

BRIEFING PAPER: CAMBODIA'S DRAFT LAW ON THE MANAGEMENT AND USE OF AGRICULTURAL LAND

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LICADHO
CAMBODIAN LEAGUE FOR THE PROMOTION
AND DEFENSE OF HUMAN RIGHTS



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

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

LICADHO pursues its activities through two programs:

Monitoring and Protection Program:

- **Monitoring of State Violations and Women's and Children's Rights:** monitors collect and investigate human rights violations perpetrated by the State and violations made against women and children. Victims are provided assistance through interventions with local authorities and court officials.
- **Paralegal and Legal Representation:** victims are provided legal advice by a paralegal team and, in key cases, legal representation by human rights lawyers.
- **Prison Monitoring:** researchers monitor 18 prisons to assess prison conditions and ensure that pre-trial detainees have access to legal representation.
- **Medical Assistance:** a medical team provides assistance to prisoners and prison officials in 14 prisons, victims of human rights violations and families in resettlement sites.
- **Social Work:** staff conduct needs assessments of victims and their families and provide short-term material and food.

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

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SUMMARY

The Draft Law on the Management and Use of Agricultural Land Threatens to Eviscerate Private Property Ownership Rights and Eliminate All Limitations on Economic Land Concessions

Late last year, the Cambodian government quietly released a draft Law on the Management and Use of Agricultural Land that would have serious implications for private landholders. The draft law as currently written could be used as legal cover for land-grabbing and for those who wish to exploit and personally profit from Cambodia's land and resources. Most alarmingly, the law creates felony criminal liability for any actions that violate the law's far reaching provisions. The following aspects of the draft law require immediate scrutiny and substantial revisions.

First and foremost, as noted above, the draft law imposes felony criminal liability. It provides for a sentence of up to one year in prison for any violation of the law itself, of any sub-decrees issued under the law, or even of any orders issued by the General Directorate of Agriculture (GDA), a body under the Ministry of Agriculture, Forestry and Fisheries (MAFF). Given the incomprehensibly vague nature of several obligations established under the law, such as the requirement that private property holders ensure their land use is "sustainable" to the GDA's satisfaction, such criminal liability is entirely inappropriate and susceptible to substantial abuse.

Second, the draft law provides for the government-led creation of vaguely described "Agricultural Development Areas" (ADAs) consisting of an unlimited number of privately owned plots, of any size. ADAs are established upon agreement by an undefined "substantial majority" of the affected landholders. The specifics and contents of plans governing such areas are left to a later MAFF prakas, as are provisions related to consultations with the landholders prior to the mandatory implementation of development plans covering the areas. Once such plans are completed, the duty to implement them is triggered by agreement of a bare majority of landholders. A failure to carry out activities as described in the plan could result in criminal prosecution and jail time, even if a landholder did not agree to the creation of the area or to the plan. The entire scheme is initiated and managed by MAFF. There are no provisions that allow for the termination or expiration of an ADA, or for private landholders to exclude their land from the ADA's development plan.

Third, the draft law requires that all private landholders take action to prevent or reverse "soil loss or deterioration." If such actions are not taken to the satisfaction of government officials, the law provides MAFF with a litany of powers to wield against the landholder. A MAFF order under the draft law can, for example, dictate the destruction of crops without compensation, or can provide for entirely unfettered MAFF "control" over the offending land.

Article 54: Any person who contravenes or fails to comply with any provisions of this Law, or of any Sub-Decree made under this Law which requires a person to do or not to do something or with any lawful order of an officer of the GDA issued to that person shall be guilty of a Class III offence.

[...]

A person who has been convicted of a Class III offence under this law shall be liable to a punishment of one month to one year in prison and a fine from one million riels to ten million riels.

