The cloak of impunity in Cambodia II: justice

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ABSTRACT

This article discusses the underpinnings of impunity and justice in Cambodia as the former Khmer Rouge leaders face trial in the Extraordinary Chambers in the Courts of Cambodia (ECCC). The extent to which the ECCC achieves its goal can only be assessed by understanding the concept of impunity from a Cambodian cultural perspective. In this ethnographic study, the cultural construction of justice is thus examined. The ECCC defendants and those who commit violence today seem to use a similar cultural framework to explain their crimes and expiate them from accountability. Any discussion of accountability, which is the Janus-face of impunity – whether at the ECCC trials or in the public arena today – will show how perpetrators conform to certain embedded Cambodian beliefs while failing to conform to others. The findings add to our understanding of the cultural footprint of evil and impunity and have implications for attempts to respond to the call for a ‘bespoke’ form of transitional justice and for a culturally responsive approach to health and human rights.

ARTICLE HISTORY

Received 10 July 2017
Accepted 13 March 2018

KEYWORDS

Transitional justice; Cambodia; Extraordinary Chambers in the Courts of Cambodia; justice; impunity; Theravada Buddhism; violence

Background

Understanding the concept of impunity is a prerequisite for effective justice and, in particular, transitional justice. Ramji-Nogales has issued a call for a more culturally responsive form of transitional justice, grounded in the micro-perspectives of cultural processes and carefully tailored to the society it serves. Doing so would involve explaining how ordinary people perceive violence through popular idioms and ontologies of impunity and how they delineate the ‘local realities on the ground’ in transitional societies.

This article discusses the cultural underpinnings of justice in Cambodia, and, in so doing, seeks to facilitate a robust debate on the relevance of the Extraordinary Chambers in the Courts of Cambodia (ECCC), commonly known as the Khmer Rouge Tribunal. In this article, I apply the findings of ethnographic research in Cambodia and discuss how the ECCC is faring as a project to end impunity.

The ECCC was established in 2004 following an agreement between the United Nations and the Royal Government in Cambodia and became operational in 2006 to bring to trial ‘those most responsible’ for the serious crimes committed under the Khmer Rouge regime.

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CONTACT

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of Democratic Kampuchea (DK) between April 1975 and January 1979. The ECCC is a hybrid court, mixing international and domestic law and civil and common law, and including a victims’ participation programme. Dittrich notes that the court, like all hybrid courts, is committed to legacy, ‘a lasting impact on bolstering the rule of law … by conducting effective trials to contribute to ending impunity’. In this article, we take impunity, in the popular sense championed by organisations such as Amnesty International, to mean exemption or protection from penalty or punishment for the commission of crimes, ‘at any stage before, during or after the judicial process’ and which we take to include not only the lack of accountability for crimes but ‘the lack of effective remedies for victims of human rights violations’.

The questions raised by the connection between the ECCC and impunity include the following: Did the Khmer Rouge defendants commit atrocities with impunity? If so, was this a total aberration of the sort of impunity found from time to time over the course of Cambodian history, or did it merely represent a grotesque caricature of the impunity that is characteristic of Cambodian society? What is the legacy of the ECCC in terms of eradicating impunity from Cambodian society? Is the ECCC itself blighted by what Ainley calls ‘complicity in impunity’?

To answer these questions, this article begins by exploring the accountability process in Cambodia from the time of the Khmer Rouge onwards and considers how recent history continues to inform our understanding of impunity in Cambodia today. First, I discuss Ramji-Nogales’ proposition in relation to ‘bespoke’ transitional justice and how the notion of impunity might be conveyed to Cambodians in their own cultural register. I then examine the cultural context in which perpetrators have been created and the place of culpable knowledge, which might be extended to include subjective motivation and ‘evil intent’, which for the purposes of this article I equate with ‘guilty mind’ or mens rea, as well as the Buddhist tropes of ‘shame and blame’, the guardians of morality. I then examine Cambodian and Buddhist voices in relation to transitional justice; accountability and justice; a comparison of forms of retribution in Cambodian and Western justice; changing ideas of accountability and punishment; Cambodian views of the judiciary, the judicial process, and reparative justice; substitution rituals; social units for reparation and redress of victims; and impunity and intent.

Method

The method is described in the first article of this two-part series.

Results and discussion

Based on information gleaned from informants as well as my own observations of Cambodian society and the related literature, I have developed a narrative related to impunity, based around a number of themes. First, I will discuss the concept of transitional justice and how it manifests in Cambodian society.

Justice

The Cambodian concept of justice is embedded in ancient local cosmology. Traces of these origins are carried into contemporary beliefs and the vernacular understanding of
accountability and justice. The entrance portico of the modern-day Ministry of Justice is flanked by a pair of statues of Yamarāja, King of Hell, also known as King of Death (Pali Maccurāja). He is the mythological judge of the dead who presides over the many Narakas (hells) and the cycle of rebirth, and examines the dead and despatches them to their appropriate rebirth. Sculptures of Yamarāja were present in the ancient Angkorian temples of King Jayavarman IV (921–941 CE), including at the temples Koh Ker and Banteay Srey. In the secular world, according to one Khmer publication, the judges of the court were akin to the Yamarāja, who had to judge and sentence the wrongdoer, and the sculptures show that, to ensure justice was meted out more-or-less impartially, every judgement or oath taking was solemnly made in open court in the presence of the Yamarāja. Moreover, the title of Yamarāja was conferred on the Minister of Justice in the royal court, who was one of the ‘four supporting columns’ (caʔtoʔ sdam), which also included the ministers of palace affairs, navy and war. As Hancock notes, ‘Buddhist political theory approves of the king as the enforcer and protector of the correct moral order’. Today, the ECCC emblem, taken from a mural in the former appeals court in the Ministry of Justice in Phnom Penh, is that of a figure seated on a dais depicting the administration of Cambodian justice during the ancient period of Angkor (802–1,351 CE), combined with the United Nations’ wreath of olive branches. This figure seems to resemble the ancient sculptures of Yamarāja. A weapon held in its right hand could represent Brahma’s club (Sanskrit, Pali brahmadanda), or perhaps the sword of absolute authority (Sanskrit daav âjñā siddhi) given by the king to the court.

