

Donors, "Do No Harm", and the issue of justice in Cambodia

Justice is a major issue in Cambodia. Strengthening the justice system figures as prominently in the government's strategic planning¹ as it does in the assessments made by major donors of this aid-dependent country. The flaws of the system are a core target of both civil society and private sector advocacy. The opinions of normal citizens confirm that something is seriously amiss; all the polls that have sought views on the formal justice system, whatever the sample of respondents, have shown extremely low levels of trust in the institution and deep dissatisfaction with its performance. Given this state of affairs it is understandable that the justice sector has received substantial foreign support and continues to do so. Much of this support, we contend, is provided on the basis of a regrettably thin understanding of Cambodian reality.

After more than a decade of donor support, the usual argumentative format for discussing the issue of justice in Cambodia is to first illustrate the importance of this issue using some dramatic examples: murder goes unpunished, unlawful evictions of slum dwellers or rural smallholders are frequent, legal or administrative regulations are used to prevent public meetings or justify imprisoning members of the opposition. And then describe the rationale underlying the recent interest in demand-side approaches. Technical supply-side support has not relieved the symptoms: In relation to the input and by comparison with other areas of donor support, the results of legal and judicial reform activities over the last decade are very disappointing. So the new talk in town is all about the need to strengthen demands for justice. What this format leaves implicit are the similarities between these approaches: they both focus on the development of organizational structures and on the building of "capacity". This "wasteland" approach shows precious little interest in what is already there. Consider the following recent events:

In March 2006, Prime Minister Hun Sen proposed introducing a law on monogamy, criminalizing adultery. The public heard nothing more about this, however, until the day that the National Assembly was due to vote on it, August 30 2006. The fact that only five months passed between the putting forward of an idea and the carrying out of a vote nevertheless indicates impressive lawmaking capacity. This kind of capacity seems, though, to be completely lacking when the donor community, which was not involved in drafting the monogamy law, tries to work with the government on laws such as the anti-corruption law (in the making since 1996) or compliance with the legal regulations of the WTO². The law on monogamy was passed after fierce debate, but only on the 1st of September. The debate and vote had in fact been rescheduled to allow for voting on another law, again prepared without donor assistance, and again not publicized until it was voted for, that regulates the privileges of lawmakers (pension and funeral expense packages), and includes a clause that effectively removes their parliamentary immunity for the somewhat ill-defined "obvious crimes" of abusing "an individual's dignity, social customs, public order and national security". Although the opposition party (Sam Rainsy Party) branded the law as unconstitutional, 10 of the party's 24 parliamentarians voted in favor of it, including Cheam Channy. Cheam Channy had been stripped of his immunity in 2005 and sentenced in what many observers³ labeled a show trial to 7 years in prison (after spending a total of one year in jail he was pardoned).

Events such as these seem to be ignored by the donor community as having relevance for its push for judicial reform and public voice beyond showing a lack of understanding on behalf of opposition parliamentarians. On the very same day that the National Assembly was voting for the "immunity law" some of the larger donor organizations were holding a workshop at which they briefed members of the Assembly, the Senate, and the National Audit Authority on the Extractive

¹ E.g. The rectangular strategy, adopted in 2004, and the Socio-Economic Development Plan 2006-2010.

² McDermid, C & Rith, S (2006) Three years on, WTO legal compliance lags. *Phnom Penh Post, Issue 15 / 17*, August 25 - September 7: "Of the 47 regulations and laws that Cambodia pledged to enact in its 'Work Program' by 2006, only 19 have been adopted".

³ US State Department, the UN, Amnesty International and Human Rights Watch.

Industries Transparency Initiative⁴. The idea was to brief parliamentarians and others and explain the need to lobby government to become a signatory to this initiative, the same parliamentarians who had effectively voted away their immunity in the morning. One *can* indeed interpret it as a huge lack of “capacity” but since then no donor has made even a single public statement about the remarkable lawmaking capacity that *was* evident. And none has hinted at the possibility that the events possibly indicate something else or more than a lack of capacity. We read that silence as a fundamental disinterest in what goes on. And we suggest – no rocket science involved - that events like this express principles underlying “how things in Cambodia work”.

The assumption that lack of capacity is the main reason for all that goes wrong within the justice system in Cambodia is questionable. After nearly five years of monitoring Cambodia, Peter Leuprecht, the former special representative for human rights of the Secretary General of the UN, concluded: “It has become increasingly clear that impunity is not only the result of low capacity within law enforcement institutions and of a weak judiciary. By upholding a system under which selected institutions and individuals have been allowed to breach the law and violate human rights without being held to account, those with economic and political power have been able to obtain personal enrichment and maintain vested interests....It is unlikely that technical assistance and capacity-building efforts directed at law enforcement institutions and the judiciary will produce results expected by donors unless this pattern of impunity is broken, and political decisions are made to address the problem....”⁵ This analysis is supported by archival research on the mid-1980s which uncovered clear evidence of the political elite having conducted an open and informed debate on the pros and cons of adopting a rights-based approach to governance and having decided against it.⁶ When already during those years lack of understanding was not the crucial issue, it does not make any sense to assume that 20 years later it is.

