



# **THE DELUSION OF PROGRESS: CAMBODIA'S LEGISLATIVE ASSAULT ON FREEDOM OF EXPRESSION**

A LICADHO REPORT  
October 2011



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CAMBODIAN LEAGUE FOR THE  
PROMOTION AND DEFENSE OF HUMAN RIGHTS

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AND DEFENSE OF HUMAN RIGHTS

## **Cambodian League for the Promotion and Defense of Human Rights (LICADHO)**

LICADHO is a national Cambodian human rights organization. Since its establishment in 1992, LICADHO has been at the forefront of efforts to protect civil, political, economic and social rights in Cambodia and to promote respect for them by the Cambodian government and institutions. Building on its past achievements, LICADHO continues to be an advocate for the Cambodian people and a monitor of the government through wide ranging human rights programs from its main office in Phnom Penh and 12 provincial offices.

LICADHO pursues its activities through two programs:

### **Monitoring and Protection Program:**

- **Monitoring of State Violations and Women's and Children's Rights:** monitors collect and investigate human rights violations perpetrated by the State and violations made against women and children. Victims are provided assistance through interventions with local authorities and court officials.
- **Paralegal and Legal Representation:** victims are provided legal advice by a paralegal team and, in key cases, legal representation by human rights lawyers.
- **Prison Monitoring:** researchers monitor 18 prisons to assess prison conditions and ensure that pre-trial detainees have access to legal representation.
- **Medical Assistance:** a medical team provides assistance to prisoners and prison officials in 12 prisons, victims of human rights violations and families in resettlement sites.
- **Social Work:** staff conduct needs assessments of victims and their families and provide short-term material and food.

### **Promotion and Advocacy Program:**

- **Training and Information:** advocates raise awareness to specific target groups, support protection networks at the grassroots level and advocate for social and legal changes with women, youths and children.
- **Public Advocacy and Outreach:** human rights cases are compiled into a central electronic database, so that accurate information can be easily accessed and analyzed, and produced into periodic public reports (written, audio and visual).

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## INTRODUCTION

The Royal Government of Cambodia (RGC) has undertaken an effort to curtail freedom of expression, assembly and association through several new pieces of restrictive legislation. Recent reports have recognized this trend, and described numerous problematic provisions in the new laws. An analysis of each new law or draft law in isolation, however, does not fully reveal the alarming extent of the government's growing control of expressive activities.

When five laws drafted or passed since 2008 are examined together, and then compared to other existing laws, an even more troubling picture of governmental control over speech and association emerges. The laws that warrant this further review and comparative analysis are: the new Penal Code, the Anti-Corruption Law, the draft Law on Unions of Enterprises (Trade Union Law), the Law on Peaceful Assembly (Demonstrations Law), and the draft Law on Associations and Non-governmental Organizations (LANGO).

A comparison of the registration requirements for non-profit legal entities in the Civil Code, which goes into effect in late November 2011, with the provisions in the draft LANGO, dispels any remaining doubt about the government's true intentions in pushing for the new law. The Civil Code, in Articles 46-118, already includes a comprehensive registration scheme, including specific requirements for the formation and registration of non-profit entities, as well as provisions governing management, dissolution, and liquidation. Those requirements have not even been tested. The LANGO, on the other hand, establishes a complete prohibition on all activity by unregistered associations and organizations, and incorporates several vague requirements that are susceptible to selective enforcement against groups deemed critical of the government.

"[P]rovisions in many laws in Cambodia, including even the new Penal Code, go beyond international standards in curtailing people's freedoms, as do the courts' application and interpretation of such laws."

– Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi, August 2011

Similarly, the new Anti-Corruption Law goes beyond the new Penal Code's corruption related offenses and fails to subject spouses and children of government officials to its financial reporting requirements, while requiring a broad swath of civil society, religious and political party actors to its provisions. More crucially, it imposes harsh criminal penalties for failure to comply with the vague financial reporting provisions. The law also imposes criminal liability on whistleblowers under poorly defined circumstances. Both of these flaws with the law run counter to well-established international law norms. And the Penal Code is itself dangerously vague and repetitive, criminalizing wide swaths of speech in multiple overlapping provisions.

The draft Trade Union Law replicates provisions in Cambodia's existing Labor Law, leading one to wonder why amendments to that law would not have sufficed. Perhaps the answer lies in provisions in the draft Trade Union Law that impose complex registration and reporting requirements, establish barriers to organizing strikes, and open trade union leaders up to significant fines for vaguely defined conduct.

Finally, the Demonstrations Law completes the government's arsenal against expression and other fundamental freedoms. Under this new law, large demonstrations must have prior

approval from the government based on a detailed notification scheme that requires the submission of photocopies of the national identification cards of three organizers, and a written statement of the number of attendees and the purpose of the event, among other requirements. The notice must be submitted at least five days in advance. Not only does the law require the notification to include information that is difficult, if not impossible to ascertain in advance, the law also gives the government absolute discretion in approving or denying permission following the notice. And again, in significant overlap with the new Penal Code, the Demonstrations Law imposes harsh criminal penalties on protestors and organizers for vaguely defined conduct.

The starting point for this analysis, as indicated above, is necessarily the new Penal Code. Nearly every new law either repeats certain troublesome provisions in the Penal Code, or includes provisions that could easily be abused through the criminal law. Before embarking on this legal analysis, however, it is useful to understand a bit more about Cambodia's legal framework and judicial background.

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## BACKGROUND: THE ALL-POWERFUL EXECUTIVE BRANCH

Cambodia's Constitution declares in four separate articles that the judiciary must be independent – Articles 51, 128, 129 and 130. Despite the clear intent of the country's primary governing document, however, the judiciary remains firmly under the control of the executive branch. Both substantive and procedural laws are routinely ignored, and accused individuals are often convicted despite little to no evidence of guilt. Judges actively campaign for political candidates and are openly members of political parties. In fact, the Supreme Council of Magistracy and Supreme Court President, the Supreme Court Deputy President, the Constitutional Council President and the former Constitutional Council

President are all members of the Cambodian People's Party's Central Committee – the ruling party's governing body.

### **Cambodia's Constitution Creates Three Independent Branches of Government**

"The legislative, executive, and judicial powers shall be separate."  
– Article 51

"The Judicial power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens."  
– Article 128

"Only judges shall have the right to adjudicate. A judge shall fulfill this duty with strict respect for the laws, wholeheartedly, and conscientiously."  
– Article 129

"Judicial power shall not be granted to the legislative or executive branches."  
– Article 130

A good example of the highly politicized nature of the court system is the legal battle between opposition party parliamentarian Mu Sochua and Prime Minister Hun Sen. Mu Sochua filed a complaint against the Prime Minister in April 2009 alleging that he had defamed her during a speech in Kampot province. The Prime Minister countersued, and Mu Sochua's parliamentary immunity was stripped. Mu Sochua's defamation case was dismissed, but the Prime Minister prevailed in his countersuit. The court ordered the MP to pay 16.5 million riel (US\$4,084) in fines and compensation. She narrowly avoided imprisonment for refusal to pay the fine when the court issued an order authorizing automatic payments out of her salary for four months. Mu Sochua's most recent attempt to restore her parliamentary immunity failed in April 2011.<sup>1</sup>

The other fundamental issue with the judiciary is corruption. Indeed, in Transparency International's most recent Global Corruption Barometer report, Cambodia was the only country whose citizens ranked the judiciary as the most corrupt institution, above the police and other government officials.<sup>2</sup> The survey also found that a whopping 84% of the respondents reported paying bribes in the past year, a figure surpassed only by respondents in Liberia and Uganda.

In 2011, nearly each week has brought another example of the judiciary's lack of independence from political and financial influence. The Appeals Court's surprising verdict on July 14, 2011, summarily upholding LICADHO staffer Leang Sokchouen's erroneous two-year prison sentence is a clear example.

<sup>1</sup> *Mu Sochua's immunity bid rejected*, Meas Sokchea, Phnom Penh Post, April 19, 2011.

<sup>2</sup> Global Corruption Barometer 2010 Report, Transparency International, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/gcb/2010/results](http://www.transparency.org/policy_research/surveys_indices/gcb/2010/results)



On August 30, 2010, the Takeo provincial court had sentenced Sokchouen to two years in prison on charges of disinformation under the Article 62 of the UNTAC criminal code, for allegedly distributing political leaflets with three others.<sup>3</sup> The trial court convicted Sokchouen despite a complete lack of evidence, despite his constant protestations of innocence, and despite numerous trial irregularities. The initial arrest warrant, for example, was issued for a different person. It had been issued for a Vietnamese man living in Phnom Penh's Russei Keo district named "Leang Sokly, called Chhoeun." Leang Sokchouen is Khmer and lived in Sen Sok district. More importantly, Sokchouen provided undisputed evidence at trial that he was in Phnom Penh at the time that the distribution of leaflets supposedly took place in Takeo.

After spending nearly a year in prison, Sokchouen was finally afforded an appeal hearing. The Appeals Court, like the trial court, heard no evidence of Sokchouen's involvement in the distribution of leaflets. Once again, that did not matter. The court instead focused on the fact that Sokchouen had been friends at university with one of the other accused individuals.

On July 14, 2011, the appeals court issued its verdict upholding the lower court's sentence, but changing the original charge from disinformation under the UNTAC code, to incitement under Article 495 of the new Penal Code. The new Penal Code came into effect in December 2010 – nearly a year after the distribution of leaflets at issue supposedly took place.

This surprise maneuver by the Court of Appeals runs counter to well-established principles of criminal law that dictate that an individual cannot be subject to criminal liability under laws that came into effect after the conduct in question occurred.<sup>4</sup> Such retroactive application of a criminal law also violates express provisions of the Penal Code as well as other Cambodian laws.



*Sokchouen stands before the Appeals Court on June 30, 2011 Photo by: LICADHO*

Article 671 of the new Penal Code expressly states that an offense that occurred before the law entered into force in December 2010, must be governed by the law that existed at the time the conduct occurred. Articles 399 and 401 of Cambodia's Code of Criminal Procedure state that when an accused appeals, the Court of Appeal may only modify the judgment in favor of the accused, and may not add any new elements that were not submitted to the lower court.

Moreover, under Article 406, if the Court of Appeal decides that the lower court's judgment is invalid, it must analyze the merits of the case in the same way that the lower court would have – in other words, through a trial where the accused is able to present a defense to the new charge. The Appeals Court ignored all of these provisions in upholding Sokchouen's sentence.

<sup>3</sup> For more background, see *The Role of the Cambodian Judiciary in Political Cases*, LICADHO Case Study, July 2010, available at <http://www.licadho-cambodia.org/reports.php?perm=144>.

<sup>4</sup> See, e.g., International Covenant on Civil and Political Rights (ICCPR), Article 15: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." Cambodia has ratified the ICCPR.

Sokchouen's arrest, trial and appeal reveal outrageous flaws at every stage of the judicial system. Perhaps more fundamentally, his case is a sharp illustration of the government's practice of using criminal laws to silence critical voices. The peaceful distribution of political leaflets has led to multiple prosecutions and lengthy jail sentences for many, as discussed further below.

Under the new legislation analyzed in this report, authorities now have even more ammunition to use against their critics. But before embarking on that analysis, a look at two more recent case studies is useful to further illustrate the judiciary's lack of independence.

#### CASE STUDY: GUILTY UNTIL PROVEN INNOCENT

Cambodia's courts regularly convict individuals solely on the basis of testimony from one government official or police officer, despite a complete lack of credible evidence or witness testimony that speaks to the actual charge. At the appeal court level, the hearing often proceeds without the defendant present, since the only appeal court is located in Phnom Penh. The government usually fails to make arrangements for defendants incarcerated outside of the capital city to attend.<sup>5</sup> Their absence is particularly alarming because Cambodian law provides that the Court of Appeals can reconsider and determine the facts of a case – it is not limited to evaluating legal arguments.

One typical example of such a lop-sided appeal court hearing took place on August 26, 2011, when the court heard an appeal from Long Sarith and Long Chan Kiri, two men who had been incarcerated for nearly two years.<sup>6</sup> They had been convicted of illegally clearing state forest near their homes in Bos village, in Oddar Meanchey province's Samrong district.<sup>7</sup> The men were not provided transportation to the court from the Siem Reap prison to participate in their appeal hearing.

