

**THEY KILLED ALL THE LAWYERS
REBUILDING THE JUDICIAL SYSTEM
IN CAMBODIA**

**Kathryn E. Neilson, Q.C.
Vancouver, BC
Canada**

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They Killed All the Lawyers Rebuilding the Judicial System in Cambodia

I. Introduction

*"The first thing we do, let's kill all the lawyers."*¹

Those words of Dick the Butcher are often quoted in western society by critics of the legal profession and the justice system in general. However, such critics are unaware that the words were spoken by Dick in the course of fomenting widespread rebellion against the existing order. In advocating the murder of lawyers as a first step, he was recognizing the importance of a legal system in protecting the institutions that maintain societal order and stability.

The recent history of Cambodia provides a tragic enactment of Dick's exhortation. In April 1975, the Party of Democratic Kampuchea, (DK), also known as the Khmer Rouge, took over the country and began a reign of terror which lasted for almost four years. During that time all traditional social institutions were destroyed by the DK as they sought to create an extreme Marxist agrarian society, cut off from the influence of the outside world. Cities were evacuated. The urban and educated population were executed as class enemies, or forced into the country to work on agricultural endeavours in conditions of extreme hardship. By the time the DK were driven from power in January 1979 at least one million Cambodians, or one-eighth of the country's population, had been executed or had died due to starvation or illness. As well, hundreds of thousands had fled the country.²

While legal professionals and the justice system were not the first or only target of the DK, both were decimated during the regime. Seventy years of French colonial rule had produced a Cambodian legal system that closely resembled the French civil law system when the DK arrived. Courthouses, the law school, and other legal institutions were ransacked and converted to revolutionary uses. Law books were destroyed. Judges, lawyers, and law professors were killed or fled.

While the DK promulgated a constitution on January 5, 1976 which provided for people's courts and for the selection of judges by a People's Representative Assembly, there is no evidence that judges held office or that any legal system existed in Cambodia from 1975 to 1979. Instead, the country descended into a state of lawlessness in which justice was meted out at the whim of revolutionary cadres. Community or legal sanctions for violence and crime were non-existent, the paramount norm being survival.³ Of the 400-600 legal professionals estimated to have been in the country prior to the DK, as few as six to twelve were alive and still in Cambodia by January 1979.⁴

In January 1979, Vietnamese troops routed the DK and Cambodia came under the control of a Vietnamese/Communist regime for the next twelve years, styled initially as the Peoples Republic of Kampuchea (PRK) and latterly as the State of Cambodia (SOC). The

Vietnamese invasion stemmed the large-scale killing of Cambodians under the DK. However, thousands continued to flee the country in the face of continuing civil war, as the DK and other Cambodian factions fought to oust the Vietnamese.⁵

In 1991 some degree of peace and stability finally came to Cambodia with a peace agreement brokered by the United Nations, and a transitional period during which the United Nations supervised a cease-fire and elections which took place in May 1993. The peace agreement imposed a requirement that the new Cambodian government enact a constitution consistent with a liberal democracy, and with extensive provisions to promote and protect human rights.

From a legal perspective, the rule of law is a critical element in the establishment of effective democracy and human rights. In its simplest form the rule of law stands for the proposition that the state is subject to the law, articulating the need for limitations on arbitrary state power in a democratic scheme.⁶ A closer analysis reveals four constituent elements: 1. an independent judiciary, 2. accessible to all, 3. administering a body of clear and identifiable law, 4. consistently to all parties, including state representatives.⁷ Effective legal rights are dependent on having a forum where they will be reliably and fairly enforced.

The elements of the rule of law have been absent from Cambodia for years. This paper reviews the process of constructing those elements in the void left by the DK, with particular reference to the courts and an independent judiciary. It also examines the success with which the international community has imposed these concepts on a country ill-suited by tradition and resources to receive them.

II. The Reconstruction Process Begins - The People's Republic of Kampuchea and the State of Cambodia

The PRK faced a monumental task in rebuilding Cambodia in 1979. There were no economic, social, and government institutions. Nor were there qualified people upon whom to draw in establishing and operating new ones. The problems were compounded by the ongoing civil war, and lack of international support for the Vietnamese regime.⁸ While attempts were made to reestablish a legal system, these were seriously handicapped by lack of resources and trained personnel.

The first courts in the PRK were set up by decree in May 1980 and styled as People's Revolutionary Courts.⁹ The role of the judicial system was formalized by the enactment of a constitution on June 6, 1981 as part of the reconstruction process. Not surprisingly, this constitution bore a strong resemblance to its counterpart in Vietnam. The judicial system was constructed in a manner consistent with a Communist model. The courts were instruments of the state whose function was to uphold the policies of the government.¹⁰ There was no appellate body. Instead, the executive branch was given power to review verdicts and sentences pronounced by the courts.¹¹

The structure of the judicial system began to take shape with the enactment of the Law Concerning the Organization of Courts and Prosecutors in 1982. This law instructed the courts to rely on "the meaning of the constitution and the political line of the revolution".¹² Gradually courts were established in each of the nineteen provinces and two municipalities.¹³ Judges were appointed and removed by local party and government committees in consultation with the Minister of Justice. Judicial officers, along with all civil servants, were poorly paid.¹⁴ With no security of tenure, and inadequate income, judges were susceptible to both financial and political influence.¹⁵ The Ministry of Justice, as well as the local committees, routinely intervened in how courts dealt with their cases.¹⁶

Staffing the courts was a significant problem, given the absence of qualified legal personnel in the country. In 1982, the PRK established the Institute of Public Administration and Law (IPAL) to educate candidates for the positions of judges, prosecutors, and other legal functions. Speed was of the essence and the first course was only three months long. This was later extended to five months and eventually in 1986 to a two year course, leading to a diploma in law. All forms of the course included a substantial dose of Marxist-Leninist philosophy, in addition to law. Facilities were paltry. Law books were rare. Instructors were poorly qualified. While some had a first level law degree, many had no university education, and were simply graduates of the two-year IPAL course.¹⁷

