Policy Paper by the Cambodian Center for Human Rights on the Current Status of the Law on Associations and Non-Governmental Organizations

Phnom Penh, 4 August 2011

Introduction

This Policy Paper is written by the Cambodian Center for Human Rights ("CCHR"), a non-aligned, independent, non-governmental organization ("NGO") that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout the Kingdom of Cambodia ("Cambodia"). The purpose of this Policy Paper is to provide an overview both of the current status of the Draft Law on Associations and Non-Governmental Organizations (the “Law”) and CCHR’s main concerns with the Law in light of the recommendations that it has made in response to previous drafts of the Law. Please note that article references mentioned in this Policy Paper are to the third draft of the Law released by the Ministry of Interior (the “MOI”) to the public on Friday 29 July 2011, unless otherwise stated, and that all quotes and interpretation derive from the unofficial English translation of the Law circulated by the United Nations Office of the High Commissioner of Human Rights. This Policy Paper also proposes arguments against the passage of the Law in its current form for the benefit of various different stakeholders. This Policy Paper aims to achieve the following:

- outline the background to the Law and the reasons given for its proposed enactment;
- provide an update as to what stage has been reached as regards the Law’s passage;
- summarize the consultation process with civil society to date;
- re-state CCHR’s main objections to the Law in its current form;
- underline why the Law would be in severe violation of the rights to fundamental freedoms;
- present the arguments against the Law from the perspective of Western businesses;
- explain why the Law, if passed, would be detrimental to “development effectiveness”;
- give recommendations to various stakeholders as to what they can do to stop the Law; and
- draw conclusions about the Law and what it should be trying to achieve.

Background

The Royal Government of Cambodia (the “RGC”) has attempted on numerous occasions, albeit unsuccessfully, to regulate civil society in Cambodia. There are arguments for regulating the large number of NGOs operating in Cambodia, even if some of the numerous justifications for the Law proffered by the RGC – from the prevention of crime to combating terrorism – are rather spurious. The RGC has pointed to NGO transparency (mainly with regard to budgeting) as a justification for the Law, although it must be pointed out that NGOs are required to account to their donors for all finances and auditing every year. In general, critics of the Law have characterized such justifications as...
as pretexts that mask other motivations, perceived by many as the real reasons for the enactment of the Law, namely to curb dissent, silence political opposition and maintain the RGC’s stranglehold on power. Yet despite receiving such fierce criticism from both civil society and the international community – including aid donors – with many questioning the need for the Law at all, the RGC has continued regardless, showing a resolute determination to bring civil society – one of the last independent voices in Cambodia – under its control.

The point of no return?

CCHR, along with other domestic and foreign NGO representatives, attended a meeting with the MOI last Friday 29 July 2011 (the “MOI Meeting”). CCHR had written a letter to the MOI requesting both the third draft of the Law and meaningful civil society consultation. The third draft of the Law was indeed handed out at the MOI Meeting, however, despite requests from the civil society representatives that civil society have a week to provide final comments on the Law, the RGC has confirmed that the third draft was passed to the Council of Ministers prior to the MOI Meeting, and indeed H.E. Nouth Sa An, Secretary of State at the MOI, indicated that the time had passed for NGOs to submit recommendations. When asked whether he would accept further input from civil society, His Excellency said that, after the MOI Meeting, “civil society organisations no longer have to worry about the law”. He reportedly told Voice of America that NGOs would have to submit recommendations directly to the Council of Ministers if they sought further changes, but the Council of Ministers has stated that there are no plans for the Council of Ministers to accept further input and that NGOs should talk to the MOI and the Ministry of Foreign Affairs and International Cooperation (the “MOFAIC”) instead.¹

Despite such contradictory statements, the RGC’s message appears to be that the Law is now past the stage when civil society within Cambodia can comment upon, influence or hinder the passage of the Law. It is not clear exactly when the Council of Ministers will meet to finalize approval of the Law at government level, but it is expected to be in the next few days. Once the Law has been approved by the Council of Ministers, it will be passed to the National Assembly and from there on to the Senate. Past experience with other legislation suggests that the process will not take long from this point, which means that the Law may well be passed early next month, after which there will be, according to the provisions of the Law, a period of 365 working days for each NGO or association to prepare and file the requisite documents for registration or re-registration (Article 55). It would seem that the point of no return is fast approaching insofar as the Law is concerned and any remaining opportunities to influence its passage and content. As such, and as set out later in this Policy Paper, now is therefore the time for various key stakeholders to take action at as high as level as possible in order to ensure that the Law is not passed in its current form.