At the appeal hearing, their attorney's examination of the sole witness, a government official, and the attorney's closing argument, revealed there was absolutely no evidence to support the villagers' arrest and conviction. First, the defense attorney established that the villagers had been living in their homes on the land in question since 2003. Starting in 2007, shortly after the land was awarded to a private company as a land concession, they began to hear from various sources that they should leave.<sup>8</sup> They never received any official notification, however. On the contrary, they were told by the commune chief that they were entitled to remain on their land — a fact admitted by the government official during the appeal hearing. As such, the defendants refused to leave their homes until they were arrested and incarcerated in 2009.<sup>9</sup>

After establishing this background, the defense attorney asked if the official had ever actually witnessed the defendants cutting down trees. The official dodged the question,

<sup>5</sup> In Absentia: The Right of Appeal and Cambodia's Inmate Transportation Crisis, LICADHO Briefing Paper, March 2010, available at <http://www.licadho-cambodia.org/reports.php?perm=140>.

<sup>6</sup> Report of LICADHO legal consultant, August 26, 2011, Phnom Penh Court of Appeals.

<sup>7</sup> *Two men sentenced to 2 years after land dispute with senator*, Rann Reuy, Phnom Penh Post, May 28, 2010.

<sup>8</sup> Angkor Sugar Company received a 6,000 hectare sugar concession over the land in question. The Cane and Sugar Valley Company and the Tonle Sugar Cane Company were also each awarded 6,000 hectares of adjoining tracts in land concessions over the surrounding area. All three companies are backed by ruling party Senator Okhna Ly Yong Phat. As LICADHO noted at the time, because Cambodian law limits the maximum size for an economic land concession to 10,000 hectares, there have been several instances of businessmen forming multiple corporations and gaining adjoining concessions to circumvent the law. See Land Law, Article 59.

<sup>9</sup> Four days after their arrest and imprisonment, the homes of more than 100 families in the area were burned and bulldozed to rubble by approximately 150 police, military police and hired demolition workers.

instead describing the arrest warrant for the defendants. A judge repeated the question, and the official finally admitted that he had not witnessed any illegal clearing. The defendants had been arrested while riding on their motorbikes, not in the act of cutting state forest.

The attorney then asked about equipment — had the officials found any tree clearing tools such as axes or saws in either defendant’s possession? The answer came quickly: no. So, asked the attorney, are there even trees on the land in question? No, answered the official, there are some small shrubs. But, said the official, he considers “anything green” to be forest.

The prosecutor, for his part, made just one brief remark during the entire hearing: he said he thought the process in the lower court was proper.

After deliberating for approximately thirty minutes, the judges returned their verdict. They upheld the conviction and refused to grant the defendants an early release. The villagers remain in prison at the time of this writing.

#### CASE STUDY: UNFOUNDED CONVICTION THREATENS TO SILENCE TRADE UNION LEADER

Another example of a seriously flawed criminal conviction occurred just over two months earlier, when the trial court convicted trade union leader Sous Chantha of drug distribution after an arrest and trial fraught with errors and blatantly unreliable testimony.



*Chantha leaves the court after his trial and conviction in June 2011 Photo by: LICADHO*

The trial began just after 9 am on June 24, 2011. By 11 am, it was over. Around 11:30, following another unrelated trial, the judge read a lengthy verdict finding Chantha guilty and sentencing him to 10 months in prison.

Evidence presented at trial established that Chantha’s arrest occurred during his drive home from the factory, just a couple of hours after he had announced plans to shift the 1,000 members of his union from the factory-supported Independent & Democratic Union Federation (IDUF) to the worker-led Coalition of Cambodia Apparel Workers Democratic Union (C-CAWDU). Two military policemen followed Chantha as he left the factory.

He soon saw two military policemen on motorbikes blocking the road in front of him. Other than the two that were following him and the two blocking his path, there were no other policemen and no signs of an official roadblock or of traffic control lights. A witness at trial confirmed that there was no police roadblock. The police report and testimony at trial, however, insisted that Chantha was stopped at an official roadblock.

When the police forced Chantha to stop, more military police arrived in a Lexus – not in a marked police vehicle. An officer pointed at Chantha’s motorbike’s seat. As he unlocked it, an officer pulled at Chantha’s shirt to get him away from the motorbike. There were many

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police officers crowding around Chantha's bike at this time. As Chantha was taken away from the motorbike, he couldn't see the vehicle for a while.

When the officers took him back to the bike, they showed him the inside of the seat. On the side of the battery, in the open area of the compartment, he could make out the edge of some plastic. He indicated in court that what he saw was about the size of his thumbnail. But he did not see any powder, pills or other substances. Chantha was then placed inside the Lexus and driven to the police station. An officer drove Chantha's motorbike to the station.

Not one police officer involved in Chantha's arrest came to court to testify. The only police witnesses were two men from the Municipal Station who eventually tested the drugs. They did not witness the search or arrest. They stated that they had received the drugs to be tested from the District military police unpackaged: they received only powder wrapped in plastic.

The defense attorneys noted that under Article 38, a drug distribution charge requires evidence of or from a buyer. The prosecutor acknowledged the lack of any such evidence, but made a cryptic statement about how perhaps Chantha distributed "to himself." The prosecutor also stated that the large amount of drugs found, supposedly nine packets, was enough to indicate his intent to distribute. The law did not provide for this assumption, however.

Finally, the attorneys noted that it is the usual practice for District police to inform the Municipal Police before setting up a roadblock. The officers gave no advance notice of their supposed roadblock here, however. The Municipal police testified that they only learned about the roadblock from reading Chantha's police report. With no evidence that an official roadblock had occurred, there is no indication that the police officers properly stopped and searched Chantha's motorbike, and the likelihood that the arrest was a setup is even greater.<sup>10</sup>

None of these procedural issues or gaping evidentiary holes made an impression on the frequently distracted and disengaged judge. Very shortly following the trial, he read out a lengthy, typed guilty verdict to the crowded courtroom. Since Chantha had already served over seven months of his ten month sentence in pre-trial detention, he was released that day.<sup>11</sup> It is, however, important to note that the erroneous conviction has serious implications for his future. If convicted of any additional offenses, he will suffer more severe penalties.

Perhaps more importantly, under the current draft of the Trade Union Law, Chantha would be barred from future trade union leadership roles.

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<sup>10</sup> See Code of Criminal Procedure, Articles 113, 91 and 92, setting out conditions on conducting searches and confiscating objects. Articles 109 and 117 provide that the rules are mandatory, and that the proceedings are null and void if the procedures are not followed. There was no evidence presented at trial that spoke to compliance with these laws.

<sup>11</sup> Under Code of Criminal Procedure Article 208, pre-trial detention must not last longer than six months.

## LEGAL FRAMEWORK FOR EXPRESSIVE RIGHTS IN CAMBODIA

On paper, the Cambodian Constitution provides a strong legal framework for the protection of fundamental expressive rights. The Constitution creates a specific hierarchy of laws, and expressly incorporates all of the human rights instruments that Cambodia has ratified.<sup>12</sup>

### Hierarchy of Law: Guaranteeing Free Speech, Association and Assembly

**Cambodia's Constitution:  
The Supreme Law of the Land**

- Article 31: The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights.
- Article 39: Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts.
- Article 41: Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to effect the good traditions of the society, to violate public law and order and national security.
- Article 42: Khmer Citizens shall have the right to establish associations and political parties. These rights shall be determined by law. Khmer citizens may take part in mass organizations for mutual benefit to protect national achievement and social order.

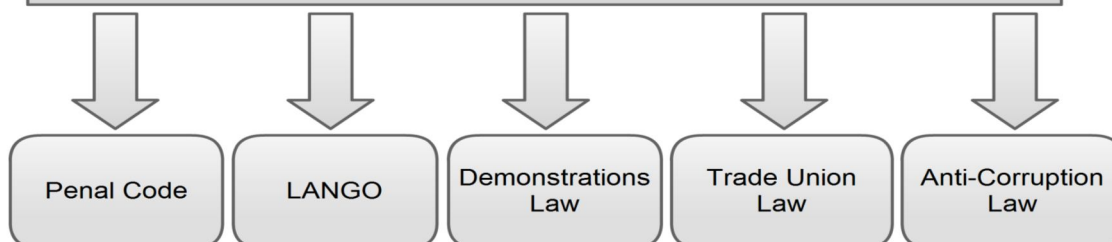


**International Covenant on Civil and Political Rights (ICCPR)  
Incorporated into Cambodian Law By Constitution**

Article 19: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (1) For the respect of the rights or reputation of others; (b) For the protection of national security or of public order, or of public health or morals.

Article 21: The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22: (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.



<sup>12</sup> As affirmed by a July 10, 2007 decision of the Constitutional Council.

Every court is thus charged with independently considering the constitutionality of the laws as applied in the case before them, as well their consistency with Cambodia's international commitments to expressive rights.

Those commitments require that laws placing limits on expression "must conform to the strict tests of necessity and proportionality."<sup>13</sup> In other words, a limitation on free speech must be absolutely necessary, and there must be no viable alternatives, before it becomes permissible. Prohibiting a demonstration due to the likelihood of some traffic congestion, for example, is not a necessary limitation, because there are alternatives such as re-routing vehicles and using traffic police. The limitation must also be proportional. A ban on an entire website or the closure of a newspaper, for example, would not be proportional to the publication of a few offensive articles, even if those articles are proven to pose a threat to public order.

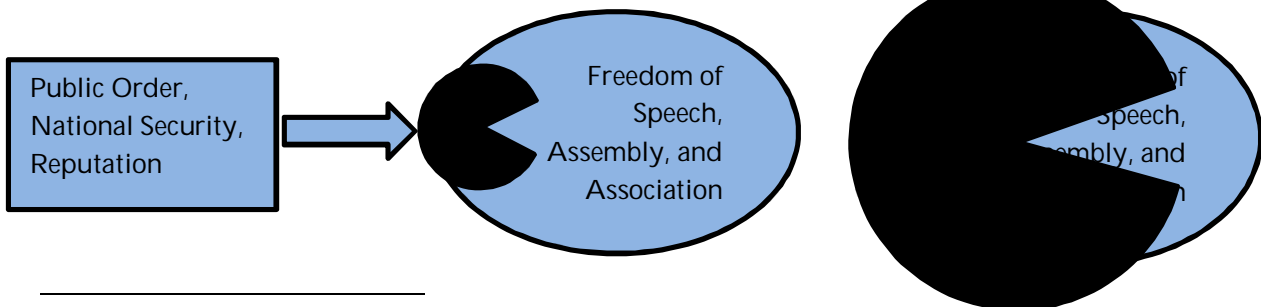
"When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."

— UN Human Rights Committee, General Comment 34, July 2011

When the principles of necessity and proportionality are ignored, the laws limiting free speech threaten to eliminate the right altogether. As noted in General Comment 34 by the UN's Human Rights Committee, released on July 21, 2011: "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself."<sup>14</sup>

Limitations on free speech, assembly and association must thus be specific, clear and narrowly applied. Independent constitutional analysis of legislation affecting fundamental rights must also be easily accessible. Currently, where a party to a legal proceeding believes that a court decision or law as applied in that proceeding is unconstitutional, that citizen can petition the lower court to submit a complaint to the Supreme Court. The Supreme Court may then forward the complaint to the Constitutional Council. In reality, there is little to no possibility of independent review in this fashion.<sup>15</sup>

### Exceptions to Free Speech Cannot Swallow the Right



<sup>13</sup> General Comment 34, UN Human Rights Committee, page 7, available at <http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

<sup>14</sup> *Id.* at page 6.

<sup>15</sup> There are also other mechanisms by which the Constitutional Council may be called upon to evaluate a law. A citizen who wishes to make a complaint may also attempt to get the King, the Prime Minister, the President of the Senate, the President of the National Assembly, one tenth of Cambodia's MPs or one quarter of its Senators to request that the Council adjudicate the case. As with the interlocutory appeal described above, this avenue's requirements are nearly insurmountable.

