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ASIAN HUMAN RIGHTS COMMISSION

ASIAN LEGAL RESOURCE CENTRE

THE PROBLEMS FACING THE CAMBODIAN LEGAL SYSTEM

By Basil Fernando

FOREWORD

The Honourable Justice Michael Kirby AC CMG

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At a defining moment in the history of Cambodia, I had the privilege of working with its people to help build a society respectful of the rule of law, fundamental human rights and the independence of judges and lawyers.

My adventure began in the No 1 courtroom of the Supreme Court Building in Phnom Penh in July 1993. This was during the phase when Cambodia was under by the United Nations Transitional Authority for Cambodia (UNTAC). Shortly afterwards, when the Kingdom of Cambodia was re-established, I was appointed as the

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President of the International Commission of Jurists; Justice of the High Court of Australia; formerly Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia.

Secretary-General's Special Representative for Human Rights in Cambodia. At the seminar and later when working with the UN Centre for Human Rights in Phnom Penh, I came to know and greatly to respect the integrity, dedication and fearlessness of many marvellous officers of the United Nations who had dedicated their lives to building a better world. Basil Fernando was then the Chief of the Legal Assistance Unit at the UN Centre for Human Rights. I came to know his sterling qualities.

Although Basil Fernando has completed his mission for the United Nations and departed from Cambodia to work in a larger theatre of human rights, he has left (as I have) part of his heart behind. He continues to work for the improvement of human rights in Cambodia. After decades of revolution, war, genocide, invasion and subjection to autocracy, the brave hopes of the United Nations, and people around the world, were that UNTAC would usher in a pluralistic democracy, constitutional institutions and a restoration of respect for human rights. The experience of many countries shows that these objectives are difficult, or impossible, to attain without "competent, independent and impartial" courts established by law. Only such bodies can defend the weak, the vulnerable and the unpopular from the brutal power of money and guns. Although some progress has been made towards the objectives of the United Nations, most especially the rise of valiant proponents of human rights and the establishment of a plethora of insistent civil society organisations, most of the recommendations of the July 1993 seminar and most of those made by me as Special Representative of

the Secretary-General, remain unimplemented. This book is a record of the many continuing failures in the Cambodian legal system. Yet it should be looked upon positively - as a challenge to the stalwart and enduring Cambodian people, and an agenda for action by their leaders.

I challenge anyone to read Mr Fernando's analysis of the legal scene in Cambodia and to emerge without a sense of frustration, distress and determination to help to put things right. Many of the fundamental constitutional bodies have still not been established because of political wrangling. Still, many of the systems introduced during French colonial rule, inimical to independence of the judiciary, remain in place. Some judges still telephone the Ministry of Justice for guidance on how a case should be determined. Still in operation is the communist system of public prosecutors determined to obtain a confession from the accused at all costs. This is a relic of the autocracy that came to Cambodia with the Vietnamese invasion; although at least the invaders helped to rid the country of the genocide and chaos of the Khmer Rouge. Still, judges, prosecutors and citizens lack modern laws to govern their conduct. The legislative programme of the National Assembly still remains slow and uncertain. Still, the military and some officials can place themselves beyond the effective control of law and the civil power. Still, effective remedies to strike down laws and actions that are inconsistent with the Constitution and fundamental rights, remain imperfect or unavailable. Reports of extra-judicial killings and

comments attributed to governmental leaders justifying or even supporting them, still continue to be a source of great anxiety.

My successor as Special Representative, Ambassador Thomas Hammarberg, has continued, like me, to insist on the centrality of building an effective legal system for the practical protection of the rule of law and fundamental rights in Cambodia. Some progress has been made. Proposals are currently before the National Assembly substantially to increase the salaries of the judges without which the risk of corruption is ever present. Legal education is increasing. The foundations for a civil society have been laid. The Cambodian people have tasted freedom, protection of fundamental rights and the rule of law during UNTAC. Above all people of the world, they know the alternatives.

The strength of this book is that it does not only concentrate on the problems facing the Cambodian legal system. It contains an agenda for change and for action. I certainly agree with the author that the impetus for, and direction of, such change must be found in the culture and traditions of Cambodia. But it must also be found in the universal principles of human rights to which Cambodia has subscribed and by which its government and officials are bound. I hope that Basil Fernando will continue to share his wisdom and experience with the people of Cambodia and those of us in the wider world who support the efforts to free its people from the shackles of the past. A modern society and a prosperous economy demand an

effective legal system. In their hearts all of Cambodia's people know this. That is why a book like this is so important and timely.

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Michael Kirby