Lack of meaningful consultation

For over a year, NGOs and other civil society actors in Cambodia have called upon the RGC to ensure that the consultation process as regards the Law is an open and extensive one which includes all parties that will be affected by the Law. And yet, throughout the legislative process, the RGC has

¹ Thomas Miller, “NGO law draft gathers pace”, *The Phnom Penh Post*, 4 August 2011.
been lambasted by NGOs and donors alike for its failure to engage in any form of open or meaningful consultation with NGOs, associations and other civil society actors. The Law has been drafted in utmost secrecy, consultation has been minimal and, for many NGOs, limited to a single day on 21 January 2011. A small number of NGO representatives were invited by the MOI to a consultation meeting on 29 March 2011 to discuss the second draft of the Law with the MOI and the MOFAIC. The NGOs selected to attend this meeting characterized it as little more than a token effort at obtaining civil society’s stamp of approval noting that a meeting of this nature and duration in no way satisfies any reasonable definition of meaningful consultation, which such important legislation merits and requires.

The second draft of the Law was made public on 25 March 2011, only four days before the meeting with the MOI and the MOFAIC. A period of four days – two of which were non-working days – is not an adequate timeframe for concerned parties to analyze fully the changes to such a controversial and far-reaching piece of legislation. A reasonable timetable should have been set which allowed people ample opportunity to analyze the second draft and to prepare properly for the meeting with the MOI and the MOFAIC. Furthermore, the draft was only released in Khmer; since international NGOs are equally affected by the Law, and since English is the language in which they work, they were clearly denied an equal opportunity to analyze the second draft.

To date, there has been no “meaningful consultation” as regards the Law, and, given the fact that the Law has already been passed to the Council of Ministers, it is now highly likely that civil society within Cambodia will be denied any opportunity for the meaningful consultation which it rightfully expected and requested before the Law was passed, and which it is owed by right. Furthermore, the MOI has suggested that the third draft may not even be the final draft as changes may be made by the Council of Ministers: civil society ultimately has no idea what the final draft of the Law may contain.

**CCHR’s principal objections to the Law**

**Associations**

The third draft of the Law has not changed CCHR’s principal concern at all: the Law will continue to impact most upon (i) community-based organizations comprising informal popular groups/movements and grassroots networks (“CBOs”), and (ii) small and/or provincial NGOs, suggesting that the RGC’s principal objective in passing the Law is not to regulate Phnom Penh-based international and domestic NGOs, but to stifle popular movements and grassroots politics. Such groups are the backbone of civil society, and will be the worst-placed to wrestle with complicated procedural requirements. They should therefore be protected by legislation, rather than subjected to “death by bureaucracy”, which could be the lasting legacy of the Law should it be passed as it is currently formulated.

As it is, the Law still applies to “associations”, namely “a group of Cambodian natural persons who agree to establish for the interest of its members or/and public without conducting any activity to generate profits for sharing among their members” (Article 4) – a very broad definition and wide scope of application. Furthermore, the limited exemption to the application of the Law to associations contained in the second draft – “community-based organizations created locally
inconsistent with conditions set forth in [the] law and operated in compliance with other existing laws for mutual assistance” – has been removed. It is not clear how Article 8, which stipulates the minimum number of founding members for an association, affects the definition of “association” and the application of the Law – really any applicable threshold should be included in the definition in Article 4. As it is, as in the second draft of the Law, the threshold for an association to register is 11 Cambodian founding members. It is not clear, therefore, whether a group of, say, 10 Cambodian founding members would qualify as an association or not – the broad definition in Article 4 would indicate “yes”. It is imperative, however, that such a group knows whether it would be carrying out activities illegally if it remains unregistered, since, by virtue of Article 8, it cannot register as it does not have the requisite number of founding members.

