

Responding to everyday rape in Cambodia:  
rhetorics, realities and *somroh somruei*

**Abstract**

This paper presents a core dilemma faced by victims of ‘everyday rape’ in Cambodia: the preferred response is *somroh somruei*, a customary dispute resolution process, but pressure is exerted by the state and by international and local NGOs to use the criminal justice system, which is corrupt and inaccessible to all but an elite. Drawing from interviews with NGO staff and field research by NGOs, we find a clash between human rights rhetoric and the realities faced by rape victims and their families. Human rights and other western donor organisations need to consider multiple meanings of justice, particularly in rural areas in countries like Cambodia, where ‘justice’ situates morality within the restoration of social harmony and the repair of aggrieved relationships. Greater attention should be given to supporting and improving *somroh somruei*, alongside that of developing more accessible and accountable conventional criminal justice responses.

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## 1. Introduction

Contemporary debates on the appropriateness of informal or restorative justice in cases of gender-based violence emerged in the 1990s in affluent western nations (Braithwaite and Daly, 1994) and accelerated in the early 2000s (e.g. Cook, Daly & Stubbs, 2006; Proietti-Scifoni & Daly, 2011; Ptacek, 2010; Strang & Braithwaite, 2002). Similar debates have emerged for societies in transition from war and post-authoritarian regimes, as critical and feminist scholars have critiqued top-down ‘rule of law’ justice reforms (e.g. Carothers, 2003; Ní Aoláin & Hamilton, 2009); analysed the promise and limits of international law and criminal justice (e.g. de Brouwer, Ku, Romkens & van den Herik, 2013; Campbell, 2007; Fineman and Zinsstag, 2013; Franke, 2006; Kouvo & Pearson, 2011); and considered the potential of informal justice or other alternatives to criminal justice for conflict-related and everyday violence (e.g. Bell & O’Rourke, 2007; Fletcher & Weinstein, 2002; Mertus, 2004; Wells, 2004-5; Wojkowska, 2006). Critics of informal or restorative justice in both contexts of victimisation argue that outcomes may appear to be too lenient and send the ‘wrong messages’ to perpetrators and would be offenders. Sexual violence, in particular, is viewed as too serious and especially inappropriate.

This paper aims to make a small contribution to a vast field of knowledge on justice responses to sexual violence in post-conflict and fragile states, although our focus is on ‘everyday rape’ (i.e. among those known to each other outside the context of armed conflict), which is less often studied (Edwards, 2010).<sup>1</sup> We examine beliefs about ‘appropriate responses’ to everyday forms of rape in Cambodia from interviews of international and local non-government organisation (INGO or NGO)<sup>2</sup> staff and social work professionals, who assist and support rape victims. The interviews are joined with studies of formal and informal responses to crime, including rape, in Cambodia. We find a clash between human rights rhetoric—that victims should report rapes to the police and perpetrators should be punished—

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<sup>1</sup> As Chinkin and Charlesworth (2006: 941) point out, in a ‘post-conflict’ phase, ‘the forms and locations of violence may change at the cessation of active conflict, but violence against women is likely to be a continual phenomenon’. Moreover, war-related and post-conflict contexts of victimisation also include everyday rape.

<sup>2</sup>Unless otherwise noted, NGOs refers to both international and local NGOs.

and the realities faced by rape victims and their families—that greater shame will occur by engaging the criminal justice system, which in any event is corrupt and beyond the economic reach of all but an elite..An informal justice mechanism, *somroh somruei*, is preferred by most Cambodians because it is more accessible, affordable and swift; outcomes can be negotiated between families and can serve to restore social harmony.<sup>3</sup> As currently practiced in response to rape, *somroh somruei* has numerous problems, and it may be viewed as inappropriate, especially from a western legal perspective. But formal criminal justice responses are little better in Cambodia. We propose that greater attention be given to supporting and improving *somroh somruei*, alongside that of developing more accessible and accountable conventional criminal justice responses. Substantive change will require more than changes to justice practices, of course: it will require significant shifts in attitudes toward and the material circumstances of girls and women, gender relations and gender-based violence.

## **2. The Cambodian context, study methods and research materials**

Cambodia is the second most aid dependent country in South East Asia (Dosch, 2012: 1068) and among the poorest nations in the world (ranked 137 out of 182 countries by the United Nations Development Programme [UNDP] in 2009). Most Cambodians (80.5 per cent) live in rural areas and are engaged in small-scale agriculture; 35 per cent of the rural population live below Cambodia's 'conservative' average national poverty line of US \$0.62 per capita per day in 2007 (Asian Development Bank, 2012: 4-5). From 1970 to 1998, Cambodians 'suffered civil war, foreign aggression and genocide' (Broadhurst, Bouhours & Keo, 2013: 167). Before the country was subject to French colonial rule in 1863, its legal system used customary law, mediation and reparation, influenced by Buddhist and Khmer traditions; from 1863, the official legal system was based on the French civil law tradition, but informal customary practices remained. With independence from the French in 1954, formal and informal legal practices continued; but in 1975, the Khmer Rouge destroyed the legal system (and killed about 1.7 million Cambodians, including almost all the legal professionals), which in 1979, was replaced by a Vietnamese socialist-style model. From 1991, with the Paris

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<sup>3</sup> We use the terms informal justice, customary dispute resolution process, and *somroh somruei* interchangeably, although as noted below, some of these are sanctioned by the state. The literature refers most frequently to *somroh somruei*, but another term used by some interviewees is *psapsaah*.

