

Cambodia

David Higgs examines the history of Cambodia and the wars which have destroyed the Cambodian legal system and suggests ways in which the Australian legal profession can help in rebuilding it.

Australia has a close association with Cambodia. On 23 November 1993 the Secretary-General of the United Nations appointed Justice Michael Kirby as his Special Representative for Human Rights in Cambodia. The Australian Government was one of the countries most active in pursuing the peace settlement in Cambodia.

How can we help?

At the University of Sydney there is the Centre for Asian and Pacific Law, the Director and Associate Director being Professor Alice Tay and Ms Conita Leung, respectively. They have just returned from Cambodia. The Centre hopes to promote its exchange programme for students from Cambodia and other parts of Asia, together with its other specialised courses to be conducted at the University in Sydney and abroad for practising lawyers and government officials as well as students. Also, they are assisting AILC (the Attorney-General's Australian Indo-Chinese Legal Committee of which Professor Tay is a member) in finding someone to go to Cambodia, Laos and Vietnam to establish and co-ordinate a continuing legal education programme in those countries. Preferably, the candidate would have at least 15 years' legal experience. The candidate would also need to be sensitive to the needs of the Cambodian people. The Centre accepts donations, volunteer time and legal textbooks and reports for assortment and distribution to Asia. It is located at 173-175 Phillip Street, Sydney. Telephone (02) 225 9275.

The Australia Cambodia Foundation has acquired recently land for a new orphanage at Battambang. A local architect has been engaged to develop plans for a new building. Construction costs (excluding furniture and fittings) will be around \$A50,000 - far in excess of available funds. The Chase Manhattan Bank has donated \$US15,000 to the Foundation. The number of children accommodated at the temporary orphanage in Sisophon has risen recently from 29 to 42. The Foundation seeks to find an individual sponsor for each of the children. The address of the Foundation is PO Box 37, Milsons Point, NSW 2061. Telephone and fax number (02) 954 5784. The Foundation has no salaried staff, no rented premises and no paid office-bearers and no other significant overheads.

There is a special need for the children of Cambodia to be supported. More than one-third of Cambodia's population of approximately 9.1 million people is below 15 years of age. 20% of the population is under four years of age. Life expectancy at birth is 49.7 years. Approximately 65% of the adult population is female (compared with 50% in 1962) reflecting the toll on the male population due to war, civil disturbance and the ravages of the Pol Pot era (1975-1979). There are approximately 188,000 orphans living outside orphanages. The shortage of male labour has also led to a

reliance on child labour with its accompanying impact upon school attendance.

History

The recorded history of Cambodia starts in the first century AD with the Kingdom of Funan whose territories at one time included parts of Thailand, Malaya, Cochin-China and Laos. Based upon the Mekong Delta and a well-developed irrigation system, Funan was prosperous and traded with China and India. Its culture, religion and administrative structure were heavily influenced by Indian culture of that time and this influence has remained as an identifying characteristic of the country's culture. The majority of the population are Khmer. The Khmer monarchy is generally dated from the reign of King Jayavarman II (802-850) who founded his capital near Angkor and proclaimed himself Universal Monarch. The empire reached its peak during the reigns of Suryavarman II (1113-50) builder of Angkor Wat and the Buddhist King Jayavarman VII (1181-1219). Thereafter, a slow decline in the empire followed, caused largely by continual wars with the Thais and Chams. In 1432, after repeated Thai attacks, Angkor was abandoned, in part, because of the destruction of its irrigation system and the capital was moved to an area near the current capital of Phnom Penh. The temples at Angkor are a special tourist attraction. The most famous temple, Angkor Wat, in 1992 became part of the World Heritage List.

From 1432 Cambodia came under increasing pressure from both of its much larger neighbours, Thailand and Vietnam, and by the late-1700s found itself virtually divided between the two. This conflict was ended with the establishment of a French Protectorate in 1863. Tensions between Cambodia and Vietnam still exist.