The current application would stifle CBOs (classified, for the most part, as “associations”), which are often convened or created on an ad hoc basis by small groups of concerned individuals to express, promote, pursue and defend common interests or to react to specific issues, and would violate the rights to the fundamental freedoms of association and expression as well as the right to “participate actively in the political, economic, social and cultural life of the nation” as enshrined in Article 35 of the Constitution of the Kingdom of Cambodia (the “Constitution”). CCHR maintains that the Law should be amended so that it does not apply to “associations” but only to NGOs, both domestic and foreign.

Right of appeal
CCHR welcomes the fact that the MOI has evidently listened to NGO and donor recommendations and included a right of appeal in the third draft of the Law – and one that allows recourse to the courts rather than just straight back to the government ministry (Article 17). Strangely, however, the right to appeal the denial of a registration application is only provided for domestic NGOs and associations; foreign NGOs are not afforded that right. Conversely, foreign (but not domestic) applicants must receive a written explanation as to why their applications are rejected. Furthermore, no time limit is given as regards the right of appeal, which means that the appeal process could end up being indefinite – a vital consideration given that there is no provision allowing NGOs or associations to continue their activities while an appeal is pending. This omission is all the more glaring considering the fact that a time period is allocated for the approval of registration (now 45 working days) – during which the NGO or association in question cannot conduct any activities. Regardless of this lacuna or oversight, the right of appeal is a welcome addition to the Law, even if the courts are not fully independent of the executive. Such concerns about the judiciary are beyond the scope of this Policy Paper.

Registration
While the third draft of the Law introduces some improvements in the registration process (please see above for the right of appeal and the reinstated registration review period of 45 working days – a reversion to the period stated in the first draft of the Law), the registration requirements are still unduly excessive and onerous. A balance needs to be struck between satisfying the legitimate and reasonable concerns of the RGC and allowing NGOs and associations the freedom to carry out their positive and beneficial activities. Furthermore, the registration process is lacking in guidance or standard forms. This lack of guidance and the onerous registration requirements mean that CBOs and small and/or provincial NGOs will be impacted most, due to resource and capacity limitations.
Furthermore, the Law still fails to provide a breakdown of assessment criteria against which applicant NGOs or associations will be assessed, meaning that the principles of transparency and accountability have still not been respected. The criteria on which the MOI may reject an application are not mentioned in the Law, with total discretion accorded to the MOI (Articles 17 and 32). Registration applications should be treated impartially without motivation by political factors. Given the absence of any assessment criteria in the Law for rejecting a registration application, there are concerns that the RGC will be in a position to exploit supposed “administrative errors” as a way of rejecting the registration or re-registration applications of “undesirable” NGOs, i.e., NGOs that are critical of the RGC and its actions may have applications rejected without explanation or on the basis of administrative errors. There should be clear and predictable reasons given for denying an application, with limited discretionary powers accorded to the RGC, the MOI or, in the case of foreign NGOs, the MOFAIC. Furthermore, there is no provision for automatic registration if the MOI fails to rule on an application within the stipulated 45 working days (Articles 17 and 32). The registration process and all relevant processes should be – and should be seen to be – transparent and free of corruption and political influence.

Monitoring and supervision
The Law requires that annual reports be submitted to the relevant executive body, a requirement that will be burdensome for CBOs and for small and/or provincial NGOs that are loosely organized and/or have little administrative support, with the result that such groups could be intimidated and discouraged from forming due to the unnecessary and unrealistic reporting requirements. Given the broad definition of “association”, an extended variety of groups are likely to be affected and put off by the onerous reporting requirements. Provisions for the monitoring and supervision of NGOs and associations should not be excessive or intrusive – a system of annual reporting can be highly intrusive and can result in the abuse and harassment of NGOs and associations. Furthermore, the rationale behind any monitoring and supervision systems should be clearly stated.

