

CAMBODIA'S DRAFT LAW ON UNIONS OF ENTERPRISES

Legal Analysis

September 2014

I. Introduction and Background

The government has once again decided to push forward with a flawed Law on Unions of Enterprises (Trade Union Law) draft that could severely undermine freedom of association in Cambodia. The law has been years in the making and saw several improvements after consultations in the past. However, the overall quality of the current draft obtained in May 2014 has taken a dramatic turn for the worse and the government has still not been able to articulate a persuasive reason for its passage.

Renewed government interest in passing the draft Trade Union Law comes on the heels of the lethal suppression of a general strike amid growing unrest in the labor sector, particularly in the garment manufacturing sector. Toward the end of 2013 and into the beginning of 2014, protests by garment workers calling for better working conditions and a minimum wage consistent with the government's minimum living wage study continued to build momentum.

The government's response was to mobilize state security forces that used wholly disproportionate force to put an end to these protests. The state security forces used live ammunition to suppress protesters, killing at least 5 and injuring numerous others. During this time 25 people, including garment workers and human rights activists, were arrested and several months later convicted in a trial process that was characterized by a total absence of fair trial rights.¹

In contrast, no credible investigation has been launched to determine who bears responsibility for the civilian deaths and injuries caused by the security forces. In the wake of this lethal suppression, the government now appears determined to exert greater control over all aspects of trade union creation and activity rather than addressing the underlying causes of the labor unrest.

The draft law states that workers have the right to form a union of their choice "without any distinction whatsoever or prior authorization,"² but subsequent provisions disprove this statement. As with the previous draft released in September 2011, the current draft continues to threaten freedom of association in Cambodia through prohibitive registration requirements as well as vague and discretionary restrictions on union autonomy and activities. Additionally, the current draft seeks to improperly expand the control of the Ministry of Labor (MOL) by delegating to it many powers that should be within the sole authority of the courts.

II. Infringements on Freedom of Association

Prohibitive Registration Requirements

Despite repeating the Labor Law requirement that unions can be formed without any prior authorization, the draft law actually imposes a strict regulatory framework with several requirements that must be met before unions can receive registration approval from the MOL.

The most severe restriction is the requirement that a local union can only be established after it has been joined by at least 20% of the workers at a particular enterprise or institution.³ The law also contains arbitrary and excessively high requirements for the formation of union federations and confederations whereby a federation can only be formed by at least 15 local unions and a confederation by 10 federations.⁴

These excessive requirements will severely restrict the freedom of workers to create or join the union of their choice and to form higher-level associations to pursue their specific interests and goals. For example, should this law be passed one of the few pro-workers confederations, the Cambodia Confederation of Unions headed by Rong Chhun, would be prevented from successfully registering to represent the rights and interests of garment workers, students, and public servants.

¹ For background information on the events and detailed coverage of the trial, see http://stream.licadho.org/cambodia.org/free_the_23_trial/

² Draft Law on Unions of Enterprises (Trade Union Law), Art. 5.

³ Trade Union Law, Art. 10.

⁴ Trade Union Law, Art. 10.

The draft law also states that union registration will be approved only if it sufficiently meets all the requirements stipulated in the Trade Union Law and in any relevant future Prakas issued by the MOL.⁵ This vaguely worded provision inappropriately allows decisions on whether to accept a union registration request to be arbitrarily enforced at the discretion of the MOL. The MOL will also have complete control to unilaterally and without consultation establish the procedures for the application process if the Trade Union Law is passed.⁶

Another problematic provision appears intended to define an extension period in which unions may be allowed to amend their registration applications if the MOL finds that the original applications do not conform to the requirements of the Trade Union Law.⁷ However, it is not hard to imagine that the vaguely defined restrictions can be used by the MOL to arbitrarily and indefinitely delay the registration application⁸ or cancel a union's registration.⁹

The latest draft has also been amended to change the registration requirements for pre-existing unions. Previously, the Trade Union Law draft provided that existing unions would remain valid until they held new leadership elections or amended their statutes. The current draft, however, further shows the government's intent to harm existing unions by requiring all previously established unions to re-register under the burdensome new law within 6 months after the law enters into force.¹⁰

Restrictions on Union Autonomy

The law purports to improperly regulate a number of operational decisions that should be left for unions to determine unilaterally within their own by-laws such as minimum membership fees as well as the composition and terms of office for union leadership.

The law creates a minimum membership fee of at least 1% of the workers' wages.¹¹ However, it is not appropriate for the government to determine how much unions should charge their members, especially considering the insufficient wages that many workers currently receive. This minimum fee creates an improper deterrent to prevent workers from joining unions and to impede the union's ability to represent the interests of a greater number of workers.

The law also imposes excessive external controls over the unions' ability to determine and elect their own leadership. For example, the inclusion of minimum age and literacy requirements¹² are not only inappropriate but also incompatible with International Labour Organization (ILO) Convention 87.¹³ The draft law further requires that anyone with a leadership or management position in a union cannot have been convicted of any criminal offence, regardless of the type or severity of the offence.¹⁴ This is particularly disconcerting in light of the recent politically-motivated conviction of 25 workers and human rights activists noted above which demonstrated the control that the government exerts on the judicial system.