Neither “soil loss or deterioration,” nor the actions that could be required to prevent or remedy it, are defined or limited by provisions requiring a reasonable burden or cost. There are also no provisions describing any appeal process, nor are there guidelines limiting the government’s sweeping discretion related to soil conservation requirements. Once again, if landholders fail to abide by the government-delivered order, they could be subject to criminal prosecution resulting in substantial fines or imprisonment.

Fourth, the draft law creates an entirely new “agricultural land lease” scheme which implicitly overwrites limitations and protections currently required of ELCs under the 2001 Land Law and subsequent sub-decrees. There are, for example, no size or duration limits, environmental impact assessments, or prior consultation or consent requirements related to such leases in this draft law.

Fifth, the draft law requires all property owners to secure “land conversion permits” before either beginning to use their own land for agricultural purposes or ceasing such use. Again, there are no minimum size or impact thresholds limiting this burdensome requirement. The draft law also fails to provide guidelines for the newly created inter-ministerial body responsible for approving or denying such permits. And it fails to provide any appeal process. The law simply makes it illegal, again subject to criminal charges, for property owners to conduct or stop conducting agricultural activities on their own land prior to receiving the permit. There is nothing to indicate that even a home vegetable garden is exempt under the draft law’s current wording.

Sixth, the draft law discourages, and may even prevent, the continuing use of traditional methods of shifting agriculture.

Seventh, the law incongruously includes provisions related to contract farming, despite the fact that the topic is comprehensively covered by the newly implemented Civil Code and a sub-decree on contract farming. In the event of any conflict between a farmer and his purchaser, this draft law expressly provides that the purchaser prevails – he or she is entitled to insist on a specific quantity, price, and several other key potential contract terms.

And finally, the law allows the government unfettered discretion in seizing inhabited land to create “agricultural bio-diversity conservation areas.”

Ultimately, the draft law poses a serious threat to private ownership rights – particularly for smallholder farmers. It also does little or nothing to address Cambodia’s core problems related to agricultural development and land rights abuses.

ANALYSIS: KEY ISSUES RAISED BY THE LAND LAW

Background: Land-Grabbing in Cambodia is Reaching a Crisis Point

Thousands of Cambodian families have lost their land to the rich and powerful in recent years. In Phnom Penh and the 12 provinces in which LICADHO works – roughly half the country – over 400,000 people have been affected by land-grabbing and evictions since 2003. In 2011 alone, over 11,000 families were newly affected by land conflicts.

One major contributor to the recent increase in land conflicts is the growing issuance of ELCs, which are long term leases, usually for 99 years, over state private property. ELCs are purportedly intended to promote industrial agriculture development. Information about lease terms and negotiations, however, as well as information about estimated returns to the public fisc or expected job growth as a result of the concessions, is rarely if ever disclosed or discussed. There is a comprehensive lack of transparency surrounding these potentially highly lucrative leases for private enterprise.

As of February 2012, the government has leased at least 2,033,664 hectares of land to private companies under its current concession schemes. Approximately 800,000 hectares were awarded in just 2011. This stunning increase in ELCs has left relatively little arable land in Cambodia unfettered by long-term leases to private companies.

Several human rights organizations, including LICADHO, have noted a dramatic increase in the number of protests related to land rights abuses recently. Many of these protests have resulted in violence. There have been at least eight incidents involving armed military and police forces firing weapons during land protests or against land rights activists since November 2011. One leading Cambodian environmental activist, Chut Wutty, was killed by military police after photographing purported evidence of illegal logging on April 26, 2012. In another more recent incident, a 14-year-old girl was shot and killed in Kratie province during a forced eviction carried out by a large military force on May 16, 2012.

Although a growing number of violent incidents have been documented in video footage or photographs, arrests have been made in relation to only two. To date, not one perpetrator of this violence against civilians has been convicted of a crime. Government officials have stated that the death of the teenager does not even merit an investigation.