A larger question for the ECCC, posed by Peou in Cambodia and Timor Leste, is that of peace through retribution versus reconciliation. In their comparison of Western and Khmer justice, Dicklitch and Malik note that ‘the Khmer concept of justice is rooted more firmly in traditional moral practices of mutual understanding and agreement than in state laws or legal practices’. They echo Hancock on the Buddhist component of double punishment, in this earthly life and in the next, arguing that the ECCC’s earthly form of ‘rebalancing dhamma’ is bound to fail and an alternative form of justice is thus required.

Jacobsen also shows an intriguing tension between Western and Cambodian tenets of punishment and notes how ‘the imposition of western values on the Cambodian penal system, through colonial and more contemporary forms of imperialism, has altered traditional ideas of Cambodian accountability and punishment’. During the Angkorian period, people would be punished twice. With the advent of Theravada Buddhism, ‘law (dharma) was to be perceived as the pursuit of individual morality’. Legal instruments thus transcended secular boundaries. Shame was integral to earthly punishments and, after death, offenders would be plunged into the fires of the Naraka hells. In the code pénal under French colonial rule (1863–1953), although the jails were full, incarceration was not invariably a deterrent, and guards frequently allowed prisoners to leave the prison compound. We have observed in our work over the last 25 years a few cases where police, after arresting villagers accused of murdering ‘sorcerers’, quietly released them within days of their arrest, an outcome which the villagers told us was fair and just because the murderers had simply carried out what was good for the village.

Pham et al. have also noted the tension between Buddhism, which teaches non-violence, and the vengeful desires of victims of the Pol Pot years. They found that Cambodians do not equate forgiveness with the absence of desire for revenge. On the eve of
the ECCC trials, Harris signalled the importance of understanding the Cambodian view of reconciliation, warning that the judiciary is widely viewed as too closely tied to the ruling party, and anticipating that many Cambodians might not view the ECCC proceedings as relevant to them. Once the ECCC was underway, Pham et al. reported how interviewees perceived the court as corrupt and were more likely to seek resolution through their village chief than through litigation. Pham’s observation tallies with my own conclusions from my fieldwork on direct violence, that many Cambodians perceive the courts as corrupt and that the monkhood is relatively free from corruption. This reflects the way in which rural Cambodians seek protection through networks of patronage and traditional authority figures such as monks, rather than turning to corrupt institutions such as the courts.

Thus, bearing in mind the tension between traditional justice and ECCC-imposed justice, in what follows, I will examine the process of accountability from the Khmer Rouge era onwards, through analysis of local stories and idioms to show how the notions of impunity and justice are embedded in Cambodian culture and how such knowledge is vital to the practice of justice and rehabilitation in this society.

The process of accountability from the Khmer Rouge era onwards

Following the advent to power of the Khmer Rouge regime in 1975, there were mass evacuations and executions and loss of human freedoms. In enacting these atrocities, the Khmer Rouge employed euphemisms and slogans, depicting their violence in a medicalised manner, as the Nazis had done in their genocidal cleansing. Moreover, by presenting the killings as health interventions for the public good, they diffused culpability. They thus presented themselves and their lofty ideology as attractive while luring victims to their deaths, a ruse characterised by my informants as speaking ‘words of the fig’ – an aphorism in which the fig’s external beauty is contrasted with its rotten midge-ridden innards. Khmer Rouge soldiers would accuse people of being ‘morally wrong’, an expression they cynically purloined from the Pali siladhamma, the Buddhist expression for ‘moral teaching’, and tell them euphemistically that they were to be ‘educated and rebuilt’ before being taken to a ‘correction centre’, where they were executed. In committing such atrocities, they sought to restore the purity of the ‘Original Khmer’, free from the contamination of Western capitalism and what they dubbed ‘indolent’ Cambodian Buddhism. Realising the potential for Buddhist values to ‘poison’ their revolution, the Khmer Rouge wiped out Buddhist practices and targeted the sangha, the Buddhist monastic order, justifying their mass murders as essential for the health of the nation and resetting time in Cambodia to what Francois Ponchaud termed Cambodge année zéro. Amidst this revolutionary fervour, the impunity of the Khmer Rouge had two faces – a lack of conscience or scruples over the cruelty, coupled with the conscious intent to oppress their class enemies.

Alexander Hinton has argued that the violence of the Khmer Rouge was fuelled by a vengeance that he has dubbed ‘disproportionate revenge’, or ‘a head for an eye’. People store[d] the memory of events that angered them, and the build-up of class resentment proved lethal when the Khmer Rouge whipped the poor into a frenzy of revenge against the rich for past abuses. As Hinton writes, ‘A person who has a “big”
grudge is said to want to “eat the flesh and sip the blood” of the enemy but may store it behind a smile until the time comes to strike back, or by hiring a killer. To stop the cycle of revenge, one must defeat the enemy (pcaɲ pcaal), and the best way to do so is to ‘cut off his family line’. This tradition of eradicating the enemy can be traced back to times when a victorious Cambodian king would kill the opposing king and wipe out his entire family line. Finally, this motif of violence is also evident in the Cambodian literary tradition and in works of mass circulation. To give just a single example, the Tum Teav, a widely taught ‘Romeo and Juliet’-style literary classic, illustrates the revenge tradition of ‘cutting off a family line’.

Far from ending with the fall of the Khmer Rouge, however, this cycle of impunity and violence continued throughout the 1980s and 1990s. Even after their fall from power, the Khmer Rouge continued to conduct internal purges, including the murder of the entire family of the former Deputy Prime Minister in Charge of National Defense and head of the secret police, Son Sen. Moreover, between 1979 and 1987 the Vietnamese-installed government of the People’s Republic of Kampuchea (PRK) continued the tradition of human rights abuses and political violence with impunity. In my participant observation research in the early 1990s, when I was occasionally caught up in landmine fields and firefights, I encountered numerous cases in which men committed foul acts of violence, for which, far from being brought to justice, they were celebrated as heroes, often decked with bundles of magically potent objects such as Buddha amulets, magical hip girdles, protective tattoos, and very rarely desiccated human foetuses.

