

DONOR DOLLARS AND MINISTERIAL MINDSETS:
CONSTRAINTS ON NGO RESPONSES TO RAPE IN CAMBODIA

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CATHERINE BURNS AND KATHLEEN DALY

INTRODUCTION

In March 2013, the organization UN Women declared “an historic global agreement [had been] reached ...to prevent and end violence against women and girls” (UN Women, 2013). Its “global blueprint” is said to provide a “roadmap” for redress by framing violence against women as a human rights violation that requires a rule of law response. In much of the western world, these ideas dominate the international community’s response to sexual violence in fragile and post-conflict countries: funds should be directed to “rule of law” and “best practice” reforms. Although framing violence against women as a human rights violation has gathered momentum, rule of law responses to violence have also been challenged.

In the last decade, we see a shift in thinking by the scholarly community and donor bodies—away from conventional criminal justice responses towards customary dispute resolution mechanisms—at least for some offences (Chirayath, Sage, & Woolcock, 2005; Samuels, 2006; World Bank, 2012). This shift does not include responses to rape, which is considered too serious for informal justice (Harper, 2011; Wojkowska, 2006). We examine how this dynamic is unfolding in Cambodia in the responses by international and local nongovernment organisations (NGOs) to everyday rape. (By everyday rape, we mean rape not occurring as part of war or conflict, although many recognize a continuum between everyday and extraordinary violence against women [Arthur, 2010, p. 10]). The criminal justice system in Cambodia is dysfunctional and beyond the reach of most citizens, but it is promoted as the optimal response by international and local NGO staff. Why do NGOs hold

steadfastly to this position when most Cambodians prefer customary justice practices, even for rape? What constraints, limitations, and opportunities are operating on NGOs in the local environment that emphasize criminal justice and discourage informal justice? Drawing on interviews with NGO staff, we address these questions and their implications for rape survivors' access to justice.

Our analysis draws from Weinstein, Fletcher, Vinck, and Pham (2009, p. 28), who consider dilemmas in responding to “atrocious crime” in Iraq, Cambodia, and Uganda. It is well-known that trials in transitional justice contexts are limited, both as a deterrent and in building peace, although they are preferred by the international community. In Uganda, for example, Weinstein et al. (2009) suggest that both the government and many people wanted to see peace negotiations and amnesties, rather than trials. The authors ask, “do we abandon victims if we argue for a response that addresses the greater good of a community?” (p. 32). They raise questions about the “beneficiaries [and] priorities [of international criminal law], and the reactionary, if not parochial nature of the human rights field” (p. 28). Although our focus is on everyday violence, similar questions are raised about the role and priorities of the international community and the impact of human rights on framing response to violence against women. Added to this mix, is government and NGO dependence on international donors.

CAMBODIA IN CONTEXT

Cambodia is one of the poorest countries in the world: 80 percent of people live in rural areas, and about one third live below Cambodia's poverty line (Asian Development Bank, 2012, pp. 4-5). Its legal system, developed under the Kingdom of Cambodia from 1993, loosely mirrors Cambodia's history, in its combination of French-based civil law, elements of common law, and informal justice. The latter include village- and commune-level customary dispute

resolution mechanisms (*somroh somruei*) that draw from pre-colonial Buddhist and Khmer legal traditions. These informal justice mechanisms aim to improve poor people's access to justice and the efficiency of the courts by alleviating the backlog of cases. They also address the critical shortage of legal professionals, resulting from the complete destruction of the legal system and an educated class under the Khmer Rouge in 1975-79.

Although there has been significant funding and reform of the judicial system, the challenges are so great that most donors have disengaged (Popovic, 2009, p. 17). The United Nations Development Programme (UNDP) faced difficulties working with the Ministry of Justice in implementing its Access to Justice program, and withdrew in 2010 partly as a result (Popovic, 2009, p. 7). An early project, the Judicial Mentor program failed to increase average salaries of judicial officers beyond US\$20 per month and to provide basic legal infrastructure (Olivella, 2003, p.4). Despite the injection of almost US\$3 million, the UNDP evaluation of its 'Access to Justice in Cambodia' program reported that "none of the project outputs to improve government responses on the supply side of justice were achieved, [and] ... the quality of judicial decisions was ... too poor to serve as a reference in the future" (UNDP, 2007, p.1).

Criminal justice and *samroh somrul*

For rape victims, engaging the criminal process is expensive and time consuming. All costs of the investigation, and collecting and processing evidence are borne by the complainant: fuel for a police vehicle (if available), food, medical examinations, transporting witnesses to court, payments to process documents, to schedule hearings, and so forth.

