

DRAFT LAW ON ASSOCIATIONS & NGOs: COMMENTS ON THE FOURTH DRAFT

A Briefing Paper

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Farmer & Nature Network (FNN), Coalition Cambodia Farmer Community (CCFC),
Independent Democracy of Informal Economy Association (IDEA), Cambodian Youth Network (CYN) and
Cambodian League for the Promotion & Defense of Human Rights (LICADHO)

BACKGROUND OF CIVIL SOCIETY ORGANIZATIONS

Farmers and Nature Network (FNN) is a network of farmers acting together to promote agricultural products and to protect the interests of Cambodian farmers. FNN was established in 2003 by a group of farmers; it has operated since then with ongoing support from CEDAC. Currently, FNN operates in 14 provinces across the nation, incorporating 1,107 associations with a combined total of more than 50,000 members.

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Coalition of Cambodia Farmers Community (CCFC) was established on January 11, 2011, by 12 communities who work together to address land rights, natural resources and forced evictions resulting from development projects which impact on farmers. Currently, CCFC is working with 74 communities in affected areas spanning 10 targeted provinces.

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Independent Democracy of Informal Economy Association (IDEA) was established in April 30, 2005, by group of workers in the informal economy, including motorbike taxi drivers, taxi drivers, tuk-tuk drivers, vendors, restaurant workers and beer promotion workers, with the aim of promoting workers' rights and freedoms. It builds capacity by educating members on labor laws related to these sectors as well as health and safety measures, and it is active in peaceful advocacy, promoting the respect and protection of human rights in Cambodia. Currently, IDEA has more than 3,500 members in five provinces.

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Cambodian Youth Network (CYN) was established on October 31, 2009, by a group of students and youths to initiate youth empowerment and involvement in Cambodia's development. The network works with youths in high schools and universities to encourage active participation in human rights protection, social protection and cultural conservation. Currently, CYN has more than 200 student members.

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Cambodian League for the Promotion & Defense of Human Rights (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.

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I- OVERVIEW

On Dec. 12, 2011, the Royal Cambodian Government released the fourth draft of its proposed Law on Associations and Non-Governmental Organizations (LANGO). The release comes almost exactly one year after the first draft was introduced in mid-December 2010¹.

The contents of the three earlier drafts provoked extensive criticism from local and international civil society organizations, donor governments, and legal analysts. Twice previously the government has acknowledged these criticisms and promised to come up with a better draft. Twice previously they have failed.

With the fourth draft, they have failed again.

Although the law has shrunk by more than 20 articles and contains some notable improvements, it is also now more confusing than ever. Several key provisions raise more questions than they answer, both in terms of the law's application and the intent of the government.

The law assures, for example, that domestic associations and non-governmental associations (NGOs) can be "freely established" without prior permission from the government, but then denies unregistered groups the legal status that could be essential to their operations. Is registration truly optional?

Community-based organizations (CBOs) are ostensibly exempt from registration provisions, but these groups are so narrowly defined that the CBO category becomes virtually inapplicable in the real world. Is an informal network of forest activists still a "CBO" if they conduct activities outside their commune or sangkat?

So-called CBOs, moreover, are required to provide written notice to commune or sangkat authorities of their activities and their leaders; this provision does not apply to NGOs and associations. Will this process evolve into a de facto registration requirement?

The law establishes three broad categories that appear to encompass virtually every domestic non-profit entity that could conceivably be established in Cambodia. Why establish a new regime of registration – applicable to organizations as diverse as chambers of commerce to large NGOs to networks of environmental activists – when a scheme for establishing and registering non-profit legal entities already exists in the Civil Code?

In a particularly incomprehensible provision, existing organizations are considered to have "abandoned their activities" unless they file a notice with the government declaring their intent to continue operating. How is this reconciled with the law's claim elsewhere that NGOs can be established without registration?

Meanwhile, several specific problems remain from earlier drafts. There is no administrative appeals process for organizations whose registration is denied; the only appeal is directly to the court, which is known to be influenced by the executive branch. Registration is effective from the date of approval, not the date of filing. And the law does not specify any remedy if the Ministry of

¹ The first draft of the law was released on Dec. 15, 2010, while the second draft was released on March 24, 2011, and the third draft was released on July 29, 2011.