Peace Agreement, the formal legal system was a blend of French law and other influences. In 2007 a criminal procedure code was established, and in 2009, a criminal code, both based on the French model (Eckelmans, 2012). Despite this, as Broadhurst et al. (2013: 173) suggest, ‘many Cambodian people continue to regard the current criminal justice system as having little legitimacy, because in the three branches of the system (police, judiciary and corrections), regime capture (lack of independence) and corruption [are] endemic’.

We draw from two sources of data in this paper: interviews with NGO staff and field research by NGOs on formal and informal justice.

### Interviews of NGO staff

Because NGOs are the sole providers of support services (as well as research and data collection on gender-based violence), the first task in locating potential interviewees was to identify relevant NGOs. From a database compiled by a Cambodian researcher, 57 NGOs were identified that had gender-based violence programs. Contact was established with 40 of these NGOs, who were emailed an outline of the research aims and an interview request in advance of a trip from Australia. Of the 40 NGOs contacted, it was possible to organize interviews with staff working for fifteen. The first author travelled to Cambodia during November and December 2012 and conducted interviews with twenty professionals, having extensive experience working in or for the NGOs, and based in or visiting Phnom Penh, the country’s capital, or Siem Reap, a provincial capital in the northwest. As an exploratory study, the questions sought to identify the services provided by the NGOs; the perceived justice needs of rape survivors; and the process, limitations and advantages of *somroh somruei*.

All those interviewed worked or had worked with international or local NGOs as directors, lawyers, social workers or counsellors, program officers, or researchers. All but six were women, eight were Anglo-European (four of whom had lived in Cambodia for over ten years), and twelve were Cambodian, most of whom were fluent in English. All Cambodian interviewees were, in relative terms, well educated, through formal schooling and/or INGO involvement. At least six had attended universities in Cambodia or other countries. Most interviews were carried out in the offices of the NGOs, and most interviewees agreed to having the interview recorded. A desire for anonymity was strongly expressed by six interviewees (including expatriates and Cambodians). They were concerned that government or donor bodies might identify them or the NGO as the source of critical comments, which could potentially compromise NGO registration, future employment, or government engagement. These concerns likely constrained responses in two cases, but once

confidentiality was assured, most interviewees were candid in their critical evaluations of institutions and programs.

Although the aid environment in Cambodia is complex, there are four main types of NGOs in Cambodia: (1) international NGOs not registered with the Cambodian government (e.g. Amnesty International, Global Witness, Human Rights Watch); (2) international NGOs registered with the Cambodian government (e.g. ActionAid, Oxfam); (3) local registered NGOs (e.g. Cambodian League for the Promotion and Defence of Human Rights [LICADHO], Cambodia Defenders Project); and (4) small grassroots organisations, more organic in terms of addressing particular issues and in some cases active in demanding change. The first type is primarily engaged in information gathering and dissemination, and the three others have increasingly formed partnerships to maximise resources to address a range of client needs (shelter, counselling, legal, among others). Of the 15 NGOs represented in the sample, two were type 1; the rest were types 2 and 3. The interviews were analysed to determine the degree of receptivity to using *somroh somruei* as a potential justice mechanism in response to rape. Three types of response were identified: rejection, tentative interest, and cautious enthusiasm. A fourth group expressed no opinion. Most interviewees were aware of, but not involved with, rape cases seeking resolution outside formal criminal processes. Thus, as we shall see, they were more familiar with conventional legal responses, and in some cases, their organisations took a strong view against informal justice.

#### Field research by NGOs

Several actors in the region have supported research on informal justice: the United Nations Development Programme in Cambodia (UNDP Cambodia), the United Nations Educational, Scientific and Cultural Organization (UNESCO Cambodia), Australian Agency for International Development (AusAID) and the European Union. Their respective major reports, providing first-hand accounts of *somroh somruei*, are Yrigoyen Fajardo, Kong & Phan (2005) [hereafter for ease of citation, referred to as *Pathways to Justice*] and Ministry of Justice, Ministry of Interior and UNDP Cambodia (2007a, b) [hereafter Ministries and UNDP, 2007a, b]; Luco (2002); Ramage, Pictet, Sophearith & Jorde (2008); and Lim (2009). These reports focus more on domestic violence than rape because, in principle, Cambodian law does not permit *somroh somruei* in rape cases. As part of a national campaign to raise awareness of the 2005 Law on Prevention of Domestic Violence and Victim Protection, a handbook was prepared for village facilitators. It states that *somroh somruei* is the recommended response, but '[o]nly in cases where the domestic violence incident can be classified as a minor

misdemeanour or petty crime’; more serious offences must be reported to the police (UNDP Cambodia and VBNK, 2010: 51). This legislation is prompting scrutiny of *somroh somruei*, and NGOs are reinforcing the message that cases of rape must be pursued through the path of criminal justice.

We rely on the NGO field research because it is the only source that gives us first-hand knowledge about how *somroh somruei* operates. Furthermore, to date, with the exception of Anderson (2005) and Kent (2011), we are aware of no published academic papers in English that focus on rape or sexual violence in Cambodia.<sup>4</sup> Anderson (2005) considers the merits of using a modified version of *somroh somruei* in the context of prosecuting sexual violence in the Extraordinary Chambers in the Courts of Cambodia. Her proposed modifications would have a balanced representation of women or women-led hearings, perhaps with local Buddhist nuns to preside. She also suggests that *somroh samruei* might be extended to everyday rape. Anderson’s position is unusual. Although there is growing interest in the international and transitional justice literature to consider informal justice mechanisms in fragile states, the general consensus is that it is not appropriate for serious crime, including rape.

