



## CCHR Briefing Note – February 2013

### Judicial Reform

#### **Executive Summary**

This Briefing Note outlines the current state of the judiciary in the Kingdom of Cambodia (“Cambodia”), analyzes shortcomings in the functioning of the judiciary and courts, and offers recommendations for reforms which would substantially benefit the functioning of the judiciary and facilitate greater judicial independence in Cambodia. The first section provides background on the way in which the judiciary and courts currently operate, including an analysis of the current state of the rule of law, separation of powers and judicial independence in Cambodia. The second section analyzes in more detail the specific barriers standing in the way of a properly functioning, independent judiciary, namely, the failure to enact key pieces of legislation, the lack of independence of the judiciary and the failure to provide adequate resources and training to the legal and judicial sectors. The final section sets out specific and realistic recommendations for judicial reform – reforms that the Cambodian Center for Human Rights (“CCHR”) believes to be vital to a properly functioning, independent judiciary that is capable of serving the citizens of Cambodia and upholding the rule of law.

This Briefing Note identifies four main areas of judicial reform to strengthen the independence and integrity of the judiciary:

1. Draft laws should be fast-tracked and enacted and necessary amendments should be made to existing laws to ensure that they can be properly enforced and have real impact upon the way in which the legal and judicial systems operate;
2. Community education should be provided and information disseminated to ensure that citizens are aware of their legal rights;
3. Improvements should be made in legal training and resources to produce skilled and knowledgeable lawyers who are experts in their field and fully competent members of the judiciary. Judges and lawyers must be fully conversant in legal rights and procedures but must also have adequate facilities and budgets to promote and enforce them; and
4. An immediate and unconditional commitment should be given from both the Royal Government of Cambodia (the “RGC”) and the judiciary that the courts will not be misused as political tools to silence dissent and stifle debate.

These recommendations are vital to meaningful judicial reform, with the aim of achieving an independent judiciary that operates within the scope of the rule of law. This Briefing Note is written by CCHR, a non-aligned, independent, non-governmental organization that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout Cambodia.

## **Background: State of the Judiciary – Separation of Powers, Rule of Law and Judicial Independence**

In Cambodia there is no real separation of powers. The influence of the executive continues to pervade the judiciary and the courts lack independence. While the RGC has stated its commitment to legal and judicial reform, little practical progress has been made, and the development of the legal and judicial sectors has fallen significantly behind the progress seen in other areas. There is a widening gap between the constitutional guarantees in terms of the status of the judiciary and the way that the judiciary functions in practice. As this gap widens, the space for criticism and debate is shrinking, as the courts are used as political tools to silence opposition and dissent.

The Constitution of the Kingdom of Cambodia (the “Constitution”) enshrines the independence of the judiciary and defines its function as being to “*guarantee and uphold impartiality and protect the rights and freedoms of the citizens*”.<sup>1</sup> In the current political climate, however, the judiciary is unable to fulfill this guarantee, and outside influences permeate the courts on a regular basis. Politically-motivated cases have been brought against opposition politicians, land-rights demonstrators and those who speak out in defense of human rights. Conversely, those with government connections or positions of authority have enjoyed impunity, even when they have been accused of committing serious offenses. Criminal investigations – which in Cambodia are court-led – have been selective and inconsistent, creating a climate in which the rule of law is absent. In such an environment, it is impossible for the people of Cambodia to have trust or confidence in their judicial system, and it is widely regarded with suspicion and fear instead of being seen as an instrument whereby disputes and accusations can be dealt with peacefully and fairly. Despite the fact that citizens remain unable to put their faith in the judiciary, there has been no real mobilization of public support for judicial reform. While this inaction may be due at least in part to the fact that the RGC and authorities have shown a willingness to suppress dissent with violence – and on several occasions, lethal force – it may also have contributed to the RGC’s delaying of the reforms that they have undertaken to make for so long.

On a more specific level, the way in which hearings are conducted is indicative of a lack of resources, insufficient quality of training, and a lack of awareness of relevant human rights standards. Basic procedures are not always followed correctly and trials can be rushed. Pre-trial detention is prevalent among adults and juveniles alike, and there is no separate juvenile law. Citizens generally have very little awareness as regards their legal rights and how to exercise them, and the legal system is overburdened with a high volume of cases.

Since CCHR commenced its Trial Monitoring Project (“TMP”) in 2009, there has been an incremental improvement in the level of adherence to fair trial standards. However, major concerns remain and it is clear that significant reform is required if any real headway is to be made. A credible and stable judicial framework is essential if the rule of law is to be upheld, which can only be achieved with fundamental changes and a genuine respect for constitutional ideals.

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<sup>1</sup> Article 128 of the Constitution.