In 1941, Norodom Sihanouk was appointed King by the French. Independence within the French Union was achieved in November 1949 and full independence in 1953. To avoid the limitations of his role as constitutional monarch and to qualify for political leadership, Sihanouk abdicated in favour of his father in March 1955 and founded the Popular Socialist Community Party which won all seats in the Assembly Elections in 1955 and 1958. After the death of his father in 1960, Sihanouk was elected Head of State.

Over the past 23 years it hasn't been fun to be Cambodian.

During the 1960s Cambodia was caught up reluctantly in the Vietnam War. Also a pro-communist insurgency movement which Sihanouk called the Khmer Rouge (the Red Khmer) became established, increasing instability. From 1969, secret American bombing of Cambodia killed an estimated 600,000 Cambodians (the aim of the bombings being to destroy Viet Cong sanctuaries). In 1970 Prince Sihanouk was deposed by a right-wing military coup led by the then Prime Minister,

Lieutenant General Lon Nol, who headed a pro-American group. Sihanouk went into exile in Beijing and formed a Royal Government of National Union (GRUNK) which was supported by the Khmer Rouge.

The popularity of the Khmer Rouge began with American bombers dropping over 100,000 tons of bombs on rural Cambodia during the first six months of 1973, nearly twice as many as were dropped on Japan for the whole of World War II. Many young Cambodians left their villages for the jungle to join the Khmer Rouge guerillas. Meanwhile, GRUNK forces (with the help and training of the North Vietnamese Army) waged war on Lon Nol's Government and by March 1975 his forces controlled less than 10% of the countryside. Phnom Penh fell to GRUNK forces on 17 April 1975. The new ultra Maoist-Government was initially headed by Prince Sihanouk as Chief of State, but he resigned and was placed under house arrest in April 1976, whereupon Khieu Samphan and Pol Pot became Head of State and Premier respectively.

The Pol Pot régime is estimated to have killed 1 million people (some say 3 million) either by starvation or execution. People were divided into two groups - namely the "old" (from the cities) and the "new" (Khmer Rouge and farmers). The "old" were executed. The victims included "intellectuals", defined as anyone who wore spectacles, monks, professional men and women, members of the former armed services and anyone defined by the Khmer Rouge as having "foreign influence" such as knowledge of English or French words.

Whereas the Khmer Rouge and North Vietnamese had combined forces beforehand, from 1970 onwards there was increasing distrust and bitterness between the Vietnamese and Cambodians, particularly as the former pursued their objectives in South Vietnam. This culminated in a Vietnamese force of 200,000 invading Cambodia on 25 December 1978. Phnom Penh was captured on 7 January 1979. The People's Republic of Kampuchea (later renamed the State of Cambodia) was proclaimed. The new Government pledged to restore freedom of movement, religion and the family unit.

In 1989 the Vietnamese withdrew from Cambodia. Following the withdrawal, there was an escalation in fighting.

On 23 October 1991, following a decade of protracted negotiations, four Cambodian factions, together with 18 Member countries of the United Nations, signed the Paris Agreements. Problems arose in relation to the implementation of the settlement, particularly arising from non-co-operation of certain Cambodian factions including (but not only) the Khmer Rouge. The key element of the peace settlement was the establishment of UNTAC (UN Transitional Authority in Cambodia), which was responsible for creating a neutral political environment conducive to free and fair elections. This task involved the UN in the civil administration of Cambodia during the transition period - being a completely new type of UN operation. Importantly, the terms of the settlement included a commitment by the external powers to end all military assistance to factions in Cambodia. During this period, Cambodian sovereignty was embodied in a Supreme National Council (SNC) made up of the four Cambodian factions under the Chairmanship of Prince Sihanouk.