## PENAL CODE

The substantive provisions of Cambodia's new Penal Code came into force in December 2010. These provisions contain over two dozen articles that are insufficiently clear, carry inadequate limitations and harsh penalties, and have the overall effect of undermining expressive and associative rights.

### Provisions Restricting Speech

Defamation remains a crime under the new Penal Code, despite the Prime Minister's assurances, back in 2006, of the government's intent to decriminalize the offense.<sup>16</sup> Carrying a hefty 10 million riel potential fine (US\$2,500), it remains a powerful tool for threatening villagers, local representatives, and activists. This is particularly true because Cambodia's Code of Criminal Procedure continues to allow for lengthy incarceration if an individual is unable to pay the fines.

More critically, the new law criminalizes defamation of institutions, not just people. This expansion is particularly troubling given the broad interpretation of defamation that the government has employed in the past, and for its potential impact on local or informal groups who are critical of abusive conduct undertaken by government institutions.<sup>17</sup>

The new Penal Code also does not provide for any of the defenses to defamation required under the ICCPR Article 19. As elaborated on by the UN Human Rights Committee in its General Comment 34:

"Defamation laws must be crafted with care to ensure that they comply with [ICCPR Article 19] paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognised as a defence."<sup>18</sup>

But defamation is just the tip of the iceberg. The Penal Code includes many more provisions outlawing critical speech, a number of which can result in hefty fines and lengthy prison sentences. These "crimes" are rarely defined in the code beyond their generic and often misleading titles, and fail to provide for reasonable defenses, as shown in the table below:

<sup>16</sup> Yun Samean, *Hun Sen: Defamation Should Be Decriminalized*, The Cambodia Daily, February 15, 2006.

<sup>17</sup> The law's failure to define the term "institution" also raises many more questions. Criticism of the ruling party, for example, may conceivably fall within its purview, though it is difficult to see how such criticism could possibly threaten public order, or be properly subject to criminal penalties.

<sup>18</sup> UN Human Rights Committee General Comment 34, page 14, July 21, 2011.

**Forbidden Speech**

<b>Crime</b>	<b>The Law</b>	<b>Penalty</b>	<b>Article(s)</b>	<b>Notes</b>
<b>Defamation</b>	Any words uttered in a public place or public meeting, or written documents or pictures of any type released or displayed to the public, or any audio-visual communication intended for the public, which convey any allegation or charge made in bad faith which tends to injure the honor or reputation of a person or an institution.	Fine: 100,000 to 10 million riel	305	LICADHO believes defamation should not be a criminal offense, and this provision should be repealed.
<b>Insult</b>	Any outrageous expression, term of contempt, or any invective that does not involve any imputation of fact.	Fine: 100,000 to 10 million riel	307	LICADHO believes this provision should be repealed.
<b>Incitement to Commit a Felony</b> [often referred to as criminal incitement]	Speech of any kind, made in a public place or meeting; or writing or picture of any kind, either displayed or distributed to the public; or any audio-visual communication to the public, when it directly incites one to commit a felony or to disturb public stability/security, where the incitement is ineffective.	Imprisonment: 6 months to 2 years Fine: 1 million to 4 million riel	494 495	LICADHO believes this law should be strictly limited to incitement to commit specific serious crimes. The law should also require some action beyond speech before imposing criminal liabilities.
<b>Incitement to Discriminate</b>	Speech of any kind, made in a public place or meeting; or writing or picture of any kind, either displayed or distributed to the public; or any audio-visual communication to the public, when it discriminates, or is malicious or violent against a person or a group of persons because of their membership or non-membership in a particular ethnicity, nationality, race or religion, and where the incitement was ineffective.	Imprisonment: 1 to 3 years Fine: 2 million to 6 million riel	494 496	LICADHO believes the terms incitement and public stability/security must be narrowly defined in the law.



<b>Offense Against State Authorities</b>	Direct incitement to obstruction of public officials.	Imprisonment: 1 day to 1 month  Fine: 1,000 to 100,000 riel	505	LICADHO believes this provision should be repealed.
<b>Offense Against State Authorities: Insult</b>	Words, gestures, written documents, pictures or objects liable to undermine the dignity of a person, addressed to public official or holder of public elected office who is acting in the discharge of duties or in relation to that office.	Imprisonment: 1 to 6 days  Fine: 1,000 to 100,000 riel	502	LICADHO believes this provision should be repealed.
<b>Intimidation of public official</b>	Intimidating a public official or a holder of public elected office to: 1) perform an act pertaining to his or her function; 2) refrain from performing an act pertaining to his or her function; 3) use his or her real or supposed influence with a view to obtaining public tenders, emblem or any other favorable decision.  Legal entities may be found criminally responsible for this offense.	Imprisonment: 2 to 5 years  Fine: 4 million to 10 million riel  Fine: 10 million to 50 million riel. Several other penalties can also apply, including dissolution and placement under judicial supervision.	607  625	LICADHO believes this provision should be repealed.
<b>Malicious denunciation</b>	A denunciation of a fact, which is known to be false and liable to causing criminal or disciplinary sanctions, if it is sent to: 1) a competent authority to take action, including judges, judicial police officers or an employer; or 2) any person having the power to refer it to the competent authority.	Imprisonment: 1 month to 1 year  Fine: 100,000 to 2 million riel.	311 312	LICADHO believes that paragraph (1) should be revised, and should include a definition of malicious in the law. Paragraph (2) should be deleted.

<b>Breach of Professional Secrecy</b>	Any person who, by reason of his or her position or profession, or his or her duties or mission, is entrusted with secret information, shall be punished if he or she discloses such information to a person not qualified to receive the information. There shall be no offence if the law authorizes or imposes the disclosure of the secret.	Imprisonment: 1 month to 1 year Fine: 100,000 to 2 million riel	314	LICADHO believes this provision should be repealed. Criminal penalties should not attach to private speech related to undefined "secrets."
<b>Threat to cause damage</b>	The threat to cause any destruction, defacement or damage shall be punishable if it is repeated, or if it is put in material form by writing, pictures or other objects.	Imprisonment: 1 month to 6 months Fine: 100,000 to 1 million riel	423	LICADHO believes this provision should be repealed. A mere attenuated threat to property should not carry criminal penalties.
	The threat to cause any destruction, defacement or damage, if it is accompanied by an order to perform or not to perform an act.	Imprisonment: 1 to 2 years Fine: 2 million to 4 million riel	424	LICADHO believes this provision should be repealed. A mere attenuated threat to damage property should not carry criminal penalties.
<b>Threats</b>	A threat to commit a felony or a misdemeanor against persons, if it is repeated, or made by means of a written document, image or any kind of object.	Imprisonment: 1 to 6 months Fine: 100,000 to 1 million riel	231	LICADHO believes this provision should be repealed.

<b>Taking advantage of vulnerable person</b>	Knowingly taking advantage of the ignorance or weakness of a person who is particularly vulnerable by reason of his or her age, pregnancy, or disability by compelling him or her to commit an act or not to commit an act to his or her grave prejudice.	Imprisonment: 1 month to 1 year  Fine: 100,000 to 2 million riel	383	LICADHO believes the vague language in this provision is overly susceptible to abuse and lacks the requisite legal certainty for criminal provisions. "Taking advantage of" and "compelling" one to commit or not commit an act should be defined in the law.
<b>Instigation<sup>19</sup></b>	An instigator is any person who: 1) gives instructions or orders to commit a felony or misdemeanor; or 2) provokes the commission of a felony or misdemeanor by means of a gift, promise, threat, instigation, persuasion or abuse of authority or power. Only punishable if crime was committed or attempted.	Incur same penalties as perpetrator	28	LICADHO believes this provision should be revised. Provoking the commission of a crime through persuasion is too vague and broad.

<sup>19</sup> While instigation, like attempt or conspiracy, is not a stand-alone crime, its broad definition under the Penal Code implicates significant freedom of expression concerns and thus bears mention here.

As of the writing of this report, the government's go-to charge appears to be the one with arguably the most unnecessary and disproportionate penalties — incitement. Incitement is defined in the broadest possible sense, as virtually any form of communication that seeks to encourage the commission of any felony, or disturb the public security, or discriminate on the basis of ethnicity, nationality, race or religion.<sup>20</sup> The provision has already been applied to a variety of peaceful expressive conduct, as shown below.

#### INCITEMENT CASE STUDY: PRINTING AND SHARING CONTROVERSIAL BLOG POSTS WITH CO-WORKERS LEADS TO SIX MONTHS IN PRISON

Just weeks after the Penal Code entered into force, the government put its new powers to work and arrested Seng Kunnakar, a logistics officer with the United Nations World Food Programme (WFP). Kunnakar had printed and shared materials found on KI Media, an internet site dedicated to aggregating news articles and opinions on Cambodia, including material critical of its government. Shortly before his arrest, WFP had been cited as saying that Cambodia was at risk of food insecurity.

"The threat from incitement will drive newsmakers to be fearful and discouraged from performing their professional roles, and sometimes they will lose their position as reporters.... There is less and less freedom for the news."

- Joint Statement by 40  
Cambodian journalists, issued  
July 3, 2011.

Arrested on a Friday before noon, Kunnakar spent two nights in custody before the Phnom Penh Municipal Court took the unusual step of convening of a Sunday morning. After a brief trial, the court convicted Kunnakar of incitement under the new Penal Code. He received a sentence of six months in prison and a fine of 1 million riels (US\$244).

Instead of downplaying or somehow justifying Kunnakar's outrageous sentence, the government vigorously defended the conviction and made further threats in the media. According to the Phnom Penh Post, for example, Council of Ministers spokesman Phay Siphon stated: "He deserves to be in jail. ... Do you want to be in jail too? If you want to be in jail, do like him, and we'll put you in jail right away."<sup>21</sup>

Cambodia's information minister, Khieu Kanharith, put the conviction into a larger context, saying: "Before, using the argument of 'freedom of expression' and opposition party status, some people could insult anybody or any institution. This is not the case now."<sup>22</sup>

In January and February 2011, the KI Media website was also blocked by several Internet Service Providers (ISPs), upon the request of a government official.<sup>23</sup> While some ISPs have since unblocked the site, other providers have continued the censorship.

<sup>20</sup> The French criminal code, on which Cambodia's code is based, does not criminalize incitement in such broad terms. In France, there are provisions forbidding the incitement of a few specific serious crimes, not generically of any crime whatsoever. This is a significant departure by Cambodia that undermines any arguments asserting that Cambodia's criminal laws are somehow less harsh than France's.

<sup>21</sup> *UN employee walks free*, Thomas Miller and Tep Nimol, Phnom Penh Post, June 21, 2011.

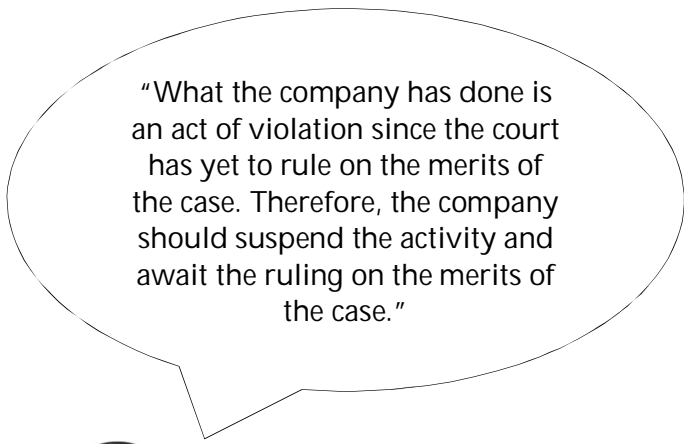
<sup>22</sup> *Cambodia: New Penal Code Undercuts Free Speech, Man Jailed for Sharing Web Articles With Co-Workers*, December 23, 2010, Human Rights Watch, available at <http://www.hrw.org/en/news/2010/12/22/cambodia-new-penal-code-undercuts-free-speech> (last accessed August 16, 2011).

<sup>23</sup> In early February, two e-mails surfaced showing that a Ministry of Posts and Telecommunications official had asked some ISPs to block the site. See *E-mails Point to Collusion in Gov't Censorship*, The Cambodia Daily, February 18, 2011.