On May 22, 2012, on the other hand, thirteen female land and housing rights activists from the Boeung Kak area in Phnom Penh were violently arrested during a peaceful protest at the former lake. After 48 hours in detention, and just about one hour after charges were filed, the women were subjected to a mass trial and convicted of “illegal occupation” and “obstruction of public officials with aggravating circumstances.” There was no basis in either law or fact for either charge. Regardless, the women were sentenced to 2.5 years in prison each, with six having portions of the sentence suspended. The “trial” lasted just three hours. The women’s lawyers were not permitted to view the case files or evidence, their request for a trial delay was denied, they were not even allowed to speak with their clients after the charges were filed, and their requests to call defense witnesses were also denied.

All of these fair trial rights are not only well-established under international law; they are also expressly included in Cambodia's own Code of Criminal Procedure.¹

Meanwhile, according to the Food and Agriculture Organization of the United Nations (FAO), 66 percent of Cambodians depend on agriculture for their livelihoods, and approximately 3 million Cambodians face undernourishment. Thirty-seven percent of Cambodia's children suffer malnourishment to the point of stunting their growth.

Disconnected and Dangerous: The Role of International Organizations

It is against this backdrop that FAO approved US\$99,000 in funding to MAFF for a project throughout 2011 to draft an Agricultural Land Law. At its inception, the draft law was purportedly intended to promote sustainable agricultural development that increases productivity and conserves soil. Since December 2010, FAO has reportedly drafted and revised this law repeatedly, with no substantive consultations or comments by any relevant stakeholders. MAFF reportedly also organized multiple workshops in late 2011.

No government-led, civil society-led, or public consultations or workshops have resulted in any changes to the publicly disseminated October 2011 draft, which is the subject of this analysis. No other draft has been released to date.

Relatedly, the Asia Development Bank (ADB) has included the promulgation and implementation of an undefined Agricultural Land Management law by 2014 as an indicator in a large project titled "Cambodia: Climate Resilient Rice Commercialization Sector Development Program." The project already has an approved funding of US \$1.5 million, and proposed additional funding of a staggering US \$55 million. In order to implement this draft law in time to satisfy the project's indicators, and given the stage at which the drafting now stands, this deadline places significant time pressure on the government to push the draft law through this year. Moreover, ADB's indicator provides the government with an excuse for creating and pushing through an egregious piece of legislation full of provisions that cater to abuse.

"The arrival of investors in agriculture may present certain opportunities, but there are also important human rights challenges, and investments that can affect land rights are a particular source of concern. The human right to food would be violated if people depending on land for their livelihoods ... were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor. In concluding agreements on large-scale land acquisitions or leases, States should take into account the rights of current land users in the areas where the investment is made..."

-- Olivier De Schutter, UN Special Rapporteur on the right to food

¹ None of the trial violations were addressed during the Appeal Court hearing on June 27, 2012. Nor was any evidence submitted by the government to prove the women's guilt. Their convictions were nevertheless affirmed. Their sentences were modified so that all 13 were released later that same day, having served one month and three days in prison. The remainder of each sentence was suspended.

Felony Criminal Liability for Any Deviation from the Law's Far-reaching Requirements

Under the draft law's criminal offence provisions in Chapter 10, anyone who "contravenes or fails to comply" with *any* of the law's provisions, with *any provisions in sub-decrees* issued pursuant to the law, or even with *any terms in a GDA order*, is guilty of a Class III felony offense carrying up to a year in prison and substantial fines. Criminal charges can be initiated by GDA officials under the law.

The draft law then includes another provision that takes things even further. Under article 54, not only is any possible deviation from the law or orders issued under the law a crime, so is the act of obstructing or hindering "any person or officer in the exercise of his powers or the performance of his duties" under the law. It is not a stretch to imagine that any landholder who disagrees, for example, with the creation of an Agricultural Development Area, or even a member of civil society who tries to advocate on issues related to agricultural development, could be prosecuted under this provision.

