and who would be in charge of implementing the Civil Code and Code of Civil Procedure.

The draft civil code was designed to provide provisions dealing with rights and obligations relating to property and right of all free citizens in product exchange society.¹⁵ To realize the product exchange in a society is only when citizens have ownership over the property (real rights) and be treated equally in exchanging their property with that of other citizens based on free will through contract. Law on family-related issues provides provision governing marriage, family relations such as parent and child relations, and succession. The working group prepared the draft civil code in consultation with the continental laws such as Japanese, French and German laws. In addition, they also took into account the pre-existing laws and regulations of Cambodia such as the Civil Code, Decree Law No. 38 on contracts and other liabilities, Law on Marriage and Family, and Land Law of 2002.

Based on Professor Takeshita Morio, who was the chairperson of working group in charge of drafting the code of civil procedure, the code was drafted by adhering to the following policies.¹⁶ Firstly, the content of the draft law on the one hand should agree with the currently practiced procedure in Cambodia and on the other hand incorporate principles of procedures of a country promoting democracy and the rule of law. Secondly, the draft shall be made with effort of both countries. The draft, which was initiated by Japanese working group, had to be discussed with Cambodian working group and finally adopted by respecting the opinion of Cambodian working group. Thirdly, the implementation of code is the task of Cambodians. Accordingly, promotion of human resources through a cooperation of drafting the code of civil procedure is very important. The draft of code of civil procedure introduced the fundamental principal such as (1) purpose of the civil action, (2) guarantee of right of access to courts, (3) guarantee of right to claim a hearing, (4) principle of “La Contradition”, (5) civil procedures and the jury

¹⁴ See speech of Professor Morishima Akio on Japanese Cooperation to Support the Formulation of Key Government Policies on Legal and Judicial System of the Kingdom of Cambodia and the Draft of Civil Code. *Id.* at no page.

¹⁵ *Id.*

¹⁶ See speech of Professor Takeshita Morio on Significance of Providing Support for the Drafting of the Code of Civil Procedure of the Kingdom of Cambodia, *Id.*

system/citizen participation system (not adopted due to different implementation), (6) organization of the court of first instance, (7) scope of the principle of open court, and (8) method of appointing judge to be in charge of case.

After the codification

The Code of Civil Procedure was promulgated on 6 July 2006 and Civil Code was adopted on 8 December 2007. However, the Japanese legal assistance has yet to an end with the codification of the two codes. Implementation of the codes is the next step of the assistance. Pursuant to Article 93, paragraph 1 of the Constitution of Cambodia, in principle, law must come into force 10 days in Phnom Penh and 20 days in the whole country after the date of promulgation. However, Article 1305 of the Civil Code provides that the Civil Code must be applicable from the date to be designated separately by another law. There must be another law that determines items necessary for application of the Civil Code including transitional measures regarding application of this Law separately. It is intended that before the enforcement of the Civil Code, there should be a reasonable period for providing education to the public and to resolve the existing civil-related matters governed by the pre-existing laws that are contrary with the Civil Code.¹⁷

The Law on Application of the Civil Code, which was jointly drafted by Ministry of Justice of Cambodia and JICA, was promulgated on 31 May 2011. This Law sets forth the date of the implementation of the Civil Code as stipulated in the first paragraph of Article 1305 (Date to be Applicable) of the Civil Code and transitional measures and other items necessary for the application of this Law as stated in paragraph 2 of Article 1305.¹⁸ Article 4 of this Law provides that “the Civil Code shall be applicable from the date of entry into force of this Law.” And Article 84 further states “after entry into force throughout the country, this law shall become applicable after 6 months of its publication.”

Since the existing laws such as Land Law, Law on Marriage and Family, and Decree Law No. 38 on Contracts and Other Liabilities have many provisions relating with issues regulated by the Civil Code, there shall be adjustment or harmonization between those existing laws and the Civil Code. Consequently, the Law on Application of the Civil Code provides that to some extents the Civil Code has the retroactive effect on the purpose to protect the existing rights and obligations under the existing laws. With respect for the implementation of the Civil Code, Article 5 of the Law on Application of the Civil Code reads:

1. The Civil Code shall not apply to matters occurring before the Date of Application set forth above in Article 4 (Date to be Applicable) (hereinafter referred to as “Date of Application”) except where otherwise provided. However, a continuing legal relations occurring before the Date of Application and still existing after the Date of Application shall be enforced pursuant to the Civil Code from the Date of Application.
2. The effect of legal provisions or customs in Cambodia before the date of the implementation of the Civil Code shall not be disrupted after the Date of Application, except where otherwise provided in Chapter 5 (Transitional Provisions) of this Law.
3. Above provisions of paragraph 1 and 2 shall not prevent fair implementation of the Civil Code to matters occurring before the Date of Application in the event that there are no applicable legal provisions or customs or existence of such provisions/customs is obscured.