Recent times

The UN-sponsored elections held 23-28 May 1993 were a great success, despite violence and unrest prior thereto. A total of 4,267,192 voters cast their ballots representing 89.56% of registered voters. About 95% of eligible voters registered to vote. In all, 20 political parties participated in the elections. On 29 May 1993, the UN Secretary-General's Special Representative, Mr Yasushi Akashi, declared that the poll had been free and fair.

The elections provided Cambodia with a 120-member Constituent Assembly to draft a Constitution and form a Government. One of the first acts of the Constituent Assembly was to nullify the effect of the 1975 coup which deposed Prince Sihanouk and declare him Head of State. It was subsequently decided to reinstate Sihanouk as King, the position from which he abdicated in 1955.

The two major Cambodian parties to gain the most seats in the elections were FUNCINPEC, the royalist party led by Prince Ranariddh (son of King Sihanouk) and the Cambodian People's Party (CPP) of the Phnom Penh Government (which had been installed by Vietnam in 1979) led by Mr Hun Sen. FUNCINPEC captured 45.47% of the votes (58 seats in the Assembly), and CPP captured 38.23% of the votes (51 seats in the Assembly). Hence, a coalition was necessary for a Government to be formed. In late June 1993, these parties, together with a third party (the Buddhist Liberal Democratic Party) agreed to form a coalition interim administration called the Provisional National Government of Cambodia (PNGC).

On 24 September 1993, the Government was formed and the Constitution promulgated. The Constituent Assembly became the National Assembly and two Prime Ministers, Prince Ranariddh and Mr Hun Sen (known as the First and Second Prime Minister, respectively) were appointed. Norodom Sihanouk was elected King by the Crown Council and ceremonially installed with his wife, Monique, as Queen. The form of government is a constitutional monarchy. In October 1993 the new Government took occupation of its UN seat.

Sihanouk's role in the rebuilding of Cambodia is important. Over the period until late January 1993 the level of internal violence was escalating. The violence diminished thereafter, in all likelihood due to Sihanouk's call for an end to internal strife and his threat not to return to Cambodia unless violence ceased. Unfortunately, he suffers bad health. Succession to the throne does not automatically go to a child of Sihanouk. There are a number of contenders. His successor has not been determined.

Khmer Rouge

The influence of the Khmer Rouge has diminished greatly. They have demonstrated their inability to intimidate or frighten the Cambodian people away from the ballot box. In 1979 they issued a formal apology to the people of Cambodia for having attempted to abolish the main religion of the country, being Theravada Buddhism. Over the Pol Pot period

(1975-1979) religion was prohibited and Buddhist monasteries were destroyed and their monks executed.

Even so, King Sihanouk has said that he regards the Khmer Rouge "as being part of the national Cambodian community" and has publicly contemplated the Khmer Rouge as having an advisory role to the Head of State or to the Government. In mid-July 1993 the Khmer Rouge returned to their Phnom Penh compound which had been vacated precipitately in April of that year. In a letter of 30 September 1993 to Mr Khieu Samphan, the nominal President of the Khmer Rouge, the two Prime Ministers placed conditions on participation in round-table discussions which had been proposed by Sihanouk. These were that the Khmer Rouge recognise the new Constitution, recognise the legitimate Government and decree that the Khmer Rouge as a "group" would negotiate with the Government under the chairmanship of the King. At the conclusion of a visit to Phnom Penh on 1 and 2 October 1993, Khieu Samphan said that the Khmer Rouge recognise the King and the Constitution. Recognition of the Government, however, has not been forthcoming.

On the military front, the Khmer Rouge continues to hold several areas in the central and western Provinces. An offensive was launched in August 1993 by the Government against these positions, followed by an amnesty appeal by the two Prime Ministers. About 800 to 1,000 Khmer Rouge troops and officers were reintegrated into the Army. Initially successful, this amnesty programme has been marred by reported corruption involving high-ranking Government officials. Ill-treatment of defectors in a Government recruitment centre has occurred and there have been reports of arbitrary killings and attempted killings of several defectors after they have surrendered. Recently, the Khmer Rouge stronghold of Pailin fell to Government troops with little resistance. The ultimate success of this operation will depend upon whether or not Government troops can hold Pailin during the wet season which lasts from May until October, during which supplies and other support can be cut off easily in the event of there being an attempt to recapture the city by Khmer Rouge guerilla forces. A common pattern of Khmer Rouge operations is to abandon positions and recapture them later on.