Sanctions and penalties
Under the third draft of the Law, the sanctions and penalties relating to breach of the Law are still (i) disproportionate and unreasonably severe, (ii) vaguely drafted and therefore open to misinterpretation and abuse, and (iii) discriminatory. For example, a foreign NGO that breaches the annual reporting requirements can face suspension of its activities and termination of its memorandum (Articles 46 and 53); yet, it would appear from Article 49 of the Law that involuntary dissolution by court judgment is also a penalty that can apply to domestic NGOs, although, due to the vague drafting of the relevant provisions of the Law, it is not clear under what circumstances. Furthermore, Article 54 states that “in case of recidivist or serious cases in the violation of the constitution or other laws of the Kingdom of Cambodia, [NGOs or associations] shall be punished according to the laws in force”. The drafting of this article is so vague that no NGOs or associations can be certain as to which misdemeanours are covered and which penalties apply. Lastly, the third draft of the Law does not provide any criteria as to the circumstances in which an NGO or association might be postponed or dissolved, leaving the whole landscape and application of the Law unclear and unpredictable.
It is important that the criteria for sanctions and penalties are made clear, objective, predictable and consistent with international law. Sanctions and penalties should always be administered by the courts, since governmental, ministerial or executive sanctions and penalties have the potential to be arbitrary and unreasonably severe. Finally, the distinction between sanctions for domestic NGOs and foreign NGOs would appear to be disproportionate and discriminatory (bearing in mind the caveat above), and should therefore be addressed.

**Fundamental freedoms**

Article 41 of the Constitution and Articles 19 and 21 of the International Covenant on Civil and Political Rights, which Cambodia acceded to and ratified in 1992 and which was incorporated into Cambodia’s domestic law by virtue of Article 31 of the Constitution, protect and promote the rights to freedom of expression and association, respectively. Furthermore, under Article 35 of the Constitution, “Khmer citizens of either sex shall have the right to participate actively in the political, economic, social and cultural life of the nation.”

However, the authorities have a track record of ignoring these legal instruments in their eagerness to prevent individuals and organizations that are critical of the RGC and its policies from informing the wider community about various human rights abuses committed by wealthy and well-connected companies and individuals. Freedom of expression is considered to be the cornerstone of democracy in the international sphere, but in Cambodia the exercise of this freedom in order to voice critical comment or opinions contrary to those of the RGC is viewed with suspicion.

*If the Law is passed, and certain NGOs and associations are refused registration – either because they are deemed “undesirable” by the RGC or because they lack the resources to comply with the onerous registration requirements – the Law will be in direct breach of the rights to freedom of expression and association, as enshrined in both domestic and international law.*

**The Law: a hindrance for Western business in Cambodia**

While it may not be immediately apparent to businesses why a law that regulates NGOs and associations should concern or affect them, if the Law is passed, Western businesses which operate in Cambodia will be significantly impacted. The reasoning is that if advocacy NGOs are refused re-registration as a result of the Law, in the absence of a viable and strong watchdog, there will be no one to highlight the corrupt practices of domestic companies or institutions. Such a void, in turn, will lead to increased corruption.

As Cambodia tries to attract more investors and capital inflows, corruption laws both domestically and abroad are placing new rules on foreign companies doing business, with experts saying that recent changes to the law could radically change the way in which foreign businesses view the risk of operating in Cambodia. As a result of a piece of US legislation, the Foreign Corrupt Practices Act (the “FCPA”), and the recently-enacted Cambodian Anti-Corruption Law (the “Anti-Corruption Law”), US companies are increasingly finding that they cannot conduct business in Cambodia: the anti-bribery provisions of the FCPA make it unlawful for a US citizen to make a payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person,
while, under the Anti-Corruption Law, paying facilitation fees to government officials is punishable by between five and ten years in jail. The Anti-Corruption Law also makes foreign companies operating in Cambodia liable under foreign bribery laws in their own countries, while US law holds that facilitation payments in foreign countries are legal as long as they are not declared illegal in the country in which they are paid. Already it has been reported that FedEx is ceasing its operations in Cambodia, due to the bribes that it has to pay to public officials to be able to conduct business. Such fees are “regularly imposed by Customs and CamControl officials to cover the costs of clearance of high-value shipments”, FedEx has claimed.\(^2\) The Law threatens the existence of NGOs and associations in Cambodia, thereby ensuring that important watchdogs and whistleblowers are removed from the scene, which in turn would increase opportunities for corruption.