## **Barriers to a Properly Functioning Judiciary in Cambodia**

### Failure to Enact Key Laws

One of the main barriers standing in the way of judicial reform in Cambodia has been the RGC's failure to enact key laws that would formally define the role and status of members of the judiciary. Without these laws, the boundaries between the legislature, executive and judiciary remain clouded and the independence of the judiciary seriously compromised. In its *Legal and Judicial Reform Strategy* (the "Strategy"), the RGC sets out its aim to "*establish a stable legal and judicial framework where ordinary citizens, as well as national and international investors, can go about their business with the confidence that their rights at all times will be protected by a transparent, predictable, and fair justice system that is credible and stable.*"<sup>2</sup> The Strategy was adopted by the Council of Ministers (the "COM") in June 2003, but it has had limited impact to date. Its failure to have any real effect is primarily due to the fact that some of the key laws that it proposes are yet to be enacted.

The Law on the Organization and Functioning of the Courts remains in draft form and is currently under review by the Ministry of Justice. This law would codify the way in which the courts operate, providing the consistency and transparency that the system currently lacks, helping to build a legal framework within which development and reform can be sustainable.

Similarly, the Law on the Status of Judges and Prosecutors is still in draft form and is currently with the COM. Until this law is passed, judges will continue to be governed by general civil service rules, so this law is necessary to reinforce the constitutional principle of judicial independence. Currently, judges lack security of tenure; the executive can retire judges over the age of 60, but can retain them well past this age at its discretion. Consequently, those judges whose decisions accord with government policy can expect to enjoy longer judicial careers than those whose decisions may go the other way. Without a law setting out the criteria for the appointment and tenure of judges and prosecutors, there is the potential for those who dissent to have their careers cut short.

Amendments to the Law on the Supreme Council of Magistracy (the "SCM Law") were drafted in April 2002 and approved by the COM, but still await the approval of the National Assembly. The Supreme Council of Magistracy (the "SCM") is intended to be an independent body, responsible for the discipline of the judiciary; it has the power to appoint, dismiss, promote and discipline judges. Its independence is currently undermined by the fact that under the SCM Law in its current form, one of the members of the SCM is a government minister from the Ministry of Justice. While the proposed amendments go some way towards rectifying the fact that the SCM's constitution undermines judicial independence (for example, by proposing that an independent budget be set rather than be allocated by the Ministry of Justice, as is currently the case), the amendments lack bite and do not tackle the main issue, namely that a member of the executive also sits as a member of the SCM.

Ironically, while the much-needed amendments remain on hold, Prime Minister Hun Sen has recently signed a sub-decree establishing a new unit to investigate judicial misconduct. The "Inspection Unit" will

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<sup>2</sup> RGC, *Legal and Judicial Reform Strategy*, adopted by the Council of Ministers on 20 June 2003, available at [http://www.cjir.gov.kh/eng/library/doc/06\\_Legal.and.Judicial.Reform.Strategy.pdf](http://www.cjir.gov.kh/eng/library/doc/06_Legal.and.Judicial.Reform.Strategy.pdf).

form part of the SCM's Disciplinary Council and its committee will include members of the executive, constituting a step backwards in terms of the Strategy and a further blow to judicial independence.

Although a Juvenile Justice Law has been formulated, a separate law for juvenile defendants has yet to be passed, and juveniles are currently subject to the same laws as adults. The age of criminal responsibility in Cambodia is 18;<sup>3</sup> ordinarily, minors who commit offenses should be subject to "*supervision, education, protection and assistance*", and only prosecuted (if aged 14 or over) if formal action is "*warranted by the circumstances of the offense or the character of the minor*".<sup>4</sup> Despite this provision, juveniles are routinely prosecuted under the same laws as adults, receiving adult sentences and subjected to excessive and unwarranted pre-trial detention. A separate Juvenile Justice Law is urgently needed to ensure that the rights of juveniles within the judicial system are properly protected.

#### Lack of Judicial Independence

The judiciary is under the influence of outside sources in numerous ways. Judges and prosecutors are currently appointed by the Ministry of Justice, political influence pervades the courts, and corruption is endemic. Government influence on the courts can be seen in the number of politically-motivated cases seen in recent years, as set out below.

Three members of the main opposition Sam Rainsy Party (which has now merged with the Human Rights Party to form the Cambodian National Salvation Party) were stripped of their parliamentary immunity to face charges: Sam Rainsy, Mu Sochua and Ho Vann were all prosecuted for criminal disinformation or defamation charges and both Sam Rainsy and Mu Sochua were convicted (the charges against Ho Vann were eventually dropped). While Mu Sochua has recently had her parliamentary immunity restored, Sam Rainsy remains in self-imposed exile, facing a prison sentence of ten years if he returns to Cambodia for charges related to criminal damage, incitement, disinformation and falsifying maps.