In a review of three edited collections on feminist analyses of gender, transitional justice and social change, Vijayarasa (2013: 362) notes that questions are raised, yet again, about the ‘shortcomings of the law in addressing gender concerns and ... the reality for feminist practitioners that the law is the primary conduit through which justice and reconciliation operate’. Our interviews find that those working for international and local NGOs in Cambodia that address gender-based violence are caught in the knot of ‘seeking redress and reform within ... the structural bias’ of the legal system. In other words, formal law is the announced ‘answer’ to justice for girls and women, despite its being structurally biased against them.

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<sup>4</sup> There are, however, numerous NGO reports, the most significant of which are Amnesty International (2010) and O’Connell (2001). Others include the Cambodian Committee of Women (2007), Cambodian Human Rights and Development Association (ADHOC, 2011, 2012), Cambodian Women’s Crisis Center (2011), End Child Prostitution, Pornography and Trafficking (ECPAT) Cambodia (2011), and LICADHO’s annual reports and special reports (2001, 2004).

### **3. Meng's story: a composite**

To appreciate the realities of everyday rape in context, we created a composite account, based on the Cambodian literature and what the interviewees said.

Meng is a typical Cambodian girl, who left school when she was 15 to work with her mother as a subsistence farmer, helping to support her two younger siblings. Like Meng's family, bitter circumstances (death, many from HIV; desertion, domestic violence and divorce) position women as heads of approximately 25 per cent of Cambodian households (up to 50 per cent in some areas), and it is here that poverty is most profound. At 17, Meng was raped by her distant cousin, Chen, who was visiting his family in their remote northwestern village in Battambang Province, where Meng lives. The pre-marital loss of virginity, regardless of the context, brings shame on Meng and dishonour to her entire family. As a result, Meng's marriage prospects are significantly diminished, and she considers the advantages of remaining silent. This is what the vast majority of rape victims will do in Cambodia, as they do in affluent nations (Daly and Bouhours, 2010; Burns, 2005).

Under Cambodian law, Meng is required to report the rape to the local or district police. Massive donor-funded projects have worked to reconstruct Cambodia's criminal justice institutions, amend rape law and build capacity to implement 'best practice' reforms, deliver punishments and deter potential perpetrators. Although this path to justice has been paved by decades of western feminist reform and human rights advocacy, it also constitutes a public broadcasting of Meng's shame. The formal pathway is also costly in terms of time and fees. Meng would need forensic medical evidence, and the nearest hospital with the necessary facilities is a half-day bus journey. Meng cannot take time from work because it is February, and in her village, the rice harvest has begun.

Meng's mother decides to take the case to the village chief, an authoritative figure, who, she believes, can achieve a good outcome. Chen's family, on whom Meng's mother is somewhat dependent, holds a position of relative power in the local patron-client string of social relationships, and Chen himself has secured a paid job in the provincial capital, increasing the disparity between their families. The chief is likely to encourage the payment of US \$200 compensation and possibly Chen's marriage to Meng. Current hostilities would be appeased, community relations restored and the family's financial situation secured.

#### 4. Taking the path of formal criminal justice

To engage criminal justice, Meng needs the assistance and encouragement of an NGO that can provide legal advice and support.<sup>5</sup> Meng's first and last contact with formal criminal justice will likely be with a police officer. Criminal offence complaints are reported to a local authority, village chief or elder, commune chief or commune police. In cases of rape, reporting to the commune police is officially encouraged and endorsed by most NGOs. Commune police officers number five to seven per commune, and the average commune population size is 8,000 (Pak, 2011: 13). Criminal cases are then passed to the district and then the provincial police, effectively providing three opportunities for a police-facilitated out-of-court settlement.

At one or all of these stages, police typically warn the complainant that a trial amplifies her shame and that of her family, reducing her marriage prospects. They advise that the court system is complicated, expensive, time consuming and weighted in the offender's favour, and that a conviction is unlikely and receiving compensation improbable. At the same time, the threat of a jail term is used as leverage with the offender, and for their services, police typically receive payments from both parties. The number of cases resolved in this way is impossible to determine because 'illegal' settlements are not likely to be recorded, although such practices are widely acknowledged as commonplace. Compensation is a significant motivation for victims to 'close the case at the police level' according to one NGO lawyer (interview #17). While police benefit financially from facilitating an informal resolution of cases,<sup>6</sup> they may also be motivated to divert complainants from the courts because of their frustrations with the judiciary, who are perceived to routinely dismiss cases, despite sufficiently strong evidence. The police view informal resolution as the most efficient and cost effective outcome following a complaint.

The judicial process is prohibitively expensive to all but the elite. A victim of crime is responsible for a wide range of fees, including legal and medical expenses in collecting and

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<sup>5</sup> Legal assistance dominates services provided by NGOs; this is followed by counselling, accommodation and food, and medical treatment (ECPAT Cambodia, 2011: 21).

