

Rule of law in Cambodia

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NDI Seminar

11 August 2004

Introduction

- The Cambodian people carried out their democratic and civic duty by voting the third time for the general elections on July 27th 2003.
- After the elections in 1993, Cambodia adopted a constitution which separated the three powers – executive, judicial and legislative, which respects international human rights treaties ratified by the state since 1992, and which establishes the legal foundation for a body to insure the independence of the judiciary (the Supreme Council of the Magistracy, SCM). However, the implementation of the Constitution is insufficient. Little progress has been made towards establishing the rule of law and democracy. More work has to be done.
- Some NGOs (such the Cambodian Human Rights Action Committee - CHRAC) have identified keys issues which need action in order that Cambodia can tackle the endemic problems of poverty, corruption, human trafficking etc., and create a more healthy system which promotes democracy, human rights and rule of law.
- The institutions and legislation which must be reformed or developed are as follows:

Reform of existing institutions:

1. Supreme Council of Magistracy
2. Judges
3. Prosecutors
4. Constitutional Council
5. National Election Committee
6. Cadastral Commission
7. Audit Commission

Institutions which should be developed:

1. Anti-corruption commission
2. Independent National Human Rights Commission
3. National Congress

Legislative reform and necessary new law:

1. Penal code
2. Civil code
3. Criminal procedure
4. Statute of Judges
5. Statute of Prosecutors
6. Statute of Armed Forces
7. Statute of Civil Servants
8. Anti-Corruption law (declaration of the assets)
9. Anti-Trafficking law
10. Domestic Violence law
11. Law on financial management of political parties

Amendments to the Constitution

1. Simple majority
2. Two terms for PM
3. Coalition government
4. Article 98

5. Electoral System

Code of Ethics

Training

1. Three branches of government
2. Armed Forces
3. Local authorities
4. Civil servants
5. Civil society and general population

Institutional Reform

Cambodia already has a number of institutions which are fundamental in establishing the rule of law. However, these institutions are inadequate and corrupt and need serious reform.

In general, keys elements of reform to set up an independent and credible institution include:

1. Independence:

- Set up in a legislative and constitutional context to avoid arbitrary exercise of power
- The members should:
 - Enjoy security of tenure to avoid arbitrary or politically motivated removal
 - Be appointed by an independent Selecting Committee (SC) composed of representatives of the parties having the seats in the National Assembly and the same number of representatives from genuine NGOs working for the rule of law (having at least 10 years of experience, recognized by the national and international communities, etc.)
 - Have transparent member selection criteria and procedures subject to the scrutiny of the public. (for example: the candidates should not be members of any political party or should resign at least 1 year before; should not join a political party after terminating the function; should have high levels of education; should serve only one term; should not hold another position which would be a conflict of interest; must have integrity, a good reputation, 10 years of experience in the field)
 - Have the freedom to set up their own work agenda free from political influence.
 - Have the independence to manage their own funds
 - Freedom to appoint their own staff (for example, a competent secretary general)

2. Mandate:

- The functions of the members should be clearly stated in the law.
- Members must have immunity from arrest and prosecution during the exercise of their duty. If a member is to be sanctioned, it must be with the approval of 2/3 of the national assembly

- Sanctions and procedures for disciplinary action against members who abuse their position of power or who do not carry out their mandate in good faith should be clearly set out in law and enforced. Disciplinary action should be transparent and public.

3. Adequate resources:

- Funds adequate to carry out the institution's mandate must be secured in the law and enforced
- Funds should be allocated by the legislative, not the executive branch to ensure accountability to the people
- Should have adequate staff

4. Accountability:

- Procedure and practices should be transparent
- Must allow free access to its proceeding or records
- Has to build legitimacy
- Must submit periodic reports to the government and parliament which should then be made public.
- Must be open to evaluation by Parliament and by Civil Society.

