

## Law Talks (7): Rule of Law

**On 16<sup>th</sup> and 17<sup>th</sup> of September, for the 07<sup>th</sup> time since 2008, Konrad-Adenauer-Stiftung in close cooperation with Jörg Menzel, Law Professor at the University of Bonn and former in house consultant to the Cambodian Senate, organised the 7<sup>th</sup> Law Talks Forum in Sihanoukville. The open discussion and exchange of ideas on legal topics between the academia, the government, legal professionals, NGO's, students and international experts has been difficult in Cambodia for many years due to its historical legacy and the legal vacuum during and in the aftermath of the Khmer Rouge regime. Legal discourse is therefore still not very well developed in Cambodia today. The "Law Talks" therefore aim at strengthening the emergence of a culture of legal discussion in the spirit of academic freedom.**

The focus of this Law Talk was put on the "RULE OF LAW". The concept has been discussed from different angles and perspectives. General principles, actual pressing issues and the relevance of international law for Cambodia have been in the focus of the debate. In a first presentation, the insufficient access of woman to secondary education in Cambodia and the concept of Rule of law as an important prerequisite for gender equality in access to higher education was addressed. Woman's access to higher education is often prevented through cultural norms, old fashioned views on the role of woman in society, physical distances between the school/university and families as well as expensive and insufficient student accommodations.

In a second presentation principles of Administrative Liability were discussed. Although the Cambodian Constitution (article 44, 93 and 128), the Criminal Code of 2009

(article 42 – Liability for all public legal persons except the State), article 38 and 58 of the Law on Statute of civil servants include principles of administrative liability, the legal framework for this important aspect of administrative law is not well developed and state practice can hardly be summarized. Distinctions between legally and illegally caused damaged need to be made as well as distinctions between the liability of the state as such and individual liability of public servants. All this needs to be clarified in the future. A lack of effective complaint mechanisms against acts of administrative bodies contributes to the lack of protection for individuals in this field.

The serious and sometimes desperate situation of migrant workers in Cambodia and the region has been the topic of the presentation delivered by the representative of CARAM (Coordination of Action Research on AIDS and Mobility) Cambodia. Currently 40 000 Cambodian migrant workers are working in Malaysia and about 200.000 in Thailand. There are no independent statistics available about the total number of Cambodian migrant workers abroad. It is undisputed that Cambodian migrant workers contribute substantially to the economic development in Cambodia through asset transfer to their families. At the same time important human resources are drawn from the sending countries. Several Human Rights organisation criticise the inhuman working conditions and missing legal protection of workers as they are not always protected by the receiving countries labour laws. Usually migrant workers are not provided with trainings before departure nor is there any support for them to reintegrate in their societies once their contract ends. Currently CARAM is also lobbying for a regulation on recruiting agencies which operate in a non

transparent way and charge exorbitant fees from the worker to organize the papers and procedures. CARAM therefore calls Cambodia to ratify international conventions like the ILO Convention on Migration and to contribute to the strengthening of the regional mechanism of the ASEAN Committee on Migrant workers. It also calls the government to enforce sub-decree 190 protecting migrants workers rights through issuing clear implementation guidelines for the sub decree, outlining the roles and responsibilities of the different state and non state actors in implementing the guideline, clarifying the responsibility and improving transparency of recruiting agencies (article 6) developing procedures of inspection of labour conditions (article 9), safeguarding medical treatment (article 28) and receiving adequate repatriation service (article 27).

The next presentation focused on the role of the Senate in the law making process and its influence in contributing to the development of the Rule of Law in Cambodia. The Senate indirectly elected by the Commune Councils and members of the National Assembly, is legally controlled by the Constitutional Council. In article 113 of the Constitution the Senate has an advisory function and shall advise and give its views on draft laws or proposed laws adopted by the National Assembly. The National Assembly can decide on the amendments proposed by the Senate, either by accepting or rejecting them in totally or in part. Since 1999, only 2 out of 200 proposed laws have been amended on initiative of the Senate. This rather modest track record in influencing the law and decision making process and in controlling the executive branch would mostly be improved through a revision or modification of the current constitution, giving the Senate more authority within the process of law making and monitoring.

The contribution of Steven Auster Miller from the American Bar Association elaborated on the success of Alternative Dispute Resolution Mechanisms in Cambodia. He outlined the key advantages of such mechanisms in terms of speed of the implementation of the mechanism, higher cultural appropriateness, lack of confidence in