In 1985 the PRK published a decree calling for the establishment of the People's Supreme Court. The Court did not begin functioning until 1987 and there was no significant activity until 1990.¹⁸ Like the lower courts, it had no jurisdiction to review or interpret laws, or to rule on executive action. There was no right to an appeal, and reviews were available only on a discretionary basis.¹⁹ From the outset, the People's Supreme Court developed a pattern of looking to the government and the party for support and assistance and consulting routinely with the Ministry of Justice in performing its role. In fact, in its report to the National Assembly in 1989, the Supreme Court stated:

"...the Court...is not competent to resolve the suits itself, (and) has only examined them...so that they may be turned over to the competent organs to be dealt with. This is because we feel that the work of receiving and resolving suits is a matter of ideology. It is not only a matter of expanding and strengthening socialist legality, but it is inseparably involved with political problems."²⁰

A new constitution was enacted in April 1989 by the SOC, to whom power had been transferred in an orderly manner by the PRK as part of an ongoing reform to allow more Cambodian control of the government and thereby attract greater international support for the regime. The 1989 Constitution brought no increased judicial independence or power of executive or legislative review. The legislative branch was given express powers to establish, monitor and dissolve the People's Supreme Court. The practice of regular consultations between the Ministry of Justice and the judiciary continued.²¹

By the early 1990's the number of judges was reported to be between seventy and ninety.²² However, few cases were being heard. The Phnom Penh court, which served a population of over 800,000, reported hearing only 133 criminal cases and 2500 civil cases from 1981-91.²³ One report on the provincial courts described them as functionally nonexistent, indicating that as of 1993, one provincial court had held four trials in the last decade, another two trials in the preceding four years, and a third in a province of over 400,000 people had heard 36 cases in 1990.²⁴

There were several related reasons for the underutilization of the courts. Faced with the task of rebuilding an entire society with limited resources, the tendency of Communist regimes to devalue law and its related institutions led the PRK to rank the justice system low in its list of priorities.²⁵ Lack of resources and adequate staff resulted in delays and inefficiencies that discouraged use of the courts.

A further obstacle to the use of the justice system was the reluctance of the security forces to relinquish their power to resolve matters affecting their interests in their own way. From 1979 until 1991, Cambodia was at war, as the DK and two other Cambodian factions, the royalist party FUNCINPEC, and the non-communist Khmer People's National Liberation Front (KPNLF) fought to oust the PRK, and the successor SOC.²⁶ As a result, the country was governed to a large extent by public security laws which enhanced the power of the police and military to the detriment of civilians and other institutions. The security forces used their privileged positions to build considerable political and social power, and to participate in lucrative and illegal activities.²⁷

The laws gave the security forces power to arrest, detain, and interrogate prisoners, without due process. The Ministry of Justice and the judicial system were subservient to the Ministry of Interior and the military. If police put a case before the courts, the expectation was that the result of their investigation as to guilt or innocence would be rubber-stamped by the judicial process. If members of the security forces themselves committed crimes, the courts lacked the courage or the resources to bring them to justice. Thus, in many respects, judicial power in criminal matters was exercised, often abusively, by security forces. Not surprisingly, these powerful elements in Cambodia had a great deal to lose if any real power was yielded to the courts.²⁸

While difficult to find confirmation of public opinion of the courts at this time, it seems likely that the role of financial and political influence in the courts was well-known in their communities, and provided a further deterrent to their use.

Given these difficulties with the justice system, many Cambodians chose to settle their disputes by other means. Conciliation had long been a part of Khmer culture, and people returned to seeking resolution of their disputes from local village or district officials, or monks. The state also employed "justice representatives" who were formally authorized to conciliate disputes on its behalf. It was only when conciliation failed that people considered going to the courts.²⁹

Thus while the PRK/SOC regime established a court system, it had little public support and it operated under severe handicaps. Judges were poorly equipped, both in terms of their training, and the resources available to them to perform their functions. There was no effective separation of powers. The executive, the legislature, and the security forces maintained firm control over the judiciary, who were subject to both political and financial influence. The rule of law and judicial independence played no role in this justice system. As a result, the courts lacked public credibility and were seldom used.

III. The Paris Peace Agreements

In the mid-1980's the shifting political climate between the Soviet Union and the West gave impetus to the commencement of discussions which ultimately led to the *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict*, signed in Paris on October 23, 1991, and referred to here as "the Agreements". They were signed by the four warring factions: the DK, SOC, FUNCINPEC, and KPNLF, as well as by 19 nations, including all the members of the UN Security Council and ASEAN.³⁰

The Agreements brought an end to twenty years of war and upheaval in Cambodia, and sought to provide a degree of peace and stability from which serious reconstruction could begin. They established a comprehensive plan for a transitional period to be supervised by the United Nations Transitional Authority in Cambodia, or "UNTAC".³¹ They created an interim government with representation from the four Cambodian factions until UN-supervised elections could be held.³² UNTAC was given a broad mandate during the transitional period, including a role in civil administration³³, supervision of a cease-fire and military withdrawal³⁴, organization of free and fair elections³⁵, and provision of human rights education and oversight.³⁶

The Agreements had as their goal the transformation of Cambodia from a socialist monolithic regime to a western model of liberal democracy. Human rights was a major focus. The Agreements stipulated that all Cambodians would enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant human rights instruments, that Cambodia would undertake to ensure respect for human rights and fundamental freedoms, and that Cambodia would support the right of its citizens to promote and protect these rights and freedoms, all of this with a view to ensuring that past abuses of human rights would never be allowed to return.³⁷

A future constitutional structure was imposed by the Agreements to ensure that these rights would be formalized in the law of Cambodia. The Agreements included comprehensive principles for inclusion in the constitution which was to be enacted by the new government once elected. These included a provision that the constitution would be the supreme law of the land³⁸, a long list of human rights to be protected in a manner consistent with relevant international instruments, an entitlement to have a court adjudicate and enforce these rights³⁹, a commitment to a system of liberal democracy on the basis of pluralism⁴⁰, and the establishment of an independent judiciary empowered to enforce the

rights created by the constitution⁴¹.