1. The Supreme Council of the Magistracy (SCM)

Description:

- This body plays a crucial role in insuring an independent, efficient and transparent judicial system which is the foundation of any democratic country.
- An independent, competent and credible judiciary can fight against corruption, deforestation, human trafficking, impunity etc. and can attract foreign investment necessary for promoting economic development.
- At the most fundamental level, a competent and unbiased judiciary is essential to providing justice to victims of civil wrong-doing, crime and human rights abuse.
- The Constitution sets out the role of the SCM:
 - requests the King to appoint judges and prosecutors
 - takes disciplinary action against judges and prosecutors if necessary
- While the SCM is set up by constitutional and legislative texts, the implementation is weak. There is lack of independence and competence.
 - It has 9 members:
 - 3 judges should be elected by all judges but instead they were appointed by the ruling party
 - 1: the president of the Supreme Court
 - 1: the president of the Appeal Court
 - 1: the General Prosecutor of the Supreme Court
 - 1: the General Prosecutor of the Appeal Court
 - 1: the Justice Minister
 - 1: the King chairs the meeting.
 - Except for the King, the 8 members are affiliated to the two main political parties.

- There is also conflict of interest; all members continue to work in other capacities as judges, prosecutors or as the minister of justice. The constitution states that the President or the General Prosecutor of the Supreme Court will chair the Disciplinary Council.
- The King, is reluctant to chair the sessions, and with only one exception, has appointed the President of Senate to do this duty. The President of the Senate is also president of the ruling party – a clear conflict of interest.
- The General Secretary is also a member.
- No independent and no adequate budget.

Recommendations:

- The SCM needs drastic reform to be efficient, credible, independent in order to perform its duty.
- The King should appoint an independent, non-partisan individual to replace him, not the President of Senate
- Members should be elected according to transparent criteria by an independent Selecting Committee.
- All members should be apolitical, selected among the judges, prosecutors, lawyers, scholars or NGOs (high education and long experience).
- Members should not hold any other position which would be a conflict of interest, should have security of tenure, should have security (immunity) and have decent salary to avoid corruption
- The Secretary General should not be a member of the SCM, should be non-partisan, with high education and be appointed by the King.
- Members should hold only one term and after that be prevented from accepting - at least for three years - important positions in the party or in the government.
- SCM should have financial resources adequate for its functioning (allocated by the National Assembly).
- All procedures of appointment and sanction of judges and prosecutors should be transparent and opened to public.
- Disciplinary Council (DC): if the judges and prosecutors didn't agree with the decision of the DC?
- Who will monitor the work of the SCM?
- Ministry of Justice is an executive power, it should monitor the courts and be able to investigate the cases of corruption of courts and send the complaint to the SCM.
- Should have more than one Appeal court.

2. Judges

Recommendations:

- Must have an education in law (school of magistrates).
- Must not be affiliated to any political party.
- Must be appointed by Royal decree on the recommendation of the SCM.
- Should have security of tenure, physical security (immunity), good salary.
- Should not stay in the same place for more than four years (rotation).
- Should be monitored by the Ministry of Justice and people. Complaints should be sent to the SCM for disciplinary action in conformity with the law.
- Complaints against judges should be investigated by the SCM (disciplinary council, chaired by the President of the Supreme Court)
- Should receive promotions from the King on the recommendation of the SCM.
- The National Assembly should adopt the statute of the magistrate.

3. Prosecutors

Description:

- The role and function of the prosecutors are not well defined.
- According to the Cambodian Constitution, public prosecutors are independent and are monitored and sanctioned by the SCM.
- In some countries like India, USA, etc., the Attorney General is a Minister of Justice. This means that the prosecutors are interdependent with the Ministry of Justice.
- The General Prosecutor of the Appeal Court has no power to monitor the work of the prosecutors in the provinces.
- The Constitution states that the Prosecutor of the Supreme Court should chair the Disciplinary Council when the SCM receives complaints concerning the prosecutors.

Recommendations:

- Same recommendations as for the judges.
- There is a need for a separate law for Prosecutors.
- The General Prosecutor of the Supreme Court should be responsible for all prosecutors in Cambodia. (technical and management support)

4. The Constitutional Council (CC)

Description:

- According to the Constitution, the CC has the duty to insure that the Constitution is respected and interpret the Constitution and the law adopted by the National Assembly and the Senate.
- It has the right to examine and decide upon procedures of election of Members of the National Assembly and the Senate
- The King, the Prime Minister, the President of the National Assembly or 1/10 of its members and the President of Senate and ¼ of its members can send the draft law adopted by NA and Senate to the CC before its promulgation.
- The NA internal regulation and all the organic law should be examined first by the CC before its promulgation.