<sup>6</sup> In this context 'informal' refers to settlements mediated by local authority figures (e.g. elders, village and commune chiefs, Buddhist monks) in accordance with customary dispute resolution practices sanctioned by the state. In addition, it includes unofficial and unsanctioned transactions facilitated by state actors (e.g. police, court clerks, judges) outside formal institutions.



processing evidence. While many refer to these fees as bribery or corruption, the police are poorly paid, typically below subsistence level at US \$20 to \$45 per month and poorly resourced. Police stations frequently lack basic office supplies, radios and fuel to run the police car or motorbike (*Pathways to Justice*, 2005: 140). Fees are extensive. For example, in one case to recover an unpaid debt, 10,000 riels (approximately US \$2)<sup>7</sup> was required for conciliation at the commune police office; when that failed, 15,000 riels was required for the same service at the district police office, and then 10,000 riels to file a complaint in the court. The complainant was summoned to court seven times for inquiries, each trip costing about 40,000 riels; and the date for the trial had not yet been set (*Pathways to Justice*, 2005: 142). In addition, a criminal case may require payment for the police to hire a car or buy petrol to go to the scene of the crime, to apprehend offenders, to transport them to the provincial town where the only jail is likely to be, and to purchase meals while conducting investigations. Victims of crime are also responsible for the food and transport costs of getting case witnesses to court in the provincial capital. This may entail a day's travel, in light of poor public transport and infrastructure. Geographic inaccessibility is compounded by the complexity of court processes, forms, formality and numerous fees (Ministries and UNDP Cambodia, 2007a).

Another hurdle is the collection of medical evidence, an imperative but costly and complex exercise. NGO lawyers (interviews #2 and 17) described numerous difficulties resulting from weak forensic capacity and its interpretation. Judges place most evidentiary weight on medical reports, without which cases are difficult to prove.<sup>8</sup> The collection of forensic evidence requires a prompt medical examination, but the courts only accept medical certificates from a limited number of doctors from a few specific hospitals. These recognised hospitals purchase rape kits, but because of the prohibitive cost, they are in short supply; the cost is passed on to the user. Permission to collect and submit DNA evidence requires a court application to a special committee including officials from several Ministries. Forensic costs are considerable, US \$4 to \$40 depending on the province. The costly and cumbersome process in gathering DNA evidence may also require the complainant to attend and sign

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<sup>7</sup> Amounts are calculated in US dollars using August 2013 exchange rates.

<sup>8</sup> Reliance on medical reports is problematic. The focus is on the hymen; and unless the victim is very young, inconclusive evidence regarding when it was torn may signal 'lack of proof' or pre-marital sexual activity and thus have a negative impact on the determination of the case.

forms at one of the Ministries in the Phnom Penh, which is up to two days' travel time for villagers. The barriers to formal adjudication are formidable and almost completely out of reach for a young rural woman. It is only with international or local NGO assistance and support, including the provision of legal services, that women can contemplate court proceedings.

Lawyers are in short supply, particularly outside Phnom Penh. According to the Bar Association in 2011, of 751 registered lawyers, approximately 30 per cent provided some pro bono legal counsel to the poor, mostly on a part-time or occasional basis. The services are generally funded by international NGOs, including the largest group organised by the Bar Association, which pays a retainer to 22 lawyers to take three to ten cases per month (United States Department of State, 2012: 8; Cox and Ok, 2012: 16). Because prosecutors do not gather evidence and police are under-resourced and under-trained, the engagement of a lawyer to assist in investigating and gathering evidence is imperative. An international NGO recently donated a car to Legal Services for Children and Women so its lawyers could reach clients in remote locations, and do so safely (interview #1).

O'Connell (2001) has catalogued numerous problems with court procedures and processes. Arising in part from scarce resources, complainants and defendants may be forced to ride to court in the same car, and 'closed' courtrooms are accessible through broken and missing shutters. Other research has found that court clerks participate in case investigations and judicial rent seeking; they adjourn proceedings to facilitate negotiated settlement payments for a fee (LICADHO, 2004: 2; Anderson, 2005: 800). Although it was hoped that significant salary increases to judges and prosecutors in 2003 would curb corruption, there is little evidence that this has occurred (Cox and Ok, 2012: 16).

All those interviewed for this study were critical of the Cambodian criminal justice system, but at the same time, because it is *the* legal response, it was viewed by most as the most suitable justice pathway. Despite this, the vast majority of rape victims do not engage formal criminal justice. When resolution in rape cases is sought, it is addressed by local customary dispute mechanisms, a point acknowledged in all the interviews and in reports that broach the topic. A general preference for informal justice was found in the eight provinces studied in *Pathways to Justice* by Yrigoyen Fajardo et al. (2005, p. x), who estimated that a national total of 40,525 cases were resolved by commune councils in 2003 (or 25 registered cases per commune per year, including 'gender-based violence and criminal matters'), a number more than three times the 12,043 criminal and civil cases adjudicated in the courts.

### 5. Taking the path of informal justice: *somroh somruei*

The local resolution of disputes in Cambodia takes varied forms, which may combine tribal law, Khmer customary law and Buddhism.<sup>9</sup> The term most frequently used is *somroh somruei* (variously translated as mediation, reconciliation or conciliation), a variant of Khmer customary law. *Somroh somruei* is permitted in less serious offences, but not rape; therefore, few rape cases using the practice are likely to be recorded.