The constant turmoil jeopardises Cambodia's recovery. There is an official unemployment rate of about 30% and even greater under-employment. About 80% of the population is classed as being below the poverty line. Employed staff routinely work 12-14 hours a day, seven days a week for very low wages. Most public servants have a second job in order to supplement their income. Agriculture employs about 80-85% of the workforce and constitutes about half the GDP. Despite this emphasis upon agriculture, the country has moved from being a net exporter of rice in the late-1960s to a net importer. The main exports are timber and rubber. The main imports are fuel, construction material, beer, tobacco and consumer goods. A major problem in the development of Cambodia is the presence of land mines which have been laid and continue to be laid by all sides. They cost \$US15 to install and \$US1,000 to remove. There is estimated conservatively to be 8 million (plus) land mines laid in Cambodia (a startling

figure when compared to its population of just over 9 million). The country has the dubious distinction of having the highest level of war-caused amputees in the world.

Legal system

When Cambodia attained full independence in 1953 it retained the French legal system which had been imposed during the period when it was a Protectorate of the French Republic. This was all changed in 1975 when the PDK (the Khmer Rouge) abolished all laws and institutions such as courts, with the result that the rights of people were determined by arbitrary administrative decisions. In 1979 the Vietnamese-backed PRK came to power. Attempts were made to rebuild the legal system upon a basis where the Executive exercised control over the legal and judicial process. In May 1980 there was established a Revolutionary People's Court in all the Provinces. The implementation of any legal system was impossible due to inadequate or no legal texts on civil law, including contracts and property, criminal law and procedure, rules of court, evidence, labour law and immigration law. Institutions such as the police and court staff were not fully organised or properly functioning. The rule of the arbitrary prevailed all too often.

At the time of the arrival of UNTAC the judiciary was not independent and courts were subjected to direction by the Executive (Ministry of Justice, Council of Ministers, local politicians and administrative authorities) and to pressure by the Police and the Ministry of National Security. Access to defence counsel was virtually non-existent and there was no properly functioning forum for appeal. Understaffing, lack of adequate resources, dysfunction due to poor qualifications and organisation and often also corruption hampered the work of most courts, resulting in the prolonged detention of suspects without trial.

Also, during UNTAC's administration, problems were encountered in charging public servants with corruption. Four arrests of public servants were made by UNTAC during the transitional period. In the first two cases a Special Prosecutor sought to bring charges against the accused in the Phnom Penh Municipal Court. Following the hearing of the first of these cases by the Court, the Minister of Justice instructed the President of the Court that he was in error in hearing the case, and that should he continue to "violate the law", he would be "punished". As a result, the Judge declined to hear the Special Prosecutor's application in respect of the second prisoner.

Fortunately, there has been some advance of the legal system since the transitional period. Recently, one of the four people arrested by UNTAC, namely the former Deputy Director of the Battambang Prison, has been convicted and sentenced to one year in prison and ordered to pay compensation to the families of his victims.

Even so, the legal system is much in need of rehabilitation. By reason of a poorly-serviced legal system, the prisons have become inevitably overcrowded and unhealthy. In the absence of effective supervision by the courts, few prisoners have been

released except through payment of bribes to prison authorities. In a recent visit to Cambodia in January of this year by the Secretary-General's Special Human Rights Representative, Justice Michael Kirby, complaints were made by prisoners of their complete ignorance of when their long-delayed cases would be heard. A distracted judge in Battambang agreed with the prisoners' complaints but pointed out that he had few colleagues to help with a crippling workload. He had even run out of paper with which to record decisions.

