



ASIAN LEGAL RESOURCE CENTRE

Joint Submission of UPR on Cambodia

by

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While recognizing some progress pertaining to the implementation of the UPR recommendations in the first cycle, the organizations taking part in this joint submission wish to bring attention to the following concerns relating to the protection and promotion of human rights in Cambodia.

Key concerns and issues:

1. The Constitution:

a: The implementation of the Constitution of the Kingdom of Cambodia, adopted in 1993, has remained problematic. The key obstruction is the failure to develop a basic institutional framework in terms of the Constitution. At the time the Constitution was adopted, Cambodia did not possess the basic institutional framework for the implementation of a constitution of a liberal democracy. For many preceding decades, Cambodia was ravaged by a long series of conflicts and all the basic institutions that had earlier prevailed were wiped out. The loss of millions of lives due to bombings, atrocities during the four-year rule of the Khmer Rouge and fighting over the following years due to the civil war between several Cambodian factions, left an imprint on the country. It was hoped that, following the UN sponsored election in 1993 and the adoption of the new Constitution, Cambodia would make a new beginning as a liberal democracy. However, the structure that was built during the civil war period has continued to have an influence and obstructed the development of the basic institutions necessary for the functioning of a liberal democracy as envisaged by the new Constitution.

b: The implementation of liberal democracy requires that conditions exist for the conduct of free and fair elections. These include the requirement that all political parties have the freedom to function within a democratic space. In Cambodia, the opposition parties are constantly exposed to extreme forms of repression. Many methods are employed for such repression, including repercussions for anyone who openly joins such opposition parties, and leaders of these parties are often exposed to fabricated charges. In such political cases, the courts do not have much choice but to strictly enforce the law in terms of the requirements of the ruling party. Thus, the mere appearance of a free and fair election by there being no direct violence exercised on the polling days does not mean that the conditions for such elections exist.

c: The development of a civilian policing system with a command structure, and the operation of such a policing system only on the basis of law, is a precondition for equality before the law, which, in turn, is a precondition for the enjoyment of any rights by the citizens. In the period following the UN sponsored elections in 1993, there has not been any qualitative improvement of the policing system. The system is still under the control of the ruling party. As a result, the public perception of the policing system is low and what exists as the policing system is a mixture of the military and the police. The continuance of military styles and habits acts as an obstacle to the development of a policing system that works only on the basis of the rule of law. Besides this, there is also a strong public perception that corruption pervades the entire policing system.

Recommendations:

(a) To take practical steps to make the constitution a practicable instrument by developing the necessary procedural requirements that enable the citizens of the Kingdom of Cambodia to bring cases before the Supreme Court and the Appeal Court of Cambodia for violations of their rights guaranteed under the constitution.

(b) In order to achieve the above purpose, make provisions for the Supreme Court to act on the basis of the separation of powers and enable it to review decisions and actions of the executive, in order to ensure that such decisions and actions are done in conformity with the constitution.

(c) Take all steps to remove the present impediments on the Supreme Court and the Appeal Court of Cambodia, which will uplift these courts from their present position of being subordinated to the executive and the legislature, and being unimportant institutions without any real power to challenge the transgressions of the executive.

(d) Provide public space for all political parties, particularly the opposition parties, to function without hindrance and to exercise their democratic rights as political parties at all times; particularly take steps to remove the abuse of the legal process that allows the suppression of leaders and other active members of all political parties, including the opposition parties, and thereby make the right of citizens to have free and fair elections a reality.

(e) Remove impediments to the development of a civilian policing system with a command structure that enables such a policing system to work only on the basis of law, ensuring the equality of all citizens through the operation of the rule of law; delink the policing system from all kinds of military and political controls; take effective steps to prevent the recruitment of the police, including the higher ranking officers, through a recruitment process that allows the payment of bribes to obtain positions.