- The decision of the CC cannot be appealed.

Recommendations:

- In democratic country, the CC is the highest institution that can interpret the law and should be independent.
- However, in Cambodia, the CC is still controlled by the leading political party. Six of nine members are affiliated to the ruling party (the 3 members appointed by the King are neutral).
- The procedure of appointment of members was not transparent. Criteria for appointment were not clear and do not conform to the law (background and education of the candidates)
- The CC lacks of neutrality and transparency for it work. (post general elections 1998 and 2003).
- Need reform to become more independent, competent and credible (selecting committee and use the same criteria as above)

5. The National Election Committee

Description:

- NEC is a very important body that organizes elections.
- Cambodia had 4 elections since 1993. The first one was organized by UN, it was free and fair despite the violence of the pre electoral period but the 3 latest (1998, 2002 and 2003) were marred by irregularities and conducted in a climate of violence and fear.
- According to the law, NEC is independent but in fact the 5 members are appointed by the interior co-ministers and are affiliated to the two main political parties.

Recommendations:

- Needs to be entrenched in the Constitution
- It should be independent, the procedure of appointment should be transparent using the same criteria as cited above with Selecting Committee, apolitical, high education, integrity, solid experience etc
- Work and procedures should be transparent.
- Must be seen by the public to be independent, and build legitimacy

Institutions which should be developed:

Commissions should be written into the Constitution and should then be established as soon as possible.

These commissions should include an Anti-Corruption Commission, and a National Human Rights Commission, with the same criteria as the others commissions, that is, it should be independent, non partisan, competent and credible.

A National Congress must be created soon to fulfill the promise laid out in Chapter XII of the Constitution. Namely by enabling “the people to be directly informed on various matters of national interests and to raise issues and requests for the state authority to solve” an effective National Congress will support the strengthening of politics at all level of society and improve public participation within the political life of the country.

Legislative reform and necessary new law

The new government will need to create new laws to ensure that the legal system is able to deal with ongoing critical problems. These new laws need to include, as a matter of priority, a new penal code, a civil code and criminal Procedure. Laws also need to be developed to regulate key institutions like a statute of Magistrates (ensuring that all judges are non-partisan) and a statute of prosecutors.

The statute of the Armed Forces and the statute of Civil Servants should be amended to ensure that the armed forces and civil service are depoliticized. The Police Act must also ensure that the police are non partisan.

Law also need to be passed to deal with specific critical problems which continue to plague Cambodia including an Anti-Corruption law (with declaration of the assets which ensure that all members of the government declare their assets before taking office), an Anti-Trafficking law and a Domestic Violence law.

In order to insure a more transparent political situation, law need to be developed to regulate the financial management of political parties.

Amendments to the Constitution

Given the experience of the 2003 election, it seems appropriate that consideration be given to an amendment to the Constitution which would require that only simple majority is required to set up the government. The current political impasse, similar to that experienced in 1998, continues to have a destabilizing effect upon the country. Without a lawful government and new National Assembly in place it is hard to see how the authorities can take any effective action. At the same time, the length of service for the office of Prime Minister should be limited to two terms.

An amendment should be made to article 98 of the Constitution allowing for the dismissal of members of the Royal Government if they do not respond to the requests of the members of the National Assembly, for explanations and clarifications as described in articles 96 and 97 of the Constitution. The law should provide that if members do not respond three times, they will automatically be dismissed.

Finally, an amendment should also be made to change the electoral system from proportional representation to direct representation.

Code of Ethics

If the code of ethics is to be effective it is necessary for a mechanism to be created in the National Assembly and the Senate whereby members of the government, National Assembly and senators can be sanctioned if they violate the code of ethics.

Training

The three branches of the government (executive, legislative and judiciary), armed forces, local authorities, civil servant, civil society and general population should receive training on important laws.