*Somroh somruei* involves reaching an agreement between both parties through compromise; in theory, each party is free to accept or reject the outcome. An authority is approached, most commonly the village chief; but he (chiefs are overwhelmingly men) may be by-passed and the case taken straight to a commune chief or commune councillor, monk or elder in indigenous communities, although the latter course of action is uncommon (*Pathways to Justice*, 2005: 110). A meeting is organised, usually in the authority's home with both parties present, or in the case of rape, the victim's family and the perpetrator. The perpetrator is most often a family member, neighbour or known person (ECPAT Cambodia, 2011: 19). Individual personality differences among the village chiefs shape the dynamics of a meeting; but in general, the village chief asks each party to explain their version of events and their demands, encourages apologies and compromises, and offers suggestions and advice in the interests of negotiating the conditions of an agreement. According to one report analysing domestic violence cases, sessions may last one to three hours (Lim, 2009: 21). Several meetings may take place, and a degree of pressure to reach agreement may be applied if the conflict threatens broader community relations. Settlement is generally fast, with the vast majority of cases (73 to 90 per cent) resolved within one week from the date of complaint coming to the attention of a local authority (*Pathways to Justice*, 2005: 128; see also Luco, 2002: 7). If resolution stalls at the village level, the case may be referred to the commune council or to the commune police in the case of a criminal matter.

Different personalities and an interest to make additional income may also shape a village chief's motivation to mediate all cases or forward the majority to the commune council. The village chief is appointed by the commune council, and as the lowest level of government authority, receives US \$5.5 per month to undertake a range of responsibilities,

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<sup>9</sup> A set of case studies of customary dispute resolution systems in twenty villages showed some differences between the indigenous and Khmer versions of *somroh somruei*, particularly in using distinctive customary rituals to mark agreement and compensation; but in general, the processes appear to be similar (Ministries and UNDP Cambodia, 2007a).

including dispute resolution. Additional income in the form of unofficial fees of US \$1 to 2 per case may deter some village chiefs from referring cases on (Ministries and UNDP, 2007b: 8). For others, the motivation to resolve many cases may stem from gaining personal prestige in the village. As a local resident with vested interests to maintain social stability, a village chief is unlikely to make unreasonable financial demands because this would increase community hostilities rather than ameliorate tensions. Restoration of social harmony is the reason for the existence of *somroh somruel*, and its success is partly due to the perceived reasonableness of any local payment, if requested, in contrast to the heftier fees required to engage formal justice processes.

If a serious case cannot be resolved at the village level and is taken to the commune level, it is likely to be resolved by all or some of the commune councillors (numbering nine to eleven, depending on the size of the commune) rather than the commune chief alone, and the village chief may also be consulted.<sup>10</sup> The commune clerk receives the complaint, often written and signed by the village chief; the clerk registers the case, files the paper work, and a conciliation meeting is organised within a week. At the meeting, the perpetrator and victim (parents are likely to represent their daughter in a rape case) are requested to explain events, an apology may be elicited if a perpetrator was caught in the act or admits his offence, and compromises encouraged. These involve negotiations on the amount of compensation to reach agreement (that is, to reduce initial demands by a victim or increase offers by perpetrators). Resolution of rape cases at the village or commune levels may involve a range of outcomes, but according to all interviewees, survivors' families, the primary advocates in the *somroh somruel* process, seek compensation first and foremost.

Drawing from Luco (2002: 124) and *Pathways to Justice* (2005: 119-121), settlement of rape cases generally involves an apology by the perpetrator, payment of US \$100 to \$250, a promise by the perpetrator not to re-offend, threat of criminal prosecution if the perpetrator re-offends and an agreement that the settlement provisions end the matter. Additional culturally-informed measures may be proposed to reinforce the agreement, such as the perpetrator making a commitment at a local pagoda not to rape again.

It would be wrong to paint a rosy picture of *samroh somruel* in rape cases. For example, Luco (2002: 116-7) describes a case of victim (a young female servant) and

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<sup>10</sup> The major fieldwork sources do not differentiate outcomes at the village and commune levels. Differences in outcomes may occur based on the degree of remoteness of the village, the share of indigenous or ethnic minorities, and the personalities of conciliators.

perpetrator (a police officer) who were from different villages. The *somroh somrueal* took place in the perpetrator's village, and the village chief said 'we must keep this business quiet to avoid shame'. Had the 'outsider' girl been from the village, the rape would have been acknowledged and the perpetrator would have had to pay compensation. However, as Luco (2002) says, gendered power relations were restored and 'concern for social order prevailed'. Another potential resolution cited in the literature and by the interviewees is marriage between the victim and perpetrator. Luco (2002: 124) cites an elderly male resident of Siem Reap as saying, 'if the matter becomes public knowledge, the father may try to marry his daughter to the rapist ... This is to preserve the girl's reputation' (see also *Pathways to Justice*, 2005: 119-121).

When agreement is reached,<sup>11</sup> a document summarising the nature of the conflict and terms of agreement is produced by the conciliator. This 'letter of promise' (*liket sanya*) is signed or thumb-printed by all parties, constituting 'proof of the management of the dispute and evidence of the parties' commitment to fulfil their promise' (Luco, 2002: 102). Luco emphasises the significance of achieving consensus and common understanding through *somroh somrueal* by avoiding attributions of blame or judgments that produce guilt and innocence, winners and losers. He notes that the 'quiet laughter and good-natured banter' marking the end of the *somroh somrueal* process 'seals the newly found harmony' (Luco, 2002: 101). The realisation of harmony in serious cases of conflict is ultimately a product of time, but elsewhere in Southeast Asian, for example, village life in Java, considerable attention is paid to performing a surface appearance of happiness or equilibrium, not as pretence but as an instrumental means to achieve longer-term internal and community balance or harmony (Seigel, 1983; Wikan, 1989).