2. **The independence of the judiciary:**

a: The 1993 Constitution incorporated the principle of the separation of powers as the basis of the power structure of the Kingdom of Cambodia. This implied that the judiciary in Cambodia would be a separate branch of government and would not come under the control of the executive. However, the institutional framework needed for the exercise of the independence of the judiciary has not been established and therefore the independence of the judiciary remains only an ideal enshrined in the constitution, not a reality.

b: The Supreme Court of the Kingdom of Cambodia has not been developed to the position of a Supreme Court in a liberal democracy. The powers of the court do not include the capacity to review the administrative actions of the government on the basis of possible conflicts with the rights of the citizens. There is no legal possibility for any Cambodian citizen to challenge the decisions of any government agency on the basis that such actions are in conflict with his or her rights. Neither the substantive law nor the procedural law allows for this possibility.

c: The Constitutional Council mostly remains a non-functioning institution. The manner of its appointments and the control exercised over it by the executive virtually prevents it from being an effective institution that ensures the constitutionality of laws and the protection of the rights of citizens. The Constitutional Council virtually blocks the development of the judiciary as an independent institution in the Cambodia.

d: The Supreme Council of the Magistracy, which could ensure the appointment of competent and impartial persons capable of functioning as judges, also remains an institution that is virtually controlled by the executive, incapable of acting independently and on the basis of the international norms and standards expected to be observed by such an institution.

e: There are serious concerns about persons seeking judicial positions paying bribes in order to obtain them. There are no independent forums to receive such complaints from the public.

f: In all sensitive cases, including the cases relating to land grabbing, the judgments and the orders given by the courts clearly indicate that there is a clear bias in favour of the government.

Recommendations:

- (a) The Supreme Court of the Kingdom of Cambodia should be elevated to the position of a supreme court within a liberal democracy and it should be the final adjudicator on matters relating to the legality of any legislation or executive action.
- (b) Remove the impediments to the functioning of the Constitutional Council, particularly by appointing members of the council only on the basis of merit, and take steps to remove the perception about the politicization of such appointments.
- (c) Make the Supreme Council of the Magistracy a functional institution with enough resources and power, and remove political control over it to enable it to make its decisions on the basis of valid criteria and only on the basis of merit. Remove all possibilities of obtaining judicial positions through political influence or payment of bribes. Take effective steps to remove the public perception of political influence in sensitive cases, particularly cases against opposition politicians and cases relating to land grabbing.

3. The practice of torture

a: The practice of torture is quite frequent after persons are arrested by the police, as well as in the prisons.

b: Torture provides an opportunity for extortion to the police officers, as well as to the prison officers.

c: There is no complaint mechanism available to victims of torture. An independent complaint mechanism with the power and the resources to investigate complaints of torture is an essential component of providing relief to victims of torture.

d: There are no medical facilities or services of forensic pathologists that could examine and make proper forensic reports relating to complaints of torture. Thus, much of the medical evidence of torture is lost and this acts against the possibilities of redress for torture victims.

e: Although the Constitution of the Kingdom of Cambodia prohibits torture and the new penal code also makes torture an offense, no clear definition of torture is available in law. The result is that there is confusion among the judges and even in the legal profession about what constitutes torture. Clear legislation defining torture in terms of the CAT Convention is an essential step in order to create the possibility of redress for torture victims.

f: There is no procedural law to file cases against torture. Therefore the legal rights for victims of torture to bring complaints before the courts do not exist. The procedural developments needed to bring cases of a criminal and constitutional nature must be established if the possibility of redress is to become a reality in the Kingdom of Cambodia.

g: There is also no legislation relating to compensation for torture. Substantive law as well as procedural law stating where the cases for compensation may be filed and the procedures for the disposal of such cases is required.

h: Above all, the power of the judiciary to entertain complaints of torture and take appropriate action against torture needs to be clearly established if the perception that the police and other authorities are above the courts is to be dispelled. The education of the judicial officers about their power and obligations on this matter is also a necessary aspect of making redress for torture available in Cambodia.

Recommendations:

- (a) Make a policy declaration and communicate it to all police, military and prison authorities, stating that torture and ill treatment are illegal and that all measures should be taken to prevent the use of torture and ill treatment.
- (b) Take particular steps to ensure that the use of torture and ill treatment is prevented for the purposes of extortion.
- (c) Institute an independent complaints mechanism to receive complaints relating to torture and ill treatment, and enable its proper functioning by granting the necessary powers and the financial and other resources needed.
- (d) Enable the education of doctors as forensic pathologists with the capacity to do proper medical examinations and make reports relating to torture and ill treatment.
- (e) Make legislation adopting a definition of torture in conformity with the definition in the Convention against Torture.
- (f) Make procedural law to enable filing cases before court on the basis of complaints of torture and ill treatment. Make legislation for compensation and rehabilitation of victims, and also for witness protection.
- (g) Above all, ensure the power of the judiciary to entertain complaints and to take appropriate action to ensure redress for victims of torture.

