

[Research Notes]

Development of Legal Norms on Marriage and Divorce in Cambodia
– The Civil Code Between Foreign Inputs and Local Growth (2)*

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Abstract

This second part of the research focuses on the development of law on divorce in Cambodia, aiming at identifying the continuation and changes in the legislative development of Cambodia in regulating divorce and post-divorce relationship. It starts with a brief overview of the legislative development from the early 20th century up till the latest codification of the 2007 Civil Code. Along this line of historical narratives, the research then examines two important elements in the legal effects of divorce, namely division of property and child custody. The final section concludes mainly for the contents of this second part, but with considerable reflection of the concluding remarks made in the first part of the research published in the first volume of this Bulletin.

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* Part 1 of this research about marriage appears in the first volume of the ALB. Since the old Civil Code has not been translated into English elsewhere this paper will produce the English translation of the relevant provisions in the footnotes as may be deemed necessary by the author. None of the translation is therefore official. The unofficial English translation of the 1989 Law on Family and Marriage was available from different sources. This research mainly uses the version annexed to the textbook by Lindsay Harris & Phyllis Cox, 1996. Since the Law has been repealed and the textbook is no longer widely available, some relevant provisions are reproduced in the footnote for reference, with occasional modifications as may be deemed necessary by the author.

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Part 2 – Divorce

Introduction

Divorce as a legal concept to refer to termination of the contractual relationship bound by marriage between a husband and a wife in Cambodia, based on legally stipulated conditions and procedures, was elaborated in detail by the old Civil Code.¹ Chapter 3 of Title 4 in the First Book on Persons² was exclusively on the issue of divorce, the relevant court procedure and the effects. Since some features of the old Civil Code remain influential in the current Cambodian law on divorce, a brief introduction of these features and their subsequent development in the later 20th century will be helpful for a better understanding of the current law and procedure on divorce in Cambodia.

I . Development of Divorce Law and Procedure in Cambodia

1. The Old Civil Code and the 1989 Law

Articles 204 and 210 of the old Civil Code gave the exclusive authority to the court at the place of residence of the defendant to pass judgment on a petition for divorce based on grounds provided by law.³ These grounds for divorce were then mainly fault-based. They included adultery, unjustifiable absence from home, failure to fulfill one's obligation as the husband to feed the wife and children, acts of violence, and expulsion

¹ In 1961, Jean Imbert wrote that divorce in Cambodia before 1907 could be recognized by the heads of local administrative bodies, starting with the district chief, who would attempt a reconciliation and, if this attempt failed, accord a divorce. The husband then would have to deliver a letter of divorce to his wife which may or may not be authenticated by a public authority. Although in his 1961 paper, Jean Imbert reported existence of divorce during the “modern” period (defined to be from 1593-1907) of Cambodia, he mainly cited a discovery reported by A. Leclere in 1890 of a document signed by the Governor of the Province of Kampot to authenticate a letter of divorce made by a man called Ouk to his wife, Keo. The document was signed on February 1, 1889, before the enactment of the old Civil Code but well after Cambodia was colonized by the France. It is not clear whether the same practice had taken place before the arrival of the colonial administration in Cambodia. See Jean Imbert, “Histoire des Institutions Khmeres” *Annales de la Faculte de Droit de Phnom Penh*, vol.II, Phnom Penh, 1961, p.101 and footnote # 12..

² Articles of the old Civil Code was arranged into three books with each consisting of several titles, chapters, sections, clauses and then sub-headings.

³ Article 204: “Husband and wife may get divorced whenever the court judges in favor of the divorce on grounds stated by law.”
Article 210: “The application for divorce, on whatever grounds, shall be filed with the court at the place of residence of the defendant.”

from home by the husband. Although two articles, 208(4) and 209, appeared to provide for non-fault-based and mutually consented divorces,⁴ they were in fact structured to fit into the category of a fault-based ground for divorce. Article 208(4) provided for either of the parties to apply for divorce if both parties had not been living together for more than one year. Article 209 provided for consented divorce, but the husband had to be assumedly on the wrong side and had to pay for all losses.

The reason for this strong tendency to adopt fault-based ground for divorce in Cambodia during the old days was presumably due to the legally defined differentiation of obligations between husband and wife in the family and the social status of married women at that time. Article 188 of the Code defined the role of husband in the family as the caretaker for his wives, whereas Article 189 required the wives to submit to the authority of the husband and to be respectful, honest and nice to the husband.⁵ A married woman was not expected to enter into any contract without explicit permission from her husband, neither was she allowed to file complaint to the court, except for divorce petition involving herself.⁶ Taking into account the restricted legal capacity of a married woman, one may argue that the fault-based approach adopted by Article 209 even for the case of mutually consented divorce was substantively necessary for economic security of the divorced woman.⁷ Although a divorced adult woman would

⁴ Article 208: “Grounds on which a husband or a wife may file for a divorce are: (1) that the complainant has been beaten, kicked, excessively abused, maltreated, reprimanded and seriously disdained by the spouse or that an ancestor of the complainant has received these treatments severely; (2) that the spouse was sentenced for commission of a crime; (3) that the spouse was bad-mannered, indecent, immoral... (4) separation for more than a year.”

