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Freedom of Information in Cambodia: A right to know or a culture of secrecy?



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Cambodian Center for Human Rights

Cambodian Center for Human Rights (CCHR)

CCHR is a non-aligned, independent, non-governmental organization that works to promote and protect democracy and respect for human rights in the Kingdom of Cambodia (“Cambodia”). Our vision is of a non-violent Cambodia in which people enjoy their fundamental human rights, are treated equally, are empowered to participate in democracy and share the benefits of Cambodia’s development. We desire rule of law rather than impunity; strong institutions rather than strong men; and a pluralistic society in which variety is harnessed and celebrated rather than ignored or punished. Our logo – a dove flying in a circle of blue sky – symbolizes Cambodia’s claim for freedom.

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No.798, Street 99, Boeung Trabek
Khan Chamkar Mon, Phnom Penh, Kingdom of Cambodia

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Definitions and Acronyms

ACU	Anti-Corruption Unit
ARTICLE 19	Leading international human rights organization on freedom of expression
Cambodia	Kingdom of Cambodia
CCHR	Cambodian Center for Human Rights
CNPA	Cambodian National Petroleum Authority
Constitution	Constitution of the Kingdom of Cambodia
CPP	Cambodian People's Party
DIAL	Development of the Internet for Asian Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
EITI	Extractive Industries Transparency Initiative
Freedom of Information Principles	Principles on Freedom of Information legislation by ARTICLE 19
ICCPR	International Covenant on Civil and Political Rights, 1966
Mol	Ministry of Interior
MoNASRI	Ministry of National Assembly, Senate Relations and Inspections
MPP	Municipality of Phnom Penh
OHCHR	UN Office of the High Commissioner for Human Rights
Organic Law	Organic Law on Administrative Management of Capital, Provinces, Municipalities, Districts and Khans, 2008
PWYP	Publish What You Pay Coalition
RCAF	Royal Cambodian Armed Forces
Report	This Report entitled " <i>Freedom of Information in Cambodia: A right to know or a culture of secrecy?</i> "
RGC	Royal Government of Cambodia

SEC	Securities and Exchange Commission
Special Rapporteur on Freedom of Expression	United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression
SRP	Sam Rainsy Party
UN	United Nations
UDHR	Universal Declaration on Human Rights
UNCAC	United Nations Convention Against Corruption
UNDP	United Nations Development Programme
UNTAC	United Nations Transitional Authority in Cambodia
USAID	United States Agency for International Development
VOA	Voice of America

Executive Summary

The right to access information is widely recognized as a fundamental human right. It is also a fundamental tenet of democracy. The Royal Government of Cambodia (the “RGC”) has declared its commitment to the right of freedom of information by, for example, preparing a draft freedom of information policy. However, the desire for information and the public’s right to access it is far from entrenched in Cambodian society.

This Report looks at principles of freedom of information, the status of the right to information in international law, and the extent to which that right is provided for in the domestic laws of Cambodia. The Report also examines challenges ordinary Cambodians face on a daily basis in accessing information, and provides recommendations for legislative, structural and policy changes that are required in order to ensure that the right is fully respected in line with international standards.

Chapter One (Introduction) of the Report explains the background against which the Report is written and sets out its purpose – to highlight challenges ordinary people face in accessing information by using as examples four areas that CCHR has identified as being particularly important in so far as freedom of information is concerned; corruption, media, rule of law, and resources and land. The Report encourages the RGC to promote the right to information by, amongst other things, enacting freedom of information legislation, and offers some recommendations as to what such legislation ought to contain. It is important to note however, that enacting legislation in itself is not enough. The Report also recommends structures and mechanisms that need to be put in place to facilitate greater access to information.

Chapter Two (Freedom of Information Principles and Law) outlines the importance of freedom of information in a democratic society. It analyzes freedom of information principles, as formulated by experts and organizations working to promote freedom of information, and explains the international law that provides for the right to access information. The Chapter also examines existing provisions in Cambodian laws that provide for access to information, and considers the development of freedom of information legislation and policy in Cambodia to date.

Chapter Three (Supply and Demand) explains that a freedom of information law must also be accompanied by a change in the “supply” of and the “demand” for information. A patriarchal culture in Cambodia and deference to authority means that many Cambodians are reluctant to ask for information, or do not think it is their right or role to do so. In addition, public officials generally have no inclination to share information, and there appears to be a reticence amongst those in authority to engage with the people. Therefore, the introduction of freedom of information legislation must be accompanied by a “cultural” revolution in how information is viewed by the government and the public.

Chapter Four (Freedom of Information and Corruption) discusses how freedom of information principles and law can operate to minimize corrupt practices. The Chapter describes how, despite the RGC ratifying international conventions on corruption, which contain requirements for transparency and the dissemination of official information, corruption continues to be widespread in many areas of public life. The recently promulgated Anti-Corruption Law fails to guarantee public dissemination of information, and contains provisions which permit the withholding of certain information. Shortcomings in the law raise concerns as to whether information gathered under the provisions of the law will in fact be used to effectively tackle corruption in Cambodia. The Chapter concludes by suggesting amendments to the law that could be implemented to ensure public disclosure of information.

Chapter Five (Freedom of Information and the Media) examines how the lack of access to information impacts upon the media and its duty to keep the public informed by reporting on issues of public interest. Journalists interviewed by CCHR during the course of researching this Report noted some positive experiences in requesting information from government ministries under the Press Law 1995, and improvements in accessing government ministries since the appointment by most ministries of spokespeople. However, the journalists interviewed explained that barriers to obtaining information remain, particularly when the information requested is contrary to the interests of, or reflects badly on, the RGC. The Chapter concludes by suggesting some amendments that could be made to the Press Law to ensure access to information, and recommends some other measures that would increase the freedom of information and ease the media's ability to publish information about the RGC.

Chapter Six (Freedom of Information and the Rule of Law) discusses the importance of access to information for the development of the rule of law in Cambodia. It outlines the importance of public access to draft legislation, but explains that it appears that this occurs more freely when the draft law in question is not considered politically sensitive. Where a draft law is viewed as politically sensitive – such as the recently shelved draft Law on Associations and Non-Governmental Organizations – information has been less forthcoming and consultation with civil society has been considered as meaningless. The Chapter also examines how public access to legal judgments is limited. There are positive examples from some courts that do routinely publish judgments, and the Report encourages all Cambodian courts to follow this practice.

Chapter Seven (Freedom of Information and Resources and Land) notes that freedom of information and access to information can help a country avoid the “resource curse” – being the paradox that countries and regions with an abundance of natural resources suffer from less economic growth and worse development as a result of a different factors, including resource mismanagement and corruption - whilst improving its investment climate and promoting greater economic and social stability. It seems that resource contracts are, for the most part, kept secret - in some cases with the support of legal provisions that expressly provide for confidentiality. Land concessions have also been granted with little or no information given to, or consultation sought with, the people who will be affected. As a result, questions remain as to who benefits from these transactions. Transparency and

access to accurate and timely information about such transactions is of paramount importance to avoid resource mismanagement, and freedom of information provisions would be the cornerstone of any such access.

The Report concludes with **Chapter Eight (Conclusion and Recommendations)** which calls on the RGC to adopt freedom of information legislation, and provides recommendations as to what that legislation ought to contain. It reiterates that real change will only manifest itself with a change of culture and attitudes towards information. This means a demand by the people for information, but also recognition by public officials of the power of information and the need for public access as a crucial element to the progressive development of Cambodian democracy.

1 Introduction

The right to access information held by public bodies is referred to as “freedom of information”, the “right to know” or the “right to information”. It is widely recognized as a fundamental human right, and is inherently linked to many other rights, as acknowledged at the first session of the United Nations (“UN”) General Assembly in 1946: “*Freedom of Information is a fundamental human right and a touchstone of all freedoms to which the UN is consecrated.*”¹

Access to information is linked to the basic elements of good governance, such as transparency and accountability, and, as such, freedom of information is important in building confidence and trust in government.² Without access to information, citizens are left unaware of issues that directly impact upon their lives. Without access to information, journalists are unable to perform their duty of informing the public of issues in the public interest. Without access to information, it is unclear how the judiciary is dispensing justice. Without access to information, governments face difficulties in deciding on important public matters and the public is robbed of the opportunity to be informed of how and why those decisions are made. In short, access to information is a fundamental tenet of democracy, and is what distinguishes democratic governments from regimes that seek to operate free from accountability and conduct their activities surrounded by a veil of secrecy.

“Experts in conflict resolution often cite inadequate or inaccurate information as potential sources of conflict. Assuming that this is true, one could therefore argue, as many human rights advocates currently do, that in post-conflict societies such as Cambodia, a free flow of information, particularly from public institutions, is vital to the building and maintenance of a stable, functioning democracy and a vibrant, informed, and engaged citizenry.”

- Raymond Leos, 2009, “Access to information South-East Asia”, p.1

1.1 Cambodia Today

The RGC has publically declared its commitment to the right of freedom of information. In 2003, the Legal and Judicial Reform Program acknowledged “*free access to information ... as a fundamental pre-requisite for a functioning liberal democracy.*”³ There are also encouraging signs that the RGC is committed to developing a freedom of information policy

¹ ARTICLE 19 (Toby Mendel), “Freedom of Information as an Internationally Protected Human Right”, p. 1.

² Summary of statement made by H.E. Khieu Kanharith, Minister, Ministry of Interior, at a Workshop on Access to Information that took place on 7 December 2010 in Phnom Penh, see Advocacy and Policy Institute (API), *Access to Information and Parliament*, December 2010, p. 8.

³ Council for Judicial Reform, June 2003, “Legal and Judicial Reform”, p.10, available at: www.cljr.gov.kh/eng/library/doc/o6-Legal.and.Judiciary.Reform.Strategy.pdf.

and legislation, although the process has been rather drawn-out (see Chapter Two).

However, the right to access information is far from entrenched in Cambodian society. On the one hand, a patriarchal tradition means that many Cambodians are reluctant to ask for information or do not see it as the role of the citizen to interfere with the affairs of the authorities, though this is slowly changing. On the other hand, the government seems reticent to share information, leading to claims that it sees itself above responsibility and beyond accountability (see Chapter Three).

The primary purpose of this Report is to encourage the RGC to continue in its efforts to adopt freedom of information legislation and to facilitate greater access to information. The Report looks at freedom of information principles, the status of the right to freedom of information in international law, and how access to information is currently dealt with in Cambodian laws. The Report also examines the difficulties that ordinary Cambodians face on a day-to-day basis when attempting to access information. The Report uses as examples four areas that CCHR has identified as being particularly important in so far as freedom of information is concerned – corruption (Chapter Four), the media (Chapter Five), the rule of law (Chapter Six), and resources and land (Chapter Seven). It also outlines structures and mechanisms that could be put in place to facilitate greater access to information, and provides recommendations for the content of a freedom of information law. However, such a law, in and of itself, will not solve the apparent absence of transparency and accountability that prevails in Cambodia today. There needs to be a change in the mindset of both the RGC and the public as to the type of information that can be accessed and how such information can be accessed.

1.2 Methodology

In the course of building the argument for freedom of information legislation and related structures and mechanisms for Cambodia, CCHR carried out desk-based research and conducted a number of interviews with interested stakeholders.

The Report cites a number of freedom of information reports written by experts and organizations who work to promote freedom of information around the world, including Toby Mendel, Andrew Eccelstone, and ARTICLE 19. The Report also refers to the work of academics in Cambodia who have examined the issue, most notably Professor Raymond Leos. In compiling the Report, CCHR has used data, information and analysis from the United Nations (“UN”) Human Rights Committee and the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (the “Special Rapporteur on Freedom of Expression”). In the course of analyzing the merits of freedom of information legislation as a means of improving and strengthening the development of Cambodia’s democracy and human rights, CCHR has used a number of media sources that have reported on the situation in Cambodia, including *The Phnom Penh Post*, *The Cambodia Daily*, *Radio Free Asia* and *Voice of America*.

CCHR staff also interviewed a number of journalists to discuss freedom of information issues as they relate to the media (Chapter Five). These interviews were conducted in Phnom Penh.