It is difficult to imagine a criminal law that allows for more discretion, or is more susceptible to abuse. It is also difficult, if not impossible, to reconcile criminal provisions with a law intended to promote efficient, effective and sustainable agriculture. The entire draft law must thus be read with these unjustifiable, draconian criminal provisions in mind.

Agricultural Development Areas: Involuntary Collectivization

Under articles 3 and 14, "Agricultural Development Areas" (ADAs) can be created by MAFF virtually anywhere, over any form of agricultural land. The purpose of such areas is vaguely described as increasing productivity and developing agricultural produce for market.

Article 15 requires only that an undefined "substantial majority" of affected landholders agree to the creation of the area.² The law thus implies that private landholders who disapprove of the creation of such development areas will nevertheless be forced to join and actively participate in them.

"States should protect legitimate tenure rights, and ensure that people are not arbitrarily evicted and that their legitimate tenure rights are not otherwise extinguished or infringed."

-- *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, released by FAO on March 9, 2012

Upon creation of an ADA under this chapter, the law mandates the formulation of a development plan which, as stated in article 17, would only require a "majority" to be approved and forced upon all affected smallholder farmers within the area. There are no provisions limiting or defining the purpose or contents of the area's plans. Article 17 simply leaves the specifics and contents of plans governing such development areas, as well as the mode of consultation with smallholder farmers during the preparation and implementation of such plans, to a later MAFF prakas.

Article 18 then states that all landholders within the development area – irrespective of whether they supported the creation of the area and/or the development plan – must "co-operate and work" to implement the plan and to "comply

² In the current Khmer translation, the law provides for the creation of an ADA upon agreement of simply "a lot" of the affected landholders.

with any directions” given by government officers. Although the law suggests that existing practices should be taken into account, there is nothing to prevent a development plan from changing a smallholder’s crop choices or methods. A farmer whose family has grown corn for generations, for example, could be forced to switch to growing rice or rubber, and would have no recourse against such a decision. Farmers who fail to comply with and implement the development plans are criminally liable and could face imprisonment under the draft law. There are no provisions in the law dealing with the termination or expiration of an ADA, or allowing for private landholders to otherwise resign or exclude themselves.

Mandatory Land and Soil Conservation Requirements

The draft law states that every landholder is under an obligation to prevent soil loss or deterioration. Such loss or deterioration is not defined, nor are any examples of the potential measures that could be forced upon landholders. If a private landholder fails to take the appropriate action under article 24 the GDA is entitled to enter the land and take remedial measures according to its own orders.

GDA’s orders under article 25 can contain nearly any action over the landholder’s property imaginable, including:

- “the firing, clearing, or destruction of vegetation when ... deemed by the relevant official to be necessary or expedient ...”,
- “requiring the uprooting, cutting or destruction, without payment of any compensation of any vegetation that has been planted or allowed to grow in contravention of any land and soil preservation order,” and
- “prohibiting, restricting and controlling the use of agricultural land.”

There are absolutely no limits on the discretion of GDA when it comes to enforcing its own orders related to soil conservation. Moreover, there is no provision related to the financing of such mandated remedial measures. It is no stretch to imagine that a small holder farmer will be unable to pay for potentially large scale conservation efforts as directed by the GDA. The consequences for such failures could result in prison time.

Agricultural Land Leases: The New Unregulated Land Concessions³

Chapter 8 creates an entirely new scheme for “agricultural land leases” which are defined to include leases by the government over state private property to companies planning to “carry out agriculture on that leased land.”

The wording should sound familiar. The 2001 Land Law states that ELCs can be issued over state private property where the intent is to “clear the land for industrial agricultural exploitation.”⁴

A legitimate question arises: why would the government redefine, under a different title, what it has already set up over a decade ago. The answer is quite simple; “agricultural land leases” are simply a new form of ELC – without any strings attached.

³ There have been recent rumors that this chapter is under consideration for deletion from the draft law. If true, this would be a welcome change. Unfortunately, all efforts to obtain any further drafts have been unsuccessful.