As late as 1991, armed bandits roamed the countryside with impunity, and crimes committed against civilians were seldom punished. Furthermore, it was unclear who the civilians were, with ‘Janus-faced’ villages that were safe by day but occupied by Khmer Rouge soldiers by night.

However, this impunity was not merely an internal affair. Until as late as 1982, even the United Nations turned a blind eye to the impunity of the Khmer Rouge, giving the Cambodian seat at the General Assembly to a coalition that included the Khmer Rouge, in order to prevent the Vietnamese-backed People’s Republic of Kampuchea, which they deemed the greater of two evils, from taking the seat.

By the late 1990s, impunity had not diminished. Human Rights Watch reported a decade of extrajudicial killings and other abuses not genuinely investigated by the authorities. In fact, impunity soared in the era of neoliberalism as people used political violence and accumulated wealth and, with it, more power. Killings occurred in acts of gratuitous terror committed by rogue military and police officers. Swathes of forest were denuded through intensive logging by generals in corrupt deals with government.

In 1992, following the repatriation from Thai border camps, former Khmer Rouge commanders found themselves living alongside their former victims in their home villages as ‘intimate enemies’. Villagers recognised their former oppressors, and sometimes this gave rise to beatings. Hinton reported that in the period immediately following the overthrow of the Khmer Rouge, most Cambodians witnessed the post-DK revenge beating and killing of former Khmer Rouge cadre by mobs of angry people and, in this way, the cycle of revenge was perpetuated. McGrew studied former KR cadres and their victims ‘living together, apart’, and is more cautious in commenting that, while many said they had heard of revenge killing, few had witnessed or taken part in it. Revenge killings have
even been reported among Cambodian refugees; in one example, in Australia, the killer had crossed the continent from Perth to brutally murder Yanny Run, a 27-year-old woman who was said to have been a former KR cadre, in Sydney. For the most part, however, perpetrators were allowed to co-exist without retribution, tempered somewhat by the comforting rationale, embedded in the Buddhist view of *karma*, that they would be punished in another incarnation.

Thwarting the impulse to avenge by killing is a form of healing. Eve Zucker has provided a brilliant depiction of how some people, such as Nuon Chea, ‘Brother Number Two’, will be recalled as an architect of the Khmer Rouge catastrophe, while others, such as Ta Kam, said to have been a low-level Khmer Rouge leader, could eventually redeem themselves. These low-level perpetrators might have taken up virtuous roles in the community as Buddhist lay officiants or traditional healers, while they younger people born after the Khmer Rouge era would know little of their past and treat them as village elders. Zucker argues that this meritorious action might be a means of redemption in the next life. Zucker’s persuasive conclusion is that those like Nuon Chea, ‘becomes the repository of blame’, whereas for those like Ta Kam ‘the blame seems to dissipate’.

Other Khmer Rouge perpetrators might not be so lucky; survivors have told me that they had harboured fantasies of savagely killing their former tormenters, but that they held back because they would leave the perpetrator to his karmic fate. This idea of retribution in the next incarnation was also applied to the ECCC in the twenty-first century, which some deemed irrelevant as ‘it would all be taken care of in the next life’.

In fieldwork, it became apparent how strongly culture had shaped the experience of impunity in Cambodia. Despite the daily barrage of press reports of all kinds of violence, only a small percentage of child rape cases, for example, are reported and, when they are, law-enforcement officials often arrange ‘agreements’. For example, the rapist may pay a bribe to be shared between the authorities and the victim’s family, after which the victim withdraws any criminal complaint, and the case is closed. When a rape is investigated, the complainant is expected to bribe the court to ensure it investigates the case. As Hinton has described, the situation in Cambodia is based on patron–client power relations, which are defined by rank (bon sak), guns, raw power, and authority (*Pamnaac*). The patron can act with impunity because he has power, the client because he or she has the ‘backing’ of the patron (*Paan knaan*), and indeed, in Cambodia, those in power do behave with flagrant impunity and routinely escape justice.

Victimisation and impunity have flowed from the Khmer Rouge period and into the twenty-first century’s era of neoliberalism. While the Khmer Rouge targeted Cambodia’s monks for defrocking and its healers for extermination, the victimisation did not stop there. The Heng Samrin regime in turn curbed the regeneration of the Buddhist sangha and, according to several of my traditional healer informants during 1990–1991, sent to their deaths those healers who did not follow Party dictums not to deal in ‘capitalist bio-medicine’, but to restrict their work to the use of traditional botanical therapies.

Despite this culture of impunity, Cambodia is now witnessing the closing phase of the ECCC trials and central to the outcome has been whether the accused continue to hide under the cloak of impunity. The trials of Nuon Chea, formerly Chairman of the Standing Committee of the Central Committee of the Kampuchean Communist Party, second to Pol Pot, and Khieu Samphan, formerly Chairman of the State Presidium and nominal head of the state of DK, continue to have implications for ordinary Cambodians who
suffered under their rule. Supported by the ECCC outreach programme, the main goal of which is to increase awareness and understanding of the ECCC among regular Cambodians, tens of thousands of people from all over Cambodia have come to the court. In coming, some work through their grief, some participate in memorialisation, and others avenge the past, while simultaneously grappling with the echoes of impunity that continue to resound today. Despite this, however, there have been mixed reports as to whether the ECCC has been successful in helping Cambodians work through their grief. Thus, while in previous sections I have examined the history of violence and impunity in Cambodia from the time of the Khmer Rouge to the present day, and outlined the atrocities committed and the principal victims, in the next section, I investigate the perpetrators of those atrocities and suggest that accountability and impunity can be better understood by investigating the evolution of those perpetrators.

**Impunity, accountability, remorse and the making of perpetrators**

It is essential to grasp the local cultural understanding of what drives a person to hurt others without any sense of remorse. Here, I outline ‘cultural attractors’ as drivers that push and pull people to become perpetrators with a lack of remorse or accountability.