As requested by the interviewees, the names of the journalists and the publications involved will remain confidential. The importance lies not in who these people are or where they work, but in the substance of what they are saying as regards their experiences with access to information in Cambodia.

2 Freedom of Information Principles and Law

Freedom of information is essential to democracy. As noted by Abid Hussain, the former Special Rapporteur on Freedom of Expression, in his 1995 Report to the UN Commission on Human Rights: *“freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.”*⁴

Democracy is about active and informed citizens, and the participation of those citizens in society. It requires open access to information about what the government is doing on the behalf of citizens, to ensure that it is representing the will of the people, that it is

“The free flow of information and ideas lies at the heart of the very notion of democracy and is crucial to effective respect for human rights (...) [C]entral to the guarantee in practice of a free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public.”

- Abdul Waheed Khan, Assistant Director-General for Communication and Information at the UN Education, Scientific and Cultural Organization

accountable to the people, and to allow citizens to exercise informed choices when choosing their government. As such, information held by public authorities should be viewed not for the benefit of officials or politicians, but for the public as a whole.

Access to information is also a pragmatic way to create a better society.⁵ Having access to information is essential to many of the goals of a fair and democratic society: to ensure transparent and accountable government, to facilitate the participation of citizens in public life, to increase dialogue between government and the population, and to create conditions for investment. The extent to which many of these goals are being achieved in Cambodia will be examined in further detail in Chapters Four to Seven.

2.1 Freedom of Information Principles

The current Special Rapporteur on Freedom of Expression, Frank La Rue, has noted that in the last decade, freedom of information has been widely recognized as a fundamental human right, noting the trend in passing laws on freedom of information.⁶ The number of

⁴ *Commission on Human Rights*, 51st Session, Mr. Abid Hussain, 14 December 1994, “Report of the United Nations Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression”, UN Doc. E/CN.4/1995/32, para. 35.

⁵ *Andrew Ecclestone*, September 2008, “Suggestions on Strategy for Freedom of Information in Cambodia”.

⁶ *The Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression*, 25 March 2010, “Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade”, A/HRC/14/23/Add.2, para. 4, available at:

www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2_en.pdf.

ARTICLE 19: Freedom of Information Principles

- 1. Maximum Disclosure:**
Freedom of information legislation should be guided by the principle of maximum disclosure.
- 2. Obligation to publish:**
Public bodies should be under an obligation to publish key information.
- 3. Promotion of open Government:**
Public bodies must actively promote open government.
- 4. Limited scope of exceptions:**
Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interests” tests.
- 5. Processes to facilitate access:**
Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.
- 6. Costs:**
Individuals should not be deterred from making requests for information by excessive costs.
- 7. Open Meetings:**
Meetings of public bodies should be open to the public.
- 8. Disclosure takes precedence:**
Laws that are inconsistent with the principle of maximum disclosure should be amended or repealed.
- 9. Protection for whistle-blowers:**
Individuals who release information on wrongdoing, whistle-blowers, must be protected.

countries that have implemented such a law has increased dramatically over the years.⁷ With this increased recognition and the central place of access to information in progressive democratic development, many international organizations have been working to promote the right, and advocating for its implementation and entrenchment.

ARTICLE 19, the leading international human rights organization on freedom of expression, has drawn up a set of principles entitled “*The Public’s Right to Know: Principles of Freedom of Information Legislation*” (the “Freedom of Information Principles”).⁸ These principles set out standards for freedom of information legislation taken from laws from around the world. The purpose of the Freedom of Information Principles is to provide guidance for the development of effective freedom of information legislation in any country that is considering implementing such a law.

There are nine Freedom of Information Principles (see text box). The first is that freedom of information legislation should be guided by the principle of maximum disclosure, which means that public bodies have an obligation to disclose information and members of the public have a corresponding right to receive information. Any refusal to provide information should be justified on the basis of a real risk of substantial harm to a legitimate protected interest, for example, law enforcement, privacy, national security, commercial confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes. It is argued that for non-disclosure to be legitimate, the net effect of disclosure must be to cause substantial harm to that legitimate protected interest.⁹ Even in cases where such a risk exists, the information should be disclosed where the benefits of

disclosure and the public interest, outweigh the harm. For example, it is argued in the

⁷ The World Resources Institute Access Initiative Director, Lalanath de Silva, noted in an interview in 2010 that of the 80 plus freedom of information laws that have been enacted around the world, the vast majority have been introduced since 2005. See interview with Lalanath de Silva, 26 September 2010, “Freedom of Information Laws Spreading Around the World”, available at: www.wri.org/stories/2010/09/freedom-information-laws-spreading-around-world. Links to constitutional provisions, laws and regulations providing for freedom of information from around the world are available at the website of *Right 2 Info*, available at: right2info.org/laws.

⁸ ARTICLE 19, June 1999, “The Public’s Right to Know: Principles on Freedom of Information Legislation”, available at: www.article19.org/pdfs/standards/righttoknow.pdf.

⁹ *Ibid.*, p. 6.

Freedom of Information Principles that “*exposure of corruption in the military may at first sight appear to weaken national defense but actually, over time, helps to eliminate the corruption and strengthen the armed forces*”.¹⁰ Any refusal by a public authority to disclose information should be subject to appeal to an independent administrative body with adequate powers to promote effective compliance with the law, and from there, to the courts (Principle 5).¹¹

Two of the Freedom of Information Principles outline positive obligations on public authorities: (i) to automatically publish certain types of material, even without a specific request, such as information about the functioning and decision-making of government institutions; and (ii) to actively promote open government, through ensuring that the public know of their right to information and that public officials are aware of the need to disclose information.

A number of principles deal with access requests, processing of requests and costs. Other principles require governments to open meetings, aimed at establishing the presumption that all meetings of government bodies are open as part of the people’s right to know what the government is doing on its behalf. There are also principles regarding protection for whistleblowers, and the relationship of a freedom of information law with any secrecy legislation.

The extent to which existing legal provisions and practices in Cambodia meet these Freedom of Information Principles will be examined in further detail in Chapters Four to Seven.

2.2 International Human Rights Law

Under international human rights instruments, freedom of information is generally protected as part of the right to freedom of expression. Article 19 of the Universal Declaration on Human Rights (the “UDHR”) provides that: “*everyone has the right to*

“[Freedom of Information] FOI laws are an instrument for achieving positive social, political and economic change. FOI laws can assist in holding people and institutions to account; in facilitating public participation in policy making and implementation; in loosening blockages to change by contributing to a better informed dialogue between protagonists about a problem; and creating the conditions that encourage investment.”

- Andrew Ecclestone, September 2008, “Suggestions on Strategy for Freedom of Information in Cambodia”, p. 5

freedom of expression; this right includes freedom to [...] seek, receive and impart information.” Article 19 of the UDHR is mirrored, almost identically, by Article 19 of the UN International Covenant on Civil and Political Rights (the “ICCPR”), which states that: “*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart*

¹⁰ Supra note 12, p.6.

¹¹ Ibid., p. 7.

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.”

The office of the Special Rapporteur on Freedom of Expression has expressly recognized that freedom of information is an integral part of Article 19 of the ICCPR. In his 1999 Annual Report to the UN Commission on Human Rights on Freedom of Expression, the former Special Rapporteur Abid Hussain, noted that *“everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights”*.¹² Furthermore, the revised General Comment on freedom of expression under Article 19, published by the UN Human Rights Committee in July 2011, refers to *“a right of access to information held by public bodies.”*¹³ It goes on to state that information *“includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production”* and includes *“all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local”* and that *“the designation of such bodies may also include other entities when such entities are carrying out public functions.”*¹⁴

The right to freedom of information, as with most human rights, is not considered absolute. However, any restrictions to the right must meet certain requirements, as set forth in Article 19(3) of the ICCPR.¹⁵ These requirements can be best applied, experts argue, by using a three-stage test that sets the limited circumstances when information can be withheld, similar to the rationale of the Freedom of Information Principles discussed above:¹⁶ (a) the information pertains to a legitimate protected interest expressly provided for in a freedom of information law; (b) disclosure of the information would threaten to cause substantial harm; and (c) the harm would outweigh the public interest in disclosing the information. This three-stage test could be applied by a court and/or an administrative body mandated to consider refusals by government institutions to release certain information into the public domain. According to freedom of information expert Raymond Leos, the purpose of the three-stage test is to *“guarantee that any withholding of governmental information must only occur when it is in the overall public interest. Correct application of the test will help prevent blanket exclusions and exceptions, eliminate provisions that protect governmental bodies from public criticism or embarrassment, protect against governmental malfeasance,*

¹² *Commission on Human Rights*, 54th Session, 29 January 1999, “United Nations Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression”, UN Doc E/CN.4/1999/64, para. 12.

¹³ *UN Human Rights Committee*, 11 July 2011, “General Comment No. 34, Article 19”, CCPR/C/GC/34, para. 18.

¹⁴ *Ibid.*

¹⁵ Article 19(3) of the ICCPR provides exceptions that are provided by law and are necessary for the respect of the rights or reputation of others, or for the protection of national security, public order or public health or morals.

¹⁶ *Raymond Leos*, 8 January 2009, “Access to Information in Southeast Asia and Cambodia”, p. 6, available at: www.cchrcambodia.org/admin/media/report/report/english/2009-01-08-%20Access%20to%20Information%20in%20Southeast%20Asia%20and%20Cambodia-%20EN.pdf.

and prevent the concealment of information that might be detrimental to an existing government policy or political ideology.”¹⁷

2.3 Existing Cambodian Law

There is no specific freedom of information legislation enacted in Cambodia, however, there are other laws which guarantee the right to freedom of information and contain freedom of information related provisions. The main laws will be discussed in turn below.

(i) The Constitution

While there is no specific provision for the protection of freedom of information within the Constitution of the Kingdom of Cambodia (the “Constitution”), the Constitution does protect the right of freedom of expression in Article 41. The right to freedom of information can be considered as a precursor for the guarantee of freedom of expression, as it is hard to form or express meaningful opinions without access to

The Cambodian Constitution

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 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 affect the good traditions of the society, to violate public law and order and national security.”*

accurate and full information. The Constitution also guarantees the right of all Khmer citizens to “*participate actively in the political, economic, social and cultural life of the nation*”.¹⁸ In order for this right to be meaningful, there must also be free access to information, as without information, the means of active participation are rendered redundant.

In addition, Article 31 of the Constitution pledges to recognize and respect the UN Charter, the UDHR, and covenants and conventions related to human rights. Cambodia ratified the ICCPR in 1992, and thus has an obligation to respect, protect and fulfill its provisions, including in relation to Article 19. As such, the provisions of the ICCPR and UDHR - namely Article 19 of both instruments, which guarantee the right to access information - form part of Cambodian law.¹⁹

(ii) The Archives Law, 2005

¹⁷ Ibid.

¹⁸ Article 35 of the Constitution of the Kingdom of Cambodia.

¹⁹ In a decision made by the Cambodian Constitutional Council dated 10 July 2007, it was confirmed that all human rights instruments to which Cambodia has acceded form part of the Constitution. See decision no. 092/003/2007.

The Archives Law regulates the management and maintenance of information in government archives. It provides for public access to “publicized documents” that are not harmful to national security, for research and consultation “*as unrestricted information*”.²⁰ However, the law does not specify what types of information are “publicized documents”, and documents that are not “publicized” cannot be accessed until at least 20 years after the date of production or the end of the proceedings during which they were created. Certain documents attract longer periods of secrecy in order to protect national security, or defend national sovereignty and the rights of individuals.²¹ The penalties for breaching the Archives Law by making these documents public are severe: a fine of between US\$1,250 and US\$6,250, and imprisonment of between seven and 15 years.

(iii) The Press Law, 1995

Article 5 of the Press Law is described by many as the closest thing that Cambodia has to a law guaranteeing access to information, as it recognizes the right of the press to “*access information in government held records*”.²² Article 5 states that in order to obtain information, a request must be made in writing to the relevant institution specifying the information sought. Officials are obliged to reply to the request within 30 days. In addition, the law provides that access can be denied on the grounds that disclosure would: (a) endanger national security, and/or harm relations with other countries; (b) constitute interference with the privacy rights of individuals; (c) lead to the exposure of confidential information and financial information; (d) affect the right of a person to a fair trial; or (e) cause danger to public officials carrying out their duties.