The reasons Cambodians prefer *somroh somrueal* or out-of-court settlements, more generally, differ according to position and perspective. For those in authority such as judicial personnel (police, judges, court clerks) and to a lesser extent village and commune chiefs, it is a means of income generation. For local officials, prestige and status are also important. For perpetrators it is a means to lessen the punishment from serving a jail sentence to paying a fine. For victims and their families, explanations are more complex. Obtaining compensation in recognition of the harm done appears to be the main reason for seeking

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<sup>11</sup> If an agreement is not reached (e.g. an offender refuses to pay compensation or a victim refuses to accept a decision), the case may be sent to the commune police, to be forwarded through the various police channels to the prosecutor; but this is unusual.

resolution through the village or commune chief. As O'Connell (2001: 29) notes, 'many Cambodians view a payment of money as the only justice they are likely to receive'. Key to the perceived success of *somroh somruei* is its accessibility and swiftness, and the ability to negotiate penalties and commitments as opposed to decisions imposed from outside. In cases where offenders are family members, neighbours or otherwise known to the victim (a high share of cases), *somroh somruei* aims to support the recovery of relationships (*Pathways to Justice*, 2005: 128). Therefore, concerns for financial redress and social harmony outweigh those of criminal responsibility and accountability.

## **6. Organisational and interviewees' views on *somroh somruei***

Human Rights organisations such as Amnesty International, LICADHO and ADHOC unambiguously reject using *somroh somruei* for sexual violence and emphasise the state's obligation under domestic and international law to pursue criminal justice responses instead. Amnesty International consistently refers to *somroh somruei* in 'illegal' or mercenary terms as:

Moneymaking schemes, to provide personal benefit for the public officials involved rather than bring justice to victims. ... Every perpetrator that goes unpunished as a result of these [criminal justice] failures is a signal that the authorities are indifferent to the plight of the victims of sexual violence, as well as to their own duty to combat it, under both international and national law (Amnesty International, 2010: 51).

Similarly, LICADHO states:

Strong action against Cambodia's epidemic of sex crimes will help to enhance the reputation of the justice system, encourage victims to have the confidence to report crimes, punish perpetrators and prevent them from continuing other rapes (LICADHO, 2004: 3).

Concerned that the number of adolescent rape victims (under 18 years) being reported to their organisation is exceedingly high (72 per cent of cases), ADHOC writes:

Relevant authorities have been working hard on preventing rape; however, mediation is still widely being used to speed up legal action and victims are bought with civil compensation where perpetrators should instead be tried at court ... The issue of

mediation being used for the resolution of criminal cases has been a significant obstacle in the process of reducing instances of rape (ADHOC, 2012: 1).

Although some interviewees endorsed the position of these organisations, others did not. All agreed that the formal justice system was dysfunctional and corrupt. Despite this, some argued that criminal proceedings were preferable to *somroh somruei*. Few dismissed *somroh somruei* outright. The context of widespread poverty in Cambodia led some to think that *somroh somruei* held promise to the extent that it delivered compensation and a form of justice, whereas others believed that compensation payments minimized the seriousness of rape, and for that reason, should not be supported. There was a degree of consensus that working to improve *somroh somruei* might be worthwhile, but not at the expense of the formal justice system and not without protections and support mechanisms in place for survivors.

It became apparent during the interviews that few had carefully considered informal justice responses to rape; and for many, opinions fluctuated during and after the interview. There were four types of response: (1) those against *samroh somruei* (six interviewees); (2) those seeing the limits of formal justice and expressing tentative interest in *samroh somruei* (six); (3) those seeing *samroh somruei* more positively as potentially victim-centred in contrast to the courts (four); (4) those who expressed no opinion on the topic (four). Their views reflected, in part, their professional work (as lawyers or social workers) and their positions in the NGO sector.

For those against *samroh somruei*, their reasoning was based on human rights concerns: deterrence, legal obligation and protection. The director of a large religious-based NGO umbrella group, who was interested to develop his relations with the government, stated:

NGOs cannot get involved because it's illegal; so the process cannot be improved. So NGOs push them to go to court. ... 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).

Similar views were expressed by a women's refuge staff member and vocal advocate for survivors of rape in a northwestern province:

Rape involves criminal law so it must go to the courts ... If they want to go to court, I connect them with our NGO partner. We provide counselling. If they don't want [to file a complaint], I put them in contact with a female commune councillor, but we try to show the way. She decides, by herself, not me ... We put an example to her: if you want to go to court, the impact of the result will be such and such; if you don't want that, the future may result in another rape of another girl in the village because [I explain to her] she is not a good example for the community (interview #8).

Motivation to uphold the law, or to be seen as doing so, may also reflect organisational needs such as attracting donor funding or not jeopardising links to the government and registration of the NGO by appearing to flout the law. For some, commitment to the law, particularly with respect to the domestic violence national awareness campaign, reflect a sense of their being modern or cosmopolitan (and by implication educated) in contrast to adherence to traditional or customary law.

The second group acknowledged the limits of criminal justice and were prepared to consider a place for *somroh somruei*, although it too was seen as a problem. A human rights advocate said:

I can really understand, I mean this is a really un-human rightsy thing to say, but I can understand that they look at a pragmatic approach. If so many other cases are lost in corruption and malpractices, then maybe you want to look at other ways for ensuring some kind of redress ... From a human rights perspective, you wouldn't do that [publicly support *samroh samruei*] because these are serious crimes and the suspects should be prosecuted and tried, and that's the way you want things to take place. But I can understand those working in a different sector viewing it differently (interview #3).