My informants depicted the Khmer Rouge and more recent perpetrators of atrocities as savages (tmil) with no belief in Buddhism, or as brutes or wild beasts, or tiracchāna. The word in ancient India and in the Buddhist canon means ‘creatures that crawl on their bellies’. It was also used to depict bestial conduct by the colonial rulers and by the retaliation by the local villagers who killed French Resident Bardez. Such beasts, like fathers who rape their daughters, have no incest taboo and thus have sex with their offspring. Tiracchāna men resemble low and ‘horizontal’ four-legged carnivorous predators and, worse, legless snakes or scorpions. The black-clad Khmer Rouge cadres were depicted as ‘black-shirted ghosts from the forest that devour blood’ (bysaad), or as ‘the dark and narrow forest’ (prey psay), where ordinary people would not venture and where Khmer Rouge soldiers lurked like blood-sucking ghosts.

In contemporary Cambodia, the tiracchāna tone is evident in the talk of impunity. In his public speeches, Hun Sen, the former Khmer Rouge commander, uses the epithet pr Hok to describe his political opponents, implying that they, not him, are low savages. In our fieldwork, we met several monks and healers who said that Hun Sen had abused his power because he was born out of alignment and had not learned from his past life. Likewise, people who commit atrocities are said to be ‘bent’ (kaac) to the point of committing reckless acts of daring savagery (pr Hok kaay kaac). This idea finds expression in the Cambodian saying, ‘If a tree trunk is bent, its vine will also bend; if a person is cast out by their family, you should not befriend them’. All this is ironic as in the ‘Low Talk Sutta’, the Tiracchāna-Kathā-Suttam, the Buddha spoke of political epithets as ‘tiracchāna talk’ that undermine peace and promote violence. The Buddha shows the intention of the government official or the parent, particularly one with an angry character (dosa-carita), who, ‘at the time of uttering the harsh words … wants the other person to feel pain’.

Someone whose atrocious behaviour crosses the line is said to be yuay. A yuay is the moveable fence rail that allows animals to enter or exit an enclosure; thus, in this analogy, the wild beast is let loose. People under the yoke of the Khmer Rouge depicted
Pol Pot’s atrocities as the ‘savagery of a carnivorous animal’ (sahaav yʊəŋ knɔɔŋ) – Khmer translations of English-language descriptions of the Khmer Rouge era, such as those sourced from Ciorciari and published in DC-CAM magazine, used the term yʊəŋ knɔɔŋ. They are also known as prey psay yʊəŋ knɔɔŋ or as pisāca yʊəŋ knɔɔŋ. My older informants told me how, after liberation in 1979, the Vietnamese-backed regime stoked hatred of the Khmer Rouge by teaching them, as schoolchildren, poetry with rhymes containing the words sahaav yʊəŋ knɔɔŋ. This was part of the government-sponsored national holiday on 20 May, known as the ‘Day to Remain Tied in Anger’, to stoke revenge against the Khmer Rouge. After 2005, media reports of the ECCC trials called the Khmer Rouge atrocities yʊəŋ knɔɔŋ, the same expression as that used to depict Nazi genocide. Media reports of the border dispute with Thailand over the status of Preah Vihear temple exploited the ancient enmity towards the Thai, claiming that Thai soldiers had incinerated a Cambodian boy; they were thus yʊəŋ knɔɔŋ ‘war criminals’ and this incident is emblematic of the more widespread violence. The most recent activation of these ideas for ‘modern’ Cambodians, notably the Muslim Cham minority, is the barbarism committed by ISIS in Iraq, which at least some have linked with that of Pol Pot. This climate of violence in Cambodia continues to the present day, with not-altogether-unique reports such as that of a father who, in a rage, beheaded his two children.

Given the language and idioms used to describe violence, and which seem to differ from those espoused in Western concepts of violence, lack of accountability, and justice, it is interesting to note how this cultural patterning of perpetrators as tiracchāna beasts manifests within the ECCC.

As confirmed in testimony at the ECCC, the Khmer Rouge cadres – continuing a long-standing cannibalistic Khmer tradition practised by the Lon Nol soldiers during the civil war of the early 1970s – were reputed to have fried the livers and sun-dried gallbladders of masses of slaughtered people to augment their powers. While this mutilation of bodies is classified as a war crime under the terms of the 1907 Hague Convention, some of the Buddhist monks we met describe the ECCC defendants as suffering from delusion, ignorance, and ‘clouded moral vision’, which blinded them to the suffering they had induced in others.

Unfortunately, as too often the case in the wake of war, this infliction of suffering has not stopped. Over the past decade, developers and the government, hungry for profits, have grabbed land and carried out forced evictions with violence. For example, the Chinese company ‘Inner Mongolia Erdos Hungjun Investment Co’ and the Khmer company ‘Shukaku Inc’ (owned by the powerful senator Lao Meng Khim) drained Boeung Kak Lake in the centre of Phnom Penh causing mental health problems, in a process that, in Kent’s words, shows ‘how the justice system may in fact help entrench impunity by criminalising and intimidating those who get in the way of the powerful’. When the bulldozers went to work, a river of human excrement flowed through the bordering houses – a problem affecting displaced people elsewhere in the city as well – while the dispossessed inhabitants who took to the streets were immediately imprisoned. Press reports of this disaster were inundated with posts blaming the craving (lobha) of the developers, and anger has led to mass violence.

The tiracchāna raises the question as to whether being a ‘wild beast’ makes the person more, or less culpable. In medieval English law, the ‘wild beast test’ of insanity, which
originated with the English judge Henry de Bracton in 1256, exempted the offender from criminal responsibility and moral accountability. The Cambodian perpetrators acted with impunity as tiracchāna wild beasts but, even so, according to Buddhist dhamma, they remained morally accountable for their actions.