Importantly the law only applies to members of the press, and thus ordinary Cambodians cannot rely on it to gain access to government held records. There appears to be no legal justification for affording the right to media when it is not afforded to other citizens.

Although the Press Law allows members of the press to access information, the experiences of members of the press interviewed by CCHR, as discussed in Chapter Five, show that the level of access granted in response to such requests is inconsistent. In addition, the law is silent on any right of appeal if a request is rejected, and no provision is made for an independent entity to monitor requests and government replies. Without such a right of appeal, there is the potential for the grounds for denying access to information as provided for in Article 5 to be over-used, or even abused.

2.4 Deconcentration and Decentralisation Initiative

²⁰ Article 13 of the Archive Law 2005.

²¹ Article 14 of the Archives Law 2005.

²² *Raymond Leos*, supra note 20, p. 6.

Since 2001, the RGC has been implementing a policy of “deconcentration and decentralisation”.²³ The central aim of the policy is to delegate and, to a lesser extent, transfer part of the decision-making power to local authorities. The policy represents a positive step forward for access to information at a local level and is premised on giving greater control to entities at a local level, and to increase the participation of the public in decisions that directly affect them. The laws governing the process of deconcentration and decentralization include the Law on the Administration and Management of Commune/Sangkat 2001, which recognizes communes and sangkats as legal entities with legislative and executive powers to design development plans for their communes and manage local projects, and the Organic Law on Administrative Management of Capital, Provinces, Municipalities, Districts and Khans 2008 (the “Organic Law”), commonly referred to as the Organic Law, which provides for the establishment of councils elected for each administrative division which are accountable directly to citizens.

Both of these laws contain provisions specifically aimed at guaranteeing freedom of information. For example, the Law on The Administration and Management of Commune/Sangkat contains provisions requiring meetings of the Commune/Sangkat Council to be held in public (Article 23), and the immediate dissemination of decisions to the public (Article 48). Similarly, the Organic Law provides, in Article 68, that all council meetings shall be conducted in public and, in Article 51, that the council shall create favourable conditions for the

Organic Law on Administrative Management of the Capital, Provinces, Municipalities, Districts and Khans, 2008

Article 41: Immediately upon approval of the development plan [the plans of the relevant council regarding development within its jurisdiction, i.e. infrastructure], the council shall post the plan in public. The public can look at the plan at the office of the council free of charge or may purchase the plan from the council at original cost.

Article 52: Each council shall have a public information board or other means of information dissemination at its main office and in other places within its jurisdiction that are easily accessed by citizens for public information.

Article 169: The board of governors shall ensure the availability of information boards and other means for information dissemination as needed by its council. All documents published in accordance with this Law shall be posted on the information boards or disseminated through other means within the jurisdiction of the council.

Deconcentration: The delegation of power from the central government to appointed representatives at a local level, for example, to provincial governors.

Decentralisation: The transfer of administrative management of national entities to elected local authorities.

²³ The policy of Deconcentration and Decentralization began with the adoption of the Law on Commune Elections 2001 and the Law on Administration and Management of Commune/Sangkat 2001.

public when disseminating public information on reports, agenda of meetings, minutes of meeting, bylaws, etc.

Information boards are mentioned in several articles of the Organic Law as a means to disseminate information to the public (see text box). They are a promising medium to increase public awareness of government activities and ensure that those affected by decisions are duly informed of them. In addition, by mandating that local officials consult citizens and report all official decisions, it appears that the Organic Law should increase freedom of information throughout the country.

While this is a positive policy, according to a recent report published by the Asian Development Bank, many of the proposed actions in the 2005 Strategic Framework document (the document that guided development of the 2008 Organic Law), and the latest draft of the 10-year National Program (which sets out how deconcentration and

“Information is the oxygen of democracy.”

- ARTICLE 19, June 1999, “The Public’s Right to Know: Principles of Freedom of Information Legislation”, p.1

decentralisation will be implemented) are years behind schedule.²⁴ CCHR is encouraged by the law and the extent of information that should be provided to the public within its provisions, but as is common in Cambodia good law is more often than not

compromised by poor implementation.

2.5 Development of Legislation in Cambodia

Since the mid-1990s, the Special Rapporteur on Freedom of Expression has called on nations to implement freedom of information legislation.²⁵ The most recent UN Human Rights Committee General Comment on freedom of expression also states that to give effect to the right of access to information, States should make every effort to ensure easy, prompt, effective and practical access to information, and should enact the necessary procedures whereby one may gain access to information, such as by means of freedom of information legislation.²⁶

Such legislation has been in the pipeline in Cambodia for some time, but no law has yet been promulgated. In 2004, the RGC, strongly encouraged by donor countries, acknowledged the need for a freedom of information law in order to create transparent government, reduce corruption and promote confidence in the government,²⁷ and stated that it aimed to develop such a law by 2006. This has not been achieved, and instead of the development of a law, the focus has been on the development of a policy framework on access to

²⁴ *Asian Development Bank* (Tariq H. Niazi), 2011, “Deconcentration and Decentralization Reforms in Cambodia: Recommendations for an Institutional Framework”, p. 67.

²⁵ *Ibid.*, p. 3.

²⁶ *UN Human Rights Committee*, supra note 18, para. 18.

²⁷ *MoNASRI*, 22 July 2007, “Access to Information: A clear policy framework for Cambodia”, p. 4.

information.

In July 2007, after three years of workshops and conferences on freedom of information, the Council of Ministers mandated the Ministry of National Assembly, Senate Relations and Inspections (“MoNASRI”) to produce a draft policy paper, which would be used as a blueprint for a freedom of information law. The Draft Policy Paper on Freedom of Information was completed in late August 2007, with technical assistance from the United States Agency for International Development (“USAID”).²⁸ However, CCHR understands that MoNASRI have yet to forward it to the Council of Ministers for review, and it was never formally accepted as official government policy.²⁹ It is unclear why the process has stalled.

In December 2010, 60 members of the RGC participated in a workshop in Phnom Penh entitled “Access to Information and the Cambodian Parliament” organized by the Advocacy and Policy Institute, to discuss efforts in promoting the right to freedom of information.³⁰ This is an encouraging sign that the RGC is taking its responsibilities to develop a law on freedom of information seriously.

Also in December 2010, the Sam Rainsy Party (“SRP”) submitted a Draft Law on Access to Information to the National Assembly, which was ultimately rejected. The draft law had many important provisions which, had the law been adopted, would have made huge strides in ensuring the right to freedom of information in Cambodia.³¹ For example, the draft law stated that any exemptions to disclosure must meet a public interest test (Article 40), and included provisions on proactive disclosure (Articles 6 to 16), detailed provisions on the institutional framework to support the right to information (Articles 41 to 67), and the protection of whistleblowers (Articles 68 to 69). There were also provisions about the development of an independent oversight body (Chapters Six and Seven of the draft law) and an Information Disclosure Tribunal (Chapter Eight).

The position on the draft law in relation to other legislation was also made clear: according to Article 5 the law “*should override other laws that prohibit or prevent the disclosure of the public (or private) body’s records and become a supreme law on disclosure of information*” but “*shall not prohibit or prevent the information disclosure under other laws, regulations, policies or practices*”. In addition, “*any provisions that are contrary to this law shall be revoked*” (Article 80).

ARTICLE 19, in collaboration with the Advocacy and Policy Institute in Cambodia, completed an analysis of the draft law and suggested that it should clearly state that it will apply to all branches of the government, and to all citizens. In addition, it was recommended that the draft law be amended to guarantee that information will be made available on the internet

²⁸ USAID, 22 February 2008, “USAID Supports Workshop on Freedom of Information for Cambodian Lawmakers”, available at: www.usaid.gov/kh/documents/USAID_Highlights_Feb22_08.pdf.

²⁹ Raymond Leos, supra note 20, p. 6.

³⁰ CCHR, 8 December 2010, “Press Release: CCHR Commends RGC on Steps Towards Freedom of Information Act”, available at: www.cchrcambodia.org/English/add_press_release/press_release/2010_12_08_cchr_press_release.pdf.

³¹ ARTICLE 19, September 2011, “Cambodia: Draft Law on Access to Information”, Appendix 1.

in clear, accessible language.³² Despite some minor deficiencies, ARTICLE 19 urged the RGC to support the draft law and to ensure that it is enacted. Moreover, it called on the RGC and all stakeholders to promote public understanding of the provisions before and after they have been enacted.

In March 2012, Sam Rainsy Party lawmaker Son Chhay sent an amended version of the Draft Freedom of Information Law to the National Assembly calling for parliament to at least debate the legislation rather than rejecting it outright.³³

³² Ibid., pp. 7-12.

³³ *The Phnom Penh Post*, "At Least Debate FOI Draft: SRP Lawmaker", 2 March 2012.

3 Supply and Demand

Given the importance of the right to information in the exercise of democracy, the formulation of a firm freedom of information legislation, is extremely important. However, the introduction of freedom of information law is not in and of itself the solution to the apparent absence of transparency and lack of accountability that exists in Cambodia. Freedom of information legislation must be accompanied by a “cultural revolution” in how information is viewed and by a change in the relationship between the people and the government.

3.1 Brief History of Record-Keeping in Cambodia

When it comes to Cambodia, it can be difficult to access accurate information about and from the RGC and its related bodies. In order to understand why this is, one must first take a brief look at the history of how records were preserved and documented in Cambodia.

Little is known about the record-keeping skills from the period of the Khmer Kings, although dedicated document repositories are known to have existed, and many of the Temples of Angkor include a number of document libraries.

Western ideas of record-keeping were introduced during the French colonial period (1863-1953). For example, in 1911, an order was issued by the *Résident Supérieur* of Cambodia, which contained guidelines for the establishment of a central archive in Phnom Penh, but its terms were not implemented until after the arrival of a French archivist Paul Boudet in 1917.³⁴

Few documents from the French colonial period have survived. There is a popular myth that after 1975 and the arrival of the Khmer Rouge, all the books and documents in the National Library and Archives were destroyed.³⁵ On the contrary, documents housed in the National Archives survived largely untouched. However, most of the ministerial documents from the 1950s and 1960s had not been transferred to the National Archives when the Pol Pot regime seized control of Cambodia. These documents may have been destroyed when the ministry offices themselves were ransacked, or when the population returned to Phnom Penh.

What is known is that during the time of the Khmer Rouge, institutions were completely destroyed, and civil registration and administration was no exception - people lost their documents or purposely destroyed them in order to hide their identities and escape the

³⁴ Cambodia Culture Profile, 2011, “Cambodia Overview: Historical Background”, available at: www.culturalprofiles.net/cambodia/Directories/Cambodia_Cultural_Profile/-1727.html.

³⁵ The National Archives of Cambodia, “History of our Institution”, available at: www.nac.gov.kh/english/index.php?option=com_content&view=article&id=47&Itemid=58.

regime.³⁶ For example, there was no private ownership of land in Cambodia; title records and registers were destroyed, and all land fell under the ownership of the government.³⁷ As a result, today the social and legal legitimacy of landholding varies widely (discussed further in Chapter Seven).

3.2 Demand for Information

In Cambodia, there is an absence of demand for information by ordinary Cambodians “*due to lack of awareness of information rights, reluctance to request ‘sensitive’ information, and little sense of how to find information or how to use it to effect change*”³⁸, though increasingly, particularly in relation to land disputes, we are seeing this change. There is a patriarchal culture among Cambodians, who show deference to authority. This can mean that traditionally people are reluctant to ask for information, or do not think it is their right to do so, as this is seen as interfering in the affairs of authorities. As a result, citizens do not ask questions about public expenditure, budgets or other “sensitive” issues. A World Bank study found that Cambodians do not see it as their role to call authorities to account, noting that “*interviews frequently revealed a high level of uncertainty about questioning or even requesting information from authorities, fearing that simply making such a request could be interpreted as an expression of distrust and lead to anger, loss of face or negative repercussions.*”³⁹

The attitude of citizens and their perception of the authorities was well summed up by a participant at a 2010 public forum hosted by CCHR on elections and democracy, who stated that “*the [ruling] Cambodian People’s Party is our parent, how is the child supposed to change its parent?*”⁴⁰ CCHR also encountered this attitude in its investigation into the tragedy at Koh Pich Bridge on 22 November 2010, when over 350 people died and a similar number were injured following a crush on a bridge in Phnom Penh; witnesses seemed reluctant to ask questions of the authorities or make negative comments, and there appeared to be a fear of negative repercussions if such questions were asked.