Article 209: “Husband and wife may also divorce by mutual consent. But in this case, the husband shall be deemed to be at fault and be charged with the loss.”

⁵ Article 188: “The husband shall support all of his wives.”

Article 189: “All wives shall obey; be submissive, honest and loyal to the husband.” Article 213 of the French Civil Code, before the amendment laws of 1938 and 1942, also provided for the “dominance of the husband” in a family relationship. However, the formula was simpler than the old Cambodian Code. It states that “The husband must protect his wife, the wife obeys her husband.” See *Le Code civil francais – Evolution des textes depuis 1804*, Dalloz, Paris, 2000, p.86; and Jean-Louis Halperin, *The French Civil Code*, Translated by Tony Weir, University College London, 2006, p.21.

⁶ Article 195: “The wives may file lawsuit with the court or enter into contracts only if the husband so permits.”

Article 196: “The husband may authorize his wives to do everything by themselves.”

Art.211: “A wife may apply for divorce with the husband without having to acquire the permission from the husband.”

⁷ Prior to 1938, Article 215 of the French Civil Code contained a provision similar to that of Article 189 of the old Cambodian Code. prohibiting the wife to file complaint to the court without authorization of her husband. But the logic of the French provision might not necessary be the same as the Cambodian one

have full legal capacity as a free person,⁸ her restricted legal capacity before the divorce would logically require her to start from scratch to sustain herself and perhaps the children under her care at the moment the divorce became definite. The best solution would therefore be the introduction of a fault-based presumption in a consented divorce, so that the legally capable husband would have to bear the loss in the interest of the post-divorce livelihood of the divorced wife and children under her care. The loss would include division of the common property and, if the divided portion of common property alone was not sufficient, provision of alimony to the divorced wife.⁹ However, the divorced woman would be deprived of these entitlement and supports if the divorce was a result of her commission of adultery. She would also have to return all gifts which she had received from her husband and the parents of the husband at the time of engagement and wedding ceremony.¹⁰ The alimony once provided, would terminate or become no longer due if the divorced wife remarried, became a concubine of somebody else or had bad behaviours.¹¹

Another important feature of the old Civil Code is the pre-trial reconciliation process in divorce cases. All divorce cases were supposed to be reconciled by the court at least one time before being submitted for hearing. Article 214 of the Code required the president of the court to summon the complainant and convince him/her to drop the case as may be appropriate.¹² If the complainant insisted on divorcing, the president of the court

in the early 20th century. Halperin suggested that the French Code Civil of that time treated the wife as “incapable not merely out of respect for the husband but also because of the inexperience of the weaker sex”. Jean-Louis Halperin, *The French Civil Code*, Translated by Tony Weir, University College London, 2006, p.21. See also *Le Code civil francais – Evolution des textes depuis 1804*, Dalloz, Paris, 2000, p.87.

⁸ According to Morice, a divorced woman would have full capacity and not fall back to the guardianship of her parents. But should she remarry, she would be subjected to the same condition required of an adult girl, as if she had never been married before.

⁹ For more details of the legal division of properties between husband and wife during a divorce and the different legal problems facing the first and the subsequent wives in the case of divorce under the old Civil Code, see Jean Morice, “Le Mariage et le Statut Familial de la Femme au Cambodge” *Annales de la Faculte de Droit et des Sciences Economiques de Phnom Penh*, vol.IV, 1962, pp.166-170.

¹⁰ Article 253: “But if the judgment for divorce was a result of the wife’s adultery, the wife may take only her personal property received before the marriage or property that she received as heritage, will or testamentary gift and clothes. Property acquired together with the spouse during marriage shall go to the husband. In addition, the wife shall return all gifts which were presented to her by the husband or his parents at the time of engagement or wedding”.

¹¹ Article 259 “The alimony shall be terminated and no longer due if the divorced wife, of whatever legitimate ranks, becomes remarried, lives in concubinage or has improper and bad behaviours”. See also Jean Imbert, “Histoire des Institutions Khmeres” *Annales de la Faculte de Droit de Phnom Penh*, vol.II, Phnom Penh, 1961, p.177.