**Intent – the prism of shame and blame**

In this section, I examine the concepts of ‘intent’ and ‘evil’ and how they relate to justice and accountability. With some notable exceptions such as Greig and Adshead, contemporary criminologists and psychiatrists seem to avoid using the concept of evil. Criminal law lies in legal maxim in the *Leges Henrici Primi* written in 1115, ‘actus non facit reum nisi mens sit rea’, meaning ‘a person is not to be considered guilty unless he has a guilty intention’. According to Kamali, this maxim is traceable to Augustine by way of Ivo of Chartres, whose works were on canon law, so there is a decidedly moral foundation to do with evil. Bishop wrote, ‘There can be no crime large or small, without an evil mind’, and there was the necessity of an evil mind to prove a felony. With the revival of the principle of *culpa* in Roman law in the twelfth century, and the canon law’s insistence on moral guilt, the scene was set for evil intent as a prerequisite for a finding of felony.

According to Mueller, ‘It is this awareness of evil, the sense of doing something which one ought not, which constitutes the crux or substance of mens rea at common law’. Mueller adds that in the case of statutory law, ‘it may again become the “sense of doing something which one ought not” – rather than the awareness of unlawfulness – which becomes the substance of mens rea for a particular offence’.

Lévitt showed how the ancient Roman Code and the code of Justinian indicated that the evil powers or wishes of the accused must be punished. In Anglo-Saxon law, punishment is also imposed because of the evil wishes of the accused, the perpetrator acting with ‘malice’ or ‘scienter’, knowledge of guilt. Miller provides a masterful analysis of what he calls ‘the mens rea quagmire’, putting the question, is mens rea a feeling of guilt/evil (the conscience model), or the intent to perform a prohibited action (the consciousness model)?

These considerations come into play in cross-cultural contexts where the nature of good and evil is culturally constructed. This has implications for the propriety and validity of the ‘cultural defence’, and whether evidence that a defendant committed a crime because it was culturally ‘normal’ should be admissible. I agree with Coleman that culture cannot alter free will and that, in the case of mass murder, the ‘cultural defence’ is ‘disingenuous because it relies upon a contorted analysis of the mens rea requirement’. It is not ‘normal’ in Khmer society to organise mass murder, so there is no applicable ‘cultural defence’.

In transitional justice, which should necessarily be culturally informed, the resolution of mens rea is complex. Riches asks if perpetrators mean to harm their victims, or to simply hide behind an internal cultural logic that lends purpose to their acts. In Miller’s depictions, the defendants of the Khmer Rouge acts were evil and lacked conscience, knew what they were doing, and were fully conscious.

However, there is more to the Cambodian understanding of mens rea, as shown in my findings on hiri-ottappa, the Buddhist rendition of shame and blame. Hancock says that,
'like customary international law, Buddhist teachings require some form of *mens rea* before a person can be punished for their actions'. The Buddha taught that there are two guardian concepts of the world – a sense of shame and a fear of blame – both of which make it possible to act in a moral and responsible way and which are the emotional drivers of conscience. My Cambodian monk informants viewed the ECCC defendants as having a deformed *hiri-ottappa*, that is, a failure of conscience. In Buddhist teachings, when *hiri-ottappa* no longer exists, the very lowest level of human existence has been reached, in which people are promiscuous and violent and reduced to the level of jackals. This absence of shame (*ahirika*) has been depicted in classical Buddhist psychology as a perceptual cognitive disorder that allows acts of violence. The ECCC defendants were said to be ‘thick-skinned’ in the face of public accusation, while lower-ranking Khmer Rouge cadres were ‘like loyal trained dogs’ (*muk ckae*, literally ‘dog face’). Politicians in power ‘store dirt’ on their opponents and then defamed them without fear of slander or libel. A similar process has been reported in contemporary events such as intimate partner violence, where victims do not want the skeletons in the family cupboard to be broadcast to the community (*haek kee*). An absence of shame and blame thus allows evil intent to blossom into wrongful acts, especially when the perpetrator knows that they can sometimes be committed without any consequences. Buddhist shame and blame concepts may relate to contemporary impunity in Cambodia, and current lay understandings of these Buddhist concepts could inform understandings of impunity amongst the general population currently in Cambodia.

Few of my laymen informants were familiar with the formal Buddhist terms, all could articulate the ideas of *hiri* and *ottappa* in their ordinary speech. *Hiri* was described as *kmaah klun?* ?aen ‘ashamed of oneself’, while *ottappa* was described as *kmaah kee* ‘ashamed of them’. The absence of *hiri* and *ottappa* was expressed as ‘you have no shame of committing a bad deed; you have no fear of the consequences of committing it’ (*min kmaah baap min klaac baap*). Another expression explains the shades of meaning of shamelessness: ‘You don’t feel ashamed (*kmaah*); you don’t feel bashful (*ʔiǝn*) about it’. This bashfulness has a deeper connotation. A person who commits an act without heed for the consequences is morally dirty. It is as if he lives in ‘shit’ and turns the name of his family into ‘shit’. In Khmer, *ʔiǝn* is also the term for the small intestinal pinworm, *Enterobius vermicularis*, which will ‘shamelessly’ infest anyone’s gut.

**Nuon Chea and the crocodile**

One further comment is needed on the possible confusion between motive and intent. Nuon Chea was an ideologue whose statement of the Communist Part of Kampuchea (CPK) to the Communist Workers Party of Denmark in 1978 was even published in the *Journal of Communist Studies*. According to Laura Summers’ commentary, Nuon Chea ‘regards the words of the party with reverence as if they contained a spirit and meaning independent of the will of those who uttered … them’. He fervently believed in what he had to do to save the nation from itself. At the trial of Nuon Chea, Defence Counsel Victor Kloppe insisted on a legal framework that would allow for a broader exploration of the facts than merely ‘focusing on the body of the crocodile while refusing to consider its head and tail’. Nuon Chea argued that the court should focus on the ‘head, body and tail of the crocodile’, namely that DK was the root cause and consequence pre-
1975 and post-1979. The head of the crocodile represents Vietnamese imperialist and hegemonic ambitions to secure long-term control of Cambodia, as well as the American bombing before 1974; the body represents the DK regime itself; and the tail represents the consequences for DK – that Vietnam successfully invaded Cambodia and toppled the Khmer Rouge.