4. Fair trial

a: Despite the Constitution recognising the equality of all persons in the administration of justice, the Cambodian courts do not have the power to summon powerful persons within the government, or even summon other persons who enjoy political patronage. In the 21 years that have passed since the adoption of the 1993 Constitution, not a single person holding a high position in the government, or even the bureaucracy or police and military, has been called before a court as an accused or even as a witness. Although, abstractly speaking, the courts have power over everyone, in actual fact the courts in Cambodia do not enjoy such power.

b: Although the Constitution recognises the right to be presumed innocent until proven guilty, in practical terms the principle that still operates is that a person charged before a court is guilty. This is especially so in cases of a sensitive nature, such as when opposition politicians or human rights activists or persons charged with such offenses as resistance to the grabbing of their lands are being prosecuted. The courts proceed on the basis that such accused are guilty. If the principle of the presumption of innocence is to be respected in reality, procedural requirements should be clearly legislated so that the courts can act on the basis of such procedures and resist political or other pressures to do otherwise. The principle of the presumption of innocence should also be developed in procedural law for dealing with bail applications.

c: The right of counsel to cross examine witnesses, including police and military officers or other officers of the state, is often not guaranteed. This is especially necessary in relation to the relevant witnesses or officers who have recorded statements made to the police or other authorities.

d: In order to ensure that the accused has the right to a counsel to represent them, a system of free legal aid needs to be established, as many persons who are charged belong to the poorer classes and do not have access to legal counsel.

e: When persons from the minorities are charged, their right to an interpreter should be guaranteed.

f: The judgments and court orders must be written by the judges who have, in fact, presided over the trial and listened to all the evidence and no one else. The judgments should be written in a manner in which the relevant law and the evidence relied on for the judgments are clearly presented. Such written judgments are an essential aspect of creating the possibility of an appeal from the relevant court to a higher court.

g: The practice of reducing the courts to a market place by way of many forms of bargaining needs to be discontinued if the practice of fair trial is to be the basis on which the charges are disposed of.

h: There is a widespread public perception of the prevalence of corruption relating to adjudication.

i: There are constant reports of land grabbing (driving away persons with legal title who have possessed these lands for long periods of time, particularly done for companies who claim these lands). The public perception is that such land grabbers enjoy political patronage and that the police and military officers take their side. Despite many assurances about the development of proper systems of legal remedy for those who are affected by land grabbing, no such system so far exists. Many people from all parts of the country have become victims and have no remedy from the law.

Recommendations:

- (a) Enable the equality of all persons before the law by removing all impediments to summoning any person to court, including high ranking persons and those who enjoy political patronage; no one should be allowed to refuse to come before court and be a witness.
- (b) Remove all impediments to the implementation of the presumption of innocence of the accused, including for opposition politicians, human rights activists and victims of land grabbing. The presumption of innocence should also be respected in granting bail and the necessary procedural laws should be developed for that purpose.
- (c) The right of legal counsel to conduct cross-examination should be ensured on all occasions, regarding the testimony of all persons, including police and military officers and powerful government officials.
- (d) The right to be represented by a counsel should be available to all, including the poor, and, for this purpose, a proper legal aid system needs to be ensured.
- (e) The right to an interpreter should be guaranteed to all minorities.
- (f) Steps should be taken to ensure that all judgments and court orders are made in writing and that such judgments and orders should be made only by the judges who are directly involved in the hearing of the case. The judgment should be written in a manner in which all relevant law and evidence relied on in the judgment are clearly stated, in order to enable the possibility of an appeal from the relevant court to a higher court.
- (g) The practices that reduce the courts to a marketplace through many forms of illegal bargaining need to be discontinued to ensure that fair trial is ensured to everyone.

(h) Steps should be taken to respond to the public perception of the prevalence of corruption relating to adjudication.

(i) As there is a serious public concern that those who are subjected to land grabbing are not provided proper legal protection in courts, special measures must be taken to ensure the credibility of courts attending to these matters.

5. The rule of law:

The overall problem that affects the implementation of rights in Cambodia is that, in many areas of life, the law is not the criteria on which the rights of persons are decided. Political power and other forms of muscle power are still the deciding factor in many disputes, rather than the rule of law and the principles relating to the administration of justice.

Recommendation:

The rule of law as the operative principle in all matters in all public institutions needs to be enforced. The criticism that political considerations dominate the concerns about the rule of law needs to be thoroughly scrutinized and remedied.