Furthermore, Western companies thinking of setting up or investing in Cambodia – the national stock exchange opened on 11 July 2011 – with a view to taking advantage of high-risk high-returns frontier markets such as Cambodia, may think twice if the economic landscape is perceived to be too risky and bedevilled by endemic corruption and a lack of rule of law. For the passing of the Law would represent a significant step in the RGC’s apparent attempts to flout the rule of law by enacting laws that seek to silence dissenting voices and oppress the Cambodian people. As stated above, corruption will only increase if, as a consequence of the Law’s enactment, advocacy NGOs are unable to re-register, meaning that those Western companies which do decide to stay may be forced to pay even more bribes as a result of the further entrenchment of corrupt practices.

The withdrawal of Western companies – similar legislation to the FCPA is either pending or already in force in other Western countries\(^3\) – would spell a decrease in influence in Cambodia for Western countries generally, with all the economic and political implications that such a loss of influence would entail.

**The enactment of the Law would result in an increase in corruption and a corresponding decline in the corporate and political influence of Western countries as regards Cambodia – a valuable frontier market.**

**Development effectiveness and a (dis)enabling environment**

In order for aid and development to be most effective, an “enabling environment” needs to be created. An enabling environment entails a positive legislative landscape whereby laws are passed to facilitate aid and development for the benefit of the poorest and most marginalized, and whereby such laws are enforced without fail. It is vital that corruption and impunity are reduced, and accountability and the rule of law protected and promoted, in order for “development effectiveness” to prevail.

It is vital that donors appreciate the gravity of the situation should the Law be passed in its present form and NGOs are not registered or re-registered: valuable public services will be curtailed, development at community level will be stunted, and poverty and corruption will rise. Donors have

---


\(^3\) In April 2010, the UK adopted a law penalizing the bribing of foreign officials. 38 countries are party to the Anti-Bribery Convention of the Organization for Economic Co-operation and Development.
a responsibility to assess where their funds are being directed: if the Law is passed, funding will cease to be managed by many of the advocacy and development NGOs which currently make use of the funds – at the expense of those who need the assistance most, i.e., the Cambodian people.

Another negative impact on the Cambodian people that the passage of the Law in its current form is likely to bring about is an increase in the corporate presence of countries such as China. At the moment, Cambodia enjoys a balance between Eastern and Western power and influence, represented by China and the US, respectively. The flipside of the decrease in Western corporate and political influence outlined above is an inevitable corresponding increase in the influence of countries with less regard for the situation of human rights in Cambodia – namely China, Vietnam, Malaysia and South Korea. The balance between East and West would then be lost, as would the stamp of legitimacy that US-protection seems to bring. This loss of balance would not only be greatly to the detriment of the RGC’s own position – whereby it is able to play one power off against the other and maintain its independence – but also to the detriment of the Cambodian people. If Western companies were forced to withdraw from Cambodia – or were unable to set up or invest there in the first place – Cambodia would by default fall fair and square within China’s sphere of influence and all that comes with it.

Chinese companies are behind many of the land evictions across Cambodia. As well as condoning existing human rights violations by their silence, Chinese companies are actively devastating Cambodian families and communities through their desire to take advantage of soaring real estate prices and a lack of adequate land titling. Poor people in both urban and rural areas are being evicted from their land with paltry compensation to make way for rampant development in the form of shopping malls, luxury housing estates and hotels. Already more than 2,600 families – and the final figure is likely to be more than 4,000 – have been evicted from the Boeung Kak lake area in Phnom Penh on the back of a joint venture development project initiated by Shukaku Inc. – owned by ruling party senator Lao Meng Khin – and Inner Mongolia Erdos Hung Jun Investment Company – a Chinese company. Furthermore, Cambodia would fall even further under Vietnamese political influence without the stabilizing effect of the US, Western businesses and international civil society.

If the Law is passed in its current state – and NGOs are shut down – Cambodia will become a “disenabling environment”, whereby aid and development are hindered, and, as a result, poor and marginalised people lose out on the essential services provided by NGOs. Furthermore, the withdrawal of Western companies will mean an increase in the corporate and political presence of Asian countries such as China – at great potential human cost to the people of Cambodia.