In using this rationalisation in attempts to exculpate himself, morally, if not legally, from full guilt for the atrocities committed by the Khmer Rouge, Nuon Chea drew on the popular expression, ‘to catch a snake, you have to seize the head and the tail’ to kill it and become free from its threat. Simultaneously, he seemed to be exploiting a powerful Khmer idiom for being caught in a dilemma. For centuries, Cambodians have seen themselves as caught between the Thai tiger to the west and the Vietnamese crocodile to the east. A popular Khmer legend about the talking crocodile Athun describes how he was killed and in his death throes created two lakes called Bəŋ kəntuy krapəə (lake of crocodile tail) and Bəŋ cramoh krapəə (lake of crocodile nose), an image that is masterfully exploited in Fabienne Luco’s depiction of approaches to conflict management titled, Between a Tiger and a Crocodile.

Kloppe argued that if one took the whole crocodile into account, Nuon Chea was not liable for his actions, an argument that the court rejected. Prosecutor Koumjian said that the defence teams had erred in confusing motive with intent. ‘It does not matter if Cham and the Vietnamese were killed because the [Communist Party of Kampuchea] saw them as rebellious or a threat; as long as they intended to destroy the group as such, their motive has no legal significance’. The Supreme Court Chamber held that while ‘[t]he root cause and consequences of certain actions may be suitable subjects for historical analysis, [they] have no bearing on an individual’s criminal as opposed to moral responsibility’. However noble Nuon Chea might have claimed his motive to have been, Nuon Chea’s intent was mass murder and, as when Philip Rees interviewed him in 1998 for the New Statesmen, Nuon Chea chuckled and boasted, ‘I have never stayed awake at night or shed any tears’. And in the following year, all he could do in his first ever public ‘apology’, according to the China Daily report, was to say, in a calm, controlled voice, ‘Actually we are very sorry, not just for the lives of people, but also for the lives of animals that suffered in the war’. Crocodile tears aside, one can agree with Fawthrop and Jarvis that, at least during the 1990s, Nuon Chea showed no remorse for the past.

After his arrest in 2007 and facing the trials, however, Nuon Chea seemed to change his tone a little. In his closing statement in 2013, he expressed ‘deepest remorse’ for the victims, but dodged personal responsibility. By 2017, at his appeal, it seemed that Nuon Chea drew on deeper cultural allusions, attempting to pull a cultural rabbit out of the hat, and echoed what my informants had told me about the anger that fuelled their violence, an ‘anger that chops off the head and the tail’ (kʰəŋ dac kbaal dac kəntuy) like a decapitated lizard thrashing blindly. This metaphor is commonplace in Cambodia, as, for example, in the following film plot of the popular horror movie The Snake King’s Child, in which a husband murders his wife for adultery, centred on poəh keəŋ kəŋəŋ (Keən Kən), according to a legend the name given to the ancestor of all snakes.

Once upon a time, Manop journeyed far from home, leaving behind his wife Nhi. While collecting firewood, Nhi came upon a large snake named poəh keəŋ kəŋəŋ, and they became lovers. One day Manop returned home and his suspicions were confirmed when he saw
that Nhi was pregnant. He plotted to trap the snake and, hiding by the doorway, awaited his arrival. As soon as the snake crossed the threshold, he slashed off his head and tail. He hung the head on the bough of the tree and the tail on a high shelf of the house. He washed away the blood and, when his wife returned, stewed it as food to serve to her. A crow showed the head and tail to Nhi who realised that she had just eaten her lover. Manop hid his feelings of revenge. He lulled Nhi into the forest and unsheathed his sword and slashed her belly in half. Nhi died at once, and all the new-born snakes crawled out of her belly and began slithering away. Manop pursued the baby snakes and chopped them up.94

In a similar vein, in the time of the Khmer Rouge, no ‘baby snake’ of the New People (nreak tmay), the urbanites who were also known as ‘April 17 people’ because they joined the revolution too late, among those from the pre-1975 liberated zones, could be allowed to escape.95 For the sake of the Revolution, all had to be smashed with impunity – in the estimation of the Khmer Rouge, with good motive and intent.

There are other similar examples. My informants knew and identified with the following story of marana? miedaa (The Motherless Girl).96 A young prince fell in love with Maranamata and married her. Kali, her envious stepmother, and her stepsister Chandi hatched a plan to kill Maranamata. On learning what had happened, the enraged king chopped off Chandi’s arms and legs, turned them into fermented fish paste, and sent it back to her mother, Kali, as a ‘revenge gift’ in a sealed jar. For Nuon Chea, when a person feels their very existence is threatened, their reaction might seem disproportionate, but when the whole story is known, their violence can be exculpated.

Nuon Chea’s image of the crocodile echoes the Khmer Rouge’s motive to protect and later avenge the despoiling of Cambodia, as reported to me by the newly demobilised Khmer Rouge cadres in 1997 in the O Bai Tap camp on the Thai border. They said that in their military struggle, they had tried to repel the Vietnamese head of the crocodile, but now that they were demobilised, the Vietnamese tail of the crocodile had brought prostitutes as bearers of HIV to rot the nation’s menfolk.

The above illustrative anecdotes show how a perpetrator twisted a local cultural idiom to serve his purpose. It is doubtful that the parameters of the hybrid court, with its Western concepts of crime and accountability, were lost on him, but that he chose not to engage with the ECCC in this way, and preferred to make arguments he thought would resonate with Cambodians, even if not legally effective.

In the trial of former mathematics teacher Duch (Case 001), however, who ran the mass interrogation and execution centre S-21, there was no apparent scope for moral and collective redress. In the trials of Nuon Chea and Khieu Samphan (Case 002/01), the court made some attempt to adapt its procedures to enable the civil parties to the criminal action to secure moral and collective redress.97 Accordingly, many people have sought the truth about lost relatives and the circumstances of their suffering, looking for reconciliation, both retributive and restorative.