### DEFAMATION CASE STUDY: CONVICTIONS CONTINUE

In January 2011, the Kampong Chhnang provincial court convicted Sam Chankea, provincial coordinator for the human rights group Adhoc, of defamation for a statement he made during an interview with Radio Free Asia in 2009 about a land dispute.<sup>24</sup> The court fined Sam Chankea 1 million riel (US\$247) and ordered him to pay 3 million riel in compensation to the company, or face prison time.

The offending comments could not have been more innocuous, or more revealing about the intent behind the criminal defamation charge.<sup>25</sup>



Court verdict: Defamation

### INCITEMENT AND DEFAMATION CASE STUDY: CRITICAL SPEECH CONVICTIONS MOUNT FOR OPPOSITION PARTY LEADER SAM RAINSY

Opposition party leader Sam Rainsy's most recent conviction in April 2011 offers another chilling illustration of how the new Penal Code provisions can be used to silence critical voices. Rainsy received a two-year jail term on charges of defamation and inciting discrimination, albeit under the former criminal code.

When he delivered the verdict, the judge told the court that Sam Rainsy's comments had tarnished not only the reputation of the individual who filed the lawsuit, but also the reputation of the Cambodian Government. He said an additional charge of inciting discrimination had been added because of the public nature of the remarks.<sup>26</sup>

### SERVING TIME FOR DISTRIBUTING POLITICAL LEAFLETS

The promulgation of the new Penal Code has also already resulted in an increase in prosecutions related to political leaflet distribution. In February, the government began a well-publicized manhunt for four men accused of this "crime." The manhunt announcement came the week after seven publicized arrests of men accused of being subordinates in a widespread leaflet distribution ring led by individuals identified as Khmer Krom "ringleaders."<sup>27</sup>

On August 4, 2011, five men in their twenties (Phon Sam Ath, 26, So Khemarak, 25, Ngor Menghong, 21, Eang Samorn, 23, and Chem Bol, 27) received lengthy prison sentences for allegedly distributing leaflets accusing Prime Minister Hun Sen of selling land to foreign countries. Though the men denied the charge, the court found them guilty of "inciting the people to commit serious crimes against Prime Minister Hun Sen and the Royal Government

<sup>24</sup> *Civil society urges review of defamation*, May Titthara, Phnom Penh Post, January 27, 2011.

<sup>25</sup> Local resident Reach Seima was convicted of disinformation in a related case the week before. See footnote 20.

<sup>26</sup> Sam Rainsy now faces a total of 11 years in prison as a result of three separate convictions. His longest sentence, ten years, was handed down last year, after he was convicted in a pair of cases related to a protest he organized in 2009 against alleged Vietnamese encroachment. That sentence was reduced to 7 years in September 2011.

<sup>27</sup> *Leaflet suspects identified*, Phak Seangly, Phnom Penh Post, February 3, 2011; LICADHO internal documents.

of Cambodia.”<sup>28</sup> Two of the men received two year sentences, and the other three received 18 months. The court fined all five men 2 million riel (US\$487).

In total, twelve Cambodians are currently jailed in relation to the distribution of political leaflets. All of them are accused of incitement under the new Penal Code.<sup>29</sup>

### Speech Related to the Judicial Process

The Penal Code contains several provisions intended to improperly shield the judiciary from criticism, and to stifle the speech of those participating in the legal system. Article 522, for example, forbids publishing remarks about a case before a final judicial decision, where the commentary is intended to influence the court determining the complaint. The publication of such “commentaries” could lead to a one to six month long prison sentence, and facing a fine from 100,000 to 1 million riel. Under Article 523, a person can face the same prison sentence for criticizing a judicial letter or decision, if that criticism is aimed at disturbing public order or endangering “an institution of the Kingdom of Cambodia.” Neither provision indicates why such a blanket prohibition on critical speech is necessary to protect public order or national security. Nevertheless, a top Ministry of Justice official has stated that the public can expect to see a lot more of the laws against criticizing court verdicts over the next two years.<sup>30</sup>

Several other articles provide steep penalties for speech made in connection with judicial proceedings and related situations, as shown in the table below. LICADHO believes that, with the exception of the final provision listed, these provisions must be repealed because they are not necessary or proportional limitations on the right to freedom of expression.

Crime	The Law	Penalties	Article(s)
<b>Published commentary intending to coerce judicial authority</b>	The publication, prior to the pronouncement of a final judicial decision of commentaries intending to put pressure on the court determining the complaint, in order to influence its judicial decision.	Imprisonment: 1 month to 6 months  Fine: 100,000 to 1 million riel	522
<b>Discrediting a judicial decision</b>	Criticizing a judicial letter or decision aimed at disturbing public order or endangering an institution of the Kingdom of Cambodia.	Imprisonment: 1 month to 6 months  Fine: 100,000 to 1 million riel	523
<b>False denunciation to judicial authority</b>	Statements made to a judicial or administrative authority of a fact constituting an offence, where it leads to a frivolous investigation.	Imprisonment: 1 month to 6 months  Fine: 100,000 to 1 million riel	524

<sup>28</sup> *Anti-government group imprisoned*, Buth Reaksmeay Kongkea, Phnom Penh Post, August 5, 2011.

<sup>29</sup> Of course, as noted earlier, Sokchouen was first convicted under UNTAC for disinformation. His sentence was upheld under a different crime in the new Penal Code.

<sup>30</sup> Remarks by HE. Mr. Chhith Sarith, Under-Secretary of State of Ministry of Justice, at Workshop on Laws and Freedom of Expression, held September 16, 2011.

<b>Coerced publication of commentary intending to influence a witness</b>	Coerced publication, prior to the pronouncement of the final judicial decision, of commentaries intended to influence the statement of a witness.	Imprisonment: 6 days to 1 month  Fine: 10,000 to 100,000 riel	549
<b>Inducing inaccurate attestations or certificates</b>	Making offers, gifts, promises or interests of any kind to another person to produce an attestation or certificate stating facts that are materially inaccurate. [LICADHO believes this provision should be revised and narrowed. "Interests of any kind" is too vague and broad.]	Imprisonment: 1 to 3 years  Fine: 2 million to 6 million riel	638
	Legal entities may be found criminally responsible for this offence.	Fine: 10 million to 100 million riel. Dissolution or placement under judicial supervision.	644

### Criminal Prosecution of Legal Entities

Under the new Penal Code, legal entities can be held criminally responsible where expressly provided by the law. Two of the above highlighted charges can be brought against legal entities: intimidating a public official or a holder of public elected office (Article 607), and inducing inaccurate attestations or certificates (Article 639). It is not a stretch to see how the government could choose to interpret either of these vague yet serious provisions in the same broad fashion as it has wielded defamation and incitement charges in the past.

In August 2011, two newspapers - The Water & Fire News and The World News - were shut down permanently by the government. The government stated it had revoked their publishing licenses because of a perceived insult to the Ministry of Information.



*A Boeung Kak Lake protestor is led away by police  
Photo by: LICADHO*

Indeed, the government appears to have already begun testing these waters. On July 7, 2011, in an attempt to justify the arrest and detention of two community representatives from Boeung Kak Lake following a protest, Phnom Penh City Hall issued a statement on its website accusing the lakeside residents of pressuring municipal authorities.<sup>31</sup> That language bears an eerie resemblance to Article 607's prohibitions, described above.

Pressuring authorities is what community representatives are supposed do when their constituents are being harmed. That it would be cited as the justification for arrests is an

<sup>31</sup> Villagers scuffle with police over Boeung Kak, Chhay Channyda, Phnom Penh Post, July 8, 2011.

alarming indication of the potential scope of the Penal Code's provisions implicating free speech.

Also of note here are the detailed penalty provisions that apply to legal entities. In contrast to the LANGO, discussed later in this report, the Penal Code provides more detail on the procedure and other requirements that must be met before penalties may be imposed on legal entities. For example, the law requires that a court pronounce the penalty, and that the legal entity be brought before the court before dissolution. A court must also specify which activities are prohibited when ordering a permanent or temporary suspension.<sup>32</sup>

While legal entities should be held accountable for crimes committed by the organization, there must be some nexus between the activity and the organizational form to justify criminal penalties. Moreover, the Penal Code must provide entities with the clarity and specificity to guide their behavior – a clarity that is entirely lacking as of now.

#### CASE STUDY: NGO ACCUSED OF INCITEMENT AFTER BASELESS SUSPENSION

On August 4, 2011, a well-respected local NGO, Sahmakum Teang Tnaut (STT), received a letter from Ministry of Interior (MOI). The letter demanded that STT suspend its activities from August 1 until Dec. 31, 2011, a period of five months.

The letter offered no legal basis for the suspension. It simply accused STT of failing to modify its leadership structure and revise its statute "according to the instruction of a specialized department." There was no further explanation, and the lengthy five month time period appeared entirely arbitrary. STT's efforts to seek clarification of the legal basis from MOI were met with silence.

There were clues as to why MOI suspended STT, however. For one, the letter came soon after STT released a credible report that used objectively quantifiable data to show the dislocation of urban poor communities that would occur as a result of the government's railway redevelopment project.<sup>33</sup>

Civil society responded quickly to this new threat, immediately issuing a joint statement endorsed by civil society groups condemning the suspension as baseless. In response to the swift outcry, the government backed off of its technical justification for the suspension and made multiple statements virtually admitting that the suspension was politically motivated.

In a statement signed by an MOI spokesman, the government claimed that STT had incited villagers set to be displaced by the railway project: "The STT has acted [by] inciting villagers in Kampot province and in Phnom Penh to protest [against] the government development plan, aiming to do whatever [it can] to make the development partners of the government suspend or stop the national development plan for restoring the railway."<sup>34</sup> MOI also issued formal warning letters to two other organizations that study the impact of the railway development plan.<sup>35</sup>

<sup>32</sup> See Penal Code Articles 18, 42, 167-182.

<sup>33</sup> [http://teangtnaut.org/PDF/Rehabilitation%20of%20Cambodias%20Railways\\_STT%20July%202011.pdf](http://teangtnaut.org/PDF/Rehabilitation%20of%20Cambodias%20Railways_STT%20July%202011.pdf)

<sup>34</sup> *NGO 'incitement'*, Vong Sokheng and Mary Kozlovski, Phnom Penh Post, August 15, 2011.

<sup>35</sup> The Penal Code does not permit legal entities to be charged with incitement. No incitement charges have yet been filed in relation to this incident.



Besides the obvious threat to free expression and healthy discourse between government and civil society posed by the government's actions towards STT and the other organizations involved, this event shows the government's intent to use new legislation to silence critics.

According to Freedom House's 2011 Freedom of the Press report, Cambodia's 2010 press freedom ranking dropped to 141 out of 196 countries and territories rated, compared with a ranking of 134 for 2009. The report describes Cambodia as "not free."

### **Taking Photographs or Recording Conversations Could Result in Up To a Year in Prison**

Two final provisions in the new Penal Code bear noting – Article 302's prohibiting on taking photographs without consent in a private place, and Article 301's criminalization of recording private or confidential conversations. Each "crime" carries a prison sentence of one month to one year, and a fine from 100,000 to 2 million riel. Both provisions

specify that consent is presumed if the subject is notified of the recording and does not object, but many questions remain. What is a private place, for example?

Photographs are a powerful tool for civil society to document and rectify abuses. Other countries with similar provisions have abused them by prosecuting human rights defenders. It remains to be seen whether Cambodia will follow in their footsteps, but there have been indications of intent to do so.

At the end of a press conference in January 2011, for example, the government's anti-corruption head, Om Yentieng, ordered his staff to confiscate reporters' voice recorders. During the question-and-answer period at the end of the junket, a Cambodia Daily reporter had asked questions about information contained in recently obtained U.S. Federal Bureau of Investigation files regarding the 1997 grenade attack against opposition activists.