Consequently, the people still have little faith in the ability of institutions to dispense honest and impartial justice.

An important element of the new Constitution is the establishment of a framework for fundamental human rights, the separation of powers and the independence of the judiciary.

Even though the independence of the judiciary is recognised in principle, provisions that will guarantee its realisation are lacking. The judiciary is not guaranteed either salary or tenure and the grounds for the removal of judicial officers have not been specified. Some provisions of the Constitution are yet to be implemented. For instance, the Constitutional Council, envisaged in Chapter 10, and the Supreme Council of Magistracy envisaged in Chapter 9, have not been established yet. This delay has prevented the reorganisation of the judiciary, particularly with regard to appointment of judicial officers and the establishment of the Appeal Court and has given rise to confusion about procedures.

The judges are poorly paid, receiving about \$US20 per month. This wage is insufficient to keep a family. Often wives of judges must go to the market to sell produce to support the family. Judges often accept gifts from winning litigants to supplement their salary or to ensure that matters are expedited. In addition to poor payment, judges are subject to physical threats and have difficulty in having their judgments enforced. There is little (if any) precedent.

Bribery and corruption is a way of life. Teachers often extort money from parents to have their children admitted to school. Likewise the police and military are poorly paid and supplement their income by extortion.

Even though the legal system as it exists is largely based upon the French model (the model being fragmented by war), the development of the law is to be determined by Cambodia. The French have a significant presence in Cambodia - and historic and cultural ties. The first Prime Minister, Prince Ranariddh, is a French-trained lawyer holding a position as a lecturer at the University of Aix-en-Provence in France. The French Government has been generous in its financial support of Cambodia and in providing trained personnel.

Even so, there is a place for common law lawyers in Cambodia. The King has publicly indicated that, in his view, Cambodia's future is more with the English-speaking countries than France. Prince Ranariddh is certainly open to Western ideas. He speaks fluent English and has excellent relations with Australia, and in particular our Foreign Minister, Gareth Evans. It is important that Cambodia develop its own legal system. That aim is better served if Cambodia is exposed to a range of legal systems.

To that end recent courses have been conducted to train judges. Eminent jurists from all over the world have volunteered their time to teach at these courses. The courses are popular. Such a course conducted towards the beginning of this year was attended by 132 judges of Cambodia.

Regardless of which system of law Cambodia adopts, Australian lawyers have a part to play. It is to our advantage to assist in this determination. A confederation of independent legal practitioners from a variety of countries (whether common law or civil) within Asia and the Pacific Rim is desirable so as to promote the future of our independent legal system as well as that of Cambodia. For example, our own independence is enhanced in the event of us being able to agree with other independent legal organisations as to the minimum requirements for laws governing the legal profession. Inevitably, our legal system will be reformed from time to time. Reform always carries with it the risk of the rights and safeguards of citizens being diminished. Obviously, that is not the aim of such reform. Hopefully, the legal profession will be reformed in the future so as to give greater access to the public without compromising present rights and safeguards. In order to achieve that end, an international association of Law Societies and Bar Associations would be helpful; as would be the personal participation of members of the legal profession in community activities such as Cambodia (but not confined thereto). □

Too Particular

Lawyers are obviously not all attuned to plain English. The plaintiff in a recent case claimed that there had been representations by the defendants as to the existence of covenants to protect the view of the house they were selling.

Particulars (see below) were given, and, no doubt, were intended to show that the covenants, if they existed, would have permanently protected the view. That was apparently too easy to say.

“The said representation was material to the value of the dominant tenement.

Particulars

A significant component in the value of the dominant tenement was the view of Sydney Harbour (Port Jackson) and its environs obtained therefrom. The servient tenements lie between the dominant tenement and Sydney Harbour. The existence of covenants to the effect represented by the defendants binding the servient tenements and appurtenant to the dominant tenement would to the full extent permitted by law assure the existence of that view obtained from the dominant tenement in perpetuity.”□