When discussing foreign efforts to promote democratization and peace building in Cambodia, Caroline Hughes identifies the assumption that “the creation of the appropriate democratic institutions, and their maintenance by sustained international intervention, can engender a process of local ‘habituation’ to internationally promoted procedures and processes.”⁷ as the fundament underlying most donor interventions. This assumption certainly explains the way in which the donor community tends to brush aside realities that do not “yet” fit with the way things were supposed to turn out. Given time, the belief seems to be, “they” will get it. This teleological view of institution building “...as a path to a predefined set of procedures, with predictable policy outcomes...”⁸ is directly reflected in the logic according to which donors attempt to achieve reform the Cambodian system of justice. Reality is described in terms of its deviation from a pre-defined end state. There is no effort to understand reality in its own terms.

We concede that it is much easier to criticize donors than to offer feasible alternatives. The problems are very real, and we cannot wait until we have it all figured out before solutions are formulated. The ‘habituation’ assumption also has a common sense appeal. Furthermore, the most frequent alternative, a culturalist pessimism that sees “...innate tendencies toward

⁴ It seems increasingly likely that Cambodia’s oil resources are going to be commercially exploited within the next couple of years. This has made the possibility of oil becoming a resource curse a hotly debated issue. The EITI is an international multi-stakeholder and voluntary initiative, spearheaded by the UK government, enticing resource rich countries to endorse and actively implement a set of principles and criteria to ensure that the revenues from extractive industries contribute to sustainable development and poverty reduction; see <http://www.eitransparency.org/>

⁵ (December 2004) Situation of human rights in Cambodia. Report of the Special Representative of the SG for HR in Cambodia , p.8

⁶ Gottesman, E (2003) Cambodia After the Khmer Rouge: Inside the Politics of Nation Building. New Haven: Yale University Press. p.xiii.

⁷ Hughes, C. (2003) The political economy of Cambodia’s transition, 1991 – 2001. London: Routledge, p.7

⁸ Hughes, opus cit. p.6

hierarchy, deference and intolerance of difference [as precluding] the Cambodian people from either seeking, or being able to sustain, meaningful participation in peaceful debate...⁹ or understanding and applying the principle of equality before the law, is a dead end as far as aiming for change is concerned. However, there is an alternative, somewhat Buddhist in character: the middle road. Both the 'old' and the 'new' (be it introduced by foreign donors or a result of spontaneous politico-economic change) are continually involved in reproducing a contemporary reality that is neither old nor new, or is in fact both. This perspective has as much common sense appeal as the 'habituation' model but it does make life more difficult for donors because it implies taking current reality seriously.

'Habituation' assumes that 'patients' are basically the same, symptoms can be read without really examining them and treatments may take more or less time but they are bound to work in the end. This is not true in medicine, let alone in social engineering. Without close examination of the 'patient' and an exploration of the reality underlying the symptom pattern, prescribing treatment will be a wild guess at best and positively harmful at worst. Few would dispute the principle of Doing No Harm¹⁰, but simply assuming that positive outcomes will eventually result as long as one is persistent enough does not sit well with this principle.

For Cambodia the predominant habituation assumption means that legal reform support is not preceded by analysis that attempts to understand how and why the system currently operates the way it does and how reform may fit into and/or change the existing incentive structures. Kheang Un's recent dissertation¹¹ analyses the functioning of the judiciary and describes "...ways in which patron-clientele networks undermine the functions of the existing, and block the formation of new, horizontal accountability institutions." He goes on to show how "...even if institutions are created, their establishment is not aimed at strengthening state capacity but to service the interests of patron-clientelism." (p.162).

One of Kheang Un's examples illustrates the risks attendant upon institution building when the possibilities of misuse have not been considered: "The Royal Government of Cambodia (RCG) is aware of the critical shortage of judges, prosecutors, and lawyers in the country. To solve this issue, in 2002 the RCG established the Royal School for Magistrates with a plan to recruit 50 trainees for every promotion. The first entrance examination took place in 2003. Rumors circulated widely in Phnom Penh and in provincial towns that the amount of bribery to secure a seat at the school ranged between US\$20,000 and US\$35,000....A judge acknowledged to have heard the rumor commented: "It is a grave situation that the judge examination involves high bribery. When these people [trainees] graduate [and become judges] they must find a way to get their money back. What will the court system be like?" (p. 187-188)

The establishment of Royal School for Magistrates received generous donor support. The way it now operates risks cementing rather than reforming the status quo. Within a couple of years the judiciary will be rejuvenated and reform opportunities that existed with a substantial proportion of judges and prosecutors that were close to retirement will be gone. Capacity building initiatives such as this do not generally allow for a second chance. This scenario and others like it could be foreseen and pre-empted if sufficient attention was to be paid to the social reality within which foreign interventions take root.

⁹ Hughes, opus cit. p.7

¹⁰ Within the aid business this principle is debated and accepted most explicitly in the sector of humanitarian relief provided in conflict areas.

¹¹ Kheang Un (2006) Democratization Without Consolidation: The Case of Cambodia, 1993-2004. Northern Illinois University

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