3.3 Governance Culture

The patriarchal view of the Cambodian people is mirrored by the attitude of successive governments and the understanding of those in power of the nature and role of government. In Cambodia, public officials generally show little inclination to share information, viewing their activities as the business of those in power. In public forums hosted by CCHR in 2010 about elections and democratic practices, participants and panelists

³⁶ Plan Asian Regional Office, 2005, “Count Me In! UBR Campaign Interim Report Background”, p.8, available at: ssl.brookes.ac.uk/ubr/files/4/11-Count_me_in!_Report_Background_ARO.pdf.

³⁷ BNG Hemoregon, February 2009, “Land and Construction in Cambodia”, p 1. ‘Organization’ in this context, or to take its Khmer name “Angkar”, refers to the ruling body of the Khmer Rouge.

³⁸ The World Bank, February 2009, “Cambodia Linking Citizens and the State: An Assessment of Civil Society Contribution to Good Governance”, p. 19.

³⁹ Ibid., pp. 19 - 20.

⁴⁰ CCHR, *Forums on Elections and Democratic Space*, July 2011, p. 38.

acknowledged that public officials are more willing than in previous years to recognize that their obligation is to serve the electorate and not the interests of their parties. However, there remains a failure on the part of ministers and National Assembly members to consider the impact of their decisions on the lives of the ordinary people and the importance of adequate information for the electorate in general.⁴¹

This is illustrated by the failure of parliamentarians in the ruling Cambodian People's Party ("CPP") to take part in public forums hosted by CCHR. These forums consider issues of importance for ordinary people and provide them with a platform to engage government, opposition, local authorities and others in positions of power. In 2009 and 2010, CCHR invited parliamentarians to 31 public forums throughout the country. On only one occasion did a CPP parliamentarian attend and listen to the concerns of the participants.⁴² Similarly, with the four forums and one workshop that CCHR held as part of a UN Development Programme ("UNDP") project on Elections and Democratic Space, no CPP parliamentarian attended, despite numerous requests from CCHR.

In Cambodia, there are close ties between the government and business. It can therefore be argued that the RGC lacks the incentive to provide information about the grant of public contracts, particularly where the contracts coincide with the business interests of government representatives or those closely aligned with members of the government. This is illustrated by a leaked document that was published in *The Phnom Penh Post* in March 2010, which outlined a private funding scheme under which businesses fund individual units and battalions of the Royal Cambodian Armed Forces ("RCAF").⁴³ Of the companies named as private funders, seven are owned or controlled by individuals who are directors of companies who have received land concessions in Cambodia since 2000, as named in a 2007 UN document.⁴⁴ In some cases, such as that of CPP Senator and RCAF funder Ly Yong Phat, the RCAF has engaged in evictions on land which was subject to a government concession. This implies that the individuals funding the RCAF are using this connection to enforce their land concessions. This information was only made available to the public through quality investigative journalism – not through any disclosure process on the part of the government or any commitment on the part of those involved the grant and receipt of the land concessions to transparent practices.

There is also evidence that information that is considered sensitive or that could be damaging to Cambodian officials has been withheld by the state and been prevented from being disseminated to the public. Following the Koh Pich tragedy for example, the RGC set up a committee to investigate the events of the night of 22 November. This investigation, however, was completed within a week, and concluded that the tragedy was caused by the panic of those on the bridge. While Prime Minister Hun Sen acknowledged that the

⁴¹ Ibid, p. 39.

⁴² For further information see <http://www.cchrcambodia.org/publicforummap/>.

⁴³ The document in question was published in *The Phnom Penh Post* on 10 March 2010.

⁴⁴ *United Nations Office of the High Commissioner of Human Rights Cambodia*, June 2007, "Economic land concessions in Cambodia: A human rights perspective", available at: www.sithi.org/landissue/source/ELC/OHCHR_ELC%20report_2007.pdf.

government was at fault in failing to anticipate that human crushes could occur, no officials were held responsible. Further, no details of the failings of the government, or the measures that would be put in place for future events have been published. Instead, only a government news conference was held, with an associated press release on the City Hall website. There were also worrying reports of the authorities preventing the dissemination of videos from that night, with police officers reportedly seizing VCDs showing a montage of videos taken by witnesses on the night of the tragedy.⁴⁵

3.4 “Cultural Revolution”

in addition to the introduction of any freedom of information law there needs to be a “cultural revolution” in the understanding of the Cambodian people of the role they play in a democratic society, and in the government’s understanding of the benefits and needs of transparency. The Cambodian people need to realize that their representatives are accountable to them and that their participation, in part through requesting information and asking questions, is fundamental for the progressive development of the economic, political, social and cultural life of the nation. Similarly, the RGC needs to appreciate that elected officials are in power to rule on behalf of the public, and are accountable to them. There should be no assumed authority, or a presumption that the public will not understand, or do not need to know, the details of the government’s decisions.

Similarly, it must be recognized that increasing access to information is not simply about having information in the public domain; it also means having the information readily accessible. The literacy rate in Cambodia is low, at 74%.⁴⁶ It is therefore essential that information is made available in forms which the population can actually access.

Chapters Four to Seven of this Report examine some of the issues that affect Cambodian people on a day-to-day basis, and how access to information could positively impact on Cambodia’s democratic development under these headings. While the Report provides recommendations as to the content of any freedom of information law, it is important to note that real change in this area is only likely to come when there is a change in how information is viewed by all sectors of society. Without such a change, any freedom of information law will be incomplete.

⁴⁵ *CCHR*, November 2011, “The Koh Pich Tragedy: One Year on, Questions Remain”; *The Phnom Penh Post*, 22 December 2010, “Koh Pich Footage Crackdown”.

⁴⁶ The International Labor Organization: www.ilo.org/public/english/region/asro/bangkok/skills-ap/skills/cambodia_literacy.htm.

4 Freedom of Information and Corruption

The dissemination of information about public affairs and the management of issues in the public interest is, in the words of opposition lawmaker Son Chhay, “*one of the most recognized ways to fighting corruption.*”⁴⁷ Freedom of information legislation is closely related to anti-corruption legislation: the absence of transparency is at the heart of corrupt practices, and public access to information is a vital means for preventing and uncovering corruption. As the Director of the Advocacy and Policy Institute, Neb Sinthai, noted “*for the anti-corruption law to be effective, we need data, we must be informed who is corrupt and who isn’t. Without information we cannot see who is crooked and who is not.*”⁴⁸

4.1 Corruption in Cambodia

Corruption is widespread in Cambodia and permeates all aspects of Cambodian public life. A USAID assessment of corruption in Cambodia concluded that it has become a part of everyday life.⁴⁹ Transparency International has recently stated that corruption in Cambodia is “systemic” with people being habituated to bribery that is now “automatic.”⁵⁰ The absence of transparency means corruption can be undertaken by all parties, from the government and judiciary, to businesspeople, doctors, teachers, and salespeople, all of whom are susceptible to unofficial payments and secret deals. The Australian government recently concluded that Cambodia loses between \$300 million and \$500 million per year in revenue to corruption.⁵¹

Transparency International’s 2011 Corruption Perception Index ranked Cambodia 164 out of 183 countries.⁵² In terms of high-level corruption, some of the most well-known occurrences involve illegal logging (see Chapter Seven); government dealings with companies to form unfair monopolies or to grant public contracts (see Chapter Seven); and inflated expenses in the national budget.

With regard to budgetary transparency, which is linked to how public resources are spent and is a key area of potential corruption, a recent Open Budget Initiative report scored

⁴⁷ *Christophe Peschoux*, 4 May 2010, Speech at “World Press Day, Freedom of Information: The right to know”, organized by UNESCO, OHCHR Cambodia with the Ministry of Information, Phnom Penh, Cambodia.

⁴⁸ *Khmer Campus*, available at: kcampus.wordpress.com/2010/02/14/what-is-freedom-of-information/.

⁴⁹ *USAID/Cambodia* (Michael M. Calavan, Sergio Diaz Briquets, Jerald O’Brien), August 2004, “Cambodian Corruption Assessment”, p. 2.

⁵⁰ See comments on Transparency International Cambodia Executive Director Preap Kol on VOA Khmer, 12 April 2012, “Widespread Corruption Now Systemic: Transparency International”, available at: <http://www.voanews.com/khmer-english/news/Widespread-Corruption-Now-Systemic-Transparency-International-146868565.html>.

⁵¹ *Voice of America (VOA) Khmer*, 22 September 2011, “2007 Audit Finds Irregularities, Inefficiencies”, available at: www.voanews.com/khmer-english/news/2007-Audit-Finds-Irregularities-Inefficiencies--130348243.html.

⁵² *Transparency International*, 2011, “Corruption Perceptions Index 2011”, p. 3.

Cambodia a dismal 15 out of 100.⁵³ Vietnam, with a score of 14, was the only country lower than Cambodia in South-East Asia. In relation to Cambodia, the report concluded that “*the government provides the public with scant information on the central government’s budget and financial activities assessed by the survey.*”⁵⁴ For example, Cambodia produced and released into the public domain only four of the seven key documents identified in the Open Budget Initiative report. In addition, the government does not release a non-technical version of the budget that would allow citizens to better understand spending priorities. If the public cannot access key information about a country’s budget, it is very difficult to verify that money is being spent for the benefit of the people. This lack of transparency increases the ease with which underhand practices can be undertaken without independent scrutiny.

4.2 Fighting corruption

In September 2007, the RGC ratified the UN Convention against Corruption (“UNCAC”). The UNCAC includes a number of references to freedom of information and sets out steps that States must take to promote transparency. These include the creation of a body that investigates and monitors corruption, and the public dissemination of official information.

Anti-corruption legislation in the form of the Anti-Corruption Law was passed by the National Assembly in March 2010 and came into full force and effect in August 2010.⁵⁵ This Law cemented the powers of the Anti-Corruption Unit (“ACU”), which was created before the passage of the legislation, and whose role it is to implement laws, orders and regulations related to corruption, and direct the work of preventing and combating corruption within Cambodia. This includes monitoring and investigating corruption, and reviewing complaints received about corruption. The law also established the National Council Against Corruption, which will provide guidance and recommendations on anti-corruption work to the ACU.

UNCAC

Article 10(a): States shall adopt “*procedures or regulations allowing members of the general public to obtain, where appropriate, information on organization, functioning and decision-making processes of its public administration and, with due regard for protection of privacy and personal data, on decisions and legal acts that concern members of the public.*”

4.3 Freedom of Information

Whilst the Anti-Corruption Law has been heralded by some as a positive step in tackling corruption, deeper analysis reveals its lack of teeth as a means to tackle corruption in any meaningful way. For example, the Law is silent on the ACU’s ability or obligation to publish

⁵³ See *Open Budget Initiative, Open Budget Report 2010*, p.5, available at: http://internationalbudget.org/wp-content/uploads/2011/06/2010_Full_Report-English.pdf.

⁵⁴ *Open Budget Initiative*, January 2011, *Open Budget Index 2010, Budget Transparency Brief: Cambodia*, Volume 3, available at: http://www.ngoforum.org.kh/eng/dip/dipdocs/NBP_OBI_Brief_2010-English.pdf.