¹² Article 214: “The president shall summon the complainant, enlighten, advise and soothe him/her as the

would then call in the couple and try to reconcile between them.¹³

Although implementation of the old Civil Code was terminated during the Khmer Rouge period (1975-1978), the socialist regime that ruled after the fall of the Khmer Rouge regime retrieved these practices with some modifications. The practice might have helped to lessen the burden of the court in conducting trials.¹⁴ In addition, it also introduced into the divorce procedure the roles of local communities in reconciliation. Article 42 of the 1989 Law on Marriage and the Family required the complaining party to file his/her divorce petition with the “People’s Provincial or Municipal Court or to the People’s Committee of the Commune or the Sangkat in whose jurisdiction the defendant resides”.¹⁵ The provision on the role of local People’s Committee of the Commune to reconcile a potential divorce might have been a codification of the actual practice introduced by the administration in the 1980s after the fall of the Khmer Rouge.¹⁶ Apart from this change in the initial stage of reconciliation and some other very limited rewording, the divorce procedure under this 1989 Law was mostly similar to the relevant provisions of the old Civil Code.

Both the old Civil Code and the 1989 Law indicated a strong Cambodian preference for reconciliation and persuasion against divorce based on court judgment, unless the will of the parties was so strong that it could not be reversed by reconciliation.¹⁷ They limited this reconciliation attempt exclusively to the initial stage of the court procedure. There was no particular provision to allow for conduct of reconciliation after the court hearing had started. But the 1989 Law contained provisions to allow the court to pass a

president may deem appropriate in order to convince him/her to drop the application, except for circumstances where the president considers that the application for divorce is based on a very serious ground.”

¹³ Article 215: “If the complainant insists on divorce, the president shall summon the husband and the wife to the court within 15 days for reconciliation, in order that a reconciliation may be realized.”

Article 217: “If a reconciliation fails, the president of the court may order the parties to conciliate one more time.”

¹⁴ This is circumstantially apparent given the fact that

¹⁵ A Sangkat is a ward equivalent to a commune. The former is a sub-administrative jurisdiction under a municipality whereas the latter under a province.

¹⁶ It was reported that in the 1980s, a divorce complaint could not be filed directly to the court but had to be submitted to the “People’s Committee” of the commune or Sangkat first. See Lindsay Harris & Phyllis Cox, *Cambodian Marriage and Family Law*, the Cambodian Legal Textbook Series prepared by the Community Legal Education Center, 1996.

¹⁷ See for example Articles 214, 215 and 217 of the old Civil Code cited above.

judgment of dismissal if the complainant failed to show up at the hearing without justification or to submit any request for rescheduling the hearing.¹⁸ The parties might therefore use this provision to reunite if they decided during the course of the procedure to reconcile and stop pursuing the case. This was quite different from the old Civil Code, which had another provision to make sure that conciliation between the parties, albeit not facilitated by the court, would be recognized at any time during the course of the procedure, including at the appellate phase, whenever the parties decided to reunite and live together again.¹⁹

However, the most remarkable difference between these two laws existed at the legal grounds for fault-based divorce. The 1989 Law revised some of the grounds stipulated in the old Civil Code to remove all relevancy to the polygamist value of the pre-socialist society and to take into greater account the legal equality between husband and wife. It removed the unequal provisions defining husband's and wife's faulty absence from home at night time;²⁰ the provision on violence committed by a subsequent wife against the first wife;²¹ the failure of the husband to feed the family;²² and the act of the

¹⁸ Article 54 of the 1989 Law on Marriage and Family: "A complainant who has properly received an invitation issued by the People's Court, and fails to appear before the People's Court without an explanation for the absence or without requesting an adjournment shall be considered as withdrawing the complaint. In such case, a dismissal order shall be entered by the court."

¹⁹ Article 238 of the old Civil Code: "If the couple reach a reconciliation between themselves and return to live together again, the divorce complaint shall terminate at that point, with no regard to the level where the litigation has reached." Although Article 236 the old Civil Code also contained provisions very similar to those of Article 54 of the 1989 Law, the latter does not have any provision similar to the contents of Article 238 of the former.

²⁰ Article 206 of the old Civil Code contained one provision on adultery committed by the wife and another provision on the wife's unjustified absence from home for one night, as grounds for the husband to file for a divorce. On the contrary, there was no provision on the husband's commission of adultery as a legal ground for the wife's petition for divorce, and a husband's unjustified absence from home could be a cause for his wife's filing for divorce only if the absence had lasted for 3 months and the husband had not provided food or supports for the wife and their children. These provisions were not incorporated into the 1989 Law. Compare the provisions of Article 206 with those of Article 207:

Article 206: "The husband may apply for a divorce on the following grounds: (1) that the wife committed adultery; (2) that the wife stayed away from home for one night without appropriate justification; (3) that the wife beat... and kicked the first wife causing the latter to suffer from wounds and scars or maltreated, scolded and looked down on the first wife."

Article 207: "The wife may apply for a divorce on the following grounds: (1) that the husband has not fed, supported and taken care of the wife, the child in accordance with the obligations of a husband; (2) that the husband has deserted the residence for more than 3 months without reasonable justification and without having provided food and cares to the wife and the child; (3) that the husband expelled the wife from the residence without reasonable ground."