the current judicial system. For Cambodian firms negotiation is by far the favourite method of Dispute Resolution. The Cambodian Legal Framework encourages negotiated settlement between both parties which can be converted into a judicial compromise that is recorded in the court record. Auster Miller emphasized the long history of mediation in Cambodia especially at the local level. Mediation is mainly applied for family disputes, labour disputes and divorce. It is also used in the framework of land disputes through the Cadastral Commission or the National Authority for Land Dispute Resolution, for Commercial Disputes through the National Arbitration Center, in small civil disputes at the District and Khan Offices and in the field of informal mediation through village chiefs, monks, the police and others. There have been important achievements under the UNDP Access to Justice Programme which focussed on Mediation in Commune councils and at "Maison de la Justice at the District Offices". Currently the government discusses about drafting a mediation law or sub decree. Compared to mediation, arbitration in Cambodia is mainly applied in the commercial field. The Law on Commercial Arbitration in Cambodia covers arbitration agreements, composition and jurisdiction of the tribunal, conduct of the proceedings, recognition and enforcement of awards and creates a National Center of Commercial Arbitration. The Cambodian Law gives supervisory powers of the arbitration process and arbitration decisions are appealable in limited circumstances. In general the courts need to recognize arbitration decisions. Effective Training for Arbitrators and setting clear benchmarks and qualification standards for arbitrators is one important prerequisite for effective arbitration.

Ms. Claudia Fenz, judge at the ECCC (Extraordinary Chambers in the Courts of Cambodia) introduced the UN concept and development of the definition of the rule of law ([www.unrol.org](http://www.unrol.org)). She stressed the importance of Rule of Law to achieve sustainable peace, effective protection of Human Rights and sustained economic progress and development. Rule of Law in an UN perspective refers to a principle of governance in

which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. Ms. Fenz introduced the UN Criteria for Rule of Law at national and international level as well as the UN Rule of Law activities in 2011. Internationally the UN focuses on peace operations, peacemaking, peacekeeping and peace building, on activities to support the codification, development, promotion and implementation of international norms and standards in the field of international law and promotes at national level the strengthening of constitutions, laws, institutions of justice, governance, security and Human Rights, transitional justice and public and civil engagement.

Jörg Menzel finally summarized the first days discussion. He explained about the discussion on terminology and definition of rule of law. According to his analysis, there is, in contrast to widespread assumption, no substantial difference between the terms Rule of Law, Rechtsstaat and Etat de droit. With respect to all of them there is a great variety of interpretations and basic concepts can be well compared. Regarding to the definition of Rule of Law it is noted that agreement on the principle in general seems to be so easy because definition in detail may vary greatly. The global unity in support for the Rule of Law (from the USA to China) therefore does not include a global agreement on how to define it. There are thin and thick concepts, formal, procedural and substantive approaches. Literature on the definition alone seems to fill libraries. A much discussed question to be raised is, if there is, in contrast to "Western" approaches, a distinct "Asian concept". From Joerg Menzel's perspective there are, however, great disparities not only within the West, but also within Asia on what the Rule of Law is. It will be interesting to observe the development of this discussion in Cambodia.

On day two three more presenters contributed their topics to the Law Talks. The first

presentation was on the importance of the application of international norms in national law. The landmark decision 92/2007 of the Constitutional Council of Cambodia was highlighted, under which international standards and norms have to be applied in the framework of the national penal code without a need for further national ratification. In this context, the German legal experts also referred to the possibility to use international human rights definitions for interpretation of national basic rights provisions. Such an approach is supported by the Cambodian constitution as well, which in Article 31 clearly articulates the country's respect for international human rights.

The following speaker introduced about the achievements of the National Arbitration Council in Cambodia for having arbitrated collective disputes in more than 1000 cases since 2003. The Arbitration Council's decisions are transparent and accessible in two languages on the internet and therefore present a unique example of legal transparency and access to legal decisions in Cambodia. Arbitrators in Cambodia currently work without payment on a voluntary basis, which makes it difficult to find good arbitrators. The speaker encouraged the young generation to be trained and to show more interest in the selection process for Arbitrators.

Finally a Human Rights NGO representative provided his assessment of the development of the Rule of Law from his perspective. He argued that the specific attitude and self image of rulers who rule by law is still a predominant feature of the relations between government and the citizens in Cambodia. Recent examples of provincial and district officials trying to prevent CCHR to implement trainings on local democratic and Human Rights and the recent crackdown on local manifestation on forced evictions seems to be a clear signal of an increasing disrespect of the rule of law concept. According to his assessment, courts are perceived more as part of the government and court decisions are easy to influence because of corrupt prosecutors. The important role of the media and investigative journalism to hold the judiciary ac-

**Konrad-Adenauer-Stiftung e.V.**

**CAMBODIA**

DENIS SCHREY

**September 2011**

[www.kas.de/cambodia](http://www.kas.de/cambodia)

[www.kas.de](http://www.kas.de)

countable has been also stressed by the presenter.

The Law Talk included two days of presentations and discussions about important topics of law in general as well as in Cambodia. Thanks to an active group of participants, which ranged from students to professors, from legal experts inside government, parliament and courts, national and international participants and NGO representatives, each presentation was followed by substantial discussions. Konrad-Adenauer-Stiftung in the future will continue to support these formats where experienced national and international and future legal professional engage in a constructive, open and critical dialogue.