Similar sentiments were expressed by another human rights advocate:

My first thought was absolutely not. I don't think there's anything like the capacity to deal with that now. And ... in the Cambodian context as well, it's hard enough trying to get the people to see that rape is not OK. And there's just such a lack of sensitivity as it is ... It would need a much much greater level of control before this could be seen as a good thing.



The interviewee then reflected on the problems with formal justice responses and what she would do if she were Cambodian:

Trials are traumatising especially when you have to pay for them; and if you pay less than the perpetrator, then that's it, he walks free ... I can see a place for the alternative system, but then he goes free to rape another day ... My second thought [was] if I was a Cambodian woman, there's no way I'd put myself through a trial here ... *Yeah, so that puts my [human rights] argument nowhere* (interview #7, emphasis added).

Both candidly illustrate the clash when human rights rhetoric confronts the realities of rape ('so that puts my human rights argument nowhere'). To maintain their reputation for integrity, some human rights NGOs have had to accept the tension of assisting those who pursue a formal justice pathway while refusing to pay the 'standard bribes' that tend to ensure success (interview #7). In doing so, international human rights interests prevail over those of the locals they want to assist.

For some, compensation was recognised as a positive element of *somroh somruel*. A legal consultant working for a large INGO reflected:

Sometimes I'm convinced by the law, that [rape] is a crime that affects society, the perpetrator should be convicted, but the woman has to get compensation because she is the victim and she has suffered. And so I think *somroh somruel* can exist alongside the justice system ... [but] the victim and her family need to be protected through the process (interview #2).

By comparison, another interviewee (a social worker) was critical of the courts for their negative impact on victims, but at the same time, cautious of the role of compensation:

The court process can often be corrupt and insensitive to the client's needs. If client needs are a priority, we should consider carefully for every case whether that court process will effectively respond to the client's needs or exacerbate their suffering. Most service providers seem to assume that advocating a court process is always the best thing to do. In fact a blind advocacy of court processes in every case can lead to further suffering for some clients. [then reflecting on the possible use of *somroh*

*somrue*] ... This goes with the proviso that out-of-court compensation payments are never supported as they are illegal and tend to minimize the seriousness of the crime (interview #19).

Like this interviewee, all those in the second group expressed initial interest in *somroh somrue*, but moderated their views on deeper reflection. An INGO director recognised that much work would be required to reform existing practices.

[*Samroh somrue*] is the best you're going to get, [but reflecting further on participation], actually it's completely the opposite of being engaged in it because what usually happens is it's the families ... They will negotiate, and she will not be consulted at all ... This whole idea of *somroh somrue* is good, but it needs a lot more work from outside to make it a process where she [has a role] in the discussion of compensation and what she wants (interviewee #4).

The third group was composed primarily of social workers and counsellors. Two prioritised what they called a 'client-centred' approach, and they believed that *somroh somrue* had more potential to be client-centred than was possible in court. For two others, the appeal was its community base. Despite their support for informal justice, all said they wanted to see improvement in formal responses. Indicative of the client-based orientation, an interviewee observed that if the case goes to court, 'it will make the incident bigger and bigger, and the survivors don't want that, and they don't know if they're going to win. So why, they think, why not get compensation now [through *somroh somrue*] ... and keep quiet?' She continued:

I mean, [do] not ignore the legal process or law, but if [*somroh somrue* is] the place where everyone is going to go, then better to improve it than push people to where they are not going to go. So if the majority of the people go through *somroh somrue*, then why not put some thought in and figure out how to really support the survivor ... (interview #20).

Similarly, an INGO programming coordinator said:

Prosecution is important [as] one aspect of a journey to recovery and justice, ... but there are cases in Cambodia where we find participating in the legal process can be traumatising and can put the client at risk (interview #15).

A colleague elaborated on the ‘very deep’ community values associated with *somroh somruei*:

There are inevitably times when the local tradition of law has influenced the process [for one of our clients] when an elder has stepped in, a council leader, or a police chief to mediate ... especially when the perpetrator is from the same community. And look in all honesty, most NGOs [are] not going to be a whistleblower about a practice like that, that’s so culturally embedded, that goes very deep back to values (interview #16).

However, in later reflecting on the *somroh somruei* process, she said:

The challenge though is that there are such strong cultural attitudes towards women: they’re either broken or not broken [hymen/virgins]; they’re bad or they’re good. That’s really unfortunate because actually you could draw on an alternative approach more effectively if the community, particularly the men, had an attitude where it wasn’t her fault and she was an equal in value as a human being ... In reality that’s just not the case (interview #16).

Thus, although there can be advantages to working with deeply embedded cultural practices, these are imbued with patriarchal attitudes that can undermine women’s claims of rape. Moreover, the degree to which survivors are connected to a patron-client network of support and protection (*khsae*)<sup>12</sup> may be ‘critical to [the survivor’s] integration back home’:

The first step is just acknowledging that this [patronage system] is how Cambodian society operates ... [survivors must be] well connected in one way or another because those connections ... are going to see them through; he or she will make sure they get

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<sup>12</sup> For a detailed explanation, see Hinton (2005: 105-116) and Hughes (2006: 470).

opportunities to go to work and that they're safe from further harm, that their reputation is somehow recovered (interview #16).

The fourth group expressed no real opinion about *somroh somruei*, or they discussed other matters. Two accepted the reality of *somroh somruei*, but had little experience or interest in discussing it. Two others focused on locating new donor support and recent domestic violence legislation.