²¹ Article 206(3) of the old Civil Code.

²² Article 207(1) of the old Civil Code.

husband to expel his wife from the domicile,²³ etc., from the list of faulty acts conducive to a divorce. The 1989 Law defined the grounds for non-consented divorce into five simpler elements, namely desertion without a good reason and without maintenance of and taking care of the child; cruelty and beatings, persecutions and looking down on the other spouse or his/her ancestry; immoral behavior, bad conduct; impotence of penis; and, physical separation for more than one year.²⁴ The fifth ground for divorce in this Law could be categorized as different from the other four and indicated an apparently no-fault-based ground for divorce.²⁵

Moreover, the 1989 Law also emphasized on the importance of the husband's participation in the parental responsibility for childbirth and set a limit to his right to divorce at the time of the wife's pregnancy. The husband only had the right to divorce his wife one year after child delivery, but the wife was not subjected to this limitation if she chose to divorce during her pregnancy.²⁶ This provision logically made good sense in the context of rebuilding Cambodian society in the 1980s, soon after the destructions by the Khmer Rouge had left many families poor and in dire need of manpower to work in the farm and take care of the children.

2. The New Civil Code of the 21st Century

The new Civil Code of 2007 adopts the legacy of 1989 Law on the definition of grounds for divorce to the extent that it takes into account the liberal approach towards equality between man and woman, but expands the opportunity for each party in a potential divorce to justify the decision to divorce by presenting his/her unique circumstance to

²³ Article 207(3) of the old Civil Code.

²⁴ Article 39 of the 1989 Law on Marriage and Family: "A husband or wife may file a complaint for divorce if there are enough grounds which indicate that he or she cannot continue the conjugal cohabitation. The grounds for divorce are: (1) desertion without a good reason and without maintenance of and taking care of the child; (2) cruelty and beatings, persecutions and looking down on the other spouse or his or her ancestry; (3) immoral behavior, bad conduct; (4) impotence of penis; and (5) physical separation for more than one year."

²⁵ See Lindsay Harris and Phyllis Cox, *Cambodian Marriage and Family Law*, Cambodian Legal Textbook Series, published by the Community Legal Education Center, University of San Francisco School of Law, Cambodian Law and Democracy Project, 1996, pp.60-61.

²⁶ Article 68 of the 1989 Law on Marriage and Family: "If a wife is pregnant, a husband may not be allowed to request divorce until one year after she has delivered the child. The above condition shall not apply to women. A woman may request divorce while she *is* pregnant." (modification in *italics* by the author)

the court and let the court evaluate the validity or appropriateness of the presented ground(s) at its discretion. In addition to four general grounds for potential divorce, including infidelity, unjustified desertion, disappearance of the spouse for more than one year and separate living for more than one year against the objective of the marriage, a fifth element is added to allow for other possible circumstances to fit in by generally stipulating that a suit for divorce can be brought “if matrimonial relationship has otherwise broken down and there is no prospect of reconciliation”.²⁷

However, these grounds do not exempt the complainant from substantial scrutiny by the court before judging in favor of a divorce. Paragraphs 2 and 3 of Article 978 confer to the court the mandate to examine whether the divorce would result in extreme poverty and difficulty in the livelihood of the other spouse or the children or intolerable sufferings. The court may therefore dismiss the request for divorce by taking into consideration all relevant circumstances.²⁸ With particular regard to examining the situation of separate living and the fifth element mentioned above, the court may also dismiss the request for divorce if it finds that the request was based on bad faith as the complainant has seriously neglected to cooperate with or assist the other spouse.²⁹ These provisions may be an effective means of enabling the court to strike a balance between granting a divorce based on the personal will of the party and ensuring the due exercise of his/her parental and other related responsibility in a fragile marital relationship.

The 2007 Civil Code also contains one subsection on procedure for initiating a formal divorce. The procedure is now much simpler than the previous ones under the old Civil

²⁷ Article 978(1)(e) of the 2007 Civil Code. The whole Article 978 states “(1) Husband or wife can bring a suit for divorce only in the following cases: a) If the other spouse has committed an act of infidelity; b) If he or she has been deserted without good reason by the other spouse; c) If it has been unknown for a year or more whether the other spouse is alive or dead; d) If the other spouse has been living apart contrary to the spirit of marriage for one year or more continuously; or e) If the matrimonial relationship has otherwise broken down and there is no prospect of reconciliation.

(2) Even account of all the circumstances, may dismiss [with prejudice] a demand for divorce if divorce would cause extreme hardship or anguish to the other spouse or the children.

(3) Even where the grounds described in item (d) or (e) of paragraph (1) exist, the court may in its discretion dismiss [with prejudice] a demand for divorce if it finds that the demand is in bad faith because the demandant has seriously neglected to cooperate with and assist the other spouse.