It was clear that enacting a constitutional framework in accord with the Agreements was only the first step in a long road toward recognition of democracy, the rule of law and human rights in Cambodia. Significant efforts in institution building and public support and education were required. In the words of one analyst at the time:

The conditions in which a liberal democratic constitution is to be established are not propitious: there are hardly any lawyers, the judiciary has been under pervasive executive influence, the legislature has been the handmaiden of the single, ruling party, the military has dominated the executive, and people's consciousness of their rights have been dulled over years of oppression...The Paris Accord therefore commits the Constituent Assembly (and Cambodia) to a constitution that has little relationship to recent legal and political practices and traditions in Cambodia... The task for the constitution is consequently not only to divide and allocate state power and place limitations on its exercise, but also to establish new institutions across a wide spectrum.⁴²

IV. The United Nations Transitional Authority in Cambodia (“UNTAC”)

UNTAC was one of the most ambitious peace-keeping programs ever mounted by the United Nations. It brought over 20,000 U.N. personnel to Cambodia during the transitional period from early 1992 to September 1993, at a cost of over \$3 billion (U.S.). The extent of its success is a matter of debate. However, it did provide an atmosphere in which the seeds of democracy and a civil society could begin to take root. During the UNTAC mandate, the Cambodian people developed a new awareness of human rights, supported a burgeoning free press, and established a number of indigenous human rights non-governmental organizations.⁴³

While the UNTAC Human Rights Component was small, it was able to place personnel in each of the provinces. These officers monitored the provincial courts and prisons, resulting in new and reliable information on the nature and extent of the problems to be faced in constructing a legal system compatible with the principles embodied in the new constitution.

UNTAC initiatives also produced some steps toward a legislative framework conducive to the rule of law. At the international level, the interim government acceded to a number of international human rights conventions during the UNTAC mandate, including the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Accession to the latter brought with it an undertaking to ensure effective remedies for violations of rights⁴⁴, and recognition of the rule of law, the importance of an independent judiciary, and other rights associated with provision of fair criminal trials.⁴⁵

In the domestic forum, on September 10, 1992, the interim government adopted a code of criminal law and procedure, drafted with significant assistance from UNTAC personnel, entitled "*Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period*" (the UNTAC Code). Despite the time limitation noted in its title, the UNTAC Code remains the primary criminal law in force in Cambodia. It begins with a requirement that the independence of the judiciary be guaranteed, in accordance with *The Basic Principles on the Independence of the Judiciary*, adopted by the United Nations.⁴⁶ It provides for the establishment of an Appeal Court,⁴⁷ and an improved Supreme Court with the power to review legislation.⁴⁸ It places military offenders under the jurisdiction of civil courts for non-military offences.⁴⁹ It also authorizes the establishment of an independent Bar Association, but recognizing the small number of attorneys in Cambodia, permits anyone with secondary school education or members of family to represent an accused person.⁵⁰ It defines what constitutes crimes and misdemeanors,⁵¹ and sets out a number of procedural steps to safeguard the rights of accused persons prior to and at trial.⁵²

While admirable in intent, its imposition on the fragmentary legal system described earlier in this paper created immediate difficulties. Enforcement of its provisions was almost impossible in the absence of competent legal counsel, and a judiciary familiar and comfortable with the concept of judicial independence.

Nowhere was this more evident than in UNTAC's own efforts to enforce the criminal law in the courts with respect to crime associated with the elections. As the elections drew closer, the political parties and members of their military forces mounted campaigns of violence and intimidation against opposing parties and candidates. The Cambodian prosecutors and judiciary, all of whom had been appointed by SOC or its PDK predecessor, were unwilling to take action against CPP suspects, the CPP being the party representative of SOC/PRK interests. As a result, in January 1993 UNTAC appointed its own special prosecutor, an Australian barrister, in an attempt to force the courts to hold trials for politically motivated crimes.⁵³

While a number of warrants for military suspects accused of political crimes were issued by the office of the special prosecutor, very few were executed. This was due largely to the resistance of the military and the lack of any remedy in the face of their refusal to cooperate. Four arrests were ultimately made. In two of these cases, the Minister of Justice called the presiding judge and instructed him not to proceed. The judge acceded. When UNTAC officials questioned the Minister about this, he indicated it was part of his job to punish judges who make incorrect judgments. Unable to force the prosecutions, UNTAC authorities found themselves in the ironic position of holding the four suspects without trial. They were ultimately handed back to Cambodian officials at the conclusion of the UNTAC mandate, leaving the special prosecutor to vent his frustrations in the following comment:

The judges here are a bunch of party hacks and flunkies and they simply

refuse to even issue warrants if the accused is of their ilk or connected to any of the dangerous politicians.⁵⁴

The May 1993 election was nevertheless a clear success for UNTAC and Cambodia. An estimated 90% of voters turned out despite threats of violence from the DK, who had withdrawn from the Agreements and the electoral process. The result, however, was disappointing in that there was no clear winner. After some skirmishing, an uneasy coalition government was formed between FUNCINPEC and CPP. The fragility of the alliance between the former enemies led to some concern that the opportunity for peace and stability would be short-lived.⁵⁵

While the coalition led to power-sharing in the central government, it had no bearing on the existing civil service, including those who served in the justice system. These functionaries were, and remained, SOC or PRK appointees and therefore CPP supporters. This gave the CPP an immediate upper hand over FUNCINPEC in directing the new government, and created an uneven power balance which has become a significant factor in the reconstruction of the judicial system, as discussed below.⁵⁶

V. The Constitution of 1993

The constitution of a nation is... 'a mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government.⁵⁷

It is doubtful that the 1993 constitution which was promulgated following the elections reflects the soul of Cambodia. Its content was stipulated by the international community as a condition of the Agreements and reflects western models rather than Cambodian ideals and values. This creates the "surrealist scenario" described by one writer of a legislative framework imposed by external forces and devoted to the rule of law, thrust on a country with few resources and neither the historical nor contemporary motivation or experience to implement it.⁵⁸ In fact, representatives of the new constituent assembly initially set about drafting the constitution in secrecy and tried to omit a number of the requirements set out in the Agreements, including provision for an independent judiciary. They were not successful in this.⁵⁹