*"We see a lot of things like [the confiscation of recorders] and they have never been prosecuted. It shows that the system here is an undemocratic system, a kind of authoritarian system."  
– Pa Nguon Teang, director of the Cambodian Centre for Independent Media*

The reporter was threatened with a court complaint by Om Yentieng, who suddenly claimed that his voice had been recorded without permission. After the Overseas Press Club of Cambodia criticized the confiscation, pointing out that the incident violated Cambodia's Press Law, a Council of Ministers spokesman apparently attempted to justify it by calling the question an "insult."<sup>36</sup>

That same month, police detained a Phnom Penh Post photographer and deleted his photos. The photographer had been taking pictures of an eviction at Boeung Kak Lake.<sup>37</sup>

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<sup>36</sup> *Press group expresses concern*, Thomas Miller, Phnom Penh Post, January 24, 2011.

<sup>37</sup> *Id.*

## THE LAW ON ASSOCIATIONS AND NGOS

On July 29, 2011, the government released a third draft of its widely criticized Law on Associations and Non-Governmental Organizations (LANGO), once again claiming that the newest draft addresses the litany of concerns raised by civil society. One needs look no further than the first chapter of the law, however, to discredit the government's reassurances.

### All groups will be required to register

In the first chapter, the draft law states that associations and NGOs, defined in the broadest possible sense, will not be permitted to operate unless and until complex registration applications have been formally approved by the government. The approval process is opaque and lengthy, and the law contains little to limit the power of officials tasked with reviewing applications. It will allow the government to deny or delay registration for arbitrary and politically-motivated reasons, while hiding behind a façade of bureaucratic legitimacy.

Criticism against the draft LANGO has focused, rightfully, on the fact that the law requires all associations and NGOs to register, and that the registration process lacks safeguards and transparency. A quick look at the bigger picture, however, reveals a more fundamental flaw. The draft law does not only mandates registration, it defines associations and NGOs in the broadest possible sense – as groups of citizens working in their own members' or the public's interest. As such, the law not only requires NGOs to register – it requires all groups, even informal ones, to register with the government before acting. More accurately, the law should be described as a ban on group activities prior to the successful completion of a complex, opaque registration process.

"We respect the local and international NGOs whose activities serve humanity and help the government of Cambodia ... They will not be threatened by this draft law. But we believe that some NGOs whose activities seem to serve the opposition party will be afraid of it."

– Prime Minister Hun Sen, making no effort to hide the intent behind the draft law in March 2010. (See *Cambodia's proposed NGO law stirs suspicion and concern*, Altnet, Thini Win, March 5, 2010.)

### The Draft Law's Unusual Registration Requirement (3<sup>rd</sup> draft)

- Article 6 of the draft law provides that any association or NGO which is not registered or has not signed a Memorandum with the government "may not conduct activities as an association or non-governmental organization in the Kingdom of Cambodia."
- Article 4 defines associations and NGOs so broadly that Article 6 becomes a complete ban on any activity conducted by virtually any unregistered group of people.
- Under Article 4, an association is: "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." An NGO has the same definition under Article 4, but is only intended to work for the interest of the public, not its members.
- There is no language exempting any groups or informal associations from the registration requirements, and no explanation of the obvious overlap between these vague definitions or of the nature of the ban on activities.

It is not a controversial point that prohibiting any activities by all broadly defined associations and organizations unless they are officially registered violates freedom of expression and association. Most countries' registration laws do not expressly state that registration is voluntary because it is obvious that requiring all groups to seek advance government approval violates free speech. Rather, most registration schemes are clearly aimed at setting up the manner in which organizations can reap the benefits of registration, such as substantial tax incentives.

It is important to note, however, that not all countries with developing legal systems have imposed mandatory registration on NGOs and associations. Many expressly assure the right

"NGOs are out of control...they insult the government just to ensure their financial survival."

Prime Minister Hun Sun in a 2008 speech, while discussing the need for an NGO Law. In the same speech, he also stated that the law was necessary because "he feared terrorists might settle in the kingdom under the guise of NGOs." (See *New Cambodia Laws May Curb NGO Activity*, The Irradawy, Andrew Nette, December 15, 2008.)

to organize without advance government approval, in accordance with their international commitments to protect fundamental expressive freedoms. Albania's detailed scheme, for example, provides that "[e]veryone has the right to collective organization without needing to register this as a non-profit organization."<sup>38</sup> Armenia's law states that "state registration ... does not impede the person's right to form associations ... or acts through the associations without state registration."<sup>39</sup> And Kyrgyzstan's law states that "[a] non-commercial organization can be created with or without registration as a legal entity in a form of a public association, foundation or institution."<sup>40</sup>

The list of countries that do include mandatory registration provisions in their associations and organizational laws is also telling, as is the fact that all of them faced substantial criticism when promulgating their laws. That list, which Cambodia is set to join, includes Uganda, Ethiopia, Sierra Leone, Algeria, Zambia, China and Afghanistan.

### Opaque appeals process

The draft law's limited appeals process for denied applications is also problematic. The appeals provisions, like those describing registration approval, fail to establish any objective guidelines for decision-makers to follow. Moreover, the law provides that appeals be evaluated by the same ministry that reviews the initial applications. Groups may then challenge a denial of registration in court, but that is of little solace given the political environment in Cambodia, and the typically lengthy appeals process. This is especially true given that the law does not provide temporary authorization for civil society groups to operate while registration applications or potentially lengthy appeals are pending. There is no reason why NGOs and associations should not be allowed to operate pending registration approval, as private companies do under Article 26 of the amended 1999 Law on Commercial Rules and Register.<sup>41</sup>

<sup>38</sup> Law on Non-Profit Organizations (Albania), 2001, Article 3.

<sup>39</sup> Law of the Republic of Armenia on Public Organizations, 2001, Article 3.

<sup>40</sup> Law on Non-Commercial Organizations (Kyrgyzstan), 1999, Article 6.

<sup>41</sup> It is also worth noting that the third draft of the LANGO reverts back to the 45 working day period - at least nine weeks if there are no holidays - for the government to accept or reject the registration application of an association or NGO. The second draft specified a time period of 90 days. This revision is positive, but it is still far too long in light of the law's express ban on activities by unregistered groups. Depending on national holidays, this timeline could be extended to over three months during the latter part of the year.

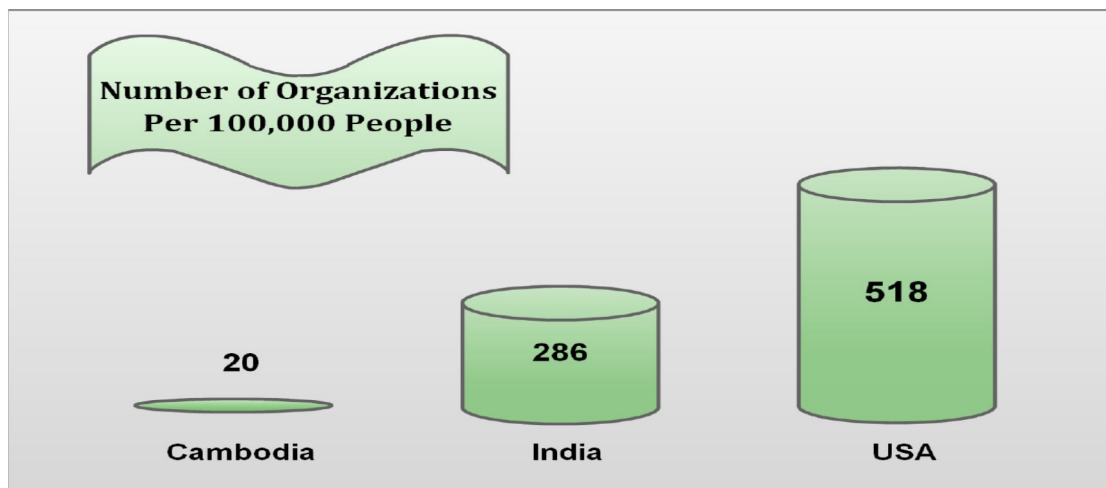
**There is no need for the law**



The government has most recently sought to justify and gain sympathy for the draft law by claiming that Cambodia's civil society sector must be regulated. Cambodian law, however, already provides for adequate regulation of both foreign and domestic not-for-profit entities. Articles 46-118 of Cambodia's Civil Code, set to enter into force at the end of November 2011, together with additional provisions in the Law on Implementation of the Civil Code, provide a detailed registration scheme, including requirements for the formation and registration of organizations and associations and provisions governing their management, dissolution, and liquidation.<sup>42</sup>

Another justification, presented through a frequently decried statistic – that Cambodia has up to 3,000 NGOs – also merits a deeper look. First, there is no reason to believe this estimate is accurate, and it is unverifiable. Second, even if this number is a good approximation, it does not reflect a glut of NGOs in Cambodia in comparison to other countries. India, for example, has an estimated 3.3 million civil society organizations, or one for around every 350-400 citizens, according to reports.<sup>43</sup> The United States has an even greater number of organizations per capita. More than 1.6 million non-profit organizations were registered with the United States Internal Revenue Service in 2011. That works out to approximately one organization for every 200 Americans.<sup>44</sup>

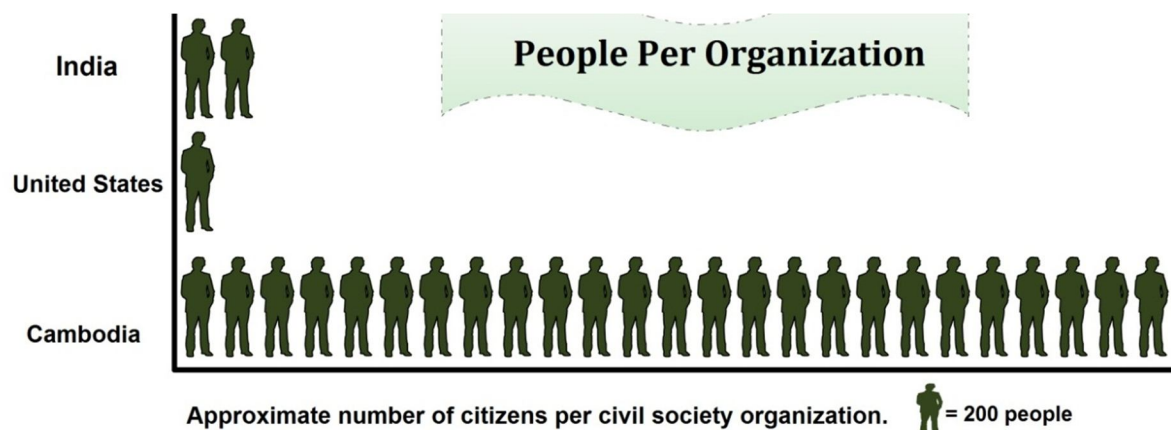
Even assuming the 3,000 organizations estimate is accurate, Cambodia, by contrast, has approximately one per 5,000 citizens. The U.S. thus has about 26 times more organizations than Cambodia.



<sup>42</sup> The Civil Code was promulgated by the Royal Kram No. NS/RKM/1207/030 on December 8, 2007. However, the Civil Code requires an implementation law to come into effect (Article 1305). The Law on Implementation of the Civil Code was promulgated by the Royal Kram SN/RKM/0511/077 on May 31, 2011. The implementation law provides that it will be effective November 31, 2011, six months from the date of promulgation.

<sup>43</sup> See *First official estimate: An NGO for every 400 people in India*, Indian Express, July 7, 2010 available at <http://www.indianexpress.com/news/first-official-estimate-an-ngo-for-every-400-people-in-india/643302/>.

<sup>44</sup> According to the U.S. National Center for Charitable Statistics, data available at <http://nccs.urban.org/statistics/quickfacts.cfm>. Associations and organizations do not have to register to operate in the United States. As such, this number, which reflects organizations who have filed documents related to their tax exempt status, is lower than the actual number of organizations in the U.S.



Moreover, associations and NGOs in Cambodia perform an impressively wide variety of activities, from providing health services and vocational training, to wildlife rescue and environmental conservation, to religious functions, to advocacy, monitoring and documentation of data related to a multitude of issues. There is no reason to believe that Cambodia’s NGOs are proliferating or operating to an extent that should require unusually restrictive regulation. There is simply no benign justification for this new legislation.