Interior (MOI) simply sits on an application, refusing to grant or deny it; the applicant organization simply has to wait.

Additionally, the draft no longer discusses registration fees or procedures forming alliances of NGOs; but it does not affirmatively state that there will be no fees or that allowances will be permitted. It is likely that these gaps, like others, will be filled by sub-decrees, which are developed behind the scenes. This robs stakeholders of the opportunity for meaningful consultation on these issues.

This briefing paper focuses on the law's most serious flaws, which Farmer & Nature Network (FNN), Coalition Cambodian Farmer Community (CCFC), Independent Democracy of Informal Economy Association (IDEA), Cambodian Youth Network (CYN) and Cambodian League for the Promotion & Defense of Human Rights (LICADHO) have divided into four separate categories: (1) restrictions on the freedom of association; (2) burdensome registration requirements for some organizations; (3) excessive powers granted to unelected officials of the executive branch; (4) unreasonable restrictions on foreign NGOs.

In sum, while FNN, CCFC, IDEA, CYN and LICADHO recognize that the fourth draft of the LANGO contains some notable improvements, it should not be enacted. Legitimate questions about the law's necessity - and the government's intentions - remain.

II- ANALYSIS OF THE FOURTH DRAFT

This document does not aim to provide an article-by-article critique of the draft law, but to highlight a number of substantial flaws in the law which will affect the independence of civil society in Cambodia.

Significant restrictions on freedom of association

The most alarming aspect of previous drafts - mandatory registration for all associations and NGOs - has been removed from the fourth draft. But the removal is in name only. Registration remains mandatory for most groups. In some instances, this requirement can be considered reasonable. In others, it is clearly not.

Article 5 of the fourth draft states that domestic associations and NGOs "may be freely established without necessarily obtaining permission or prior notice. However, these associations or non-governmental organizations shall not have *legal capacity*, unless they have complied with the provisions as provided for in Article 7 of this law." (*emphasis added*)

The wording of this provision raises several questions, most notably: what does legal capacity mean in this context? In what circumstances is it needed? And what happens if an organization operates without obtaining it?

Legal capacity is not defined in the draft law, but the term presumably implies the creation of a legal entity. Among other things, this allows individuals within an organization to act on behalf of the organization, and not on behalf of themselves. Provisions elsewhere in the law give some clue as to what legal capacity implies, and who needs it: Articles 21-23, for example, give registered organizations duty free import rights, the right to hire staff, and the right to enter into contracts.

FNN, CCFC, IDEA, CYN and LICADHO believe that the need for legal capacity is apparent and acceptable for many NGOs and some associations. These organizations typically need legal capacity to rent premises, enter into contracts with staff members, open bank accounts, sign agreements with donors, represent themselves as an entity, and so on. The only alternative to this is for a staff member to conduct these activities in his or her own name.

However, it is equally clear that a denial of registration by MOI will completely rob NGOs of the ability to operate. Without legal status, an NGO cannot reap the benefits of Articles 21-23, and would be unable to enter into contracts, enter into agreements with donors, hire staff, rent premises, and represent itself as an organization. They may also face criminal sanctions under the Penal Code, as detailed further below.

For this reason, it is essential that the registration process be simple, neutral, fair and non-politicized. In other words it should be a formality. This issue remains a grave concern in the current draft, and is discussed at greater length below, in the section titled “Excessive powers granted to unelected government officials in the executive branch.”

Mutual Interest Associations, Informal Groups and Networks: Where do they Fall?

While the necessity of registration is relatively clear for large organizations that require legal capacity, the issue is murkier when it comes to small associations, informal groups and networks.

Certain groups may be informal, small and temporary, and therefore may not need to establish a legal entity to hire staff, enter into contracts, rent premises, import goods, and so on. What happens if these organizations do not register?

The law contemplates a third possible category for these organizations – so-called CBOs, which are defined in Articles 4 and 5. But this category is so narrow that it excludes most existing groups who currently operate in Cambodia.