It is not only politicians who have endured such treatment: Mam Sonando, the owner of an independent radio station and outspoken defender of human rights, was arrested in July 2012 in connection with land disputes in Kratie province. Armed police entered Pro Ma village in order to evict around 1,000 families; when the villagers refused to leave their homes, the authorities opened fire, killing a 14-year-old girl, Heng Chantha. Nobody has been held accountable for her death, and no proper investigation into the incident has been carried out. However, following this episode, police made a number of arrests, accusing villagers of being part of a secessionist movement and claiming that they were seeking independence from Cambodia. Despite there being no apparent evidence to implicate Sonando, he was arrested on a number of charges, including incitement offenses and participation in an insurrectionary movement. Mam Sonando's trial took place in Phnom Penh in September 2012 and he was sentenced to 20 years in jail on 1 October 2012. The fact that Mam Sonando was arrested and that his case proceeded to trial in the absence of any inculpatory evidence demonstrates the extent of the sway that the RGC holds over the judiciary; in glaring contrast is the absence of any investigation into the death of the 14-year-old girl at the hands of the authorities, which both demonstrates that the law is not applied equally or consistently and highlights the problem of impunity. Mam Sonando's conviction and his sentence of

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<sup>3</sup> Article 38, Criminal Code of the Kingdom of Cambodia.

<sup>4</sup> Ibid, Article 39.

20 years demonstrate the lengths to which the RGC is willing to go in manipulating a pliant judiciary to its own political ends.

This combination of politicized prosecutions and impunity for the well-connected not only undermines the independence of the judiciary, but also poses a serious threat to the values of a liberal democracy. This situation is the result of endemic corruption and a failure to honor the commitments set out in the Strategy; as long as the power to regulate and discipline the judiciary remains in the hands of the executive, any progress will be thwarted.

Even the long-awaited Anti-Corruption Law (the “ACL”) that was passed in 2010 – some 15 years after it was initially proposed – has proven to be toothless because the power to bring prosecutions under its provisions still rests with a judiciary that is under the influence of the executive. The ACL is not robust enough, in that it fails to create an independent, transparent body to oversee enforcement, and as such does not have the capacity to tackle corruption effectively. The members of most of the bodies created under the ACL are appointed by the Prime Minister,<sup>5</sup> and the bodies must report directly to him.<sup>6</sup> The mechanisms set up by the ACL lack transparency and, yet again, the influence of the executive is being exerted over what should be independent bodies. The ACL has no prospect of tackling corruption within the RGC for as long as the bodies that apply the ACL remain under government control.

#### Insufficient Resources and Training

The judicial and legal sectors were decimated during the Khmer Rouge regime, and the RGC has made commendable progress in terms of rebuilding these sectors and facilitating professional training, although there is still much work to be done. Immediately after the promulgation of the Constitution in 1993, the majority of judges and lawyers had had little or no training.<sup>7</sup> The Royal Academy for Judicial Professions (the “Academy”) opened in 2003 and it is hoped that this institution will in time provide the necessary level of training and education to produce a new generation of well-educated, competent and capable professionals. Currently, however, the reputation of the Academy is tarnished with allegations of bribery and corruption, with judicial appointments often going to the highest bidder, rather than the most capable candidate.<sup>8</sup>

CCHR’s own TMP often monitors cases in which judges announce verdicts with little or no legal reasoning, while the quality of legal argument in court is extremely poor. Furthermore, the intricacies of the law are often bypassed and evidence is rarely closely examined, trials are rushed with verdicts often bearing little correlation to the evidence presented; and convictions are routinely based on confessions, even in the absence of any other corroborating evidence. Such weaknesses in the judicial and legal sectors are the result of corruption and poor training and are exacerbated by a lack of resources, both in terms of personnel and finances. During dialogue meetings between members of the judiciary and

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<sup>5</sup> Articles 6 and 11 of the ACL.

<sup>6</sup> Articles 10 and 13 of the ACL.

<sup>7</sup> Dr Lao Mong Hay, ‘Institutions for the Rule of Law and Human Rights in Cambodia’ (*Asian Human Rights Commission*, undated article) <[www.humanrights.asia/resources/journals-magazines/article2/0501/institutions-for-the-rule-of-law-and-human-rights-in-cambodia](http://www.humanrights.asia/resources/journals-magazines/article2/0501/institutions-for-the-rule-of-law-and-human-rights-in-cambodia)>.

<sup>8</sup> Asian Human Rights Commission, ‘To Be a Judge, Be Ready to Bribe’ (12 May 2009) <[www.humanrights.asia/news/forwarded-news/AHRC-FAT-004-2009/?searchterm](http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-004-2009/?searchterm)>.