The constitution thus provides for a constitutional monarchy, committed to the principles of liberal democracy and pluralism, and a market economy.⁶⁰ It states that the legislative, executive, and judicial powers shall be separate.⁶¹ It includes an impressive catalogue of human rights, beginning with the broad statement that Cambodia will recognize and respect those rights as stipulated in United Nations Charter, the Universal Declaration of Human Rights, and other international covenants and conventions.⁶²

Legislative power is to be exercised by an Assembly of 120 members, democratically elected for a five year term. They are not allowed to hold other offices

provided for in the constitution, with the exception of a position in the executive. The Assembly has the power to dismiss members of the executive on a vote of two thirds.⁶³

The executive branch is referred to as both the Council of Ministers and the Royal Government. Members may be members of the Assembly or members of political parties represented in the Assembly. They are appointed by a vote of confidence from the Assembly and are responsible for "overall policy" of the Royal Government. A member of the executive may not hold a position in the public service.⁶⁴

The judicial power is stated to be independent. The judiciary are to be impartial and protect the rights and freedoms of citizens. Trials are to be conducted in accordance with the law. A Supreme Council of the Magistracy chaired by the King is to be created by legislation. This Council will have the power to appoint and discipline judges and prosecutors. The King is made the guarantor of judicial independence, assisted by this Council.⁶⁵

The constitution is designated the supreme law of Cambodia and other laws and state decisions must be in strict conformity with its provisions. A two thirds majority vote is required to amend it.⁶⁶ With respect to powers of judicial review, citizens are given the right to make complaints or file claims against the state, and the courts are given competence to deal with these.⁶⁷ However, interpretation of the constitution and review of legislation for conformity with it is entrusted to a Constitutional Council. This Council is to have nine members, three of whom will be appointed by the King, three by the Assembly, and three by the Supreme Council of the Magistracy. Its members are to have a higher education, and cannot be members of the Assembly, the Council of Ministers, members of the executive of political parties or trade unions, or members of the judiciary. The rulings of the Constitutional Council on matters of constitutionality and interpretation are final. The council is also to be consulted with respect to any constitutional amendments.⁶⁸

Thus the Constitution of 1993 set out the required framework for a liberal democracy, the rule of law, and an independent judiciary. Its enactment marked the conclusion of the UNTAC mandate and final withdrawal of UNTAC personnel, leaving Cambodia to wrestle with the "surrealist scenario" of implementation.

VI. The Justice System in Post-UNTAC Cambodia

1. An Overview

The legacy of twenty years of war was still much in evidence when UNTAC departed. Cambodia remains a severely poor and needy country, with an unlimited wish list.⁶⁹ It lacks fundamental infrastructure such as roads, power, and communications. It has no significant industry, or sources of foreign or domestic investment. GDP was \$237(US) in 1994 and \$315(US) in 1995.⁷⁰ Almost 50% of its national budgets since 1994, the first year a budget was introduced and passed

since 1975, comes from foreign aid.⁷¹ Life expectancy remains in the range of 50 years. Infant mortality is 12%. The rate of illiteracy was 59% in 1994.⁷²

The justice system is not high on the government's list of priorities. While it is difficult to obtain reliable figures, the budget of the Ministry of Justice is said to be less than 1% of the total.⁷³ The budget of provincial courts can be withheld for both financial and political reasons, leaving some courts operating with no resources for months at a time.⁷⁴ Even if the allocated funds arrive in a timely manner, they are not sufficient to permit efficient operation. In one province, the court receives \$9(US) per month for stationery for 27 staff, and routinely runs out of paper for its work.⁷⁵

In 1995 many provincial courts still did not have such basic resources as copies of the laws of Cambodia. There was no national system for regular reporting or distribution of judgments. Opportunities for judges and prosecutors to meet their counterparts from other provinces were limited, leaving most operating in isolation with no means of developing a consistent approach to the application of the laws of the land. In 1995 only five provinces had telecommunication services.⁷⁶

Typically court proceedings take place in hearing rooms striking for their state of disrepair. The walls have bullet holes and other damage. Electricity is marginal or non-existent. Birds fly in and out of open windows and nest in the ceilings. Old wooden benches and tables covered by worn cloths are moved in for use at trials. In terms of the public perception, it must be difficult to believe that anything worthy of respect or dignity takes place in such surroundings.

With regard to personnel, the court system had expanded well beyond that of the SOC. There were 140 judges covering the 21 provincial and municipal jurisdictions in 1995.⁷⁷ Forty-two new judges were trained in 1995 but cannot take office until the Supreme Council of the Magistracy is in place, a topic discussed in more detail below. Few judges, including the new trainees, have university training in the law. All are still paid only \$20(US) per month.

The courts are more active than prior to UNTAC but still have serious problems with backlogs. In one province, the court reported having heard almost 100 criminal cases and over 300 civil cases in the first eleven months of 1994. However, there remained over 100 criminal cases and over 500 civil cases on its agenda. In July 1996 the same court reported that it had heard 80 criminal cases and 100 civil cases thus far in the calendar year, but had a back log of 300 criminal and 400 civil cases.⁷⁸

Neither the Supreme Council of the Magistracy nor the Constitutional Council had been established as of mid-1996.