Accessing the courts may require one to two days' travel from rural areas, and a public trial amplifies the shame experienced by rape victims and reduces their future marriage prospects. Legal aid is scarce, particularly in remote areas; and if the defendant has the financial means, he will likely be freed before or during trial. Judicial officers lack gender sensitivity and have

a poor understanding of the law (O'Connell, 2001). For these reasons, most criminal cases, including those of gender based violence, are addressed by a local customary dispute mechanism called *somroh somruei* (Yrigoyen Fajardo, Kong & Phan, 2005).

Somroh somruei is generally affordable, accessible, familiar, swifter, and more likely to result in a financial payment, which is negotiated rather than imposed by outsiders. The village head or commune chief may be asked by either party to resolve a conflict, and convene meetings in his home (almost all are male) until agreement reached. Discussion centers on the amount of money to be paid and a promise not to re-offend. If a solution cannot be reached, the matter may proceed to the police. Attributions of guilt and blame tend to be avoided because the fundamental goal is restoration of social harmony. The same process is used in rape because most offenders are known to the victim and live nearby (EcpatCambodia, 2012).

Somroh somruei is the preferred dispute resolution mechanism, but it is not a panacea. Cambodian NGO staff almost invariably note that resolution, particularly if the rape resulted in a pregnancy, may include marriage between victim and offender, and that police are able to generate income in the form of bribes from both parties. Some also note that it is families, not victims, at the center of negotiations. In addition, human rights advocates and development practitioners identify a lack of accountability, transparency, and predictability in the decision-making process; they view it as non-compliant with international human rights standards. Women's rights advocates emphasize the patriarchal structures of traditional cultures, limited participation of women in decision-making, and gendered and wealth power differentials that make a fair resolution difficult. Others argue that informal justice is fundamentally inequitable, offering sub-standard justice for the poor (Ramage, Pictet, Sophearith & Jorde, 2008; Swaine, 2003; Wojkowska, 2006). However, because there is donor and government interest to improve access to justice for the poor and vulnerable, conditional formal support

exists for *somroh somruei*. In 2005, it was legislated as an appropriate response for domestic violence, which is classified a “minor misdemeanor or petty crime,” in contradistinction to “severe” cases of rape in marriage.

Foreign aid

The foreign aid environment was created by the temporary governance of Cambodia under the United Nations Transition Authority Cambodia (UNTAC) during 1992-93. To rebuild the country, large amounts of aid flowed in: more than US\$3 billion during 1992-95 (Nagasu, 2004, p. 3). Total foreign aid continues to increase at a rate higher than the developing country average, at just over US\$1.2 billion in 2011; it is almost half Cambodia’s annual budget (Khieng, 2013). Cambodia is widely recognised as aid dependent. Some go further by saying it is donor driven (Khieng, 2013; Nagasu, 2004) and a “donor’s playground” (Fforde & Seidel, 2010).

Cambodian NGOs emerged under UNTAC, and many were specifically created by donors to deliver donor-initiated and funded social services. According to the most recent 2011 estimate, there are approximately 1,350 active NGOs that deliver a vast number of diverse social services beyond the capacity or interests of the government (Khieng, 2013). A survey of NGOs in Cambodia found that 57 identified a gender based violence program (personal communication, Khieng 2012).

UNDERSTANDING NGO COMMITMENT TO CRIMINAL JUSTICE

An apparent contradiction

In previous research, we investigated the degree of support for *somroh somruei* by those working in gender based violence programs, by carrying out interviews with 20 staff working for international and local NGOs [hereafter NGOs] (Burns & Daly, 2014; see for detail on methods used). All were familiar with *somroh somruei*, although not through direct

experience. Opinions varied on the appropriateness of *somroh somruei* in responding to rape: six were against it; six expressed tentative interest; four saw it more positively as having potential to be more victim-centered than a court process; and four gave no opinion. A contradiction emerged in the findings. Although all were critical of Cambodia's formal criminal justice system, particularly its systemic corruption, most believed it was the right response to rape. What explains this?

For many, it was simply that "rape is criminal law so it must go to the courts, not *somroh somruei*" (interview #8). It is important to emphasize that this is a relatively new idea in Cambodia. The 2005 law on domestic violence, coupled with an NGO educational campaign to implement it, has strengthened the view that the legitimate and modern response to rape is through criminal law.