⁴ 2001 Land Law, Article 49

In other words, the draft law conflicts with, and thus overwrites requirements imposed on ELCs – such as the 10,000 hectare size limit and requirement for consent and prior consultation with current inhabitants of the land – that are included in the 2001 Land Law and the Sub-decree on Economic Land Concessions. Instead of imposing any requirements or limitations on agricultural leases whatsoever, the draft law simply regurgitates standard boiler-plate property law related to private rental properties, such as the requirement to meet conditions stated in the lease, and to pay rent on time. A 100,000-hectares lease lasting 200 years would be perfectly fine under these terms.

The inclusion of this implicit evisceration of important concession limitations into a law purportedly about improving agricultural yields, sustainability, and conservation, is hardly surprising. The government has been under increasing pressure to abide by the laws governing ELCs in light of the recent escalation of improperly issued concessions, and a concomitant increase in publicized land disputes.⁵ For example, several adjacent concessions have been documented as being controlled by the same interests – either through family ties or through shadow companies. With no limitations on agricultural land leases included in this draft law, such criticisms will no longer apply and the government will be free to grant private leases to companies regardless of size, duration, consent, relocation agreements, or prior consultations.

Land Conversion Permits: Gutting Private Ownership Rights

Under Chapter 9, a private landholder who wishes to either begin or stop using his or her land for any agricultural purposes must apply to the newly created “Agriculture Land Conversion Committee” for a land conversion permit. The Committee has absolute discretion to grant or deny such permits, or even to place conditions upon the land use requested in the permit application.

The application procedures are not defined in the law, but rather left to a later sub-decree.

In Contrast: Benefits of Private Ownership under the 2001 Land Law

Article 85

The owner of immovable property has the exclusive and extensive right to use, enjoy and dispose of his property, except in a manner that is prohibited by the law.

Article 87

The owner of land may plant, develop and construct anything he wishes, unless it is prohibited by law. Such development or constructions are his ownership, in accordance with the provisions of Part 3 of this Chapter.

Article 88

The owner of immovable property may freely carry out any development or alteration of the original type or structure of his property in accordance with his use purposes and in accordance with the provisions of the law.

Article 89

Modification of the original nature or structure of immovable property, in the terms of this law, include the clearing of lands and forests (logging) and their cultivation, the filling up of land, the leveling of hills or talus, the digging and hollowing out of land to extract earth, the exploitation of mines or quarries, the establishment or drainage of water reserves, the urbanization of agricultural land, and the development of industrial zones and factories.

Moreover, where a private land holder begins the activity requested in the permit application while that application is pending, the law explicitly refers to criminal penalties under Chapter 10. If you were to allow your home vegetable garden to lie fallow, for example, you could be considered in violation of this chapter as currently drafted.

Bio-diversity Areas: Formalized Land-Grabbing

Under article 12, the draft law allows the government unfettered discretion in creating “agricultural bio-diversity conservation areas” over “state agricultural land,” regardless of whether that land has been “allocated to and is being used by individuals or organizations.” Where the land subject to such seizure is in private hands, the draft law promises the payment of “fair compensation” which is not tied to market value or any other objective measure, and which is left entirely to the government’s discretion. There is no appeals process. Given that the government considers all land that does not yet have a formal hard title attached to it to be state private property, and given that possession may entitle an inhabitant to full ownership rights under the Land Law even if he or she does not yet have full title, this article amounts to nothing short of legalized land-grabbing.

Once such an area has been created, the government is then expressly given the ability to develop that land as it wishes.

Legal Basis for Discouraging Shifting Methods of Cultivation

Chapter 6 purports to govern traditional community use and management of agricultural land, but the majority of its provisions appear designed to encourage the abandonment of shifting methods of cultivation. This is no surprise given the government’s well-established antipathy towards this traditional, sustainable method of soil rejuvenation.