### The crackdown has already begun

With the suspension of STT, described earlier in this report, civil society has been offered a preview into the future of government control over organizations and associations under the draft law.

To the date of this writing, the government has still failed to provide a legal justification for such a severe penalty. Instead, the government issued formal warning letters to two other groups, publicly stated that STT’s suspension was related to the organization’s alleged “incitement” of communities affected by the country’s railway, and even asked STT for a public apology admitting its “mistake” and that it had “done wrong,” as a condition for being permitted to re-register.<sup>45</sup>

On September 21, 2011, reports of a letter from Deputy Prime Minister Keat Chun to Prime Minister Hun Sen surfaced. The letter reveals more about the reasons for STT’s suspension, and expressly shows the true intent behind the LANGO.<sup>46</sup> Dated June 17, 2011, Keat Chun’s letter refers to STT and another NGO, Bridges Across Borders Cambodia (BABC), by name, and denounces their criticisms of the railway development project. The letter also accuses “ignorant foreigners working in NGOs” of inciting the estimated 4,000 people affected by the railway project, and recommends that foreign NGOs be banned from performing any advocacy work in Cambodia. Foreigners who work for Cambodian NGOs that do advocacy work should not be allowed to do advocacy work, according to the letter. Finally, the letter urges that the Council of Ministers accelerate its review of the LANGO. Hun Sen appears to have approved the letter by signing it two days after its submission, on June 19th.

<sup>45</sup> *Interior Ministry Asks Suspended NGO for Public Mea Culpa*, Phorn Bopha and Zsombor Peter, The Cambodia Daily, August 30, 2011.

<sup>46</sup> *NGO Ban Questioned*, Vincent MacIsaac, Phnom Penh Post, September 21, 2011; *Letter Reveals Minister’s Ire With NGOs*, Zsombor Peter, The Cambodia Daily, September 21, 2011.

Although the real reason for STT's suspension has thus quickly become apparent, the disingenuous use of vague administrative technicalities to suspend an organization critical of the government is an alarming sign. It is clear that the Cambodian government intends to use the LANGO to curb the activities of all associations and NGOs that advocate for the rights of marginalized groups within Cambodian society.

#### CASE STUDY: NGO-LED WORKSHOP STOPPED TWICE BY ARMED POLICE

Also in August, authorities forcefully disbanded a workshop focusing on natural resource and forest protection in Kampong Thom province. The event had been organized by the Cambodian Center for Human Rights (CCHR) and the Natural Resource Protection Group (NRP).<sup>47</sup> About 10 police officers armed with AK-47 assault rifles arrived at the workshop to stop the training session, which was directed at villagers who rely on the nearby Prey Lang forest for their livelihoods. As the police presence intimidated participants, Commune Chief Chhoy Mab threatened to fine them up to US\$500 for attending.

Sim Vanna, Sandan district governor, later told a reporter that he had asked the commune chief to stop the meeting because the organizers had failed to obtain a letter of permission from the provincial authorities. In another harbinger of the future of group activity under the LANGO, the district governor then confirmed that he ordered the dispersal even though the workshop was not illegal, saying: "It does not break the law, but when you go into someone's house, you have to ask permission first."<sup>48</sup>



*Armed military police stop a protest by the Prey Lang community in February 2011 Photo by: LICADHO*

Less than a month later, armed police again disrupted another attempt to conduct the workshop.<sup>49</sup> The September 7, 2011 training session had barely commenced when approximately 30 armed civilian and military police arrived accompanying local officials.

Authorities threatened the organizers and participants with arrest, photographed everyone involved, and requested identity cards.

"This is my land, my area and my commune, and you need my approval to come here."

— Chheum Khon, chief of Meanrith commune, while disbanding a training workshop for local residents with armed police.

Representatives from CCHR, LICADHO and Community Legal Education Center (CLEC) as well as the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) Cambodia later attended a meeting with district officials to discuss the training event's improper disruption. The justification offered by the district officials was that the organizers had failed to provide local authorities with notification of the event.

<sup>47</sup> *Authorities Break Up Forest Protection Workshop*, The Cambodia Daily, August 11, 2011.

<sup>48</sup> *Id.*

<sup>49</sup> *Armed police break up forum*, John Anthony and May Titthara, Phnom Penh Post, September 8, 2011.

The officials did not provide any legal basis for this requirement, and the Demonstrations Law exempts organizers of “education dissemination activities” from providing any notification for such activities conducted on private or public property. Moreover, the organizers had, as a matter of courtesy, informed provincial authorities of the event in writing.

Of even greater concern, however, were the unwarranted conditions on future workshops that the district officials then described. Again without any reference to a legal authority, the officials stated that organizations without offices in Kampong Thom province could not conduct activities without permission from the authorities. The deputy governor of Kampong Thom province Ouch Sam On subsequently reiterated this unfounded new rule in the Phnom Penh Post, stating that they would not allow groups from other provinces without offices in Kampong Thom to participate in activities in that province.

As the above examples show, it is no exaggeration to say that the proposed law threatens the very existence of independent civil society in Cambodia, perceived by many observers as one of the few remaining positive legacies of UNTAC.

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## LAW ON PEACEFUL ASSEMBLY

Cambodia's Demonstrations Law was adopted December 5, 2009, and entered into force in April 2010. The law requires that virtually any public gathering, regardless of size, be approved in advance by the authorities.<sup>50</sup>

There are two methods for notifying the government of a planned demonstration, and they depend on the nature of the event. To hold an "ordinary" demonstration, the organizers must notify the Provincial Governor at least five days in advance.<sup>51</sup> The notice must explain the purpose of the event, where it will take place, and how many are expected to participate. Under the language of the law, if any of these details are different at the time of the demonstration, it can be stopped. The notification must also include photocopies of three Khmer nationals' identification cards.



*A woman from Boeung Kak Lake was dragged by police in front of Phnom Penh Municipality on March 21, 2001 Photos by: LICADHO*

The authorities may deny permission for the noticed demonstration if there is clear information that the event may cause danger or may seriously jeopardize security, safety and public order.<sup>52</sup> There is no definition of these vague terms in the law, nor is there any precedent in Cambodia for defining them in a way consistent with international norms. If the MOI denies permission for a demonstration, there is no appeal under the law. The law taken as a whole clearly transforms the notice requirement into a request for permission.

If a planned demonstration will have fewer than 200 attendees, however, then it may take place in one of the country's designated "Freedom Parks." Such demonstrations require 12 hours' notice.

The law also provides authorities with the power to stop a demonstration if it begins to damage private or public property. If such damage occurs, both the offenders and "accomplices" will be held responsible for reparations.<sup>53</sup> There is no definition of the term "accomplices" in the law. Given the requirement that organizers submit national ID cards with their requests, it is not difficult to see how this provision could be used to threaten potential protestors.

### **Authorities Often Deny Permission for Peaceful Demonstrations**

Demonstration notifications continue to result in denials frequently, despite the creation of implementation guidelines seeking to establish clarity about the law. When the Cambodian National Confederation of Laborers Protection sought permission for thousands to march to protest the rising cost of living, for example, city officials rejected their request, instead

<sup>50</sup> Article 4 of the Demonstrations Law defines a demonstration as "any gathering or procession made by a group of people to demand, protect or express publicly their feelings/sentiments, ideas/opinions or will by using peacefully various forms or means."

<sup>51</sup> The former law required just three days' notice.

<sup>52</sup> See Article 9.

<sup>53</sup> See Article 26.



granting permission for only a maximum of 200 people to gather at Phnom Penh's Freedom Park.<sup>54</sup> The officials also warned that the group would be fully responsible for security, that the 200 person demonstration in the Freedom Park must not affect the business of government or dignitaries, and, perhaps most bizarrely, that the gathering must not be done at the behest of any political party.

Perhaps the clearest recent example of the government's use of the Demonstrations Law to deny Cambodians their basic rights was the denial of a permit for an International Women's Day rally to be held on March 8, 2011. The Cambodian Women's Movement Organization (CWMO) had sought permission for a rally in central Phnom Penh to mark the 100th anniversary of the holiday. The government did not provide any reason for the denial, which was issued in a letter just one day before the planned event.

Authorities have also intimidated would-be protestors by erroneously telling them that they are forbidden from speaking to media or NGO workers about their concerns, and by seeking improper promises of future silence.<sup>55</sup>

### **Peaceful Demonstrations Are Often Broken Up With Excessive Force**

It is not only trade union related demonstrations that attract a violent response from the authorities, as shown by the government's reaction to protests over the notorious Boeung Kak Lake land grab in Phnom Penh. On April 21, 2011, for example, roughly 100 lake residents were violently dispersed by the municipal intervention police force while staging a peaceful protest in front of the Phnom Penh municipality building. Among the worst injured, an elderly woman suffered from an open wound to the head, a female community representative had her thumb broken, and a pregnant woman in her twenties suffered a miscarriage due to beatings delivered to her stomach.

Indeed, such violent reprisals have occurred frequently since the passage of the Demonstrations Law:

- On February 28, 2011, police carrying riot shields and electric batons subdued another protest led by the lake's villagers. A reporter and villagers heard Daun Penh district deputy governor Sok Penhvuth ordering authorities to "beat" the protestors on that occasion.
- On April 29, 2011, three villagers were beaten with guns during a violent attempt by approximately 100 Kratie military police officers to disperse a group of 2,000 villagers conducting a two-day protest to highlight ongoing land grabbing in Mondulhiri.
- On May 10, 2011, a 28-year-old community representative was beaten on his forehead with a gun while 10 houses and properties belonging to 100 families were set on fire by a group of men led by ACO tank unit soldier Touch Sopheak in Tang Samraong commune, Phnom Sruoch district, Kampong Speu.
- On June 9, 2011, over 100 armed military police and police officers attempted to seize 65 hectares of land owned by 88 families on behalf of a Taiwanese businessman. At around 1

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<sup>54</sup> *City Denies Permission for Union March Sunday*, VOA Khmer, August 5, 2011.

<sup>55</sup> *Authorities Instruct Boeung Kak Families on Protests, Interviews*, The Cambodia Daily, August 3, 2011.

p.m., a violent confrontation between villagers and the authorities took place, leaving both sides with injuries.<sup>56</sup>

- On October 27, 2010, Suong Sophorn, a 23-year-old Boueng Kak Lake resident, was arrested by riot police after they beat him unconscious during a protest in Phnom Penh.<sup>57</sup> He had been attempting to deliver a petition to United Nations Secretary General Ban Ki-moon, who was wrapping up a three-day visit to Cambodia. Six other protestors were also injured during the violent suppression of the protest. In typical fashion, Sophorn was released after he agreed to sign a pledge that he would stop leading protests.
- On September 16, 2011 Sophorn was severely beaten again by riot police, this time with batons and bricks, until he lost consciousness. The beating took place shortly after several lakeside homes were unexpectedly destroyed by excavators.<sup>58</sup>

### **Demonstrations Also Often Lead to Unwarranted Arrests and Detention**

Peaceful protests also often land participants in unjustified detention. After the April 21 Boeung Kak Lake demonstration described above, 11 community representatives were detained overnight. Similarly, on July 7, 2011, two Boeung Kak Lake community representatives were detained by police during a protest in central Phnom Penh. They were held overnight again, but no charges were ever filed. The two were released only after they agreed to thumbprint documents stating they would not conduct "unauthorized" public protests again.

On March 3, 2011, a 53-year-old community representative was detained by a group of national military police officers and environment officers in Koh Kong, after he led his community in a peaceful protest against land clearing by Chinese Union Development Group. The company had been granted a large concession overlapping with villagers' land. The representative was released on the same day.<sup>59</sup>

#### **CASE STUDY: HUNDREDS DETAINED FOR PASSING OUT INFORMATIONAL PAMPHLETS**

More than 100 villagers protesting the loss of land in Prey Lang forest were detained on August 18, 2011, for distributing leaflets discussing the importance of preserving the forest.<sup>60</sup> Large tracts of Prey Lang, a lowland evergreen forest, had recently been leased to rubber plantations.