For others, support comes from significant investment (professional and organizational) in criminal justice, coupled with conventional understanding of "justice." For example, the country director of a policing-focused NGO, which is attempting to establish a "one stop shop" for victims explained, "the biggest justice challenge for the girls is that they're going to be mediated out at the village level rather than seeking services. That's our biggest challenge" (interview #6). Likewise, a legal aid lawyer expressed frustration when *somroh somruei* derails court cases mid-proceedings:

In some cases, the perpetrator's family goes over to the victim's family to pay compensation to close the case ... When the negotiation is over, they are [found] sitting outside court, and they tell the lawyer they won't proceed with the case ... Sometimes the other party doesn't pay, and then they come back to us asking for further legal assistance! (interview #17).

Prosecution is perceived as a deterrent and a strong reason to support formal legal mechanisms. The Cambodian director of an NGO umbrella group said:

NGOs cannot get involved [in *somroh somruei*] because it's illegal.... The victim may get money from the offender, but then [the offenders] do it again and again. *Somroh somruei* does not solve the problem (interview #14).

A Cambodian country director of another NGO made a similar point, arguing further that cases must be brought to court to address corruption:

It is not going to help because he'll just do it again... [The women] must stand up. We explain that the strength comes from the woman herself first and that there is a system [of local authority being established that] you can trust and you will benefit from. You have to put them in jail... The Ministry of Women's Affairs is very strong. They have a network to ... connect with the police, judge, court. So that's why we have to go through [the system]: many people together to deal with and stop corruption (interview #9).

There are many complexities in addressing corruption, which we cannot address here.

However, the goals and priorities of ministries and NGOs, which align with human rights concerns, may compromise rape survivors' (and their families') interests and raise ethical questions. We turn next to how human rights ideas have shaped the thinking of the NGO staff and the landscape of international responses to violence against women.

Human rights

A commitment to human rights is a commitment to legalism, specifically, western ideas of law and justice. NGO staff recognised the gap between human rights aspirations and the reality facing rape survivors in Cambodia, but ultimately they equated human rights with legal mechanisms of formal justice redress. An NGO researcher who had lived in Cambodia for 7 years said, "rape is far too serious a crime to ever leave the justice system and go for something like [*somroh somruei*] when you have a justice system. The justice system ... is the primary institution to provide redress... what [*somroh somruei* does] is remove the

seriousness of how the crime is perceived.” Despite the emphasis on using the justice system in responding to serious crime, the human rights advocate then shifted her position later in the interview by acknowledging that

So many cases are lost in corruption and malpractice ... Many [victims] talked about how vulnerable they felt with the police and the court, and we must remember that we’re talking about people who are extremely vulnerable in the sense that they’re basically illiterate. It’s very difficult for them and frightening to go to the authorities, the police and to the court (interview #3).

Her shift in perspective shows the tension between how a “community” may see the seriousness of rape, and how an individual experiences justice: whose rights are promoted and whose are sacrificed in the push towards formal justice? A US trained academic social worker, who advocates for a client-centred approach to services, explained:

Human rights NGOs have good intentions, but they pressure survivors to go to court. They think the best way to help is to put them through the legal services. But girls are reluctant to go to court. They don’t want to confront the perpetrator, make their story public, lose time and money... I used to work with survivors of rape and sexual violence, they think why not get compensation now [through *somroh somruei*] and keep quiet (interview #20).

These two NGO staff members show the problems of applying human rights ideals in responding to rape in Cambodia. Where, we may ask, did these ideals come from? Why do they hold such sway?

Beginning in the 1980s, the global campaign to end violence against women gathered momentum, with increasing acceptance of the idea that “women’s rights are human rights.” The international community’s response to violence against women is now largely directed by UN Women, established in 2010. It supports and assists inter-governmental bodies’

formulation of policies, international standards, and norms; and governments' adoption and enactment of legal reforms in alignment with international standards. Such standards and norms are articulated (among other places) in guidelines for program planning and design, which emphasize the "powerful role" of the justice sector (Thomas, Young, & Ellingen, 2011, p. 6), explicitly rejecting alternative dispute resolution mechanisms. Thomas et al. (2011) refer to informal justice throughout the text, highlighting in bold a negative assessment. For example, "it is important to note that ... restorative justice mechanisms can be detrimental in cases of violence against women" (p.8); "informal justice mechanisms pose many risks to women and girl victims of violence" (p.10); "restorative practices, which can minimize the effect that violence has in women's lives, can perpetuate discrimination, and can risk women and girls giving up their individual rights so as to preserve harmony within a social group" (p. 24). No research evidence or citations are given. We argue that this reiteration of western values and norms within an emerging international regime to end violence against women sits uncomfortably with the need to address local circumstances. The possibility of survivors' individual rights being sacrificed to broader justice principles becomes even more apparent in the Cambodian context of a dysfunctional criminal justice system.