Article 4 defines such organizations as “a group of Cambodian citizens who voluntarily agree to establish, manage and conduct ... activities to serve and protect the interests within its local community.” Article 5 states that CBOs do not have to register, but “shall provide a prior written notice regarding the name of the organization, objectives and ... the organizations president to the authorities of the commune/sangkat where they conduct activities.”²

The law does not explicitly define “local community,” but provisions elsewhere clearly restrict CBOs to acting within their own commune or sangkat³.

This limitation may not prove an issue for some groups, but in reality, many organizations do not restrict themselves to the borders of their commune. They may act in multiple provinces – such as the Prey Lang network, which defines its “community” as a large swath of forest covering parts of four provinces. Other groups may join networks of local activists. Yet the law appears to arbitrarily require them to stay within the confines of their commune.

² FNN, CCFC, IDEA, CYN and LICADHO believe that this notification requirement is a blatant violation of Cambodians’ right to freedom of association, and will likely be used as a de facto “request for permission” process. This provision effectively denies community groups the ability to organize and act spontaneously. This group urges that it be removed from the draft law.

³ The law defines NGOs and Associations as groups of who establish to “conduct activities to serve public interests,” while CBOs are limited to activities “to serve and protect the interests within its local community” (Article 4). This is arguably a violation of Article 35 of the Cambodian Constitution, which gives Cambodians the right to participate in the political, economic, social and cultural affairs “of the nation,” i.e., at the national level.

What happens if a CBO acts outside of this approved sphere? Are they still a CBO? Do they suddenly become an association or NGO? Are they required to register? Are they “illegal” if they do not register?

The question is not simply academic. Although the LANGO itself is mostly devoid of penalty provisions, the penal code contains a handful of provisions that seem tailored to punish unregistered groups. These laws could be used to impose harsh sanctions on unregistered associations or NGOs.

Article 377 of the Penal Code, for example, states that “‘fraud’ is the act of deceiving a natural or legal person by the use of a false name or a fictitious capacity, by the abuse of a genuine capacity, or by means of unlawful maneuvers, in order to obtain from that person, to his or her prejudice or to the prejudice of a third party: (1) the transfer of funds, valuables or any property; (2) the provision of a service; or (3) the making of a document incurring or discharging an obligation.” Fraud is punishable by up to three years in prison.

Article 391 of the Penal Code concerns breach of trust, which “is committed when a person, to the prejudice of other persons, misappropriates funds, valuables or any property that were handed over to him or her and that he or she accepted subject to the condition of returning, redelivering, presenting or using them in a specified way.” It is also punishable by up to three years in prison.

Finally, Article 584, “breach of obligations imposed upon legal entity” could also apply. This provision states that “where obligations or prohibitions have been imposed upon a legal person, breach by a natural person of such obligations or prohibitions shall be punishable by imprisonment from one to two years and a fine from 2 million to 4 million Riels.”

The dangers of the current draft are clear. The government has removed mandatory registration in name only, and seems to be disguising its intentions.

FNN, CCFC, IDEA, CYN and LICADHO believe that the law should further clarify which groups are required to register. Specifically, the phantom category of CBO should be renamed and expanded to include more groups. The arbitrary limitations on these groups – requiring them to stay within commune borders and act only in their own “community’s” interests – should be removed from the law. CBOs should include informal groups who act outside their own local communities and who may also act in the “public interest.”

Registration should not be mandatory for such groups; nor should notification to the authorities.

Re-Registration for Existing Organizations Remains Mandatory

The law also contradicts itself on the issue of mandatory registration. Article 5 states that an association or NGO may be freely established without registration. But Article 32 states that any existing domestic association or NGO “shall provide written notification regarding the continuity of its activities within 365 days at the latest by specifying the name, office address, identity of governing members and the latest amended statute (if any). In case it is overdue, the Ministry of Interior shall consider that the domestic association or non-governmental organization has virtually abandoned its activities.” (*emphasis added*)

The meaning of Article 32 is clear: Re-registration is, in fact, mandatory – even for organizations that do not wish to obtain legal capacity. This is inconsistent with other provisions in the law, and

violates international law provisions protecting freedom of association⁴. Article 32 should specify that re-registration is necessarily only for those organizations wishing to obtain legal capacity.

Are Alliances Governed by the Law?

