CCHR’S LEGAL ANALYSIS OF THE THIRD DRAFT OF THE DRAFT LAW ON ASSOCIATIONS AND NON-GOVERNMENTAL ORGANIZATIONS – AUGUST 2011

Introduction

This Legal Analysis 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 Legal Analysis is to provide an overview of CCHR’s main concerns as regards the Law on Associations and Non-Governmental Organizations (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 Legal Analysis 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.

CCHR’s main 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 – if not entirely intended – legacy of the Law.

The Law, as it is currently formulated, 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 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. The current application would stifle CBOs, 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.

It is not clear how Article 8 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.

CCHR has no problem in principle with mandatory registration as prescribed by Article 6, as long as it does not apply to associations, and in the event that there is a viable and robust appeal system in place (please see below). 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 Royal Government of Cambodia (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. Even so, in the spirit of full transparency and accountability, it is reasonable that NGOs be treated as companies are in the private sector, with all the requirements as to monitoring and so forth. Therefore, if the RGC were to restrict application of the Law just to NGOs, and given the other prerequisites mentioned in this paragraph and elsewhere, CCHR would have no serious objections to the mandatory registration provision in Article 6.

There is no reason, however, why voluntary registration should not be available to associations which might want to avail themselves of the benefits of the Law. Article 6 misleadingly implies such a possibility – misleading in that it states that NGOs and associations which are not registered may not “enjoy any benefits from [the] law”, though nor may they “operate the activities in the name of an association or non-governmental organization”, in other words, in reality, they cannot carry on their activities without having registering first. Therefore, the appearance of a move towards voluntary registration is in fact mandatory registration in (thinly-veiled) disguise. An amendment to the Law that opens up the possibility of genuine voluntary registration to associations would be welcomed by CCHR as a possible compromise on this key point.

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). However, no time limit is given as regards the right of appeal – a vital consideration given that there is no provision allowing NGOs or associations to continue their activities while an appeal is pending. Considering the time period allocated for the registration approval window (now 45 working days) – during which the NGO or association in question cannot conduct any activities – one would have expected a timeline for an appeal to be outlined if it is intended to be taken seriously. Regardless of this obvious lacuna or oversight, the right of appeal should be maintained as a point of principle, even if the courts are
not fully independent of the executive. However, there is still an overwhelming concern in this regard, namely enforcement of the right of appeal: the Cambodian judiciary is notorious for being merely the enforcer of the RGC’s policies, agendas and whims, which means that, in practice, the rejection of a registration application will be final, in other words the NGO or association in question will not be able to register or conduct its activities.

Furthermore, the Law still fails to provide a breakdown of assessment criteria against which applicant NGOs or associations can 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 direction 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. There should be clear and predictable reasons given for denying an application, with limited discretionary powers accorded to the RGC, namely the MOI or, in the case of foreign NGOs, the Ministry of Foreign Affairs and International Cooperation. Furthermore, there is no provision for automatic registration if the MOI fails to rule on an application within the stipulated 45 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.

Registration requirements
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 45-day review period – 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 their lack of know-how and/or resources.

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 monitoring and supervision 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 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). Having said that, 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, in relation to violation of an NGO’s statute or memorandum (as applicable), that “in case of recidivist or serious cases in the violation of the constitution or other laws of the Kingdom of Cambodia, 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 precise penalties apply. Lastly, the third draft of the Law does not provide any criteria as to the circumstances in which an NGO or association would be postponed or dissolved, making 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 (or other independent arbiter), 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), which is not acceptable.

**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 it is viewed by the RGC with suspicion and something that should be suppressed at all costs, while the NGOs that promote it and that are critical of the RGC are viewed as subversive.

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.

**Conclusion**

The Law in its current form is still flawed on many levels, while representing an improvement on the second draft. The third draft of the Law takes account of some NGO and donor recommendations, such as the right of appeal, but either ignores or inadequately addresses the rest. 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.

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