2. Foreign Aid and the Justice System

Since the departure of UNTAC the international community has been aware of and has responded to the "desperate need for activities aimed at supporting the establishment of an independent and effective judiciary system" to assist in carrying out the promise of the new constitution.⁷⁹

A number of international organizations have established programs which work to strengthen judicial institutions and their officers. A U.N. program and an American program have placed foreign lawyers and judges in a number of provinces to work with the provincial tribunals as mentors or trainers. These programs have also been able to offer some funding for physical renovations to court facilities and for distribution of copies of the laws of Cambodia to court staff.⁸⁰

French and American programs have placed advisors with the Ministry of Justice and established a judicial training program for new judges. An American project offered a short term centralized training program for some of the judiciary in 1995.⁸¹ The Australian Agency for International Development commissioned a report in July 1995 which called for \$10 million in Australian aid to create a coherent legal system.⁸² The Asian Legal Resources Centre/Asian Human Rights Centre in Hong Kong has established a three stage program to initiate a campaign for judicial and legal reform in Cambodia, drawing on the experience of Asian judges and lawyers.⁸³

3. The Cambodian Government and the Justice System

The list of aid programs above is not intended to be comprehensive, but it is long enough to demonstrate the diversity of assistance being offered to the justice system and the need for coordination. No matter how well-intentioned, foreign legal assistance brings with it practitioners with legal experience in their own countries, whose recent history and laws are undoubtedly different from those of Cambodia. Given the severe needs of the Cambodian system, the Minister of Justice might be forgiven for not wishing to say no to any prospective donor. Nevertheless, it is incumbent on the Cambodian government to provide guidance as to the nature of the legal system that will develop in Cambodia. It must be a system suited to Cambodia, within the present constitutional framework, and not a system imposed by donors.

The present state of the Cambodian justice system gives rise to a strong impression that activity in this sector is almost entirely donor driven. Without government action in four key areas, efforts by foreign programs to promote the rule of law cannot succeed.

A. Political Independence

Conditions of judicial tenure remain unclear and fragile, providing a means for continuing political influence over judicial officials. The constitution gives the

power to appoint and discipline judicial officers to the Supreme Council of the Magistracy, chaired by the King.

Legislation to create the Council was introduced in 1994. It was controversial as it permitted the Minister of Justice to be a member of the Council, a move opposed by human rights groups on the basis that this would undermine the separation of the executive and the judiciary.⁸⁴ Nevertheless it was passed in this form by the National Assembly in December 1994.⁸⁵ All members of the Council, with the exception of the King and the Minister of Justice, are to be prosecutors and judges.⁸⁶ All judges and prosecutors in Cambodia have been appointed by the CPP, or by its predecessors, SOC and PRK. Thus most members of the Council will have CPP affiliations, with the potential for influence that this imports. There will be no representation from FUNCINPEC or any sector independent of politics.⁸⁷

Relations between the two parties in the coalition government have deteriorated since the elections. FUNCINPEC is resistant to a dominant CPP presence on the Supreme Council of the Magistracy. It argues that some FUNCINPEC judges or prosecutors must be appointed to allow balanced representation on the Council. CPP, with some irony, argues that if appointments are made on this basis, they would be purely political and not conducive to an independent judiciary. It is a political impasse.

One of its effects has been to delay the appointment of 42 new judges, who have been waiting to take their places in the provincial courts since finishing their training in December 1995. Their services are badly needed. However, this has not moved the parties any closer to a resolution.

In the absence of security of tenure, judges continue to communicate regularly with the Minister of Justice, accepting his advice and decisions on how to interpret the law, and how to handle their cases.⁸⁸ Judges are also subject to control by provincial governors, who have control over court budgets, and may withhold funds if they are unhappy with the court's decisions.⁸⁹

B. Financial Independence

A second major problem, as yet unaddressed by the government, is the pay scale of the judiciary. Their present monthly salary of \$20(US) is well below the \$100-200 per month which is considered the minimum amount required to support a family.⁹⁰

It is instructive to contrast this with the income of the other two branches of government. In its first plenary meeting the National Assembly voted themselves an income of \$650(US) per month, plus additional perks worth approximately \$1000(US) per month.⁹¹ Members of the executive earn from \$560-1500(US) per month in salary and benefits.⁹²

It is small wonder that stories abound of judges working in rice paddies, driving cyclos, or sending their wives to work in the market, in order to supplement their income.⁹³ Of greater concern is the widely held belief that judicial officials accept payments from successful litigants because they do not earn enough upon which to live.⁹⁴ The Special Representative of the Secretary-General for Human Rights in Cambodia, himself a judge from Australia, has repeatedly emphasized this significant barrier to judicial independence in his reports:

Such low salaries make it almost impossible for judges to be independent. They expose judges to the temptation of corruption and the necessity to rely upon gifts, etc., which are incompatible with judicial office. Means should urgently be found to provide judges in Cambodia with salaries and other benefits of office sufficient to remove the exposure of judges to temptations of corruption... Without an incorruptible judiciary, the rule of law will not take root in Cambodia.⁹⁵

Judicial corruption is no secret.⁹⁶ Until judges are paid a reasonable salary, the temptation and the need to accept payments from litigants will continue. The justice system will have no public credibility. Those with no money will use guns or other means of settling their differences, or will continue to be victimized by a justice system in which the wealthy always win. Until judges are paid properly, it is impossible to separate those who accept payments because they are needy from those who are irredeemably corrupt, and remove the latter.

C. Lack of Accountability of the Security Forces and other Government Officials

The third major area requiring government action is the lack of accountability of the security forces to the civil authority of the judicial system. Cambodia's long history of war, superimposed on the absence of civil authority and legal order in the wake of the DK regime, has produced powerful and corrupt military and police forces which operate beyond the law. Their mistreatment of civilians rivals the brutality of the DK in some parts of the country. International human rights observers have identified this as the most important human rights issue in Cambodia.⁹⁷ As well, high level military and police officials are rumoured to be involved in lucrative international crimes, such as smuggling and drug trafficking.⁹⁸ The government must support the efforts of the courts to hold military and police accountable for criminal activity if the rule of law is to supersede the law of the gun in Cambodia.