Daily village life reveals a different traditional outlook on processes of reconciliation. Monks may intervene by, for example, conducting substitution rituals in which a victim’s suffering is transferred to an effigy, or in which ritual reparations are made not only to the wronged person but also to their guardian spirits and the cosmic deities in a local cultural nod to the Western law of torts. Monks also educate communities on non-violence using the precepts in the dhamma and the easily grasped suttas, a particularly Cambodian rendition of obligations between people, and between people and the
supernatural world. They also disabuse perpetrators of their sense of entitlement and impunity. In my fieldwork experience, I have observed that these substitution rituals have lost little of their potency among villagers today. Although fieldwork experience provides only anecdotal experience of much broader points, it is possible that the ECCC’s focus solely on the KR leadership while allowing lower-level perpetrators to walk free means that it does, in fact, end up resembling these ‘substitution’ rituals.

Over the years, I have often observed people, who had committed violence with impunity, explain how in their previous lives they had been murdered at the hands of the Khmer Rouge and were reborn filled with vengeance to commit atrocities with impunity. The challenge, then, is to resolve the question as to whether the impunity of perpetrators is fed by their explanations that they are simply enacting the violence inflicted on them in a previous life, and whether such explanations absolve them of accountability. Armed with an understanding of evil intent in cultural context, tribunals can best evaluate the intent and culpability of defendants and pursue the goals of restorative justice. A defendant accused of ordering mass murder, for example, has a greater ‘evil mind’ and bears infinitely greater responsibility than a child soldier forced at gunpoint to kill a parent. Visitors to Buddhist temples will see graphic depictions in the temple art of how punishment is meted out to perpetrators who enter the road to ruin.

**Buddhist voices**

It is now timely to consider ‘Buddhist voices’ on non-violence, politicisation, reconciliation with local accountability systems, and reparations. There is a puzzling contradiction between the stereotype of Buddhism as rejecting violence and creating peace and, as has been amply shown in the recent history of Southeast Asia, its more violent face.

Just as Cambodian Buddhism has been afflicted with the pacifism/violence duality, it has also been politicised, as seen in the voices of the two most influential monks in Cambodia. On the one hand, the voice of the leading pacifist Bhikkhu Yos Hut Khemacaro emphasises the forgiveness required to put an end to accusation, rather than calling for punishment, a position that is echoed by monks who help people come to terms with old and new scars by recounting legends such as that of Angulimala or the parent murderer Moggalana. On the other hand, the Samdech Preah Agga Mahā Sangharājādhipati (Great Supreme Patriarch) Venerable Tep Vong cries for revenge, saying, ‘Savage beasts should be turned upside down like bats, with their legs in the air above their heads, and once they have fallen … condemned to hell’. Tep Vong’s excoriating words are not merely political but artfully pick up the Cambodian vernacular in which people really believe in the punishment of wrongdoers who enter the Naraka hells.

Hancock argues that trials must reconcile the punishment of perpetrators, in this case the Khmer Rouge leadership, and local systems of accountability as seen through Cambodian Buddhist teachings. However, we can see from the language of the two monks, Tep Vong representing the political will of the ruling Cambodian People’s Party and Yos Hut a more populist movement for engaged Buddhism, that their teachings are inescapably political. Perhaps, as McGrew says, the ECCC is injected with a mission to challenge impunity in Cambodia: ‘A judicial mechanism … serves many purposes: challenging the culture of impunity, individuating guilt … averting unbridled
private revenge … [and] fulfilling an obligation to victims to publicly acknowledge guilt …’

The ECCC has recognised several innovative reparation projects in their respective judgments on Case 002/01. Testimony therapy (TT) was developed in Chile during the dictatorship in the 1970s to treat former political prisoners of the regime102 and has been used for torture survivors in India, Sri Lanka, Cambodia, and the Philippines.103 TT has also been adopted by the Khmer Rouge Tribunal as one of the reparations made available to 200 civil parties from Case 002/01.104 Seponski, Lewis, and Megginson evaluated mental health interventions and reported that in TT, ‘therapeutic testimonies of KR survivors are provided to the courts as official records of atrocities they experienced or witnessed [which] … empowers clients, promotes the telling of their narratives and supports them in seeking justice for their torture and that of their unburied relatives … TT addresses the shortcomings of the legal system [and] incorporates a blessing to those involved in the testimonies’.105 TT is usually held in pagodas with the assistance of Buddhist monks, ritual officiants, and professional Cambodian mental health workers.106 This example of the collaboration of local, religious actors in a reparation project submitted to the ECCC is a relevant case study in this article, since it precisely aims to discuss the tension between ‘Western and Cambodian tenets of justice, punishment and forgiveness’.

A ‘bespoke’ transitional justice

Clearly, there is a tension between Western and local tenets of justice, punishment, and forgiveness. Kelsall,107 for example, contrasts Western approaches as reflected in international criminal law and local understandings of agency and responsibility in the context of Sierra Leone, and also makes a significant case for the contribution of anthropology. Castillejo-Cuéllar108 notes that in transitional justice, societies move forward, and violence is hermetically sealed off. Transitional processes are not ‘ruptures’ but ‘continuities’ that demand ‘a critical focus on particular cultural contexts …’ .109 Based on her experience in Uganda, Baines110 argues that processes involving spirit-induced misfortune are central to transitional justice. I agree with the strong warning given by Baines, who cites the work of Huyse and Salter,111 that ‘local-level mechanisms should not be analysed too swiftly through a Western-centric lens, holding them up against norms established by purportedly universal laws’ and says that the cultural realm, including local cosmologies, is tricky for transitional justice scholars and practitioners who may want to proceed with the rule of law. One would hope that, rather than holding a view of local traditional cultural mechanisms of transitional justice as inferior to and inherently different from the Western standard, it would be possible for local and Western standards of justice to be complementary.