⁵⁵ The Anti-Corruption Law is available at the CCHR hosted Cambodian Human Rights Portal at: www.sithi.org/temp.php?url=view_law.php&&id=172.

information regarding its activities and investigations. This in effect codifies the presumption against disclosure, rather than endorsing the principle of maximum disclosure, as advocated by the Freedom of Information Principles. Furthermore, the law expressly precludes the publication of any reports by the ACU; these are instead sent directly to the Prime Minister, raising concerns not only about the lack of transparency, but also about the ACU's political independence.⁵⁶

Under the Law, certain individuals and bodies must make declarations of assets and liabilities in order to help avoid claims of conflicts of interests (Article 17). However, the Law states that declarations to the ACU will remain confidential; this includes declarations by members of the Senate, National Assembly, RGC, trial judges and leaders of civil society.⁵⁷ The opposition pressed for an amendment to the draft law whereby disclosure of such assets should be made public, but this was ultimately not included. As noted by SRP lawmaker Son Chhay *"we believe that if you treat the declaration of the asset as top-secret, particularly the asset of those in government, this kind of declaration will become meaningless. So we want the public [to] have the right to know what these senior government assets are all about."*⁵⁸

The Anti-Corruption Law also fails to provide a legal framework for the physical and legal protection of individuals who blow the whistle on corrupt practices, as is recommended under the Freedom of Information Principles. Indeed, Article 41 of the law creates criminal offences for leaking information and for making false complaints of corruption. There is no requirement of intention in relation to a false complaint, meaning it is unclear whether an incorrect complaint, rather than a deliberately false one, would constitute an offence under the Law. These provisions, and the lack of certainty as to how they will be interpreted, are likely to act as deterrents to those who might come forward with information about corruption. In addition, given the rather opaque procedures in the Law and the lack of obligations to publish information about investigations into corruption, there are concerns about whether the information gathered will be used to genuinely tackle corruption.

Freedom of information legislation that includes the presumption of maximum disclosure would mean that the practices of public officials could be appropriately monitored and corrupt practices uncovered. Freedom of information would therefore complement the Anti-Corruption Law by strengthening the ability of ordinary Cambodians to hold public officials accountable. Equally, public disclosure of the workings of the ACU would increase its credibility and the legitimacy of and confidence in its work. In relation to freedom of information and corruption, CCHR recommends the following:

⁵⁶ CCHR, 10 March 2010, "CCHR Letter to President of the National Assembly regarding the draft Anti-Corruption Law", available at: [www.cchrcambodia.org/English/add_press_release/press_release/cchr%20letter%20to%20the%20president%20of%20the%20national%20assembly%20concerning%20the%20draft%20anti-corruption%20law%20\(english%20translation\)\(031010_1268279956\).pdf](http://www.cchrcambodia.org/English/add_press_release/press_release/cchr%20letter%20to%20the%20president%20of%20the%20national%20assembly%20concerning%20the%20draft%20anti-corruption%20law%20(english%20translation)(031010_1268279956).pdf).

⁵⁷ See Articles 17 and 20 of the Anti-Corruption Law 2010.

⁵⁸ Son Chhay, as quoted on ABC, *Radio Australia*, 12 March 2010, transcript available at: www.radioaustralia.net.au/connectasia/stories/201003/s2843946.htm.

Recommendations

- In accordance with the Freedom of Information Principles, the Anti-Corruption Law should be amended to:
 - ensure maximum disclosure;
 - guarantee the independence of the ACU;
 - include provisions that the workings of the ACU, its reports, and any disclosure it receives are made public;
 - provide greater protection for whistleblowers, and
 - remove offences related to leaking information.
- The RGC should create a committee or working group to analyze the Anti-Corruption Law and other relevant Cambodian laws (and any amendments or new provisions that are enacted) to ensure they are compliant with the obligations under UNCAC.

5 Freedom of Information and The Media

A healthy, free media is essential for any functioning democracy; through publishing articles and stories about public affairs and figures, the media facilitates public scrutiny and therefore strengthens democratic government. The information provided to the public through a pluralistic media also allows the people to make informed decisions about public matters. Access to information is fundamental for the press to perform this role. Whilst some improvements have been made to the manner in which information is made available to the media in Cambodia, the media continue to encounter obstacles in their efforts to access certain types of information.

5.1 Access

As noted in Chapter Two, Article 5 of the Press Law provides the press with the right to access information held by the government, although access can be restricted on a number of grounds, as provided for by the Law.

In the process of preparing this Report, CCHR spoke to a number of journalists in order to determine how this Law operates in practice. Journalists noted many positive experiences in exercising Article 5 of the Press Law. Particularly when reporting on non-political issues, interviewees stated that the RGC and government ministries were generally forthcoming with information. Journalists also acknowledged a recent improvement in the speed and efficiency with which they could access certain information, since most government ministries have appointed spokespeople to deal with inquiries directly. The RGC has also established the Press and Quick Reaction Unit and, in March 2011, set up a new press reaction unit to relay information to the press on issues relating to military action, diplomacy and national security.⁵⁹

These are welcome developments for the flow of information, making access to information for journalists and members of the public more straightforward and achievable. Nonetheless, there is still room for improvement, as some ministries have yet to appoint spokespeople, and some of the journalists interviewed raised concerns about the availability of the existing spokespeople. It was also suggested by a number of those interviewed that spokespeople are too far removed from the actual issues, and that the information they provide is sometimes vague or incorrect.

The journalists interviewed also noted that when asking for politically sensitive information, or information that might give rise to criticism of government policy, specifically in relation to land that is the subject of ongoing disputes between residents, authorities and private companies, they often ran into difficulties and their requests for information were generally

⁵⁹ *The Phnom Penh Post*, 25 March 2011, "PM touts media task force".

denied. As set out above, and contrary to the Freedom of Information Principles, the Press Law contains no appeal mechanism and has no monitoring body, meaning there is no recourse for journalists who are denied access to information.

It was also noted that when it came to asking for information in a less formal manner, requests were generally denied. According to those interviewed, tactics employed by officials include acting elusively, stating that they are too busy to deal with inquiries, and referring journalists elsewhere for information. For example, one journalist described the course of action for accessing information possessed by the Ministry of Finance as a particularly drawn out process, in which a written request with specific questions must be submitted. The experience of the journalist was that the response was delayed and the information provided vague.

From the discussions CCHR had with journalists, it is also apparent that the experiences of Cambodian journalists and foreign journalists can differ: Cambodian nationals often find it easier to access information, possibly due to the common language and through personal connections. However, it is clear that Cambodian journalists are also more likely to be asked to reveal their sources, be offered bribes to withhold certain information or, in more serious cases, be threatened or even attacked. The interviews also revealed that refusals to provide information were more frequent where English language publications, which are generally more willing to criticize the government and report on sensitive issues compared to their Khmer language counterparts, were concerned.

The overall feedback received from journalists illustrates that the principle of maximum disclosure has yet to be fully embraced in Cambodia, even by ministry spokespeople appointed to share information. The lack of access to sufficient and accurate information severely hinders the ability of journalists to provide information and encourage debate and undermines the media's function as the fourth pillar of democracy.

5.2 Dissemination

There are also issues with disseminating – or to use the language of the ICCPR, “imparting” – information, further restricting the ability of the public to access information.

The RGC's dominance in the media means it has a strong control over information dissemination. All television stations, most radio stations and the main Khmer newspapers are owned or controlled by CPP members or individuals aligned with the ruling party.⁶⁰ Unsurprisingly, the information disseminated by these media outlets is generally favorable to the RGC. An advisor to the Prime Minister owns the country's most popular TV station, the Cambodian Television Network (CTN), while the Prime Minister's daughter owns another channel, Bayon TV. Permission to set up a network and broadcast on television or radio is granted by the Ministry of Information, although this power has seemingly been used as a

⁶⁰ COMFREL, February 2010, “Cambodian Democracy, Elections and Reform: 2009 Report”, p. 12, available at: www.comfrel.org/images/others/1265785063Comfrel-Cambodia%20Democratic%20Reform%202009-En-Final.pdf.

means of exercising control of politically sensitive information by ensuring that permission is only granted to government aligned entities.⁶¹ In August and September 2011, the Ministry of Information closed 39 Khmer-language newspapers for allegedly holding expired licenses and, in two cases, for failing to publish their addresses.⁶² The MoI has agreed in principle to allow journalist Ros Sokhet, a freelance journalist who in 2009 was controversially jailed for disinformation for sending disparaging text messages to Soy Sopheap, a well known CTN anchor, to start a new newspaper called “Revealing Corruption News”, though Mr. Sokhet has yet to receive a formal license.⁶³ The blocking of certain blog-sites, such as KI-Media, is the most recent example of control being exercised by the government. Such methods prevent ordinary people from voicing opinions through the media, and prevent them from accessing information to form their own opinions and to participate in informed discussion and democratic debate.⁶⁴

Freedom of information and the media must be looked at in the wider context of freedom of expression in Cambodia. Excessive use of repressive legislation, prosecutions and criminal sanctions, as well as tactics such as intimidation, harassment, and even murder, have acted to prevent open and free journalism.⁶⁵ While the Press Law provides in Article 20 that “no person shall be arrested or subject to criminal charges as the result of the expression of opinions”, many of the terms within the Law, and the apparent delineation between the Press Law and the criminal law, are unclear. For example, Article 12 states that the Law does not take into account “due punishment according to Criminal Law” and Article 20 states that “any act committed by employers, editors or journalists that violate[s] the criminal law, shall be subjected to punishment according to Criminal Law.” While in the case of *Mong Rethy & Ors v. Keo Sothea* (April 2002), it was successfully argued that criminal defamation provisions were superseded by Article 10 of the Press Law (which sets out the civil offence of defamation), this precedent has failed to be put into practice, and journalists have continued to be prosecuted under the criminal law.⁶⁶ Hang Chakra, publisher of the opposition-affiliated *Khmer Machas Srok* newspaper, was one such journalist. He was arrested on 26 June 2009 after his newspaper published a series of articles accusing several of Deputy Prime Minister Sok An's aides of corruption.⁶⁷ After Hang Chakra refused to name his sources (a refusal sanctioned by Article 2 of the Press Law), he was convicted *in absentia*, of disinformation and sentenced to a year in prison and ordered to pay a fine of 9,000,000 riel (about US\$2,250).⁶⁸

The Penal Code 2009, which entered into force in December 2010, does expressly state that defamation involving the media should be dealt with under the civil provisions in the Press

⁶¹ Ibid., p. 13.

⁶² CCHR, November 2011, “Fundamental Freedom Factsheet: Closure of Newspapers”, available at: http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=factsheet_detail.php&fsid=21&id=5.

⁶³ *The Cambodia Daily*, 23 March 2012, “Ministry Ok's New Title for Anti-Graft Newspaper”.

⁶⁴ *The Phnom Penh Post*, 15 February 2011, “Opposition site blocked”.

⁶⁵ CCHR *et al*, September 2010, “Cambodia Gagged: Democracy at Risk?”, in particular Chapter Four.

⁶⁶ ARTICLE 19, December 2005, “Freedom of Expression and the Media”, p. 54.

⁶⁷ *Reporters Without Borders*, February 2010, “Cambodia: Prime Minister, You Promised That No More Journalists Would Go To Prison”, p. 3.

⁶⁸ Ibid.

Law. However, it remains to be seen how such provisions will be applied in practice, particularly as the Penal Code still contains provisions which could represent a serious threat to freedom of expression of journalists, including the offenses of public comment to influence the judiciary and discrediting judicial decisions.⁶⁹

As a consequence of fear of threats, intimidation and criminal sanctions, there is evidence that media professionals use self-censorship and avoid publishing information that the RGC would consider offensive or politically sensitive.⁷⁰ Observers have noted that there is an active policy on the part of publishers and editors to cover less sensitive and often less interesting stories “*in order to stay out of harm’s way.*”⁷¹

It is important to remember however, that whilst an environment that encourages and facilitates pluralism in the media is important for access to information, journalists are a key link between the public and information. They too should consider their responsibility to publish sensitive information. There have been increased reports of journalists accepting, or even requesting, bribes in exchange for withholding information, particularly in relation to cases of illegal logging.⁷² Observers are split as to whether this reflects an attempt by loggers to intimidate reporters, or whether reporters are guilty of attempting to exploit a government crackdown. Sam Rithy Duong Hak, former vice-president of the Cambodian Association for the Protection of Journalists, has said that he suspects some reporters are guilty of extortion.⁷³ Weak journalistic practices and low wages are factors which could be contributing to a trend of journalists accepting or requesting such payments. Whatever the truth, such stories raise questions about the integrity and independence of some journalists operating in Cambodia. This also has consequences on the ability of the public to access accurate and objective information.

