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**ចក្រភ័យមនុស្សធម៌កម្ពុជា**  
Cambodian Center for Human Rights

## A SERIES ON FAIR TRIAL RIGHTS AND RULE OF LAW

### Prohibition Against Retroactive Application of Criminal Law: New Provisions of the Penal Code

[www.cchrcambodia.org](http://www.cchrcambodia.org)

**Issue 9: December 2011**

#### Message from Cambodian Center for Human Rights (CCHR) President, Ou Virak

*"It has been a year since the Penal Code came into full force and effect. While its enactment was a necessary improvement to the provisions of the UNTAC Law, contributing to much needed legal reform in Cambodia, the manner in which it has been implemented in practice remains an issue for concern. Now that judges, prosecutors and lawyers have had a year to familiarize themselves with the new law, I hope that its provisions are applied in the spirit of the many international human rights conventions and treaties to which Cambodia is party, and in compliance with the human rights principles enshrined in the Constitution."*

In October 2009, the National Assembly approved a new penal code, which came into full force and effect in December 2010. The Penal Code of Cambodia (the "Penal Code") is a code of criminal law consisting of 672 articles. It tacitly replaces laws from the United Nations Transitional Authority in Cambodia (UNTAC) period.

Since December 2010, the Cambodian Center for Human Rights' (CCHR) Trial Monitoring Project has monitored the manner in which the provisions of the Penal Code have been implemented specifically in relation to the prohibition against the retroactive application of penal legislation and sentencing.

#### Prohibition Against Retroactive Application of Criminal Law

A fundamental principle of criminal law is that no one can be found guilty of a criminal offense for an act or omission that did not constitute a criminal offense at

the time the alleged action or omission took place – otherwise known as the principle of legality.

The prohibition against retroactive application of criminal law is provided for in international law by Article 11 (2) of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Civil and Political Rights and is reflected in Article 3 of the Penal Code.

Additionally, a heavier penalty may not be imposed than the one that was applicable at the time of the offense. If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the lighter penalty shall apply. Penal Code Article 10 goes on to provide that new provisions of the Penal Code that provide for less severe penalties for existing offenses are applicable immediately. Those providing for more severe penalties are only to be applied to acts committed after the provision has come into effect.

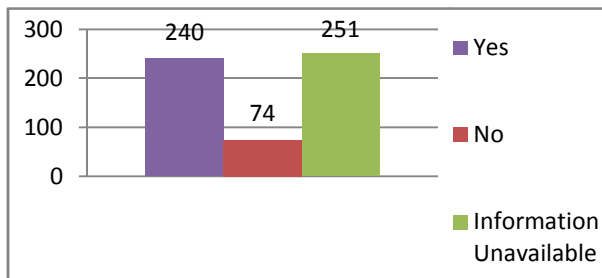
#### Findings of the Trial Monitoring Project

Of the 567 trials monitored at Phnom Penh Capital Court of First Instance between December 10, 2010 and October 31, 2011, CCHR has observed that in six cases the law under which the accused was charged was not in force on the date the offense was allegedly committed. In all six of these cases the accused was charged with offenses under the Penal Code even though the Penal Code had not been in force at the time of the alleged offense.

Of the 567 trials monitored between December 2010 and October 2011, trial monitors saw the provisions of the Penal Code applied in sentencing in 240 trials.

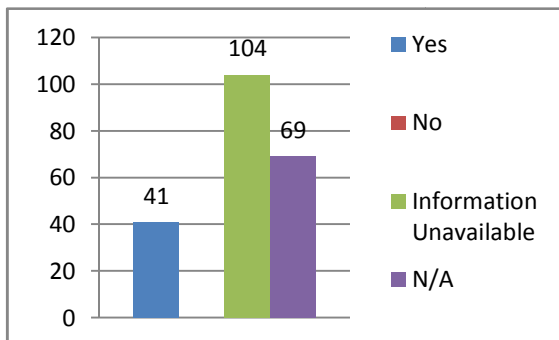


Figure 1: Were the provisions of the Penal Code used in sentencing?



As of July 2011, where the sentencing provisions of the Penal Code are used, CCHR has been monitoring compliance with Article 10 of the Penal Code to see if the retroactive sentencing provisions of the Penal Code in relation to imposing less severe penalties are being applied correctly.

Figure 2: Were there retroactive sentencing provisions of the Penal Code applied correctly?



In 41 of the trials monitored by CCHR, Article 10 of the Penal Code has been correctly applied with the less severe sentences applied where provisions of the Penal Code provided for such less severe penalties. In none of the trials monitored did CCHR monitors observe that more severe sentences were applied to acts committed before the effective date of provisions in the Penal Code, which provided for more severe penalties.

#### Case Study: Moeung Sonn

While CCHR has observed positive trends in relation to the application of less severe sentences as provided for under the Penal Code, it has also observed cases where the accused are charged with an offense under the Penal Code when in fact the law was not in force at the time of the said offense. In May 2011, a CCHR trial

monitor observed Moeung Sonn's, head of the Khmer Civilization Foundation ("KCF"), appeal in relation to a charge of disinformation under Article 62 of the UNTAC Law. On 15 July 2009, Moeung Sonn was found guilty of disinformation for criticisms he made in relation to a lighting installation at Angkor Wat. Moeung Sonn was sentenced *in absentia* to two years imprisonment, fined 7 million Riel (\$1,750 USD) and ordered to pay compensation of 8 million Riel (\$2,000 USD).

On appeal, the court reduced Moeung Sonn's fine from 15 million Riel (\$3,750 USD) to four million Riel (\$988) in compliance Article 10 of the Penal Code. However, the court changed the charge from disinformation under the UNTAC Law to incitement under Article 495 of the Penal Code. The change in charges could be interpreted as a misapplication of the law that resulted in Moeung Sonn being found guilty via the application of Penal Code provisions that were not substantively the same as the crimes with which he was originally charged. Arguably, this constitutes a retroactive application of the law.

#### Conclusion and Recommendations

It is a fundamental principle of criminal law that no one can be found guilty of a criminal offense for an act or omission that did not constitute a criminal offense at the time the alleged action or omission took place. It is important for all judges and lawyers to be mindful of the principle of legality in order to safeguard due process. Judges must also be reminded to ensure that the only time that provisions of the Penal Code are applied in relation to offenses that occurred prior to the Penal Code coming into full force and effect is in respect of Article 10 and less severe penalties for existing offenses.

#### CONTACT

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CCHR is a non-aligned, independent, non-governmental organization that works to promote and protect democracy and respect for human rights throughout the Kingdom of Cambodia.