While military offenders fall under the jurisdiction of the civil courts for offences involving civilian matters,⁹⁹ judges are often afraid or unable to enforce the law against them. They have no power over military offenders who choose to ignore their authority. Justice meted out to a military criminal usually depends on his commander. The concepts of civil authority and the rule of law are anathema to many commanders, who view them as disruptive to their own control and interests. They prefer to administer their own form of justice to their troops.¹⁰⁰

Judges who do attempt to bring military offenders to account generally encounter lack of cooperation at best, and violent opposition at worst. One judge, who stated publicly that he believed 90% of the 1700 unresolved murders in his province were committed by the military, had his vehicle rammed by military vehicles four times. In other cases, judges and prosecutors have been forced to flee from armed military personnel disrupting trials.¹⁰¹ Military offenders regularly avoid arrest, escape, or are released from custody while awaiting trial through use of force or threats.¹⁰²

Nor is such interference is restricted to the military. A recent incident in Kampot province demonstrates the complexity of the problem and the diversity of pressures that may be brought to bear on the courts by authorities intent on evading justice. In December 1995, the Chief Judge and other court staff had to flee the court building to escape a mob of armed Buddhist monks, who ransacked the building and stole or destroyed court records and property. The monks had been incited by a Deputy Governor of the Province, who was angry over losing a case over a land dispute.¹⁰³

D. Lack of Appropriate Review Mechanisms

The Cambodian government has failed to establish the necessary institutions and procedures for independent law review to ensure compliance with the constitutional framework and the rule of law.

The most important organ to oversee legislative and executive power is the Constitutional Council. Two and a half years after the Constitution was enacted, this Council has yet to be formed. The required legislation with respect to its organization and operation has not been passed. Since three of its members are to be appointed by the Supreme Council of the Magistracy, it cannot be operative until the impasse over the appointment of members to that body has been resolved. Appointment of its members will undoubtedly be blocked by similar political considerations to those which have stalled the Supreme Council of the Magistracy.¹⁰⁴

Until the Constitutional Council is in place no legislation or internal rules of procedure enacted by the National Assembly can be reviewed for compliance with the Constitution. As well, the Council has not been able to fulfill its duties with respect to ruling on significant and controversial matters such as the constitutionality of the new *Press Law*¹⁰⁵ or the legality of the expulsion from the Assembly of Sam Rainsy, former Minister of Finance and outspoken critic of the government.¹⁰⁶

With respect to appellate review of judicial decisions, an Appeal Court was established in May 1994 as an intermediate level of review between the provincial tribunals and the Supreme Court. However, both appellate courts labour under

difficulties similar to those facing the trial courts. Lack of financial and other resources interfere with their effectiveness and result in a significant backlog of cases. Access is limited to the wealthy and the centrally located. A small fraction of trial decisions reach either court for review and the vast majority of these are civil rather than criminal matters.¹⁰⁷

4. The Rationale for Government Inactivity

The establishment of a functioning justice system has not proceeded expeditiously despite its importance in the constitutional scheme. There are a number of reasons for this. First, the level of legal and institutional development itself has an effect on the pace of development. A less developed legal system may make it difficult to accurately determine whether lack of government action is due to government policy or lack of resources.¹⁰⁸ This is particularly so in a situation where sophisticated and foreign concepts of western liberal democracy have been imposed on a society virtually devoid of the institutions necessary to protect and nurture them.

There is no doubt that a lack of financial resources places limitations on the ability of the Cambodian government to implement the rule of law. As described earlier, Cambodia remains a poor country with significant needs in virtually every area. The government must constantly face questions of priority. Comments about democracy made in an address in August 1995 by the first Prime Minister, Prince Ranariddh of FUNCINPEC, are instructive:

Democracy means food for the people's stomach, shelter, education, medical facilities and basic amenities and the freedom to express and move freely. This is democracy in the Cambodian sense. It is easy to preach or advocate democracy when one has a full stomach or is (sic) living comfortably in a fully air-conditioned villa or mansion. But what about the poor rural people. The farmers who till the land for the day so that they will have food for their stomachs at the end of the day. To them, democracy is just a phrase to be talked about in idle gossip. It does not ensure food for their stomach nor an end to their plight.

The people of Cambodia have undergone much suffering. As a result, the attitude and basic principles and necessities of life has also changed, as with their perception of their needs and desires. Given this situation, discipline is more essential in our society than democracy, though they have a need of both.

When the rural poor people have sufficient food, shelter, education, and basic amenities, then democracy can be preached and installed in abundance. Not now when there are many elements

within our society, notably the Khmers Rouges to take advantage of the democracy issue and turn the country into another killing field.¹⁰⁹

This "bread before freedom" debate is not new, but must be examined in the context of who the speaker is, and from what perspective and power stratum the statements emanate.¹¹⁰ They seldom come from the rural poor.

Notably, Ranariddh's comments slide from "bread before democracy" to "discipline before democracy". This apparent non-sequitur, as well as his reference to the familiar spectre of the Khmer Rouge, may serve to explain why the Ministries of Interior and Defence together received almost 30% of the 1996 budget of approximately \$600 million (US). Education and health, both services seriously deficient for the rural poor received only 5.6% and 4% respectively from the total budget, belying his comments.¹¹¹ As noted previously, the Ministry of Justice is believed to receive less than 1% of the budget.

Moreover, some of the key needs in the justice system, such as establishing the Supreme Council of the Magistracy and the Constitutional Council could be undertaken without significant government expenditure, or reallocation of resources earmarked for development.

Ranariddh's reference to the Khmer Rouge typifies another common government response when criticized for failing to implement the rule of law and other aspects of the democratic constitutional regime. In the view of the government, the country is still at war, and concerns of national security supersede the rule of law. There is no place for civil authority. Such interference will jeopardize the war effort and result in defections to the DK.¹¹² For example, the government says it cannot raise the salaries of the judges without a similar increase in military salaries, which it cannot afford.

In fact, the DK threat has diminished significantly in the last two years, in large part due to a successful amnesty program launched by the Government which has resulted in the defection of over 15,000 DK troops and family members.¹¹³ In the opinion of a noted Cambodian historian, "the last serious military victory the Khmer Rouge won was in April 1975...they're not the story".¹¹⁴

Excuses that the rule of law cannot be implemented in Cambodia due to lack of resources or ongoing war must therefore be viewed with skepticism. It appears most likely that lack of progress is due primarily to two other factors: self interest of the powerful, and lack of public interest.

Some commentators in the debate about the cultural relativism of human rights and democracy have made the point that these concepts serve a different function in Asia from their function in western societies. In the latter, they have developed in a climate generally characterized by law-abiding state institutions.