According to authorities, the disruption and detention of the villagers was not connected to the content of the leaflets, but rather to the fact that their distribution was disrupting public order. The villagers were released after they promised not to hand out leaflets again without permission. Despite multiple inquiries from the media and civil society, the government did not elaborate on its definition of "public order" or on what permission must be sought before citizens pass out informational pamphlets.

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<sup>56</sup> This land dispute has been going on for years. All three levels of the court system failed to consider evidence against the Taiwanese businessman such as forged official documents and testimony supporting the villagers. Days before the violence, the community submitted a request to the court to suspend the eviction pending further action in the case. The court took no action on the request prior to the violent clash.

<sup>57</sup> *Activist beaten unconscious*, Khouth Sophak Chakrya and Cheang Sokha, Phnom Penh Post, October 28, 2010.

<sup>58</sup> See LICADHO video, available at <http://www.licadho-cambodia.org/video.php?perm=25>.

<sup>59</sup> LICADHO internal documents.

<sup>60</sup> *Cambodia Villagers Stage 'Avatar' Themed Protest about Land Loss*, Robert Carmichael, Phnom Penh Post, August 18, 2011.

## THE ANTI-CORRUPTION LAW

The Anti-Corruption Law entered fully into force in August 2011.<sup>61</sup> There are several issues with the law that threaten freedom of expression.<sup>62</sup> First, the law's scope is both under- and over-inclusive. It fails to require spouses and relatives of government officials to comply with its financial disclosure requirements, yet includes broadly defined civil society, religious and political party leaders. Though it is unclear who exactly falls within its broad scope and why, the law provides lengthy prison terms as punishment for vaguely improper financial declarations. Second, the law threatens whistleblowers with criminal penalties if their allegations are determined to be false. Finally, the law creates anti-corruption institutions that are structurally bound to the ruling party.

Article 17 of the new law lists the types of individuals who are required to declare their assets and liabilities, in person to the Anti-Corruption Unit, upon taking and leaving office. The list glaringly omits spouses and relatives of government officials – historically the holders of illicit gains. The law does, however, include “leaders of civil society.” Though “leaders” are not defined, “civil society” is defined in Article 4(8) as “any community or group of persons created for the sake of protecting the economic, socio-economic, political, science, cultural, and religious benefits, namely associations, NGOs and political parties.”

The law's financial disclosure requirements glaringly omit spouses and close relatives – historically the holders of illicit gains.

This financial disclosure requirement is not a mere technical requirement resulting in fines or bureaucratic hassle. Under Article 38, a failure to properly declare assets and liabilities can be punished with a sentence of one month to one year in prison, and a fine from 100,000 to 2 million riel. As such, its vague requirements are alarmingly susceptible to abuse. Moreover, the inclusion of such a broad swath of the private sector in a piece of anti-graft legislation is extremely unusual. Indeed, research to this point has found only one other country with such a broad anti-corruption law – Sierra Leone.

Curiously, the law is silent as to why civil society leaders must submit their financial information. None of the corruption offenses listed in Chapter 6, incorporated from the Penal Code, are crimes that only apply to civil society groups or NGOs. As to be expected, however, most of the crimes are directed specifically at government officials or law enforcement.

This incongruence is further highlighted by two additional provisions in the Law on Anti-Corruption that are directed specifically at foreign public officials and officials of public international organizations. Under Article 33, if such individuals improperly ask for, demand or accept any gifts, donations, promises or benefits in order to either perform or refrain from performing their duties or to facilitate their functions, they can be sentenced from seven to 15

<sup>61</sup> Parts of the law were in force starting in April 2010.

<sup>62</sup> Much ink has been spilled discussing the apparently unforeseen effects on foreign investment resulting from the law's provisions outlawing “facilitation fees.” (See, e.g., *Cambodian Anti-Corruption Drive Creates Headache for Western Firms*, Robert Carmichael, VOA, August 18, 2011.) Such informal fees have long been the manner in which most paperwork and other business related interchange with government officials has proceeded. Under certain foreign laws, such as the United States' Foreign Corrupt Practices Act, if such fees are illegal in Cambodia, then their payment could result in criminal liability in the business' home jurisdiction. The sudden criminalization of the manner in which nearly all transactions have previously taken place is a strong indication that the law was not properly thought out or competently drafted. More importantly, though such fees were very common, they have always been inherently corrupt.

years in prison. Under Article 34, the person doing the offering may be imprisoned from five to 10 years. But what "duties" or "functions" does this provision refer to? Corruption is generally defined as a crime that occurs when a government official seeks or is promised personal gain for either performing or refraining from performing his job and providing a government service. It thus does not make sense that anti-corruption effort could target civil society, or foreign officials, who do not have a governmental role or duty in Cambodia. Moreover, why stop there? Why should other private sector actors be exempt from these requirements?

The second provision that violates freedom of expression is Article 41, which is titled "Defamation and Disinformation." Under this provision, someone who informs the Anti-Corruption Unit or any judge about corruption – in other words, a whistleblower – is subject to imprisonment from one month to six months and a fine from 1 million to 10 million riel, if the information leads to a "useless inquiry." There is no further definition of the term "useless" in the statute. The potential for abuse of this provision, and its significant chilling effect, is obvious.

Finally, and perhaps most problematically, the law has serious structural flaws. It creates an Anti-Corruption Institution composed of the National Council Against Corruption (NCAC) and the Anti-Corruption Unit (ACU), which has been given significant judicial police powers to investigate corruption. Though anti-corruption is a highly politically sensitive issue requiring enforcement bodies free from political influences, neither the NCAC nor the ACU are fully independent bodies.

The NCAC is composed of 11 members as follows:

- One dignitary appointed by HM. the King
- One dignitary selected by the Senate through absolute majority of votes of the whole Senate
- One dignitary selected by the National Assembly through absolute majority of votes of the whole National Assembly
- One dignitary selected by the Royal Government
- One dignitary selected by or from the National Audit Authority
- One dignitary selected by or from the Ministry of National Assembly-Senate Relations and Inspection
- One dignitary selected by or from the Council of Magistracy, and
- One dignitary selected by or from the Council for Legal and Judicial Reform
- One dignitary selected by or from the Supreme Council of Magistracy
- One dignitary selected by Cambodia Human Rights Committee
- Chair of Anti-Corruption Unit

All but two are thus appointed, and both legislative selections require an absolute majority. This ensures that the executive branch, and therefore the ruling party, has complete control over the composition of the NCAC.

There is even less separation between the ACU and the executive. The ACU is "led by one chairperson with the rank of senior minister, and a number of vice-chairpersons with the rank of minister as his assistants. The chairman and vice-chairman are appointed by the Royal decree at the request of the Prime Minister."<sup>63</sup>

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<sup>63</sup> Anti-Corruption Law, Article 11.

The current head of the ACU is Om Yentieng. He has been one of Prime Minister Hun Sen's key advisors since 1993. Since 2000, he has also been the President of the Human Rights Committee, a position for which many have noted his questionable credentials. In one recent display of his understanding of human rights, for example, he responded to criticism about the use of excessive force to stop a peaceful protest over the Boeung Kak Lake development by arguing that the police brutality was not "wrong" under Cambodian law.<sup>64</sup>

"[Villagers] asked City Hall about this many times, but I do not view this as a human rights violation. ... Which article says that the actions of authorities were wrong?"

– Om Yentieng, making the case that police beatings of peaceful protestors are perfectly legal.

### Prosecutions to date indicate risk of abuse for political purposes

There have been three high profile prosecutions under the Anti-Corruption Act so far. Both the identity of the accused and the timing of their arrests may imply that the law is at risk of being abused as a means through which to attack political rivals.

First, the law itself originally provided that its criminal provisions would go into effect twelve months after the effective date of the new Penal Code – or December 2012. But in April 2011, the National Assembly unceremoniously removed the delay provision from the law.<sup>65</sup> Many have speculated that this quiet, yet substantial change occurred to facilitate the convictions of political enemies already publicly under investigation or facing charges.

Also of concern is the fact that those prosecuted to date appear to have mostly come from the faction of the ruling party that is known to be loyal to CPP President and Senate President Chea Sim and Interior Minister Sar Kheng.<sup>66</sup>

Moek Dara, former secretary general of the National Authority for Combating Drugs, was charged in January for dealing drugs and taking bribes. He was formerly a police official in Battambang province, a region traditionally associated with the Sar Kheng faction.<sup>67</sup> Also caught up in the same investigation and prosecution was former Banteay Meanchey provincial police chief Hun Hean. Hun Hean is a former bodyguard of Sar Kheng.<sup>68</sup>

Tellingly, other high-profile revelations of graft have so far been met with warnings and excuses, not prosecutions. When the ACU's investigation of the Ministry of Social Affairs, Veterans and Youth Rehabilitation discovered widespread corruption, the response was a warning and request for repayment.<sup>69</sup> The ACU's investigation exposed that an estimated US\$5.5 million had been misappropriated by the Ministry through theft from the pensions of dead and retired civil servants, and by the payment of salaries to non-existent or "ghost" officials – officials who simply do not show up for work. Instead of prosecuting responsible

<sup>64</sup> *Beatings no human rights violation: official*, May Titthara, Phnom Penh Post, May 12, 2011.

<sup>65</sup> *Lack of disclosure criticised in assets*, Vong Sokheng and Chhay Channyda, Phnom Penh Post, April 4, 2011 (mentioning that National Assembly dropped Article 57, the law's implementing provision, without any explanation of why).

<sup>66</sup> See, e.g., *Potemkin graft crackdown in Cambodia*, Sebastian Strangio, Online Asia Times, June 11, 2011.

<sup>67</sup> Moek Dara was also one of the few drug enforcement contacts available to diplomats and development officials, according to Graham Shaw, technical officer on drug use with the World Health Organisation. *Wiki Leaks sheds light on Dara*, James O'Toole, Phnom Penh Post, January 23, 2011.

<sup>68</sup> The third defendant, Top Chan Sereyvuth, was a former prosecutor of Pursat province. He received a 19-year sentence in May, becoming the first high-profile individual to be imprisoned. He had been accused of ordering his employees to extort money from the plaintiff, Khol Soknha, a man who said he had been transporting wood through Pursat and was illegally detained until he paid US\$3,000. Top Chan Sereyvuth's bodyguards also each received lengthy sentences of 16 and 15 years in relation to the incident. *Top Chan Sereyvuth found guilty of corruption*, May Titthara, Phnom Penh Post, May 12, 2011.

<sup>69</sup> *Ministry's 'massive graft'*, Vong Sokheng, Phnom Penh Post, July 15, 2011.

parties, however, the investigation resulted in a request that the Ministry of Social Affairs simply repay the loss from its next budget. Not one individual was charged with a crime.<sup>70</sup>

The ACU's response to a December 2010 request by the Cambodian Independent Teachers' Association (CITA) for the ACU to investigate corruption complaints against a high school director in Siem Reap, was just as weak.<sup>71</sup> CITA accused the school director of improperly withholding salaries, extorting students, and embezzling funds, but there have been no signs of an investigation since. Similarly, a February 2011 complaint filed with the ACU by teachers in Svay Rieng's Chrom district, alleging that the school directors had stolen more than US\$17,000, was met with defamation allegations against the teachers and a similar lack of investigation.<sup>72</sup>

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<sup>70</sup> H.E. Ith Sam Heng, the Minister of Social Affairs, Veterans and Youth Rehabilitation is also a close ally of the Prime Minister.

<sup>71</sup> *CITA files classroom graft claim*, Kim Yuthana, Phnom Penh Post, December 23, 2010.

<sup>72</sup> *Teachers file ACU complaint over graft*, Meas Sokchea, Phnom Penh Post, February 18, 2011.

## THE DRAFT TRADE UNION LAW

The government released a fourth draft of the much-discussed Trade Union Law in September 2011. This most recent draft includes significant revisions. Several very troubling provisions, such as prison sentences for vaguely defined conduct and dissolution of unions at the behest of “concerned third parties” are not present in the most recent draft, released days before this report was finalized. These positive changes likely reflect the fact that garment exporters, importers and purchasers have played an influential role in the drafting process. In any event, although the draft reflects positive changes, some troubling provisions appear to remain at the time of this writing.