Article 27 implies that any recognition of shifting cultivation – a phrase which in itself encompasses multiple variations of well-recognized modes of agriculture – as viable, requires an initial finding that the method is currently in operation in that area. This hurdle alone will be difficult to meet, given that Cambodian officials have repeatedly forbidden indigenous communities from continuing to use such traditional methods, and have even stated that shifting cultivation no longer takes place in Cambodia.⁶

More importantly, Chapter 6 provides for a GDA-led effort to change to cultivation methods more suitable for commercial agriculture, where there is evidence expressed to GDA or in any other forum that a community “wishes to move away from shifting cultivation to take advantage of market opportunities.” This provision provides ample cover for government officials already seeking to force communities who practice traditional methods of cultivation to abandon those methods.

In Case of Contract Disputes, the Farmer Expressly Loses

Chapter 7 bizarrely establishes certain special rules for contract farming. Not only is this topic seemingly irrelevant to the purposes of the draft law, it is also covered by Cambodia’s recently implemented Civil Code.

⁶ LICADHO sources have attested to such statements by officials on multiple occasions.

In any event, there is simply no excuse for article 37, which states that if a contract dispute between the “producer” (farmer) and “purchaser” cannot be resolved, then “both parties shall implement the mechanism cited in Article 35 of this law.”

Article 35 deals exclusively with the rights and obligations of the purchaser, as opposed to article 34 which discusses the farmer’s rights. Under article 35, the purchaser alone is empowered to “determine the commodity items such as their quantities, qualities, place and the date of delivery and acceptance of the commodities.” A more unequal relationship can hardly be imagined. The chapter makes no reference to resolving contract disputes in the courts or through any other neutral or administrative body.

Dictates Vague “Sustainable” Agricultural Activities on Private Property

Article 8 requires that all persons or legal organizations who undertake “any agricultural activity on any land shall be under an obligation to undertake that activity in a sustainable manner.” The term “sustainable” is not defined, nor is there any justification for this vague burden on private landholders. And again, under Chapter 10, any deviation from government mandated “sustainability” measures over privately held land could give rise to serious criminal penalties, including jail time.

RECOMMENDATIONS

Because this draft law poses a serious threat to private land rights, LICADHO recommends that the law be significantly revised:

- The criminal offence provisions must be removed in their entirety. The government should encourage good agricultural land practices by setting examples and through positive incentives, not by putting farmers behind bars.
- The law should clarify that no landholders can be forced to join Agricultural Development Areas, regardless of whether their neighbors so choose.
- The law must include guidelines clarifying the potential contents and purposes of Agricultural Development Area plans, as well as the prior consultation processes. The consultation phase should be required to include a discussion of the potential negative consequences of joining these areas, not just the benefits.
- Since the law claims that Agricultural Development Areas are intended to assist smallholder farmers, the creation of such areas should also be triggered by the farmers themselves, not solely by MAFF.
- The law must clearly define potential obligations related to soil loss and deterioration, as well as specific definitions of the terms “loss” and “deterioration.” There must also be appeals processes described in the law. Industrial land should not be exempted from any restrictions on private landholders related to soil conservation. Private landholders must also not be expected to incur unreasonable personal expense under these provisions.
- The law should not include any provisions related to agricultural land leases. Such provisions are not consistent with the supposed purposes of this law, and are amply covered under multiple laws already in existence. The law must not include this

transparent attempt at removing the safeguards and requirements surrounding economic land concessions.

- The provisions related to land conversion permits for private property owners should also be removed.
- Remove the chapter related to contract farming.
- The drafters of the law should re-examine the need for creating additional bureaucracy in the form of several large new inter-ministerial committees with undefined duties and overlapping roles.

In light of the severity of the above concerns, LICADHO suggests that the government clearly articulate the need for and specific aims of this sprawling draft law before proceeding further with consultations and revisions.

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