What is the source of authority for international standards and norms? In the Thomas et al. (2011) guidelines, 15 of the 20 contributors were lawyers; at least five were from the United States, and the publication was endorsed by The Advocates of Human Rights. A legal orientation dominates donor-initiated programs and government development policy. The UN is the biggest multilateral donor that focuses on gender equality in Cambodia (Bottomley, Leang, Urashima, & Prak, 2012, p. 30), and its programs on violence against women are coordinated by UN Women, using its international standards and norms. In this context, it would be difficult to find support for a project that challenges such standards.

Our point is not that international standards and norms should be undermined. Rather, drawing from Hafner-Burton and Ron (2009, pp. 393-94), by conceptualizing violence against women solely within a global human rights framework, the local significance of community as social identity and as a means of survival is obscured. It stifles consideration of alternative perspectives and approaches to justice. And it threatens to displace resources that might be directed to more innovative or locally appropriate responses, even in the interim period of establishing a functioning criminal justice system. In short, a human rights framework “offers a discourse of both freedom and domination” (Evans, 2005, p. 1049).

Donor dependence

In Cambodia’s donor-driven aid environment, the government and NGOs largely comply with top-down directives. In relation to everyday rape, the result is that programs redirect victims away from customary dispute mechanisms towards a criminal justice response. It is not the government or NGOs who approach a donor with a project. Rather, donor interests or experts initiate and drive the development program from conception to delivery (Dosch, 2012, p. 1074; Nagasu, 2004, p. 1).

For government, this is not entirely or necessarily a reflection of ineptitude. It may utilize existing aid arrangements and an apparent lack of capacity to maximize foreign aid opportunities that align with donors’ projects (Nagasu, 2004, p. 4). At the same time, an exodus of donor dollars from the justice sector suggests that the government’s strategy might backfire after consistent failure or low ministerial commitment.

The impact of a ministry’s dependence on funding was emphasized by one interviewee, whose NGO wanted to close an orphanage when child abuse allegations emerged. She explained that the raid was scheduled, but they then had to fight the ministry to get approval because the international donor was going to be in-country. “We’re like, are you kidding?! It’s very very donor centric here” (interview #6). The orphanage was an early

example of ‘volun-tourism’, a new multi-billion dollar global volunteering industry, which has contributed to a significant increase in the number of Cambodian “orphans” (70 percent of whom are said to have a parent) and unregistered orphanages (Ruhfus, 2012).

For NGOs, donor dependence affects their activities in three ways: NGO services cluster in areas limited to donor priorities and interests, though these may not accord with the perceived needs of the NGOs; original NGO goals or priorities may be diverted to enhance funding opportunities; and aspirations to play an expanded role in civil society are constrained.

Donors generally contribute to specific projects and personnel costs, but little to a NGO’s operating costs. Additional donors are needed to cover any shortfalls. One effect is competition among NGOs and a regional-sectoral clustering in areas where donors dominate: this creates “aid darlings” (where aid is most concentrated) and “aid orphans” (where aid is needed, yet missing). According to the country director of a policing affiliated NGO, police training programs are a “darling”:

Twenty different organisations are turning out 20 different training programs. There’s a big push to get one standardised program; but it’s been 6 years, and they still haven’t been able to do it ... No NGO wants to give that up because it’s a huge source of funding (interview #6).

Everyday rape does not motivate donors. However, according to the same interviewee, “everyone loves trafficking. It’s very sexy, very cool,” with these implications:

In the Cambodian context, it [trafficking] is not happening nearly as much as [donors and therefore NGOs] want ... They really want that to be a big issue here. And what do you really call trafficking? ... A lot of NGOs have to say it’s a trafficking case because of their donors, but it’s not trafficking. It’s exploitation, it’s awful; but it’s not trafficking. You have the international donors who are insisting on trafficking and

so NGOs create trafficking cases... It's a complete misdirection of funding (interview #6).

Available statistics show that rape is far more widespread than trafficking, but few NGOs focus on the rape of adults (over 18 years). Rape cases are captured by NGOs that provide services in the areas of trafficking, domestic violence, and the protection of children—all donor-funded programs that reflect priorities of the international aid community.