²⁸ Article 978(2) of the 2007 Civil Code.

²⁹ Article 978(3) of the 2007 Civil Code.

Code and the 1989 Law. A request for divorce may be filed directly to the municipal or provincial court or to the commune council at the place of residence.³⁰ The commune council may attempt to convince the parties to reconcile within 15 days of the complaint. If the attempt fails, a divorce complaint is thereby assumed to exist and the commune council must forward that complaint to the court immediately.³¹ Unlike the previous laws, the new Civil Code does not require the court to prioritize reconciliation in addressing a divorce complaint. However, the court may still attempt to reconcile the parties despite the strong desire for divorce by one of them.³² If this attempt fails, the court must try the case and render a judgment.³³

II . Legal Effects of Divorce

1. Division of Property

Division of property as a result of divorce in the new Civil Code is quite a deviation from the previous laws in two ways. First, the marketization process in the 1990s has enabled the parties in a divorce dispute to increase their say in how the property is to be divided. The court will intervene if the parties could not discuss with each other on how to divide their property. The court may decide on the details of the division based on some rules and principles. The Civil Code contains only one single article to set down a couple of general rules and principles for the court to observe when deciding on the dispute related to division of property.³⁴ Second, division of property under the 2007 Civil Code follows the 1989 Law in ensuring better equality between the two parties based on general rules and principles governing the division of property. But the new Civil Code gives more discretion to the court in determining the final portions to be given to each of the parties, whereas mandatory post-divorce spousal support or alimony stipulated in the section on “effects of divorce” under the two previous laws³⁵

³⁰ Article 982(1) and (2) of the 2007 Civil Code.

³¹ Article 982(2) of the 2007 Civil Code.

³² Article 984(1) of the 2007 Civil Code.

³³ Article 984(2) of the 2007 Civil Code.

³⁴ Article 980 of the 2007 Civil Code.

³⁵ Articles 256 of the old Civil Code: “The wives may receive alimony only if the divorce is not caused by their own fault”.

Article 258 of the old Civil Code: “In case the divided common property may not support her livelihood, the first wife shall receive alimony if the divorce is not caused by her fault”.

no longer exists in the provisions on divorce under the 2007 Civil Code.

Article 980 of the 2007 Civil Code adopts two approaches to the division of property at divorce, namely by agreement of the parties and by the decision of the court. In the absence of an agreement of the parties, the fair division of property will be based on categorization of the property and some factual circumstances. Property for this purpose will be categorized as separate and common properties. Separate property is defined as (1) property held by a spouse premaritally; (2) gift, inherited property or testamentary gift acquired by a spouse during marriage; and, (3) property obtained as the consideration for items mentioned in (1) and (2) above.³⁶ Upon divorce, each spouse will retain ownership over his/her separate property.³⁷ Common property is defined as property earned by both spouses or by either of them during the marriage, except for the property mentioned in sub-categories (2) and (3) mentioned above.³⁸ Each spouse is entitled to one half of the common property, in addition to the portion of separate property.³⁹ But this entitlement is not irrespective of some other necessary considerations. In some special cases and upon request by one of the spouses, the court may decide on the division of common property by taking into account various circumstances; such as portions contributed by each of the spouses, contributions by each of the spouses to the acquisition, maintenance and increase of the property, the period of the marriage, the living standard during the marriage, the age, mental and

Article 259 of the old Civil Code: “The alimony shall be terminated and no longer due when the divorced wife, in whatever legitimate status she used to be, is remarried, has a lover or has bad and inappropriate manner.”

Article 76 of the 1989 Law: In case of a divorce where a party is not at fault and is in need, he/*she* may request the other party to provide alimony. The latter party shall support the party in need according to his or her abilities.

The amount of alimony shall be determined according to the agreement between both parties.

In the event there is no agreement, alimony shall be determined by the People’s Court. If the party who is entitled to receive alimony remarry, such party may no longer receive alimony.”

Article 77 of the 1989 Law: “The People’s Provincial or Municipal Court may change, increase or decrease the amount of alimony if there is a request of any party. The increasing or decreasing alimony shall be made according to the abilities of the party paying alimony and according to the party in need who is entitled to alimony. Alimony may be in money or properties.”

Article 78 of the 1989 Law: “Failure to pay alimony as provided above shall be considered as a crime and shall be punishable according to existing laws if there is sufficient evidence proving that the person who is bound to pay alimony is dishonest.”

³⁶ Article 972 of the 2007 Civil Code.

³⁷ Article 980(2)(a) of the 2007 Civil Code.

³⁸ Article 973 of the 2007 Civil Code.