¹⁷ Japanese Working Group in Charge of Drafting the Civil Code and Committee in Charge of Defending the Draft Civil Code of Ministry of Justice Cambodia, Commentary on Each Article of the Civil Code, at 166 (2010).

¹⁸ Law on Application of Civil Code, art. 1 (2011) (Cambodia).

Under the Japanese legal assistance, ancillary laws and regulations have been adopted to support the implementation of the codes. For example, Law on Civil Fine Procedure was promulgated on 31 March 2008. Law on Procedures in Actions Relating to Personal Status of the Kingdom of Cambodia was promulgated on 08 June 2010. Non-Suit Civil Case Procedural Law of the Kingdom of Cambodia was promulgated on 10 July 2010. In addition, Prakas on assigning extra judges to the provincial courts which have a shortage of judges was adopted on 19 December 2008 and Prakas on Court Deposit Procedure was adopted on 09 December 2009. Joint Prakas on registration of immovable in relation to the Code of Civil Procedure was adopted on 03 May 2011. Joint Prakas on Procedures for Registration of Real Right in relation with the Civil Code was adopted on 29 January 2013. Prakas on Matrimonial Property Contract Registration Procedure was adopted on August 2013. Laws on roles and responsibilities of court clerks, bailiffs and public notary are being drafted.

Conclusion and expectation for the future legal development

Cambodian legal system starts from law that is technically supported by foreign donors based on their legal systems to practice that may not be consistent with the purposes intended in the laws. Judges and legal practitioners in Cambodia have little experience implementation of the codes and judge-made laws or case laws have not been established yet. It may be too early to make such assumption. However, since the judgment is not published, it is difficult to understand how laws are interpreted and applied in the real cases. It is important to make sure that similar facts should have similar decision, which brings stability of laws and practices based on an expectation that the same court should have the same rules for making decisions.

The Japanese legal assistance to Cambodia is not only to draft laws but also to enforce laws by establishing workable mechanisms such as drafting laws and regulations to support the enforcement of codes and developing human resource to ensure the smooth implementation. Furthermore, it is worth noticing that to guarantee the smooth and sound implementation of the codes, explanation and commentaries on the Civil Code and Code of Civil Procedure are available for research and education. That will help the Cambodian scholars, legal professionals, practitioners and common people to understand more about the codes.

My personal view is that Japanese legal assistance to Cambodia is a successful and fruitful mission. This outcome does not happen by incident. Japan has successful experience in borrowing or transplanting foreign laws and legal systems into Japanese society through a comparative study approach. Cambodia has learnt this experience to develop its legal system for social stability and economic growth. Through getting involved with Japanese experts in drafting process, I am of the optimistic opinion that Cambodian scholars, experts and professionals have absorbed know-how and skill in law drafting from Japanese experts. JICA's continuous training of legal professions such as judges, lawyers and professors at universities will ensure the sound implementation of the codes and enhance capacity of Cambodian experts to further develop Cambodian law in the future.

Moreover, I would like to highlight that most of young Cambodian scholars, professionals and partitions can read English texts which enable them to develop Cambodian laws by referring to foreign laws and legal systems. Center for Japanese Laws (CJL) of Graduate School of law, Nagoya University located at Royal University of Law and Economics and Cambodian-Japan Cooperation Center (CJCC) at Royal University of Phnom Penh are providing Japanese language education to Cambodians who, I believe, will develop Cambodian laws based on Japanese laws through comparative approach in the near future.

As the society develops and human's activities diversify, it is undeniably true that amendment and supplement to the codes are necessary in the future. This is because the Civil Code only provides the fundamental and basic principles to deal with civil matters and we cannot completely rely on the Civil Code to deal with specific issues with respect for commercial, banking and financial transactions. For example, to protect the guarantor, Article 901 of the Civil Code requires guarantor to write the amount of money so that the guarantor knows the scope of his obligation. Such rule is criticized for its inconsistency with practice of corporate guarantee. Additionally, there is no specific law governing escrow agreement, which is very similar with bailment and bailment of object in dispute and which is popularly used in sale-purchase of immovable property. Accordingly, laws for specific commercial transaction or civil-related matters are also necessary.