5.3 Freedom of Information

Detailed freedom of information legislation would sit well with the Press Law, and would provide additional mechanisms for journalists to access accurate information legitimately. Such legislation would also ensure the liberty and safety of journalists, and provide protection from the provisions of the Penal Code. Such legislation should uphold the

⁶⁹ In total there are nine provisions in the Penal Code which undermine the right to freedom of expression, as follows: defamation (Article 305 Penal Code 2009), public insult (Article 307), slanderous denunciation (Article 311), incitement – leading to or not leading to a crime (Article 495), incitement to discrimination (Article 496), contempt (Article 502), public comment to influence (Article 522), discrediting a judicial decision (Article 523) and false denunciation to judicial authorities (Article 524).

⁷⁰ In the past, there have been cases of journalists being threatened, or even killed in suspicious circumstances. See also *CCHR et al*, supra note 60, p. 10.

⁷¹ *The Phnom Penh Post*, 6 January 2010, quote from Moeun Chhean Narridh, Director of the Cambodian Institute for Media Studies, in Ban Tharum, “Soldiers for free speech”.

⁷² For example, *Koh Santepheap* reporter Sim Samnang was held in Siem Reap Court for months after a warehouse owner accused him of attempted extortion after he allegedly threatened to expose the latter’s illegal operation unless the warehouse owner paid a bribe. In May 2010, three journalists from Kampong Chang province were accused of extorting money from wood vendor Mey Kim Huon. It was alleged that they threatened to publish a story that she was allegedly selling illegal wood unless she paid them US\$300. See *The Phnom Penh Post*, 1 June 2010, “Extortion claims raise alarms”.

⁷³ *Ibid.*

principle of maximum disclosure, facilitate openness of government, and ensure strict justifications for any refusal to grant access to information, and establish a monitoring body mandated to examine any refusal of access.

Again, freedom of information legislation must be accompanied by a change in attitude on the part of public officials as to the importance of freedom of information, and their willingness to comply and assist with requests from journalists. While the appointment of ministry spokespeople is a step towards greater recognition of the importance of freedom of information, a change in culture is still required so that journalists can perform their essential role in democracy. With respect to freedom of information and the media, we recommend the following:

Recommendations

- All forms of media should have equal access to information and should be allowed to disseminate that information.
- An independent broadcasting regulating authority should be established to ensure the plurality of the media.
- The Penal Code, particularly the provisions which threaten to undermine the right to freedom of expression, should be amended to ensure that freedom of expression is guaranteed.
- The RGC should desist from using the criminal law to punish journalists. Any such proceedings should be brought under the Civil Code, as per the Press Law.
- Defamation should be brought within the scope of the Civil Code.
- All government departments and public bodies should more readily provide journalists with access to information in government held records, as prescribed by law.
- The RGC should ensure that all ministries have spokespeople appointed to deal with questions from the public and the press, including a number of specialized spokespeople able to speak on particular issues. Each ministry should ensure spokespeople are appropriately trained and that information is made available to the spokesperson as required.
- The Ministry of Information should provide guidance as to when access to information can be denied under Article 5 of the Press Law. Such guidance should be drafted in line with the principle of maximum disclosure.
- The Press Law should be amended to:
 - provide recourse to an independent review and appeals process against any

refusal to provide information.

- establish an independent monitoring agency or ombudsman to monitor access to information, and examine any refusals to disclosure information.
- NGOs working with journalists should provide training programs to ensure that journalists are equipped with the necessary investigative journalism skills and can disseminate information accordingly.

6 Freedom of Information and the Rule of Law

As a society transitioning from conflict, there is a pressing need for Cambodia to re-establish the rule of law. This has been one of the RGC's main goals and is reflected in its Rectangular Strategy for Growth, Employment, Equity and Efficiency in Cambodia, which states that the development of the rule of law is a crucial element of the RGC's efforts to promote good governance.⁷⁴ Fundamental to re-establishing the primacy of the rule of law, as opposed to rule *by* law, is transparency in the development of law, access to and knowledge of the law, and transparency in its application.

6.1 Transparency in the Legislative Process

The ability of interested parties, such as lawyers, academics, policy makers, civil society organizations and concerned citizens, to access draft laws is fundamental in ensuring that laws being adopted by the government adequately address the needs and interests of society, and do not impinge upon the rights of the people. Open government, as outlined in the Freedom of Information Principles, requires draft laws to be made publicly available so their objectives and content can be debated and the consequences of the laws can be discussed.

There appears to be a culture of secrecy within the legislative process in Cambodia, whereby access to information before bills become laws is severely limited and, in some cases, restricted to only a few days before the bill in question is due to be debated. This is particularly so when the draft law in question is considered to be politically sensitive. For example, whilst the MOI was relatively open about the recently passed Acid Law during the drafting process,⁷⁵ and while there was progressive consultation in relation to the Law on Peaceful Demonstration, consultation in relation to more politically sensitive, laws, such as the Anti-Corruption Law, and the NGO law, has been more restricted and less forthcoming, with many in civil society regarding the consultation that followed the release of drafts of the laws as “meaningless”.⁷⁶

⁷⁴ RGC, *Rectangular Strategy for Growth, Employment, Equity and Efficiency in Cambodia*, 2004, “Access to Legal Information in Cambodia”, p. 6.

⁷⁵ Drafts of the Acid Law have been made available to certain media and civil society organizations. See *The Cambodia Daily*, 10 November 2010, “Draft Acid Law Just Wks Away, Officials Say”; *The Cambodia Daily*, 13 October 2011, “New Version of Acid Law Reduces Punishment”. Note also that the live debate of this law was streamed online at *Debates from the National Assembly*, available at: www.ustream.tv/channel/debate-from-cambodian-national-assembly.

⁷⁶ CCHR, 4 August 2011, “Policy Paper by the Cambodian Center for Human Rights on the Current Status of the Law on Associations and Non-Governmental Organizations”, available at: http://www.cchrcambodia.org/index_old.php?url=media/media.php&p=analysis_detail.php&anid=15&id=5.

Databases of legislative documents

- The UNDP compiled a tri-lingual record of Cambodian laws on CD-ROM, but funding expired and the catalogue has not been updated since 1994.
- The World Bank funded Journal and Council of Jurists published a small selection of laws between 1999 and 2001.
- WorldLII/DIAL published an index of Cambodian laws. However, it is far from comprehensive.
- The UN Office of the High Commissioner for Human Rights Cambodia has a Khmer law bank, however, it was last updated in 2006.
- The Cambodian Human Rights Portal (www.sithi.org) hosted by CCHR aims to provide a directory of Cambodian laws. At the time of writing, the National Laws section of the portal contained around 80 laws, three draft laws, and around 20 sub-decrees, and a number of prakas.
- Some government departments do publish relevant laws relating to their field. For example, the National Committee for Sub-National Democratic Development (www.ncdd.gov.kh/) includes details of all relevant legislation and guidance on its website.

With regards to the draft NGO law specifically, the government has been reluctant to engage with the public and NGOs. The first draft of the NGO Law was withheld until a few weeks before a consultation that was planned with NGOs, and the second draft was withheld until two working days before a closed consultation with a handful of NGO representatives.⁷⁷ Following the release of the third draft again there was an absence of meaningful consultation. Before the fourth draft was released, the RGC announced that discussions on the law would be postponed until 2013.

During the drafting of the Anti-Corruption Law, CCHR wrote to the President of the National Assembly complaining about the secretive manner in which the law was being prepared, and the lack of consultation with civil society. The draft law was only made available to the political opposition on 4 March and was debated on 20 March 2010, not providing the opposition with sufficient time to consider and consult on the draft before it was debated “*contrary to the spirit of transparent governance that any anti-corruption law ought to create.*”⁷⁸

All laws and regulations should be published in the form of an official gazette, as per Article 13 of the Organization and Functioning of the Council of Ministers. However, the publication is neither exhaustive nor regular.⁷⁹ Attempts have been made to compile a database of

legislative instruments (see text box), but there is no single source of all the relevant laws. In addition, Cambodian law relies heavily on sub-decrees and “prakas” to fill the gaps in the

⁷⁷ International Center for Non-Profit Law, 18 October 2011, “Law Monitor: Cambodia”, available at: www.incl.org/knowledge/ngolawmonitor/cambida.html; see also CCHR, *Ibid*, pp. 2-3.

⁷⁸ CCHR, 10 March 2010, Letter to President of the National Assembly regarding the draft Anti-Corruption Law, available at: [www.cchrcambodia.org/English/add_press_release/press_release/cchr%20letter%20to%20the%20president%20of%20the%20national%20assembly%20concerning%20the%20draft%20anti-corruption%20law%20\(english%20translation\)\(031010_1268279956\).pdf](http://www.cchrcambodia.org/English/add_press_release/press_release/cchr%20letter%20to%20the%20president%20of%20the%20national%20assembly%20concerning%20the%20draft%20anti-corruption%20law%20(english%20translation)(031010_1268279956).pdf)

⁷⁹ *Journal of Information, Law and Technology* (Daniel Adler), 30 January 2006, “Access to legal information in Cambodia: Initial steps, future possibilities”, p. 2.

enacted laws, which are also rarely published. The absence of a reliable compilation of the relevant instruments makes it extremely difficult to identify the state of the law and how it deals with any issue at a given time.⁸⁰

The lack of uniform or consistent information available about pending and existing laws directly impacts upon the public's ability to fully participate in the legislative process. It also goes against the principle of legality, which requires that people must be in a position to ascertain what the law is in order that they can be held liable for its violation where a violation does occur. The World Bank has reported that in Cambodia, whilst 94% of people think it is important to be informed about domestic laws, 72% know little or nothing about the laws.⁸¹ From CCHR's own experience in providing human rights and land law training as part of its Community Empowerment and Training Program, it is clear that such information is not readily available, or not available in a form that is accessible and understandable to the vast majority of people.

6.2 Access to Legal Judgments

In Cambodia, there are no laws restricting access to court judgments.⁸² On the contrary, Article 14 of the ICCPR states: *"any judgment rendered in a criminal court case or in a suit at law shall be made public"*, and the RGC's 2003 Legal and Judicial Reform Policy expressly notes that *"publishing existing judgments and establishing a case-law digest for printing and dissemination of verdicts, decisions and rulings of courts to ensure that court judgments are available on request"* is one of its specific objectives.⁸³

The Extraordinary Chambers in the Courts of Cambodia ("ECCC") publishes all its judgments and decisions online. Similarly, the Constitutional Council of Cambodia publishes its decisions on its website (www.ccc.gov.kh/english/index.php) and the Supreme Court's judgments, up until 2006, are published online (www.supremecourt.gov.kh/). The Arbitration Council, an independent, quasi-judicial tribunal that carries out mandatory arbitration of collective labor disputes, publishes all of its judgments online, in both Khmer and English (despite conducting hearings in private). Commenting on the importance of publishing judgments Tuon Siphann, an arbitrator at the Arbitration Council, noted, *"access to information is the cornerstone of accountability and responsible decision-making. As arbitrators, we publish our judgments for everyone to read. Sometimes people criticize us but that is OK. It encourages us to improve our work. We try to set an example to a judiciary, which seems afraid to let the people know how they decide."*⁸⁴

In Cambodia, other court judgments are not generally made public, and at times are not read in public; where written judgments do exist, they are generally only shared with the parties to the proceedings.

⁸⁰ *Ibid.*, p.3.

⁸¹ *World Bank*, supra note 38, p. 21.

⁸² *Journal of Information, Law, and Technology*, supra note 78, p. 3-4.

⁸³ *RGC, Rectangular Strategy for Growth, Employment, Equity and Efficiency in Cambodia*, supra note 73, p. 5.

⁸⁴ *Journal of Information, Law, and Technology*, supra note 78, p. 4.