Lastly, the fourth draft eliminates the old section on “alliances” of NGOs and associations but does not explicitly say that alliances are allowed (former Articles 19-27). The law does, however, contemplate that NGOs or Associations can be made up of individuals or “legal entities.”

Does this mean that alliances will have to register as separate associations or NGOs? Are such alliances permitted to mix foreign and domestic organizations? Once again, the law raises more questions than it answers.

Burdensome registration requirements & process

The new law eases the burden of registration requirements from earlier drafts, but the requirements will remain an issue for many organizations. This is especially true given the law’s lack of clarity over which groups must register.

An established, sophisticated, domestic NGO based in Phnom Penh – with lawyers, compliance officers and the capacity to submit and review applications – should have little difficulty complying with the law’s registration requirements. But this is not the end of the analysis. As noted above, the law establishes three broad categories that appear to encompass virtually every domestic non-profit entity that could conceivably be established in Cambodia⁵. This means that it is likely that many smaller organizations, including those which are informal and membership-based, will be required to register. If so, they could have significant difficulty complying with the requirements.

For example, to be registered, all groups must submit an organizational statute “in conformity with the Constitution and other existing laws” that covers specific points, including: property management, rules for selecting directors, rules for amending the statute, sources of resources and property, and so on. These requirements are not a significant burden for most large organizations, but they seem out of place and unnecessary for a network of farmers or an informal group of forest activists.

FNN, CCFC, IDEA, CYN and LICADHO believe that this problem could be addressed if the law further clarified who is required to register, as noted in the previous section. Specifically, the category of CBO should be renamed, expanded to include more groups and totally exempt from registration and notification provisions.

⁴ Article 22 of the ICCPR guarantees the right to freedom of association as follows:

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.

⁵ A domestic NGO is defined as “a group of Cambodian natural persons or legal entities who agree to establish to conduct activities to serve public interests without conducting any activity to generate profits for sharing among their members” (Article 4). A domestic association is a “group of Cambodian natural persons or legal entities who agree to establish for the interests of its members without conducting any activity to generate profits for sharing among their members. A domestic association may conduct activities for the public interest” (Article 4).

Excessive powers granted to unelected government officials in the executive branch

The fourth draft retains provisions which grant wide-ranging powers to government ministries responsible for registration. This issue has been discussed extensively in three LICADHO briefing papers, and has not been substantially addressed in the fourth draft.

There is still no administrative appeals process for denial of registration in Article 8. Instead, organizations whose registration applications are denied must appeal to the court system, an avenue that is fraught with delays and executive influence.

Guiding principles for the approval of registration applications are sorely lacking, and do not even tie registration approval to the application requirements in Article 7. The law essentially empowers MOI to rule on legal and constitutional issues regarding organizations' applications. This is open to abuse and gives de facto judicial and constitutional powers to the MOI, which is inappropriate in a State which claims to respect separation of powers. The law should explicitly specify that MOI can only deny registration if required documents are not submitted or are incomplete.

This issue is especially important given that a denial of registration by MOI will rob NGOs of the ability to operate. As noted previously, an unregistered NGO has no legal status, and cannot enter into contracts, make agreements with donors, hire staff, represent itself as an organization, and so on. The employees or members of such an organization may also face criminal charges under the Penal Code.

For this reason, it is essential that the flaws with the registration process be addressed. The process must be simple, neutral, fair and non-politicized.

The law also contains a loophole which allows MOI to delay the approval of applications indefinitely. Applicants can only appeal a denial of registration, not a failure by MOI to act. MOI is supposed to act upon applications within 45 days, but the law does not specify what could be done should this process take longer. Questions remain over when exactly the 45 days begin to run – upon submission, or upon review by MOI officials? Again, the law does not say.

Even if an application is not outright denied, some officials may still claim non-compliance with one of the many requirements, creating delays which serve to intimidate and deter applicants from pursuing their applications. This is particularly true for organizations and associations based on the provinces, without the means to travel repeatedly to Phnom Penh. Officials may do this not only for political reasons, targeting organizations out of favor with the government, but also to extort bribes from applicants.