³⁹ Article 980(2)(b) of the 2007 Civil Code.

physical condition of each spouse, the occupation, income and earning capacity of each spouse, the interests of the children, etc.⁴⁰ Housework is considered to have the same value as work outside the house.⁴¹

2. Child Custody, Child Interests and Parental Power

The Old Civil Code

The old Civil Code provided for two methods to decide child custody as a result of divorce, either an agreement between the divorcing couple or a court judgment. If the couple failed to reach an agreement, the court would pass a judgment on child custody by enabling the mother to keep children under 5 years old, unless there existed any reason to decide otherwise.⁴² For children older than five, the daughter had to stay with the mother and the son had to stay with the father.⁴³ The child would only have the right to choose whether to stay with the father or the mother after he/she reached the age of 16, unless there existed any reason to decide otherwise.⁴⁴

Whereas the old Civil Code seemed to adopt a very clear-cut method for the court to decide on physical custodial questions, it contained no provision on the right to visitation and the requirement for the other parent to remain obliged to participate in making decisions about the future of the child. It only required the other parent to help feed, help take care of the child, and help pay for the child's education and study, in accordance with his/her resources.⁴⁵

Parental power under the old Civil Code was defined to be the rights and authority which the parent(s) could legally exercise on the body and property of the child. It

⁴⁰ Article 980(2)(b) of the 2007 Civil Code.

⁴¹ Article 980(3) of the 2007 Civil Code.

⁴² Article 248 of the old Civil Code: "If the father and the mother cannot agree on the raising of and caring for the child, the judge shall make the mother maintain small child under the age of 5, unless there is any ground for objection. When the children pass the age of 5, the daughter shall stay with the mother and the boy shall stay with the father."

⁴³ Article 248 of the old Civil Code.

⁴⁴ Article 249 of the old Civil Code: "When a child reaches the age of 16, unless there is any ground for objection, the child may stay with the father or the mother, depending on his/her own voluntary decision."

⁴⁵ Article 247 of the old Civil Code: "The father or the mother whom the judgment does not authorize to maintain the child shall help raise, support and maintain, pay for the education and studies of the child, according to his or her resources."

consisted of the right to detain, the right to correct/punish the child⁴⁶ and the right to administer the child's property.⁴⁷ Inside the family, these rights and authority stayed solely with the father.⁴⁸ The mother could be given these rights only when the father died or lost the authority as the result of a court judgment or had restricted legal capacity.⁴⁹ In case of a divorce, the mother would have parental power only over the child or children whom she was allowed to keep with her.⁵⁰ Logically constructed, this provision opened up the possibility for the divorced father to continue his parental rights even over the child who had been transferred to the care of the mother.

The 1989 Family Law

The 1989 Family Law reproduced the whole wordings of Article 246 of the old Civil Code in its Article 72, requiring a divorce judgment to decide on the issue of parental power and post-custodial relationship between the divorced parent(s) and the child.⁵¹ The 1989 Law retained the same methods as the old Civil Code in determining the issue of parental power, i.e., either by parental agreement or by court decision, but in

⁴⁶ Article 340 of Chapter 6 on "Child Custody" listed three compartments of the rights involved in child custody. The second compartment was referred to as "prean prodaw" which is closer to the meaning of "correct" or "discipline" in English, but section 2 of the same chapter which obviously attempted to further define the second element of child custody mentioned in Article 340 was entitled "the Right to Punish" (seth dak toankam, consisting of Articles 349 and 350).

⁴⁷ Article 340 of the old Civil Code: "The parental rights are the right to detain the child, the right to discipline the child, and the right to administer the property of the child."

⁴⁸ Article 336 of the old Civil Code: "When the parents are still in a married relationship, only the father holds the parental right." The original French Code Civil (of 1804) contained a somehow similar provision in Article 389 to the effect that, during marriage, the property of minor children was administrated by the father. Jean-Louis Halperin, *The French Civil Code*, Translated by Tony Weir, University College London, 2006, p.27 and *Le Code civil francais – Evolution des textes depuis 1804*, Dalloz, Paris, 2000, p.164.

⁴⁹ Article 337 of the old Civil Code: "When the father dies or the court judges revokes his authority, or the father has restricted legal capacity, the mother shall receive the parental rights in these cases."

⁵⁰ Article 338 of the old Civil Code: "When the father and the mother get divorced, the mother only receive the parent rights over the child who has been transferred to the care of the mother."

⁵¹ Article 246 of the old Civil Code: "The judgment that separates the husband and the wife shall decide on the parental rights which will go to either the father or the mother and shall decide on the contacts between the parents and the child".

Article 72 of the 1989 Family Law: "The divorce judgment shall be based on the parental power to determine who should receive the custody of the children and to determine the relationship between the father, mother and children."