Cambodian NGO reports on gender based violence and violence against women overwhelmingly focus on domestic violence and trafficking. There has been no targeted research on rape and appropriate justice responses. Universal “best practice” criminal justice responses are assumed to be optimal.

To accommodate donor objectives, NGOs may need to adjust their priorities and programs and accept new projects. Khieng (2013) argues that such alignment with donor interest has a “goal displacement effect” on the NGO. To illustrate, aid dependency derailed a once prominent NGO with considerable experience researching and working directly with gender based violence. As a result of their need to attract funding, they turned away from this work to assist reforms on women in politics. They became project focused, preoccupied with writing reports for donors, and in the eyes of one interviewee, Cambodia lost their accumulated expertise and leadership role in the area of sexual violence.

NGO dependence on donor funding may constrain engagement in long-term, policy agenda-setting activities. Despite a recent shift in the international development community encouraging the participation of NGOs in planning processes, one NGO country director confirmed that this was inhibited by donors who had little interest in funding policy work. What attracts funding, she says, is results in service and project delivery. However, “Cambodia is changing,” she argues, “and what we need now is strategic work rather than the service delivery” (interview #4).

OPENINGS AND OPPORTUNITIES

There is more to the Cambodian story than the hegemony of human rights ideals and the dominance of donors. Openings and opportunities are emerging. These have resulted from two shifts in the international dialogue on aid effectiveness: increased recipient country ownership of development programs and increased participation of civil society organizations, including NGOs. To achieve the first, OECD donor partners are now obligated to provide more funding through government institutions. This means less direct donor funding to NGOs. The pressure on NGOs to find alternative income is increasing and may encourage some to turn to the government as a funding source. In the past, government funding was extremely limited, generally forthcoming when foreign development partners provided government grants stipulating collaboration with NGOs to implement programs (Khieng, 2013). Although there is greater NGO competition for funding, NGOs have new opportunities to shape government policies and initiate programs where NGOs see the need. As one NGO country director explained, “so far gender based violence is all about trafficking and domestic violence. Unless other aspects get on the agenda, there’s no funding” (interview # 4).

Cooperation between donors and NGOs in agenda-setting work has been encouraged, albeit inadvertently, by the difficulties donors have had in working with the government. Before meeting with the government, donors and NGOs now get together to strategize. A subgroup of all UN bodies, bilateral donors, and NGOs working on gender based violence meet monthly. Their consultations with the Minister of Women’s Affairs on the Second National Action Plan to Prevent Violence Against Women, 2013-2017, put gender based violence in urban areas on the government agenda.

Increasing involvement of NGOs in policy making has been embraced by some, particularly those with a degree of donor independence, like interviewee #4 above. The opportunity to make a more significant contribution through policy input is regarded by this

interviewee as a more effective way to address “aid orphans” than service delivery in the changing aid environment. Once on the agenda, it is more likely to attract the attention of donors and other government ministries.

CONCLUSION

Cmiel (2004) invites us to ask difficult questions of human rights. Ours is: what if responses framed by universal human rights are not the best way to address everyday rape in countries where the justice system is dysfunctional and customary law is preferred? What if most victims and their families prefer to use an informal justice mechanism instead? There is a need to investigate the unintended negative consequences of encouraging formal justice—which is distant both in geography and global ideal for most Cambodians—and discouraging locally-based practices of *somroh somruel*.

We see several ways forward, guided in part by the interviews. First, we agree that pressure to improve the criminal justice system is vital to providing appropriate legal redress, as one justice pathway. We also advocate client-centered and community-based responses to survivors, and we think that this can be extended to address survivors’ justice interests. The existing informal justice pathway is far from perfect, but so too is the existing criminal justice system. The legal implications that complicate NGO engagement with *somroh somruel* in cases of rape cannot be ignored. NGOs might continue to provide the same services, including legal advice and support, but consider more carefully the range of needs and options available to their clients, rather than encouraging them to engage formal justice. Some NGOs might work to support and improve customary practices in ways that do not compromise their own legal position, that is, by not working directly on particular cases, but with the village or commune leaders and local communities to improve an understanding of rape, its causes and effects. Agenda-setting forums might also offer opportunities to extend research on *somroh*

somruei in responding to rape, with greater attention to the experiences of those who have used it.

To return to Weinstein et al.'s (2009) question, "Do we abandon victims if we argue for a response that addresses the greater good of a community?" Our answer is that if, by community, is meant an (inter)national body upholding symbolic universal principles, then our answer is yes, victims are abandoned. If, by community, is meant a local basis of identity, support, and survival, then our answer is no, they are not.

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