The existence of rights is seldom contentious, and they serve the purpose of "fine-tuning" the relationship between the individual and the state. In the Asian context, on the other hand, human rights and democracy have a more significant transformative potential. Here they represent a major challenge to the vested interests of those in power, who often maintain their positions of economic and political influence through participation in, or support of, authoritarian regimes characterized by large scale human rights abuse.¹¹⁵

The rule of law as a constituent element in human rights and democracy has the same transformative and threatening potential. When examined in this context, it is remarkable that the Cambodian signatories to the Agreements agreed to be bound to a future state structure so antithetical to their own interests. Some ambivalence in performing the terms of the Agreements, and implementing the related constitution, should not be unexpected.

Most Cambodians do not challenge this ambivalence and the resulting government inactivity. Cambodia is a country in which people have traditionally endured abuse by authority. The inequities existing between the powerful and the powerless are characteristically large but accepted. Individual protection lies in patronage: securing a powerful protector and serving him without question or criticism.¹¹⁶ While the DK regime represented a gross departure from the accepted norm, its themes of subjugation and authoritarian rule were not new to Cambodians. Similarly, the rigid controls and lack of freedom under the PRK were not unique. Thus the Agreements and the constitution, in addition to imposing liberal democratic concepts on an unenthusiastic leadership, also introduced them to a populace that has no history or understanding of them or of their role in establishing them.

Finally the performance of the courts to date has failed to attract the public support which is critical to implementing the rule of law. The public remains unconvinced that the justice system is worthy of their support.

In short, introduction of the rule of law would dramatically change the traditional power relationship, to the detriment of the elite in Cambodia. The people of Cambodia are still emerging from years of trauma and historical subjugation. Most of them have yet to appreciate their role, and that of the rule of law, in a fledgling democracy. Ultimately, these provide the most likely explanation for government lethargy in establishing a viable legal system.

5. The Future of the Rule of Law in Cambodia

Critics must not lose sight of the fact that the international community, through the Agreements and resulting constitution, conceived a plan for Cambodia that was extremely ambitious, given the historical and economic conditions of the country.¹¹⁷ The opportunity for a concerted international effort to implement that plan ended

with the departure of UNTAC. In retrospect, there is support for the view that UNTAC should have had a longer mandate, sufficient to establish the institutions necessary to ensure success of the new constitutional scheme.¹¹⁸

However, there are limits to what international aid can do with respect to the central problems in the justice system. Payment of judicial salaries with international funds raises problems of sustainability, and the possible perception of intrusion into judicial independence by a foreign nation. International aid can play no role in the present political impasse that has stalled the appointment of the Supreme Council of the Magistracy and the Constitutional Council.

Nevertheless, Cambodia remains heavily dependent on international aid and badly needs international investment, both of which give some continuing leverage to the international community. It is this area of economic development which carries the most promise as a means of forcing the government of Cambodia to realize the value of the rule of law. A stable and independent justice system is critical to attracting the foreign investment which Cambodia so badly needs for economic development. Crime, corruption, and the absence of a reliable means of dispute resolution remain significant deterrents to potential investors.¹¹⁹ Without addressing those concerns, the Cambodian government forestalls important sources of foreign revenue and business development.

Land disputes are a major problem which demands an impartial and reliable means of resolution for investment security. The destruction of land entitlement in the DK regime, the dislocation of large numbers of the population due to war, and corruption of government officials who have seized and sold lucrative tracts of land without attempting to identify their rightful owners, have led to entanglements of competing rights. The potential for business and domestic conflicts arising from these laws require urgent and impartial resolution.

In the past year, the Cambodian government has received stern warnings from the United States and France, two of its largest donors, that failure to implement the rule of law and the necessary judicial infrastructure may have some bearing on future aid. In the fall of 1995, large-scale trafficking in narcotics in Cambodia was reported with high level government and military personnel implicated. The United States threatened to place Cambodia on its Major Narcotics Country list. Once on that list, Cambodia would be obliged to demonstrate that it has taken "legal and law-enforcement measures to prevent and punish public corruption" that is contributing to such activity. If it cannot, the United States must consider halting most bilateral assistance and voting against multilateral assistance.¹²⁰

As well, Cambodia's application for most-favoured nation trading status with the United States was held back because of human rights concerns.¹²¹ The 1995 U.S. State Department Country Report on Human Rights, as well as the 1996

General Accounting Office Report, raised concerns about corruption and political influence in the courts and the lack of accountability of the military.¹²² France, which pledged \$60 million(US) in aid in 1996, has also had government representatives intimate that future aid may be affected if there is not better progress toward democracy.¹²³

Such reports must cause consternation in Cambodian government circles. It is this link between the rule of law and financial matters which appears most likely to prompt positive government activity in the justice system. It is difficult to measure in any tangible way how a stable and impartial legal system factors into investment decisions. However, there is no doubt that the absence of such a system is a deterrent for foreign investors. Delivery of this message to the Cambodian government is important.

The international community also has a continuing role to play in the support and encouragement of the emerging civil society in Cambodia. This potential for a strong domestic force for change is both more precarious, and more promising, than international pressure for change. Ultimately if the rule of law is established in Cambodia, it will be due to a populist movement with the courage to move the country beyond the traditional culture of authoritarian abuse and patronage.¹²⁴

However, these initiatives are fragile and gaining internal support slowly. Much of the population remains isolated and illiterate, with no history or understanding of their role in forging social change. In fact, many fear change, especially if it requires a challenge to traditional power structures. Nevertheless, if civil society can be nurtured and strengthened, it will become the most effective force in establishing a strong and independent justice system.

The rate of progress is slow. However, there have been encouraging developments as well. In January 1996, a series of incidents of interference with the judiciary moved the Minister of Justice to make a formal complaint to the Prime Ministers, and request that armed soldiers and police not interfere with court decisions and actions, a move lauded as courageous, but also long overdue.¹²⁵

Periodically, judges do convict members of the military, or release prisoners due to non-compliance with the procedural requirements of the *UNTAC Code*, demonstrating they have grasped the importance of their role in the new Cambodia, and have the courage to exercise their independence.¹²⁶ Their examples provide important encouragement to other judges and reassurance to the public that the courts can deal fairly with their cases.