(Cited from the English translation annexed to the textbook by Lindsay Harris & Phyllis Cox, 1996, p.139. The Khmer language is almost completely the same between Article 246 of the old Civil Code and Article 72 of the 1989 Law. Yet, the differences in the English translation are nonetheless remarkable.)

accordance with the principle that a breast-feeding infant stays with the mother. This was based on the conviction that parental agreement would serve the interests of the child.⁵² If the divorcing parents could not reach any agreement, the court would then have to decide.

One important deviation of this 1989 Law from the old Civil Code was the right to visitation of the non-custodial parent. The non-custodial parent had the right to visit the child, and the custodial parent had to do everything possible to facilitate the other parent's visit.⁵³ In addition, the non-custodial parent could also challenge the custodial right of the other parent at any time and ask the court to revoke it if there would be bad impacts on the interest of the child.⁵⁴ However, the 1989 Family Law did not provide for a mechanism through which the non-custodial parent could retain some kind of role in helping to decide for the future of the child. In some extreme cases, he/she might have resort to the power to challenge the custody of the other parent in order to change the way of raising and education of the child, but this procedure could only be invoked when the interest of the child could be proven to be in jeopardy.⁵⁵

Although the 1989 Family Law did not explicitly provide for joint parental custody over a child, the principle of equality between spouses in marriage and in family life stipulated by Articles 1 and 29 theoretically rejected the concept of paternal custody embodied in Article 336 of the old Civil Code.

⁵² Article 73 of the 1989 Family Law: "For the children interests, a decision to which party will receive the custody of the children shall be determined in accordance with an agreement of the divorcing husband and wife.

According to general principles, a baby who is still breast feeding shall be under the custody of the mother.

In a case where there is no agreement between the parties regarding the custody of the children, the custody shall be determined by the court."

⁵³ Article 75 of the 1989 Family Law: "A party who does not receive custody of the children has the right to visit his or her children.

The party who is entitled to receive custody of the children must make it easy for the other party to come to visit the children.

The party who does not receive custody of the children has the right to file a complaint at any time with the People's Court to revoke the other party's right to custody of the children if the children's interests is violated."

⁵⁴ Article 75 of the 1989 Family Law.

⁵⁵ Article 75 of the 1989 Law.

The New Civil Code

The new Civil Code further pursues the course of development launched by the 1989 Family Law, by incorporating the principle of collaborative exercise of the parental power by spouses in a marital relationship.⁵⁶ When one of the parents cannot exercise the parental power, the other parent shall then exercise it alone.⁵⁷ Persons having parental power are responsible for education of the child;⁵⁸ place of residence of the child;⁵⁹ punishment of the child;⁶⁰ giving permission to the child to start a profession or business;⁶¹ and, demanding the transfer of custody over the child.⁶²

In a divorce, the divorcing parents are required to discuss and determine between themselves who will have the child custody.⁶³ In the case of a yet-to-be-born baby at the time of divorce, the mother will have custody when the baby is born. But the divorcing parents may then determine, after the baby was born, that the father is the custodial parent.⁶⁴ At the failure of a discussion between the divorcing parents, the court must decide on the question of child custody by taking into consideration the interests of the child.⁶⁵ The court may also replace the parental power holder based on an application submitted by the child's relative up to the fourth-degree consanguinity relationship, if the court considers that to be in the interests of the child.⁶⁶

The non-custodial parent has the right to visit and socialize with the child and the duty to bear the necessary cost of caring for the child.⁶⁷ The right to visitation and the detail mode of its realization have to be determined by agreement between the divorcing parents.⁶⁸ Upon the failure of parental discussions, the court will have to decide on the mode of visitation and the amount to be borne for the caring of the child, based on

⁵⁶ Article 1036 of the 2007 Civil Code.

⁵⁷ Article 1036 of the 2007 Civil Code.

⁵⁸ Article 1043 of the 2007 Civil Code.

⁵⁹ Article 1044 of the 2007 Civil Code.

⁶⁰ Article 1045 of the 2007 Civil Code.

⁶¹ Article 1046 of the 2007 Civil Code.

⁶² Article 1047 of the 2007 Civil Code.

⁶³ Article 1037(1) of the 2007 Civil Code.

⁶⁴ Article 1037(2) of the 2007 Civil Code.

⁶⁵ Article 1037(3) of the 2007 Civil Code.

⁶⁶ Article 1039 of the 2007 Civil Code.