Workers join International Labor Day in Phnom Penh on May 1, 2011 Photo by: LICADHO

Analysis of the justification and impact of this draft law is no mere academic or theoretical exercise, of course. Cambodia exported US\$2.15 billion worth of goods in the first six months of 2011 – a 45.9% increase over the same period in 2010, according to the Ministry of Commerce.<sup>73</sup> Of that sum, a staggering 80%, or US\$1.74 billion came from garment exports. Shoes accounted for an additional US\$123.1 million – over 75% more than during the same period in 2010. One figure missing from the Ministry’s data, however, is the low salary of the workers fueling this phenomenal boom. Garment and shoe workers typically earn the minimum wage of US\$61 per month for 48 hours of work a week, which is not sufficient to provide for basic living costs in Phnom Penh.<sup>74</sup>

Factory workers, who are predominantly women under the age of 25, also endure poor working conditions on top of their incredibly long hours.<sup>75</sup> It is thus not surprising that independent trade unions have flourished to the extent possible in recent years. And it is equally unsurprising that the government, advised by employers, would seek to create obstacles for worker-led organizational efforts.

Enter the draft Trade Union Law. As with the draft LANGO, the government has not articulated a persuasive reason for the new law. The government claims the new law is intended to protect workers, and that it is necessary to regulate a large number of unions.<sup>76</sup> But the 1997 Labor Law already appears to include much of the protective and regulatory framework needed. Moreover, the inconsistent overlap between the Labor Law and the draft

<sup>73</sup> Exports Increase 45.9% in First Six Months, Simon Marks, The Cambodia Daily, August 24, 2011.

<sup>74</sup> See, e.g., *Factory Girls*, Cambodia Asia Life, March 7, 2011, available at <http://www.asialifeguide.com/Cover-Story/factory-girls.html>; ‘Forced overtime’ claim in H&M mass fainting, Tep Nimol and Vincent Mac Isaac, Phnom Penh Post, August 25, 2011.

<sup>75</sup> *Id.*

<sup>76</sup> *Ministry Denies Bias in Draft Labor Law*, Khmer Weekly, July 13, 2011, available at <http://khmerweekly.com/2011/07/13/ministry-denies-bias-in-draft-labor-law/> (last accessed July 28, 2011).

Trade Union Law could create confusion as to which provisions in the Labor Law survive the enactment of the Trade Union Law.

The similarities between the draft Trade Union Law and the draft LANGO go beyond the lack of a coherent justification for the legislation. Both seek to establish burdensome registration requirements and obstacles to formation. Both fail to set out objective guidelines for government decision-makers and the judiciary. Both neglect to include adequate definitions or details about appeals processes. And both seek to penalize individuals who voice unfavorable opinions or take peaceful action in opposition to government or business interests.

The following key provisions in the draft Trade Union Law merit particular concern:

- The law includes complex and burdensome registration and reporting requirements.
- The law subjects those who obstruct the operation of a business or engage in other vaguely defined improper conduct to significant fines. Among those actions that can subject trade union leaders to hefty fines are: agitating for purely political purposes at the workplace; illegally blocking an entrance or exit gate; preventing non-striking workers from working; and striking "illegally."<sup>77</sup>
- The worker's rights delineated in the draft law are subject to the interpretation that all trade union activity must occur outside of work hours, unless the workers have the employer's consent.<sup>78</sup>
- It establishes unreasonable requirements for union leaders, managers and those responsible for the administration of unions, including that they have never been convicted of any criminal charges whatsoever.<sup>79</sup>

"Anti-union practices and obstacles to organizing remain widespread. Collective bargaining is rare and difficult. Cambodia has still not established labor courts and impunity continues to be the rule when it comes to trade union rights violations."

— International Trade Union Confederation's 2011 survey of trade union rights violations

The above provisions in the draft Trade Union Law should be amended to comport with Cambodia's constitutional and international obligation to respect fundamental associative and expressive rights.

### **Attacks on Trade Union Representatives and Activists Remain Unsolved**

This atmosphere of impunity surrounding attacks on trade union representatives provides the context in which the draft Trade Union Law, and its lack of adequate protections for unionized workers and union representatives, must be evaluated.

In 2004, after being warned that a government official was plotting to have him killed, Free Trade Union leader Chea Vichea was gunned down in Phnom Penh while buying a newspaper. The two men wrongly arrested for the crime were finally released from prison in 2010, when pressure on the government made their further unjust incarceration untenable.

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<sup>77</sup> Articles 66 and 81.

<sup>78</sup> Article 5.

<sup>79</sup> Article 21.



No further arrests have been made, and there have been no subsequent signs that authorities are pursuing an investigation into the actual assassin(s).<sup>80</sup>

Chea Vichea's death was followed by the killings of two more FTU activists in 2005 and 2007. Those killings both involved gunmen on the backs of motorcycles, shooting their victims in public. Both murders also remain unsolved.

In September 2010, Phao Sak, president of the FTU at the International Generation Co. footwear factory in Kampong Speu was violently attacked by two individuals armed with batons. Phao Sak had been meeting with the factory's management to discuss demands related to leave days just before the attack. No investigation has been conducted. The attack was so violent that FTU called it an attempted murder and also stated that it was clearly linked to Phao Sak's trade union activities.

### Excessive Force Often Used in Stopping Worker Protests

The past year has seen an alarmingly large number of strikes and worker protests broken up with the excessive use of force. With the draft Trade Union Law's additional vague restrictions on worker led assembly and activities, the government will have even more ammunition to stop such demonstrations and strikes.

- In July, three women were injured when approximately twenty armed police officers arrived to break up a strike of about 500 workers outside the Zongtex Garment Factory in Phnom Penh.<sup>81</sup> The workers protested outside the factory because four of their representatives were summarily dismissed by the factory the previous week. The workers also asked that their company abide by an Arbitration Council ruling in their favor, requiring the factory owner to pay each worker US\$4.50 to cover the cost of a medical examination.
- Also in July, at least two people were injured when about 100 police with guns, electric batons and shields dispersed 300 workers during a protest in front of the Supertex Garment Factory.<sup>82</sup> A police officer told a reporter that authorities had intervened because the protest caused traffic congestion. The officer denied that police had used excessive force, commenting that the protestors "slipped and fell by themselves – no authorities hit them."<sup>83</sup>



Workers join Mithona factory strike on May 2011  
Photo by: LICADHO

<sup>80</sup> The documentary *Who Killed Chea Vichea?* chronicling the threats against Chea Vichea, his assassination, and the subsequent framing of two men for the crime is now available online in Khmer at <http://vimeo.com/28577020>. The English version of the documentary is banned in Cambodia, and multiple attempts at public viewings have been stopped by authorities.

<sup>81</sup> *Armed police crack down on protest*, Tep Nimol, Phnom Penh Post, 28 July 2011.

<sup>82</sup> *Two injured in 'brutal' crackdown*, Khouth Sophakchakrya, Phnom Penh Post, 20 July 2011.

<sup>83</sup> *Id.*

- On May 8, 2011, over a thousand Mitona garment factory workers, mostly young women, were violently dispersed by the municipal intervention police force while the workers staged a peaceful strike in Phnom Penh. LICADHO brought eight seriously injured female workers to the hospital to receive treatment. The injuries included head wounds, trauma, and lacerations, two of which required stitches. A week prior to the strike, the Mitona factory somewhat suspiciously caught on fire, leaving workers with no work. The factory owners refused to pay the reasonable financial compensation required by the law.
- On March 27, 2011, police violently dispersed a protest of more than 1,000 former workers at Phnom Penh's Tack Fat Garment factory.<sup>84</sup> The former workers were seeking a better severance package after the company had stopped operations a week earlier. Local Free Trade Union representative Chheang Chanda said security forces, made up of hundreds of police officers, had ripped down banners and hit workers with electric batons in order to disband the crowd of protesters.

Trade union leaders have also faced unwarranted arrests and criminal charges, as shown by Sous Chantha's conviction described earlier, and by the case of Free Trade Union representative Sun Pisey. Pisey was arrested on June 10, 2011, purportedly for striking a co-worker in an altercation. Several days later, approximately 1,000 of his co-workers protested, stating that the arrest was actually due to Sun Pisey's union affiliation. One other worker representative stated that the alleged victim had initiated the violence, spitting on Pisey and slapping him when he talked about the benefits of joining his union. Pisey was released on bail about two weeks after his arrest, and the plaintiff dropped the complaint, but the court did not drop the charges. On the contrary, Court President Khlot Pich said that authorities would "continue to keep an eye on" Sun Pisey and call him back for questioning if necessary.<sup>85</sup>

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<sup>84</sup> *Police Crack Down on Garment Protest*, Hul Reaksmey, The Cambodia Daily, March 29, 2011.

<sup>85</sup> *Union rep out on bail*, Kim Yuthana, Phnom Penh Post, June 23, 2011.

## CONCLUSION AND RECOMMENDATIONS

The freedoms of association, expression and assembly in Cambodia are already heavily restricted, particularly at the community level. Ordinary people are limited in their ability to voice opinions on issues affecting their welfare and development, and NGOs and other groups which seek to work with them have limited room to operate. Anyone who is perceived to be challenging local or government officials is open to persecution, including arrest, detention, threats and violence.

All of the laws analyzed in this report must be assessed within this context.

They must also be assessed in relation to Cambodia's Constitution and the ICCPR, which Cambodia has ratified – both of which guarantee fundamental rights to freedom of expression, association and assembly. Indeed, a July 10, 2007, decision by the Constitutional Court expressly reminded judges that they must uphold the Constitution and international law.

The provisions discussed above are currently inordinately susceptible to abuse. They should be amended or abandoned as follows:

- The new Penal Code suffers from overly broad language, particularly the potential charges for speech, such as incitement. The Penal Code should be substantially revised to ensure that it is in line with the Cambodian Constitution. Four recommendations are as follows:
  - Redraft provisions that are overly broad and vague.
  - Revise the Penal Code's laws that impact freedom of speech, such as laws against defamation and insults, to ensure that these provisions are specific and do not violate the Cambodian Constitution's guarantee of freedom of expression.
  - Repeal the over-broad incitement provision.
  - Repeal the provisions that criminalize commentary related to the judiciary.
- The Law on Associations and Non-Governmental Organizations (LANGO) is unnecessary. The Civil Code already provides for a detailed registration scheme for such organizations. The draft law both repeats and conflicts with the Civil Code, imposing unnecessary burdens on informal associations and potentially harming a robust civil society. Mandatory registration of all associations, organizations and informal groups is always antithetical to fundamental expressive rights. This law should not be passed.
- The Law on Peaceful Assembly requires that almost every public gathering receive advance permission from the government. The government should seek to provide clear, coherent guidelines that allow for freedom association and expression. Three recommendations are as follows:

"Some of the most important factors that the majority of prospective foreign investors take into account before deciding to invest large amounts of money in any country are an independent judiciary and a robust system of justice."

– Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi, September 2010

- Provide clear criteria for rejecting demonstration notifications and provide a transparent application process.
  - Provide a clear, transparent system for appeals.
  - Require police officers to undergo trainings on the freedom of association and freedom of expression before those officers are assigned to work at a demonstration.
- The Anti-Corruption Law is both incomplete and improperly broad. It exempts spouses and close relatives of government officials and law enforcement heads from its key transparency provisions, yet includes civil society, religious and political party leadership. The government should also seek to ensure that it effectively protects whistleblowers. Three recommendations are as follows:
    - Add spouses and relatives of government officials to the provisions requiring financial disclosures, and specifically define the improprieties that can lead to criminal penalties for inadequate or improper disclosures. Define the term "leader" and "civil society" narrowly in accordance with the principles of legality for criminal laws.
    - Remove the provision that punishes whistleblowers whose claims cannot be proven.
    - Fix the structural flaws in the law to ensure the enforcement bodies are free from political influence.
  - The Draft Trade Union Law imposes barriers to prevent employees from striking and demanding fair labor practices. Recommendations are as follows:
    - Revise unreasonable requirements for union leaders, such as the requirement that the leaders have never been convicted of any criminal charges.
    - Remove the vague language that would require that all trade union activity must be done outside of working hours, and revise the complex and burdensome registration and reporting requirements.

