

CAMBODIA AT THE CROSSROADS

Since the July 2013 general election, the Cambodian ruling party has had a choice to make in the face of record voter disapproval: reform or repress. Improve accountability, responsiveness and inclusion in the benefits of economic development to win public support – or take steps to constrain dissent and cripple the opposition. It appears the ruling party is putting forward a package of laws, which they call reforms, but on closer look may be repressive.

The package under question consists of at least 5 pending laws¹, along with several pieces of legislation that were hurriedly enacted, the three recently adopted fundamental laws on the judiciary.² The content, and generally, the manner in which the government has advanced them for parliamentary consideration raise deep concern. The drafts, while presented as meeting donor demands, implementing obligations under human rights and serving the public interest, contain provisions that accomplish the opposite. Each of these laws contains provisions that will increase governmental control over some sector or institution of society. Urgent attention is needed to respond to specific provisions in the draft laws. This briefing note explains how such provisions run counter to investment interests of the private sector, civil society and donors, threatening further prosperity and development in Cambodia. At a minimum, donors are encouraged to urgently and publicly call for advance publication of and consultation on draft legislation, and to qualify any previous encouragement to the government to enact laws on these topics.

The Three Fundamental Laws on the Judiciary. Judicial reform is essential for tackling Cambodia's endemic corruption which impedes economic growth and social development. The stated purpose of the Fundamental Laws on the Judiciary is to establish an independent, effective and ethical judicial branch. However, the laws themselves appear to contradict this stated purpose. The Law on the Statute of Judges and Prosecutors backtracks from its 2012 version to drop provisions significant to protecting judicial independence, including prohibitions against the warrantless search of a judge's home, workplace and vehicle, and eavesdropping on a judge's phone calls. Another dropped provision had guaranteed that the judiciary would not be subordinate to the executive or legislative branches. The Law on the Organization and Functioning of the Supreme Council of the Magistracy gives the Minister of Justice a greater role within the Council and greater influence over judges and prosecutors; financially, administratively and in relation to suspension or removal for misconduct. The Law on the Organization and Functions of the Courts provides a role for private experts to act as advisors in certain types of cases with insufficient criteria and protocols on their appointment. (All three laws have been adopted and, as of 16 July 2014, promulgated by the King. The influence and control these laws allow the government to exercise over the judiciary now becomes a factor the prospective application of the other laws discussed below.) Despite the fundamental significance of all three laws, none of these was released to the public prior to Parliamentary consideration. The lack of consultation with concerned stakeholders is itself a reason for grave concern. The government appears to be using the same strategy with other drafts described in this paper, specifically the Cybercrime Law and the current draft of the LANGO.

¹ The drafts are of the Law on Associations and NGOs, the Cybercrime Law, the Telecommunications Law, the Law on Trade Unions and the Law on Agricultural Land Use.

² Despite analysis and advocacy from civil society challenging the adoption of the three laws, to which U.N. Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, and the International Bar Association added their opposing voices on 15 July 2014, <http://m.voacambodia.com/a/legal-experts-say-cambodia-judicial-laws-of-deep-concern/1958277.html>, based upon their compromising judicial independence, King Norodom Sihamoni promulgated the three laws the following day, 16 July 2014. <http://www.phnompenhpost.com/national/king-oks-judiciary-laws>

The Cybercrime Law. Given the primacy of the internet for commerce and communication for all stakeholders, the draft Cybercrime Law is particularly important to get right. A review of the draft by the Asia Internet Coalition, which includes the likes of Google, notes many concerns: among them the need to have crimes defined to include culpable knowledge or intent, the secondary liability that the draft law places on internet service providers and other commercial concerns (to the extent that that operators will be deterred from doing business here), and that Article 28 “is troubling as it could be used to limit legitimate forms of online expression.”³ That last point is particularly significant, as the law would appear to criminalize much of the social media traffic that is critical of ruling party officials. Looking at the draft itself,⁴ one sees that under Art. 28(4), one could serve three years for retweeting a suggestion, later deemed “non-factual” by a court, which “undermines” a government agency. The draft available also creates a new enforcement body, that has special authorities extending to warrantless search and seizure of computer devices and data, which is chaired by the Prime Minister.