FNN, CCFC, IDEA, CYN and LICADHO believe that this problem could be partially addressed by making registration applications effective from the date of filing, rather than from the date of MOI's approval, as currently specified in Article 9. Alternatively, MOI's failure to act on an application within 45 days of submission should result in an automatic approval of the application. Such "default approval" appears in other Cambodian laws, such as the Law on Peaceful Assembly.

Restrictions on foreign NGOs

Foreign NGOs face some of the most severe restrictions in the latest draft of the law. The sum of these provisions makes it clear that the government is only interested in welcoming foreign NGOs

who fund development projects focused on service-delivery. Those who conduct advocacy or human rights work are all but excluded by the draft, although not in direct terms.

To start with, all foreign NGOs and associations are required to “discuss and agree” with partner institutions of the government on “aid projects/programs” before applying for a Memorandum of Understanding (MOU). (See Article 14). The phrase “aid projects” is used continuously throughout the law, giving the impression that NGOs which do not dispense aid in the form of cash, materials or infrastructure are not welcome.

This impression is reinforced by Article 15, which requires that foreign NGOs not spend more than 25 percent of their total budget on “administrative expenses, including staff salaries, office equipment, and other expenditures for office functioning.” This will exclude NGOs which engage primarily in human-rights monitoring, advocacy and training. For some projects, staff members are the “aid”.

Foreign NGOs also face significantly stricter penalty and reporting provisions, including:

- Article 12, which requires the submission of a foreign NGO’s bank statements within 30 working days after an MOU is signed.
- Article 17, which allows termination of a foreign NGO’s MOU with the government if activities are deemed to “jeopardize peace, stability, public order or harm the national security, national unity, culture, customs and traditions of the Cambodian national society.” This is typically vague language that allows for completely arbitrary termination of foreign NGOs, essentially a *carte blanche*. Given the government’s past interpretation of these terms, advocacy that is critical of the ruling party could be considered to “jeopardize public order” or violate other provisions of Article 17.
- Article 31, which allows for one-sided termination of MOUs with foreign organizations if they fail to comply with certain reporting requirements. In contrast, local organizations will only be “removed from the registration list.”
- Article 13 does not require the government to provide a foreign NGO with any explanation if it rejects its application for an MOU. Foreign NGOs also have no right to amend the application or appeal a denial.

FNN, CCFC, IDEA, CYN and LICADHO believe that these provisions have the effect of making NGOs arms of the government. This is contrary to the very definition of “non-governmental” organization. The offending provisions should be amended or removed to allow foreign NGOs more operational freedom and to subject them to less control from the government⁶.

The fourth draft also appears to take aim at local NGOs which hire foreign staff. Article 23 “entitles” local organizations to “recruit Cambodian staff” – which initially seems like a complete ban on recruitment of foreign staff. It then clarifies – or contradicts – that Cambodians must be hired to the “maximum extent.” The true meaning of this article is unclear, but its undertone is disturbing⁷.

⁶ We acknowledge that some provisions in the draft law are already used – albeit in slightly different formats – in MOUs with foreign NGOs. This does not change the fact that these are misguided; nor does it mean it is acceptable to enshrine these provisions as permanent legislation. Further, the provisions in the draft law are harsher than those in most current MOUs. For example, many current MOUs set an administrative cost cap of 25 percent, but this only includes the salary of the foreign NGO’s director’s and administrative staff. Article 15 of the draft NGO law sets the 25 percent cap to include *all* “salaries, office equipment, and other expenditures for office functioning.”

⁷ There are also differences between domestic and foreign organizations when it comes to the distribution of assets after involuntary dissolution. A domestic entity’s assets are distributed according to a decision by a court, not by the entity’s by-laws (Article 28). For foreign organizations, assets are distributed at the direction of the foreign organization (Article 29).

We urge the government to remain open to various types of foreign NGOs, not only those which dispense tangible aid.

Wither the Civil Code?

Lastly, where does the LANGO leave the Civil Code?

Article 34 of the LANGO claims to abrogate provisions contrary to the LANGO. It appears that this provision may invalidate less burdensome Civil Code registration provisions for non-profit and public interest entities. Indeed, it is not clear whether any of the Civil Code registration provisions - which have not even come into effect yet - will survive. This further confuses the legal environment in Cambodia, which the new Civil Code and Penal Code were supposed to simplify.

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