CCHR's trial monitors, judges have stated that defense lawyers are sometimes appointed on the day of trial because there are simply not enough lawyers to match demand and basic procedures, such as displaying public notices of hearings. The lack of sufficient numbers of lawyers, particularly defense lawyers, acts as an impediment to accessing justice and also has a negative impact upon the quality of representation if lawyers are not given sufficient time to prepare cases.

Failures to follow basic legal procedures can also be attributed to a lack of quality legal training. Judges often fail to properly advise defendants of their statutory rights and, when defendants are reminded of their rights, judges routinely fail to give adequate explanations to them. During the fifth reporting period of CCHR's TMP, judges informed and explained the defendants' rights to be legally represented and to remain silent in only 2% of cases.<sup>9</sup> During the same reporting period, judges answered their mobile telephones during 32% of trials.<sup>10</sup> Such conduct undermines the integrity of legal proceedings and does nothing to promote an image of professionalism among the judiciary.

### **Conclusions and Recommendations**

While the necessary changes are fundamental and far-reaching ones, CCHR nevertheless considers them to be both realistic and achievable. Much of the necessary legislation already exists, either in draft form or in legislation that has already been enacted, and these laws need to be strengthened and refined in order to address the concerns set out in this Briefing Note. The recommendations regarding training and education can be commenced within a relatively short time-scale, and are practical and sustainable, provided that adequate financial and human resources are made available, and provided that the RGC is willing to make a genuine commitment to meaningful judicial reform.

Expedite the enactment of draft laws: Key pieces of legislation must be sharpened and finalized so that their ratification can be expedited. Such laws are critical in achieving the objectives of the Strategy and in achieving an independent, impartial judicial and legal system capable of protecting the rights of all citizens. Therefore, CCHR recommends that the following laws are fast-tracked and enacted as a matter of urgency:

- **The Law on the Organization and Functioning of Courts**
- **The Law on the Status of Judges and Prosecutors**
- **The Juvenile Justice Law**

Make additional amendments to the SCM Law: Before the current draft amendments are enacted, they must be modified to ensure the judiciary's independence from the executive. CCHR therefore recommends that:

- **Amendments to the SCM Law should legislate for the exclusion of any members of the executive from sitting on the SCM**

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<sup>9</sup> Data relates to the Phnom Penh Court of First Instance only, from 1 July 2011 to 31 January 2012.

<sup>10</sup> Data relates to the Phnom Penh Court of First Instance.

Amendments to the ACL: Amendments should be made to the ACL to ensure that the bodies created by the ACL are completely independent and transparent. As such, CCHR makes the following recommendations:

- **Amendments must ensure that the bodies created under the ACL are accountable to the judiciary and not to the Prime Minister**
- **Amendments must ensure that responsibility for the regulation of these bodies rests with an independent judicial body and not with the executive**

Increase education/awareness of rights: Education and awareness of rights must be increased not only to inform citizens of their rights and how to access them, but also to mobilize public support for judicial reform. Such progress can be achieved by distributing information to defendants in courts and prisons as follows:

- **Defendants are often unaware of their legal rights; information should be disseminated to all those involved in court cases from the outset of proceedings. Simple leaflets and/or posters should be distributed to police stations and prisons where defendants are held on remand, setting out their legal rights and entitlements**
- **The same information should be made available at courts, and all courts/prisons should hold a directory of legal aid lawyers with contact details for lawyers made available to defendants**

Improved training and resources within the judicial and legal sectors and introduction of a Code of Conduct for judges: Training must be improved from the earliest possible stage, with a focus on legal arguments, rules of evidence and the principles of fair trial standards. As such, CCHR makes the following recommendations:

- **The Bar Association of the Kingdom of Cambodia should take a more active role in the education of trainee lawyers and also in creating an effective continuing professional development scheme for practicing lawyers**
- **Additional financial resources should be channeled into the legal and judicial sectors to ensure that courts have adequate facilities and that there are sufficient numbers of legal aid lawyers**
- **A robust Code of Conduct for judges should be drafted and enforced by the SCM to ensure adequate standards of professionalism within the judiciary**

The judiciary and the RGC must make an immediate commitment to cease the judicial harassment of human rights defenders and activists: The recommendations set out in the above categories can only be successfully implemented if the judiciary and executive make a genuine commitment to put an immediate stop to the use of the courts to silence political dissenters and critics of the RGC and its allies:

- **The RGC and the courts must stop the judicial harassment of human rights defenders, political activists and opposition politicians**

- The RGC must agree to the immediate and unconditional release of those currently detained for politically-motivated convictions that have no basis in law and no place in a liberal democracy

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