The emergent Cambodian legal profession is also playing an important dual role as educators and watchdogs in the justice system. From 1975 to 1992 there was no law school and no independent legal profession in Cambodia. During the PRK/SOC regime, social defenders, who were lay people or IPAL graduates

appointed by the state, played a limited role in trials, consistent with the demands of the party.¹²⁷

The arrival of UNTAC and the enactment of the *UNTAC Code* revealed the serious need for defence counsel in the courts. UNTAC provided several weeks legal training as defenders for 60 lay people, and these defenders then set about contributing what they could to the daunting task of representing the many Cambodian prisoners who required their services. This group of defenders provided the first independent legal services available to Cambodians in over fifteen years.

Five NGO's have since established defenders training or services¹²⁸, allowing an increased level of service which nevertheless falls far short of fulfilling the need. In some cases the courts have learned the value of assistance from legal representation, and have been guided by their arguments. In others, the presence of a defender provides a deterrent to corruption.¹²⁹

The Faculty of Law and Economics at the University of Phnom Penh reopened in 1992 with significant financial assistance from the French government. Almost 200 law students will graduate in 1997, producing the first lawyers in Cambodia in twenty-two years.

Another major step in the development of the legal profession was the adoption of the *Law on the Bar* by the National Assembly on June 15, 1995, and the subsequent establishment of the Bar Association of the Kingdom of Cambodia in October of the same year.¹³⁰ The legislation permits the creation of an "independent and autonomous" legal profession. It provides for an elected President and Bar Council to govern the profession, establishment of ethical guidelines and disciplinary procedures, and training and qualifications for membership.¹³¹ The question of what role the Bar may play in promoting the rule of law remains open, but the independence endorsed in its enacting legislation can make it a vital force in this endeavour. The effect of approximately 200 law graduates next year cannot be over-estimated. 1997 will be a transformative year for the legal system in Cambodia.

If Dick the Butcher was correct in surmising that the absence of lawyers would ease destruction of societal order, it may be hoped that the return of lawyers to Cambodia will advance its reconstruction. But perhaps the ultimate impetus for the rule of law will come from a fear common to all Cambodians of a return to the "killing fields", and a growing realization that a functioning justice system plays a pivotal role in avoiding that.

* * * * *

Endnotes

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- ¹⁸ LCHR, *supra*, note 4 at p. 31.
- ¹⁹ Donovan 1 *supra*, note 3 at p. 85.
- ²⁰ Ross, *supra*, note , p. 4; UN5, *supra*, note 16, footnote 19 at p. 63.
- ²¹ Fernando, *supra* note 2 at p. 1-5.
- ²² Donovan 1, *supra* note at p. 88.
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- ³⁰ Shawcross, *supra*, note 26 at p. 10-12.
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⁶⁴ *Ibid.*, Articles 99-108.

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- ¹¹⁰ Yash Ghai *Human Rights and Governance: The Asia Debate*. Occasional Paper No. 1, The Asia Foundation's Centre for Asian Pacific Affairs, November 1994 at p. 13 (*Asia Debate*); Clarence Dias, "Rural Development, Grassroots Education, and Human Rights: Some Asian Perspectives" in *Human Rights in the Twenty-first century: a Global Challenge*, ed. Kathleen Mahoney and Paul Mahoney. The Netherlands: Martinus Nijhoff Publishers, 1993 (Dias).
- ¹¹¹ Indochina Digest, *supra*, note 71.
- ¹¹² HRW, *supra*, note 97 at p. 47.
- ¹¹³ Ranariddh, *supra*, note 109.
- ¹¹⁴ David Chandler, speaking at the Foreign Correspondents Club, Phnom Penh, November 23, 1994.
- ¹¹⁵ *Asia Debate supra*, note 10; Dias, *supra*, note 10, at p. 704-705.
- ¹¹⁶ See generally David Chandler, *supra*, note 2; and Shawcross, *supra*, note 26.
- ¹¹⁷ Yash Ghai, *supra*, note 42 at p. 11.
- ¹¹⁸ Doyle, *supra*, note 53 at p. 88; Yash Ghai, *supra*, note 42 p. 5; Shawcross, *supra*, note 26 at p. 2.
- ¹¹⁹ See for example, "Cambodia, Shady side-show", *Business Asia*, October 23, 1995; "Cambodia, Troubled times", *Business Asia*, March 11, 1996.
- ¹²⁰ *Far Eastern Economic Review, supra*, note 98.

- ¹²¹ Keith Richburg, "Cambodia Slides Back Into Violence", *Guardian Weekly*, December 31, 1995.
- ¹²² "US view on Cambodia's human rights", *Phnom Penh Post*, March 22- April 4, 1996; Matthew Grainger, "Democracy or diplomacy?", *Phnom Penh Post*, April 19-May 2, 1996.
- ¹²³ Christine Chaumeau, "French MP says Cambodia 'no democracy'", *Phnom Penh Post*, April 19-May 2, 1996.
- ¹²⁴ Shawcross, *supra*, note 26 at p.58-68; HRW, *supra*, note 97 at p. 78-90; AI, *supra*, note 84 at p.39-53.
- ¹²⁵ Ker Munthit and Matthew Grainger, "Sgnoun gets tough in support of courts", *Phnom Penh Post*, February 23-March 7, 1996.
- ¹²⁶ HRW, *supra*, note 97 at p.69, 72-73.
- ¹²⁷ Ross, *supra*, note 13 , at p. 2-3, Donovan 1, *supra*, note 3 at p. 86-87.
- ¹²⁸ The International Human Rights Law Group, funded by USAID, SIDA, and Novib, launched one of the most ambitious and successful training courses, lasting for 10 months and producing 25 graduates in February 1995.
- ¹²⁹ Jason Barber, "Courts respond to defenders", *Phnom Penh Post*, May 17-30, 1996.
- ¹³⁰ "Cambodian Bar Association Formed", *Reuters World Service*, October 17, 1995.
- ¹³¹ *Law on the Bar*, Unofficial Translation Prepared by the American Bar Association Cambodia Law and Democracy Project, Phnom Penh, August 1995.