In sum, we see varied views and concerns about the use of *somroh somruei* in rape cases. These range from no support at all to seeing the value of a process perceived as being more 'client-centred' than court. Although all recognised the limits and failures of formal criminal justice, few could endorse *somroh somruei* outright. Of those who saw its potential, most said 'it needs more work' in providing supports and protections for victims.

## **7. Discussion and conclusion**

In Cambodia, as elsewhere, customary dispute resolution mechanisms are not a remedy for the shortcomings of formal criminal justice. Critics point to these problems: bribery and abuse of power, limited participation of women in decision-making processes, and differences in wealth and power that make a fair resolution difficult. Human rights advocates would add that such mechanisms do not comply with international human rights standards; their argument would be reinforced by rule of law and development practitioners, who point to a lack of accountability, transparency, predictability and coherency in decision-making. To this chorus, the voice of women's rights draws attention to the patriarchal structures of traditional cultures, which inevitably infuse processes and outcomes in ways that discriminate against or disadvantage women. Overall, there is widespread agreement among feminist, legal and development scholars that the risks of using informal justice in rape cases are too great. Some also suggest that the appeal of customary dispute resolution or informal justice is rooted in desperate economic circumstances, and as such, it offers a substandard justice for the poor (Ramage et al., 2008; Swaine, 2003; Wojkowska, 2006). The Cambodian example lends substance to these arguments, but it is important to add, formal justice responses are no better and out of reach for most Cambodians.

Contrary to those who challenge or see little value to informal justice practices, our research suggests a need to reflect on the multiple meanings of justice, particularly in rural areas in fragile states, where Meng and her family live. Here 'justice' situates morality within the restoration of social harmony and the repair of aggrieved relationships. This is a form of

‘emotional reconciliation’ (Hutchison and Bleiker, 2008) that centres on the value of ‘balancing the needs of the individual[s] with those of the collective while avoiding the declaration of a clear winner or loser’ (Ramage et al., 2008: 2; see also Backstrom, Ironside, Paterson, Padwe & Baird, 2007: 65). The process of *somroh somruei* aims to achieve this balance through compensation payments and the shared understanding that this outcome finalises the matter. A Cambodian preference for *somroh somruei* is framed by an understanding of the individual and the collective as fluid and flexible. These are constantly being reinterpreted in the contexts of a contemporary Cambodian modernity: an emergent market economy, international NGO engagement, urbanisation and new communication technologies that are bringing other worlds and ideas into view (see Derks, 2008; Hoefinger, 2011). Against the backdrop of historical turmoil and nascent modernity, the concept of justice underlying *somroh somruei* continues to deliver decisions that are desired or accepted by the vast majority of Cambodians, even in rape cases.

We do not know what Meng, or others in her circumstances, think about *somroh somruei* in responding to sexual violence because where there is research, most focuses on the use of *somroh somruei* in domestic violence cases. However, we suspect that the collective interests of village and family social harmony would outweigh the principled rhetoric of human rights and state-imposed justice. Meng’s individual right to bodily integrity does not necessarily trump other rights such as her family’s right to economic survival, to which Meng has an obligation to contribute. Similarly, the community’s survival and adaptation to the pressures of a market economy and modernising world is reliant on a degree of cohesion that may be emphasised over internal discord. Pragmatic considerations of future survival may well trump the alternative of achieving ‘justice’ by arresting and prosecuting a perpetrator.

We sought to compare the ‘realities’ of every day rape in rural Cambodia, through the story of Meng and her family, with the ‘rhetorics’ of NGO staff whose role is to support and assist victims of gender-based violence. The two do not align. We cannot be sure if our interview results generalise to larger numbers of NGO staff or others working in the social welfare, law, and justice sectors in Cambodia. We do know that NGO staff, both expatriate and Cambodian, are an educated elite, whose views are shaped by the local environment and the norms and debates of an international aid community that can be far removed from everyday realities.

Not all NGO staff were opposed to *somroh somruei*. Of sixteen who expressed a view, six were opposed; but four saw its value and six gave tentative support. There are doubts

about taking a principled position for conventional criminal justice and against *somroh somruei* in responding to rape. This was exemplified in the comments of two female expatriates holding senior positions, both of whom had spent considerable time in Cambodia and were familiar with western feminist arguments about gender-sensitive law reform. In contrast to the stated principles ('rhetorics') of their organisations, the women's more introspective comments acknowledged a gulf between rhetoric and reality. Albeit inadvertently, their views of the potential of *somroh somruei* support our recommendation for further research on what the practices are and how they could be improved. A study of *somroh somruei* that is informed by feminist theorising on human rights, appreciative of customary justice responses to rape, and attentive to rape victims' and survivors' experiences is required.

The potential of such research is great. It would extend upon field research of customary justice practices (the subject of NGO field research) and on NGO staff members' perceptions of conventional and informal justice (the subject of our study), by explicitly examining the views and experiences of victims and their families.

### **A post-script on words**

The words associated with *somroh somruei* are similar to those used in restorative justice: restoration, repair of social relationships and achieving social harmony. For that reasons, some may wish to call *somroh somruei* a type of 'restorative justice'. Moreover, debates in Cambodia about the appropriateness of *somroh somruei* for gender-based violence are similar to those in western affluent nations about the appropriateness of restorative justice for these cases. For naming the practice, we prefer to see it as it is: a type of informal justice or customary dispute resolution process, with all its strengths and limits. Meng would call it *somroh somruei*, itself a good reason not to re-name the practice.

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