The Law on Associations and NGOs (LANGO). The current version of the LANGO under consideration has not been made public, but it is reportedly similar to the previous 4th draft that was circulated in 2011, before being shelved in the face of unified CSO and donor concerns. An analysis of that draft noted, among many other problems, that it provides no protection against improper denials of registration or from dissolutions. That’s a big deal – not only does it provide unfettered discretion to officials and opportunities for corrupt rent seeking, it means that an NGO can be suspended for anything the government doesn’t like. For example, the Ministry of Information (Mol) suspended the Cambodian NGO STT in 2011, initially for failing to update contact information relating to officers. When the Mol was criticized for the suspension, it presented another reason to suspend – that STT had incited villagers to oppose “the government development plan.” The plan at issue was the compensation scheme for persons relocated by ADB’s railway rehabilitation project. In fact, ADB subsequently concluded that STT was right – compensation was not being provided in the manner required by its program and displaced persons were suffering as a consequence. In this case the Mol used its administrative fiat in an effort to silence an NGO that was holding the Cambodian government to account for meeting the terms of its agreement with a donor. If the LANGO is adopted without additional safeguards, it will reinforce those administrative powers, and narrow the scope of what NGOs can list as their registered purpose, making the government less accountable to donors financially and to society politically.

A draft that backtracks on previous positive elements is **the Law on Trade Unions**. A 2011 draft that was considered repressive by some labor representatives was, through consultation, amended to ameliorate a number of adverse provisions and to include pro-labor enhancements, such as a provision explicitly extending the right to unionize to domestic and informal sector workers. The draft under consideration now reportedly excises most of the previously negotiated provisions favorable to labor.

The Law on Management and Use of Agricultural Land, which has been in development for several years, was reviewed by rights group LICADHO in 2012.⁵ They note that the law facilitates land-grabbing and exploitation of natural resources, and compels acquiescence by creating “felony criminal liability for any actions that violate the law's far reaching provisions.”

³ www.asiainternetcoalition.org/aic-comments-on-the-draft-cybercrime-law-for-cambodia

⁴ http://sithi.org/temp.php?url=law_detail.php&lg=&id=258#.U2EKdqlyqCo Note that this copy is unofficial, as no official copy has been publicly released.

⁵ See *Cambodia's Draft Law on the Management and Use of Agricultural Land*, <http://www.licadho-cambodia.org/reports.php?perm=169>

The Telecommunications Law, which was made available only to telecommunication businesses, in July 2014, on a confidential basis, has been described by industry representatives as “draconian”⁶. It permits, without stating applicable criteria/conditions, state seizure of telecom systems to “maintain national interest, security and stability and public order” and the state’s installation of own equipment to “ensure good control of telecommunications operations inside and outside the country”. (Article 7) It creates a set of new criminal offenses (some overlapping with existing criminal laws) that includes substantial jail time for unintentional damage to a telecommunications network (up to 3 years). (Art.75) A provision that may further aggravate the impact to the Cybercrime Law is Art. 72, which provides a jail term of between 5-10 years for the “use” of telecom equipment or networks which “affects public order or national safety and security”. No mental state, such as intentional or knowingly, is associated with the definition of the offense. A violation of a telecommunication technology standard or professional code of ethics “as determined by the Ministry of Post and telecommunication” is punishable by up to 3 years in jail, again with no culpable mental state required. (Art. 90). Once a violation is determined by the Telecommunications Regulator of Cambodia (TRC), it has the authority to unilaterally fire senior managers at the subject telecom company and hire replacements who then report directly to the TRC. (Art. 63(a)(5) and (6)).

The information provided above does not compel outright rejection of any of the draft laws. It does however impel the need for their publication, and the opportunity for consultation and meaningful stakeholder input. These drafts, many of which have been long awaited, have the potential to very substantially move Cambodia forward or backward in terms of governance, human rights, political parity and an economy more amenable to western investment.

In the last week of April 2014, despite past practice to the contrary, the Prime Minister stated that the Cambodian Constitution does not permit consultation on draft laws with civil society. In fact, there is nothing in the Constitution that prohibits consultations with civil society; however, this interpretation signals the government’s intent to adopt the current legislative agenda without accountability to public input. Unless donors weigh in, invoking their concern for past and current investment in Cambodia’s social development and stability, and a business climate amenable to participation by ethically compliant businesses, a series of repressive laws may be enacted that rapidly and dramatically change Cambodia’s governance, taking it backwards by decades.

⁶ <http://www.phnompenhpost.com/business/telecom-law-grants-police-powers>