Recommendations

In light of the views and facts outlined in this Policy Paper, CCHR makes the following recommendations to the following stakeholders:

The RGC

- should allow sufficient time for meaningful consultation with civil society to take place on the third draft of the Law;
- should take account of civil society’s – including CCHR’s – recommendations;
• should remove all mention of “associations” from the Law – so that the Law only applies to NGOs – thereby allowing participatory democracy to flourish at a grassroots level;

• should ensure that the passage of the Law is in accordance with the Constitution;

• should ensure that the Law is compatible with all obligations to protect and promote the rights to freedom of expression and association that are enshrined in domestic and international law;

• should help to create an “enabling environment” – and a constructive legislative landscape is an essential ingredient – whereby (i) aid is able to be given and development allowed to proceed in the most effective way, (ii) the poor and marginalized are prioritized, and (iii) governments and other key actors work together with civil society and donors to ensure that progress is achieved;

The National Assembly

• should vote against the Law at the stage of the National Assembly approval, or should at least push for certain of its provisions to be amended;

Western businesses

• should appreciate the gravity of the situation should the Law be passed in its present form and realise that the Law will impact upon them: if advocacy NGOs are silenced, corruption will increase, and the business and corporate landscape will be deemed overly risky and inaccessible, meaning that a potentially very profitable frontier market will be out of bounds;

• should refrain from establishing a presence in Cambodia, investing in the Cambodian stock exchange, or conducting business or corporate activities in Cambodia until they are comfortable that the Law will be passed in a form that will not have a negative impact upon them;

• should speak out against the Law and apply pressure on the RGC not to pass it in its current form;

Donors and embassies

• should appreciate the gravity of the situation should the Law be passed in its present form and NGOS are not registered or re-registered: valuable public services will be curtailed, development at community level will be stunted, poverty and corruption will rise, the business and corporate landscape will be deemed overly risky and inaccessible, and one of the last voices of opposition to the RGC and its policies will be silenced for good;

• should assess where their funds are being directed: if the Law is passed, funding will cease to be managed by many of the advocacy and development NGOs which currently make use of the funds – at the expense of those who need the assistance most, i.e., the Cambodian people;

• should be aware of the likely influx of Chinese corporate and political influence – and all that that would entail – if the Law is passed in its current state; and
• should put pressure on the RGC to refrain from passing the Law in its current form, and on their own governments and regional blocs to apply similar pressure at as high a level as possible.

Conclusion

The third draft of the Law, while representing an improvement on the second draft, is still flawed on many levels. It takes account of some NGO and donor recommendations, such as the right of appeal, but either ignores or inadequately addresses the rest. Furthermore, the numerous inconsistencies and ambiguities that characterized the first and second drafts of the Law have still not been addressed and will likely cause significant confusion in the future. The Law should focus upon NGOs with substantial donor funding rather than upon CBOs and small and/or provincial NGOs. If those NGOs receiving donor funding above a certain threshold were required, in the interests of transparency, to make their accounts public, the RGC’s fears about fraud, money laundering and terrorism would be assuaged. If, however, the RGC’s interests lie elsewhere, namely controlling grassroots advocacy and curtailing the free association and expression of all Cambodians, then it should say so explicitly.

CCHR re-iterates its position that a law to regulate NGOs should be passed that represents both a clear and positive step in Cambodia’s development and democratization, and a commitment by the RGC to uphold human rights, particularly the rights to freedom of expression and association – as enshrined in international and domestic law – as well as the constitutional right to “participate actively in the political, economic, social and cultural life of the nation”. It hopes that the RGC will belatedly recognize the positive effect that NGOs have upon Cambodian society, while also allowing grassroots democratic politics to flourish.

The RGC’s message appears to be that the Law is now past the stage when Cambodian civil society can comment upon, influence, or hinder the passage of, the Law. It would seem that the point of no return has now been reached as regards any influence that civil society might have upon the RGC and the imminent passage of the Law; now is the time for various key stakeholders to take action at as high a level as possible, in line with the recommendations set out in this Policy Paper.

For more details please contact Ou Virak (tel: +855 (0) 1240 4051 or e-mail: ouvirak@cchrcambodia.org) or Robert Finch (tel: +855 (0) 7880 9960 or e-mail: robert.finch@cchrcambodia.org).

The Cambodian Center for Human Rights (CCHR)
4 August 2011
Phnom Penh
Kingdom of Cambodia