⁶⁷ Article 1040(1) of the 2007 Civil Code

⁶⁸ Article 1040(2) of the 2007 Civil Code

requests submitted by the father or the mother.⁶⁹ The court may also change the mode of visitation and the necessary amount to be borne for the caring of the child, based on the requests by the father or the mother, if the court considers this change to be necessary for the interests of the child.⁷⁰ When deciding on visitation, the court must take into account the interests of the child; and when it decides on the amount to be paid for the caring of the child, it must take into consideration the actual living and economic conditions of the father and the mother.⁷¹ If the divorcing parents cannot discuss between themselves or submit the requests mentioned in this paragraph to the court, a relative of the child up to the fourth degree consanguinity relationship may submit the relevant requests instead.⁷²

Although Article 1037 requires the parental power to stay with only one of the divorcing parents, the non-custodial parent nevertheless retains some important roles to play in safeguarding the interests of the child. These roles include the right to demand the parental power holder to report on the situation of the child,⁷³ and the opportunity to be discussed with about some key elements related to the exercise of the parental power.⁷⁴ Article 1042 elaborates on these elements by stating that, except for cases of emergency, the parental power holder must discuss with the other parent about the child's education when the child is over the age of statutorily defined compulsory education; any change in the child's place of residence from one city or province to another; the child's profession or business; medical treatment crucial to the survival of the child; administration of the important portion of the child's property; and, any other important issues related to the caring of the child and management of the child's property.⁷⁵

General Conclusions

The old Civil Code incorporated much of the French notions and norms about family

⁶⁹ Article 1040(4) of the 2007 Civil Code.

⁷⁰ Article 1040(5) of the 2007 Civil Code.

⁷¹ Article 1040(6) of the 2007 Civil Code.

⁷² Article 1040(7) of the 2007 Civil Code.

⁷³ Article 1041 (1) and (2) of the 2007 Civil Code.

⁷⁴ Article 1042 of the 2007 Civil Code.

⁷⁵ Article 1042 of the 2007 Civil Code.

during the early 20th century, mixing them with the Cambodian way of structuring a feudal society conceding to polygamy and seeking modernization under the French colonial rule. This system sustained for more than half a century. It was then replaced by the 1989 Law on Marriage and Family, which for a significant part re-employed the norms of the old Civil Code, but with elements of de-feudalizing the society and restructuring the family and social relationship in a socialist context focusing more on the equality of man and woman, and the role of local people's council in guiding the progress of social and economic lives of the society through the management of crisis within family units. It was also a period of transformation to put women's social status to a new transition towards better equality and empowerment, seemingly following the developing concepts of women's and child's rights on the international agenda. The pursuit of international trends indeed sped up further with the adoption of the 1993 Constitution, following Cambodia's accession to the Convention on the Rights of the Child (CRC) and the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) on 15 October 1992.

Focusing on the development of Civil Code provisions on marriage and divorce, the research finds that these provisions have followed a track change recognizable in the very context of historical, political and social developments and intellectual evolution of the legal system of Cambodia. Starting with the old Civil Code enacted in the early 1920s and subsequently amended in 1937 and 1954, then filtering through the 1989 Law on Marriage and Family enacted by the post-Khmer Rouge socialist government and closing up at the 2007 Civil Code prepared side-by-side with top Japanese scholars and experts in the post-1993 Cambodian context, the research has been able to identify a few dramatic changes in the way Cambodian legislative drafters perceived of the issues of family, marriage and divorce as they developed in the country over a century. Unlike Japan or other legal systems where the court has contributed to the development of law through their leading judgments, the case of Cambodia saw these changes predominantly led by the legislative branch of different regimes. Legislators have embraced the knowledge from foreign experts in combination of their understanding of the global trends and their reflection of the problems of the past, in order to shape the paths of social and legal development.

However, if the current trend of securing gender equality and party autonomy in marriage and safeguarding child interests in case of divorce indeed was attributed to the development of the 1980s, it was not due to external liberal pressures, nor the direct effects of international conventional obligations, as the country was technically isolated from the Western liberal influences and not in a position to accede to the international treaties on the rights of woman and the child in the 1980s.⁷⁶ The research also finds that the 1989 Law started to follow the emerging international efforts to place the interests of the child at the center of court judgments related to divorce and its legal effects on child custody and division of property. But this new tendency has only produced more tangible effects through legal language and practices after the 2007 Civil Code emphasizes on the role of the court as a third party to pass the concluding judgment on the issue of child custody and parental responsibilities. This latest development has brought Cambodian law on divorce one step further in search for the proper protection of the “best interests of the child” in the Cambodian context. It has come about as a result of the collaboration between Cambodian legislative drafters and the Japanese experts to incorporate the relevant provisions into the 2007 Civil Code.

With the cycle of transition having been culminated in the promulgation and coming into force of the 2007 Civil Code, accelerating the ongoing legal and judicial reforms to empower the judicial system and to introduce a stronger concept of the rule of law based on the constitutional principle of separation of powers, will this trend of legal development, particularly in the field of family laws and norms related to marriage and divorce, be picked up and strengthened by the judiciary, following the experiences of Japan, France or other donor countries that have assisted the legal and judicial reforms in Cambodia during the last one decade or two? This is a question deserving further observations and research.

⁷⁶ The Phnom Penh administration that controlled most of the Cambodian territory after the collapse of the Khmer Rouge and promulgated the 1989 Law was not represented at the United Nations until the early 1990s.