Further, in cases of interest to the government, the judiciary seems willing to conduct proceedings behind closed doors, apparently actively seeking to ensure that minimal information is made available to the public. For example, the trial of opposition leader Sam Rainsy and two villagers from Svay Rieng Province on 27 January 2010 on charges of racial incitement and destruction of property was closed to journalists, human rights organizations and the general public.⁸⁵ In view of the sensitive nature of the criminal prosecution of any member of the political opposition, and the fact that Sam Rainsy was tried *in absentia*, there was arguably an even greater need for public scrutiny of the proceedings.

Courts in Cambodia should take heed of the example set by the Supreme Court, Constitutional Council, Arbitration Council and the practices of the ECCC, which can be considered as a model court for all courts in Cambodia in this regard. The publication of judgments encourages better legal arguments by judges and facilitates public scrutiny of decisions. For the Cambodia judicial system, a system that continues to be the subject of accusations of corruption, political partiality and executive control, publishing judgments would do much to instill public confidence and help to achieve the constitutional commitment to the separation of powers between the executive, legislative and judicial branches of government.

6.3 Freedom of Information

Addressing the shortcomings in access to legal information is fundamental as a means of improving transparency and confidence in the judiciary and the executive, and ensuring adherence to the rule of law. The RGC's Legal and Judicial Reform Policy includes as one of its Strategic Objectives the provision of better access to legal and judicial information and notes the importance of the free flow of information as part of a system of transparent governance.⁸⁶

Bearing in mind issues of literacy in Cambodia discussed in Chapter Three, one way of ensuring access is by broadcasting law and policy via the radio. For example, CCHR has produced audio files of the Constitution, the land law and the Yogyakarta principles - a set of international principles relating to sexual orientation and gender identity - which have been broadcast over the radio. This method of dissemination also tackles the fact that online information is generally inaccessible to the vast majority of Cambodians due to the very low rate of internet usage in the country.⁸⁷ In addition, as discussed in Chapter Two above, the Law on the Administration and Management of Commune/Sangkat 2001 and the Organic Law both contain provisions about information boards, a medium specifically aimed at ensuring the general public is informed.

⁸⁵ *Human Rights Watch*, 28 January 2010, "Cambodian Opposition Leader Sam Rainsy's Trial a Farce", available at: www.hrw.org/en/news/2010/01/28/cambodia-opposition-leader-sam-rainsy-s-trial-farce.

⁸⁶ See the Legal and Judicial Reform, adopted by the Council of Ministers on 20 June 2003, in particular strategic objective 3 and p. 7.

⁸⁷ *UNDP*, 2009, "Cambodia Country Competitiveness: Driving Growth and Poverty Reduction", p. 47.

Another way for the information gap to be filled is through civil society. For example, in relation to workers right, Trade Unions and supporting NGOs and UN/International Labour Organisation Initiatives, such as Better Factories Cambodia, which aids unions' efforts to inform employees of their rights, have been largely successful in recent years in improving the treatment of workers in Cambodia through the provision of information in workshops and training sessions.⁸⁸ Similarly, CCHR conducts public forums and trainings across the country, providing information on key points of law to members of communities affected by land conflicts and other human rights issues in order to develop the capacity of marginalized and vulnerable communities to defend and advocate for their rights themselves.

These methods are important ways for the information gap to be filled and for people to be informed about their rights. The RGC should support and facilitate these methods and should be working to increase transparency by making laws and other important information more readily available. However, there are concerns that two new draft laws, on Trade Unions and NGOs respectively, may hinder the work of unions and civil society. These draft laws have been criticized due to the onerous requirements they seek to place on Trade Unions and NGOs respectively, particularly concerning registration, details of members, and reporting requirements.⁸⁹ Although both of these drafts have been amended recently to reduce the burden on civil society,⁹⁰ and the adoption of an NGO Law has been put on hold until after next year's national elections, it is vital to the cause of freedom of information that the ability of Trade Unions and NGOs to operate and disseminate information be jealously preserved.

To further freedom of information and the rule of law, CCHR makes the following recommendations:

Recommendations

- The RGC should encourage wider consultation on the development of policy, legislation and regulation.
- The RGC's Official Gazette should be circulated on a regular basis, and a database of all laws, sub-decrees and prakas should be made available online and updated regularly.
- The RGC, relevant ministries and other stakeholders should consider appropriate media, such as radio, for the dissemination of information.

⁸⁸ *Better Factories Cambodia*, available at: www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1.

⁸⁹ VOA, 15 March 2011, "Unions Meet Over Worries in Draft Law", available at: www.voanews.com/khmer-english/news/Unions-Meet-Over-Worries-in-Draft-Law-118006569.html; CCHR, 6 October 2010, "Briefing Book for Donors and Others on the Law on Associations and Non-Governmental Organizations and the Shrinking Space for Civil Society in Cambodia".

⁹⁰ *The Phnom Penh Post*, 18 November 2011, "'Huge changes' made to new draft union law"; *The Cambodia Daily*, October 28 2011, "Gov't Will Drop Mandatory Registration From NGO Law".

- The RGC, MOI and other government departments should organize public forums to discuss laws, policies and regulations so that information is disseminated at a local level.
- The Ministry of Justice should work with the Cambodian courts to develop a system for publishing the judgments of all the courts in the Kingdom.
- Court proceedings should be open to the public (except in limited circumstances, such as where the interests of juvenile victims may require proceedings to be held *in camera*).

7 Freedom of Information, Resources and Land

As noted by the Special Rapporteur for Human Rights in Cambodia, “*the manner in which land is managed and used by the Government for various purposes continues to be a major problem.*”⁹¹ As of May 2010, according to the Ministry of Agriculture’s public information, economic land concessions covering a total land area of 956,690 hectares have been granted to 85 companies.⁹² This conflicts with information made available by the Forestry Administration of Cambodia, which stated in its 2010 annual report that 1.3 million hectares of economic land concessions had been granted.⁹³ A recent report by the Cambodian Human Rights and Development Association (ADHOC) claimed that 2.3 million hectares of land was under concession - amounting to 14.7% of Cambodia’s total landmass – and granted to some 225 national and international companies.⁹⁴ Whilst the discrepancy may be accounted for by the different timing of the reports, it is an example of the conflicting information that the public is given about land concessions.

The apparent widespread violation of land rights and the opaque practices that surround the extractive industries in Cambodia underline the need for access to information. Transactions involving a country’s land and natural resources should be concluded with the interests of the people in mind, free from corruption and in line with legal requirements. The only way to ensure that this is the case is to provide people with access to information about such transactions. The absence of information means that important resources could be “*captured for personal gains rather than national benefit*”⁹⁵ and could contribute to the mismanagement of funds, potentially serving to widen the gap between those who benefit from the land concessions and those who feel their rights have been neglected.⁹⁶

7.1 The Extractive Industries

The Cambodian extractive industries are expanding with great speed and are generating huge revenues. This has the potential of lifting the Cambodian people out of poverty. However, Cambodians whose land is affected by these activities state that they have little or no information regarding the activities, and that their livelihoods have been put at risk as a result of apparently secret arrangements between the RGC and private companies.

⁹¹ *United Nations Special Rapporteur on Human Rights in Cambodia*, September 2010, “Report of the Special Rapporteur on Human Rights in Cambodia”, A/HRC/15/46, p. 8, available at:

cambodia.ohchr.org/WebDOCS/DocReports/3-SG-RA-Reports/A_HRC_CMB16092010E.pdf.

⁹² *Ibid.*

⁹³ *The Phnom Penh Post*, 17 January 2011, “Cambodia: Forests under threat”.

⁹⁴ VOA Khmer, 23 March 2012, “Nearly 15 Percent of Cambodia Under Land Concession: Report”, available at:

<http://www.voanews.com/khmer-english/news/Nearly-15-Percent-of-Cambodia-Under-Land-Concession-Report-143992206.html>

⁹⁵ *Global Witness*, February 2009, “Cambodia: Country for Sale”, p. 52.

⁹⁶ *Ibid.*, p. 5.

Article 9 of UNCAC calls for the publication of information about commercial deals involving the government, including invitations to tender and the criteria for granting government contracts. Despite Cambodia's ratification of UNCAC in 2007, Cambodian laws are conflicting as to the legal requirements for the publication of this information.

For example, the Environmental Law provides that the Ministry of Environment should release information on a company's activities when requested, and encourages participation by the public in environmental protection and natural resource management.⁹⁷ However, the Law on Management and Exploration of Mineral Resources 2001 specifically states that all applications, reports, plans and notices concerning exploration and exploitation are confidential.⁹⁸ This expressly denies the right of access to information, and ensures that there is a lack of transparency built into the legal framework.⁹⁹ Reports have exposed, for example, that during a supposed moratorium on dredging activity,¹⁰⁰ sand-dredging licenses were granted to companies linked with members of the RGC or CPP, with little evidence of the revenues reaching the state or benefiting the people.¹⁰¹ In areas such as Koh Kong, such activities are impacting the lives of local people, with some 200 families supported by small-scale fishing operations having been affected.¹⁰²

In relation to mining, Article 20 of the Mining Law 2011 states that information related to environmental and social issues can be released to the public but only at the discretion of the Minister in charge of minerals. The laws on mining become even more ambiguous when applied to areas of land classified as "protected" due to their high conservation and biodiversity values. A prakas on protected areas from 1994 stated that mining in protected areas was prohibited. However, in August 2006, this was quietly annulled. This had almost immediate consequences: the World Bank's Biodiversity and Protected Areas Management Project attempted to protect communities inhabiting Virachey National Park, a protected area that stretches across Ratanakiri and Stung Treng provinces. However, in 2007, a concession was granted to an Australian company providing exploratory rights over 54% of the area.¹⁰³ The amendment or annulment of such legislation should not take place in secrecy. In addition, the complexity between laws, sub-decrees and prakas, as highlighted in Chapter Five, provides a certain veil of ambiguity that facilitates such practices.

Some limited information in relation to mining is available. The Ministry of Industry, Mining and Energy (MIME) website¹⁰⁴ includes a collection of policies and regulations governing the mining sector as well as a list of companies and their exploring activities.

⁹⁷ Article 16, Law on Environment Protection and Natural Resource Management 1996.

⁹⁸ Article 20, Law on the Management and Exploitation of Mineral Resources, 2001.

⁹⁹ *Global Witness*, supra note 110, p. 18.

¹⁰⁰ *The Huffington Post*, 22 August 2011, "Cambodian Sand Dredging Threatens Environment, Ecotourism Industry"; www.dredgingtoday.com, 10 August 2011, "Cambodia: Controversial sand dredging on Tatai River continue".

¹⁰¹ *Global Witness*, May 2010, "Shifting Sands: how Singapore's demand for Cambodian sand threatens ecosystems and undermines good governance".

¹⁰² *The Phnom Penh Post*, 11 January 2011, "Koh Kong Dredging Resumes".

¹⁰³ *Global Witness*, supra note 110, p. 20.

¹⁰⁴ See <http://www.gdmar.gov.kh>.

The oil industry also provides limited information to the public. The Cambodian National Petroleum Authority (“CNPA”), whose Chairman reports directly to Prime Minister Hun Sen,¹⁰⁵ controls the granting of concessions and explorative contracts for oil. Despite having a public website (www.cnpa-cambodia.com), little information is actually released to the public. Instead, information about the operations and activities of the CNPA are usually made public through media reports or unofficial leaks. For example, on 28 April 2010, the Prime Minister announced that French oil company TOTAL had paid US\$8 million into a social development fund as part of its agreement to explore potential oil deposits in Cambodian waters, and an additional US\$20 million in signature bonuses.¹⁰⁶ This openness is encouraging, and it is hoped that it sets a precedent for CNPA (and other relevant government ministries) for making information about such agreements public. However, questions still remain as to the whether the funds were deposited into a national account, and no information was made available as to what the money would be used for.

In November 2011, it was reported that the current draft petroleum law still lacks the provisions necessary to ensure that the government publishes all financial transactions with oil and gas companies. It is argued that the most concerning characteristic of the draft law is the lack of reference to transparency of information relating to the petroleum sector, or the requirement to engage in public consultation. There is also evidence that payments made to the government from gas and oil companies have been omitted from the government’s books.¹⁰⁷ CCHR believes that the draft law should be amended to ensure that all information regarding the gas and oil industry is made publicly available.