In relation to Cambodia, Guillou112 contrasts the ECCC and local systems of justice and remembrance based on the Khmer popular religious system. Ramji-Nogales argues that ‘a transitional justice mechanism that looked to Cambodia’s Buddhist monkhood for its moral authority rather than to its government might have resonated more deeply with the local people and been better able to withstand corrupting influences’.113 As shown earlier, this view must be tempered by Cambodian Buddhist monks’ capacity to hold diverse positions, by how political the Cambodian Buddhist monastic order is, and the extent to which it fails to escape partisan politics or the political control of the ruling party.
Thus far, I have sought to link the old and new epochs of impunity in Cambodia, where invisible conflicts often make up the narratives of a past war, different perspectives on how people deal with the past, and the views of people affected by violence. Jasini and Phan note that post-conflict societies are often confronted with how to address the burden of the past and what kind of transitional justice they wish to pursue. The end of the mass violence of civil war in the 1990s, after all, seems merely to have given way to wholesale impunity. Although the jails are full, sometimes the inmates are there because of the impunity and criminality of others. Thus, for transitional justice to be tailored to the Cambodian experience, the local cultural notion of impunity and the way it works need to be conveyed to Cambodians in their own idiom. This article, by focusing on the internal psycho-cultural reality of impunity rather than on the legal focus on external accountability, has shown how the landscape of impunity is driven by local Cambodian structures of lack of remorse and, from a Buddhist perspective, by evil intent. The article provides a perspective very different to that normally taken by lawyers in the study of impunity.

Conclusions

Achieving transitional justice for the violence of the past requires an understanding of the stain of impunity that has dogged Cambodian society long after the end of the Khmer Rouge era.

This article has discussed the cultural meaning of justice in Cambodia, as a few of the surviving former Khmer Rouge leaders face trial in the ECCC. The extent to which the ECCC achieves this goal can be assessed by understanding the notion of impunity from a Cambodian cultural perspective and in a Cambodian historical context. Perhaps Nuon Chea among the ECCC defendants, and those who commit violence today, might be drawing on a similar cultural framework to explain their crimes and expiate themselves from accountability. It is true that, in the legal sense, the defendants have been prosecuted and ‘lost’ their impunity as they face a court, and their local arguments have not been successful in gaining impunity at the court. It is impossible to every know what, in their own minds, the defendants believe of this external reality. It would appear that Nuon Chea thinks he has done nothing wrong.

This article has raised questions about competing conceptions of justice and the frictions between them as well as the mapping of violence in current social and political orders that follow as effects of impunity for Khmer Rouge crimes. There are frictions between the ECCC as an expression of a particular conception of justice that may grate with or remain incommensurate with vernacular Buddhist accounts. The idea of karma in the next life, for example, may render punishment in this life useless.

Thus, if the aspirations of the internal Legacy Advisory Group created in 2010 by the ECCC are to be realised, a culturally responsive approach is required. This article has offered evidence of the significance of a cultural reading of impunity, guilt, and justice. It has shown just how profoundly transitional justice is shaped by culture and context, giving weight to Ramji-Nogales’ call for a form of transitional justice that is more culturally responsive, grounded in the micro-perspectives of the cultural processes, and carefully tailored to the society it serves.

In terms of future research on this issue, further cultural analysis of the ECCC is required. How and why does the ECCC express a particular prism of blame? Is it...
simply retributive and, if so, does that make it ‘Western’? It is unclear whether this aspect of the court, reducible to punishment, can be characterised as its main feature when it poses questions of cultural discord. Furthermore, in many respects, the ECCC’s focus on the Khmer Rouge leadership, while allowing lower-level perpetrators to remain free, means that it arguably does end up resembling one of the ‘substitution rituals’ discussed above. The ECCC reparations role also needs further discussion, as the court is a contingent feature of Cambodian and global political life that is not reducible solely to retribution. Any discussion of accountability, the Janus-face of impunity – whether at the ECCC trials or in the public arena today – will show how perpetrators conform to certain embedded Cambodian beliefs but fail to conform to others. This has implications in responding to the call for a ‘bespoke’ form of transitional justice.

Declarations

Ethics approval and consent to participate

Approval by the National Ethics Committee for Health Research (NECHR), Government of Cambodia. Professor Eng Huot, Chair. Verbal consent was obtained from participants where appropriate.

Consent for publication

No individual data published.

Availability of data and material

The data for this study cannot be made publicly available, but can be accessed upon request from the author.

Competing interests

The author declares that he has no competing interests.

Authors’ contributions

The author is sole author.

Notes


41. M. Eisenbruch, ‘Reinterpreting the psychiatry of sexual abuse of children - The case of Cambodia’ (to be presented at Becoming Well Together: Partnerships in Mental Health, 18th Congress of Royal Australian and New Zealand College of Psychiatrists, Auckland, New Zealand May 13–17, 2018).


48. L. Xem, Record All the Name of Those Are ‘Prey Psay ឯង ខ្មែរ’ (n.d.), http://haiphim.com/clip-_kRGNFbE48qTM.html.
50. See Marks, ‘Forgetting the Policies and Practices of the Past’.
52. M. Ly, Reaction of Islamic People in Cambodia on Atrocity of Isis.
74. Coleman, ‘Culture, Cloaked in Mens Rea’.
76. Hancock, ‘No-Self at Trial’, 106.
89. Supreme Court Chamber, F36 Case 002 01 Appeals Judgement Para 82 (Phnom Penh: ECCC, 2017).
96. C. Sukh, Ryan Maranamata (Phnom Penh: Buddhist Institute, 1965).
100. Hancock, ‘No-Self at Trial’.


Acknowledgements

I am indebted to Chou Sam Ath for his stalwart contributions as a research assistant over many years. Thel Thong provided insights into Cambodian Buddhism, and Phally Chhun made invaluable contributions to the analysis of the fieldwork data. Willem van de Put provided many ideas, contributed to a focus group with the Black Monday women, and co-led a workshop on violence against women. Jaya Ramji-Nogales, Sandra Davis, Steve Gourley, Colleen McGinn, Ruth Ní Ghlasáin and David Chandler made valuable contributions in the critique of the work. I would like to thank the many women and men who willingly shared their stories.

Disclosure statement

No potential conflict of interest was reported by the author.

Funding

The research was supported by project grants from the Australian Research Council DP0665062 and LP110200049 and from the Berghof Foundation GIC150139.
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