7.2 Land Evictions

Cambodia’s recent history, including the abolition of land titles and the evacuation of cities and towns during the Khmer Rouge era, has created widespread uncertainty as to the ownership of vast areas of the country’s land. In recent years, economic land concessions and other transactions involving land have capitalized upon this uncertainty, with severe consequences for hundreds of thousands of Cambodian people, mostly from rural and urban poor, and vulnerable and marginalized groups.

The Land Law 2001 and its associated sub-decrees contain a number of provisions that support the publication of information. Article 53 of the Land Law, for example, states that economic land concessions “*must be based on a specific legal document, issued prior to the occupation of the land by the competent authority.*” The Sub-Decree on Economic Land Concessions dated 27 December 2005 provides that an economic land concession may only be granted when a number of criteria are met, including public consultation between

¹⁰⁵ See the “Organization” section of the CNPA website at: cnpa.gov.kh/index.php?option=com_content&view=article&id=45&Itemid=119.

¹⁰⁶ *The Phnom Penh Post*, 30 April 2010, “TOTAL Confirms \$8m Social Fund”.

¹⁰⁷ See comment from George Boden of Global Witness in *The Cambodia Daily*, 4 November 2011, “No Transparency Provisions in Draft Oil Law”.

territorial authorities and local residents.¹⁰⁸ The RGC’s Leopard Skin “Policy” furthermore provides for social land concessions to be granted within economic land concessions, effectively safeguarding ‘black spots’ – schools, sacred areas, hospitals etc. – from development.¹⁰⁹

The Special Rapporteur for Housing Rights states that *“all potentially affected groups of persons...have the right to information, full consultation and participation through the entire [eviction] process”*.¹¹⁰ The Ministry of Agriculture, Forestry and Fisheries has an economic land concession page on its website which includes profiles of concessions granted and basic company information.¹¹¹ While this information is extremely useful and is an encouraging step towards publishing information about concessions, the website contains limited information about the owners of companies involved and no information about concessions that are being considered. There are also provisions in the Land Law concerning the Cadastral Administration, which has a number of roles in relation to verifying land ownership. As part of this, the Administration must *“produce a Land Register and [register] the names of the owners and all collected data relating to the physical features, area and identity”* of land and to *“provide information to any person who seeks information from the Land Register with regard to the situation of ownership that is subject”* to certain rights (Article 229). The local Cadastral Offices should assist the Central Cadastral Administration in *“maintaining documents and providing information to any person who requests information”* (Article 232). A *“request for cadastral information by any person who has an interest in it many not be refused”* (Article 240).

The Expropriation Law 2009 similarly sets out clear procedures for public consultation on actions and the publication of information about projects. The Expropriation Law provides that before proposing a project, the Expropriation Committee shall publicly conduct a survey of property (Article 16). In preparing the survey, the Expropriation Committee *“shall arrange a public consultation with the authorities at provincial, district and commune level, the commune council and village representatives or the communities affected by the expropriation in order to give them clear and specific information and to have all opinions from all concerned parties about the public physical infrastructure project”* (Article 16).

The provisions in the Land Law and the Expropriation Law are encouraging and seem to recognize the importance of sharing information about land that is under consideration for concession or expropriation. However, a common trait amongst cases of land conflicts and forced evictions in Cambodia is the fact that law and policies are rarely correctly implemented in practice and that there is a lack of information actually made available;

¹⁰⁸ *United Nations Cambodia Office of the High Commissioner for Human Rights, Special Representative of the Secretary-General for human rights in Cambodia, June 2007, “Economic land concessions in Cambodia, A human rights perspective”*.

¹⁰⁹ Cambodian Rehabilitation and Development Board, and Council for Development of Cambodia, 2 June 2010, available at: http://www.cdc-crdb.gov.kh/cdc/third_cdcf/opening/shs_third_cdcf_en.htm

¹¹⁰ *Report of the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Miloon Kothari, 5 February 2007, A/HRC/4/18, para.38.

¹¹¹ See <http://www.elc.maff.gov.kh/en/>

families affected are often not informed about company plans and are not included in negotiations. Information that is provided is often incomplete and/or inaccurate.¹¹² When consultations with communities do occur, they are often manipulative or coercive: residents of Boeung Kak Lake – an area in Phnom Penh subject to a land concession resulting in the eviction and displacement of nearly 4,000 families - who spoke at a CCHR public forum in December 2010, stated that despite trying to make their concerns and complaints heard by local authorities and the Prime Minister, they have been oppressed and ignored, and at times, criticized for the way they handled their complaints.

7.3 Freedom of Information

The contradiction between the relevant laws and the actual practices of those involved in different resource industries in dealing with public disclosure demonstrates the need for freedom of information legislation. Such legislation should clearly set out the publication requirements of relevant bodies that have authority relating to Cambodian natural resources.¹¹³ The “deconcentration and decentralisation” policy, discussed in Chapter Two of this Report, is a positive example for access to information. Although this policy focuses on infrastructure rather than resources and land per se, it shows how communication with those affected can be a positive step for the government to take.

It seems in Cambodia though that there is a presumption amongst those at the top that consultation and the sharing of information in this area may slow Cambodia’s economic growth. However, well-managed revenue raised from the resources within Cambodia could in fact help it to develop. Transparency and freedom of information could ensure that revenues are not mismanaged and that those who are affected by these industries are properly protected, whilst also allowing the RGC to achieve its development plans.

The Aphiwat Meanchey resettlement illustrates this point. In 1997, the Municipality of Phnom Penh (“MPP”), residents and local and international NGOs, met to discuss the resettlement of 129 families living on the roadside near the Chinese Embassy in Phnom Penh. The RGC wanted to move the families to a new location as part of the development of the city. As part of this, residents were given an opportunity to choose their land and played an active part in the process. As of 2006, the community was thriving and had retained 75% of its original residents.¹¹⁴ Transparency about the project and the need for development, active communication with residents, and a clear and public strategy has been responsible for creating land security for the evicted residents, and has allowed the RGC’s development plans to go ahead. It should be noted that the cost of this specific project was considered to be high (US\$784 per family), but it is believed that the process was a positive one, and could be used as a model for similar projects in the future.

¹¹² CCHR, December 2010, “Report Summary, Business and Human Rights in Cambodia: Constructing the Three Pillars”, p. 2, available at: www.cchrcambodia.org/English/add_report/reports/2010_11-30_bhr_report_eng.pdf.

¹¹³ *Global Witness*, supra note 110, p. 19.

¹¹⁴ *Sahmakum Teang Tnaut*, December 2006, “Fact & Figures: Relocation or Removal?”, p. 2.

In relation to extractive industries, there are a number of international initiatives that focus on using freedom of information principles to ensure that natural resources are dealt with in a way that benefits all. The Extractive Industries Transparency Initiative (the “EITI”) supports resource rich countries in improving governance in relation to natural resources, primarily through the verification and publication of company payments and government revenues from oil, gas and mining. The EITI recognizes that public access to information can help a country avoid the “resource curse” – being the paradox that countries and regions with an abundance of natural resources suffer from less economic growth and worse development as a result of different factors, including resource mismanagement and corruption – whilst improving its investment climate and promoting greater economic and social stability.¹¹⁵ Cambodia is not yet a member of the EITI, but CCHR considers that it would provide a useful objective safeguard to monitor the use of resources within Cambodia.

The Publish What You Pay (“PWYP”) Coalition is a global network of civil society organizations focused on transparency within the oil, gas and mining industries. The organization recently welcomed the introduction of amendments made to the US Dodd-Frank Wall Street Reform and Consumer Protection Act. The amendments require oil, gas and mining companies to disclose what they pay to the US government and foreign governments as part of their annual filings to the US Securities and Exchange Commission (“SEC”), the agency that regulates the US financial sector. Therefore, companies must disclose what money is paid to governments, including the RGC. This applies to all oil, gas and mining companies with securities listed on US stock exchanges, and includes most of the world’s largest internationally operating oil and gas companies, and eight of the world’s ten largest mining companies.¹¹⁶ The information provided is made public. Therefore, even if the RGC does not implement specific laws in relation to access to information about the extractive industries, it seems likely that in the future, this information may become available by other means.

In relation to freedom of information, land and resources in Cambodia, CCHR proposes the following recommendations:

Recommendations

- The RGC should sign up to and implement the EITI.
- The RGC should amend laws related to land and the extractive industries that conflict with freedom of information principles. For example, amendments should be made to the Mining Law to ensure that information regarding mining contracts

¹¹⁵ VOA, 6 April 2010, “Cambodia urged to join the Transparency Initiative”, available at:

www.voanews.com/khmer-english/news/economy-business/a-40-2010-04-06-voa8-90235222.html.

¹¹⁶ *Publish What You Pay*, November 2010, “Extractive Industries Disclosure Provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act”, available at:

<http://www.cgdev.org/doc/blog/globaldevelopment/PWYP%20Fact%20Sheet%20on%20Extractive%20Industries%20Transparency%20Provision.pdf>.

is made public.

- The RGC should increase disclosure of all public contracts and provide full disclosure with regards to the management of public assets, including with respect to oil, gas and mineral deposits. Such information should be published online by the relevant ministries.
- The draft law petroleum law should be amended to include provisions about transparency and public consultations.
- The RGC should regularly publish and distribute, in hard copy and through government websites, information on economic and social land concessions. In relation to land concessions, the RGC should ensure that public consultation is carried out in respect of each and every consultation granted, as prescribed in the Land Law.

8 Conclusion and Recommendations

Democracy requires an informed citizenship and accountable leadership. For these goals to be realized, the public's right to know must be protected and positively enforced through freedom of information legislation, and through the active implementation of freedom of information principles. This Report has shown that there has been some progress in relation to guaranteeing public access to information in Cambodia. The appointment of ministry spokespersons to answer queries from the media, and the publication of judgments by certain courts and tribunals for example, are welcome developments in moving towards greater access to information.

The steps that have been taken towards adopting freedom of information legislation and policy are also encouraging. However, CCHR is concerned by the apparent lack of political will to enact a law, and to ensure the necessary structures and practices are in place to support the implementation of that law.

Limited resources, and at times the mismanagement of resources, make dissemination of information challenging in Cambodia. However, this should not be used as a reason for prolonging the implementation of a freedom of information law. CCHR also acknowledges that a freedom of information law on its own will not be sufficient to ensure access to information for the Cambodian people. The culture of how information is dealt with and shared also needs to change. This

“An FOI law will not work without a civil service that has the expertise, equipment, resources, training and commitment to comply with the law. Nor will the law work without effective records management in public authorities – how can it, if the information is not being created, maintained, stored and disposed of properly?”

- Andrew Ecclestone, September 2008,
“Suggestions on Strategy for Freedom of Information in Cambodia”, p.5

requires changes in the attitudes of the public as well as the government, with ordinary people understanding their role in a democratic society and their right to demand information from those in authority, and the government gaining an appreciation of their role as representatives of the people, a role that entails accountability to the people.

In light of the above, and in addition to the recommendations made in each of the preceding Chapters, CCHR proposes the following general recommendations for the promotion of freedom of information in Cambodia:

- The revised draft Freedom of Information Law put forward by the SRP in March 2012 should be duly debated and considered by the National Assembly, with appropriate amendments mooted to ensure that the law duly abides by Freedom of Information Principles, and be passed by the National Assembly and the Senate before being

promulgated into law. Alternatively, the MoNASRI should finalize the freedom of information policy that it began drafting in 2007 and this should be used as a basis for drafting freedom of information legislation for Cambodia.

- Any Freedom of Information Law that is promulgated should include a right for everyone to access and request the information.
- The RGC should amend the Archives Law to define “publicized documents” and to allow greater access to information.
- All public bodies should ensure that they have websites, and develop internal policies with regards updating and publishing information on the website.
- All public bodies should be encouraged by the RGC to adopt and implement internal codes on access to information based on the enacted laws.

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