The government will additionally be able to initiate a cumbersome financial audit of any union whose annual financial reports are deemed by the MOL to have irregularities.¹⁵ In a previous version of the draft law, an independent financial audit could only be triggered at the request of 50% of the union's members. However, the most recent version allows a single member of a professional organization or the MOL to request such an audit. Such cumbersome, time consuming audits could easily be used to arbitrarily harass and interfere with a union's activities.

⁵ Trade Union Law, Art. 12.

⁶ Trade Union Law, Art. 15 (the latest version of the draft law removed a provision that required the MOL to consult and get agreement from the Labor Advisory Committee regarding the procedures for the application process).

⁷ Trade Union Law, Art. 16.

⁸ As above.

⁹ Trade Union Law, Art. 19.

¹⁰ Trade Union Law, Art. 87.

¹¹ Trade Union Law, Art. 23(a).

¹² Trade Union Law, Art. 21.

¹³ International Labour Organization, Freedom of Association and Protection of the Right to Organise Convention (ILO Convention 87). Article 3 states that "Workers' and employers' organisations shall have the right to... to elect their representatives in full freedom..."

¹⁴ Trade Union Law, Art. 21.

¹⁵ Trade Union Law, Art. 28.

On top of the requirement for submitting an annual audit, the most recent version of the draft law also requires unions that receive financial assistance from abroad to report all such assistance in writing to the MOL.¹⁶ As all financial assistance, domestic or foreign, will have to be recorded in the unions' financial audits there is no convincing reason that unions should be subjected to the burden of additional reporting requirements.

Improper Restriction on Union Activities

As noted above, there are several provisions and penalties characterized by vague language that could be subject to arbitrary enforcement. These provisions lack objective criteria to clearly define what activities are prohibited and to guide government and judicial decision-makers.

For example, the draft law states that a union's financial sources must be derived from legitimate money-making activities or with the assistance of other parties for the purpose of serving legitimate activities.¹⁷ Without further clarification, it is anyone's guess what financial sources, excluding membership fees or state funds, could potentially lead to the suspension or cancellation of a union's registration.

In addition to the numerous arbitrarily enforceable provisions, the draft law creates a flawed framework for certifying one union from an enterprise or more broadly from a profession or economic sector as having most representative status (MRS).¹⁸ The MRS union at the enterprise or economic sector level will have the exclusive authority to negotiate all collective bargaining agreements and resolve all collective labor disputes with employers or employer associations.

The criteria for a federation or confederation to secure most representative status include having the most card-holding members in the profession or economic sector for which it seeks to be certified.¹⁹ As the ILO noted, this could lead to a situation where a federation with just 5% of workers in its profession as members is responsible for negotiating collective bargaining agreements for the entire profession or sector.²⁰ Additionally, a minority union leader could be punished with fines from \$250 - \$1,500 under yet another vaguely defined offense if found to have interrupted or disturbed a MRS union during a collective bargaining agreement or during the resolution of a collective labor dispute.²¹

Not only do the rules establishing these MRS unions threaten to undermine the rights of workers to freely associate with and select their representatives to resolve collective labor conflicts but once again the MOL is given discretion to determine which union will be certified as the MRS union.²² The MOL will then also be responsible for investigating, suspending or revoking the most representative status for any union.²³

If the MOL does not revoke a union's most representative status and the union does not dissolve itself, then the certification cannot be challenged for two years after it is awarded.²⁴ This could lead to a wholly unrepresentative situation whereby a MRS union loses its membership to another union that more accurately represents the interests of the workers but still retains exclusive collective bargaining rights.

III. Government Overreaching

The law also fails to protect workers and unions by authorizing the MOL with too much oversight authority. On top of the complete discretion to accept or reject union registration applications and decide which union will have the most representative status, the MOL is additionally delegated powers that should be within the sole authority of the courts.

¹⁶ Trade Union Law, Art. 23.

¹⁷ Trade Union Law, Art. 23.

¹⁸ Trade Union Law, Art. 55.

¹⁹ Trade Union Law, Art. 56.

²⁰ ILO Memorandum of Technical Comments on Draft Law on Unions of Enterprises of Cambodia. The ILO further stating that this "may lead to a serious breach of commitments under C98," and it "will also lead to enormous conflict among unions in Cambodia." The ILO concluded that this article should be deleted.

²¹ Trade Union Law, Art. 81.

²² Trade Union Law, Art. 58.

²³ As above.

²⁴ Trade Union Law, Art. 61.

Of particular concern is that the decision on whether to suspend a union for failing to meet the requirements of the Trade Union Law rests entirely with the MOL in direct contravention of Cambodia's obligations under ILO Convention 87.²⁵ Until the most recent version this authority was properly delegated to the labor court but now the labor court only becomes involved if the union appeals the MOL decision within one week after receiving notification of the suspension.²⁶

Other notable concerns include that legal challenges to the certification of an MRS union will also be delegated initially to the MOL instead of the courts, although there will be a right to appeal.²⁷ More troubling is that law also authorizes the labor inspector to declare when a strike is illegal, a decision that the Labor Law states can only be made by the courts.²⁸

Decisions on whether individuals or groups have violated provisions in the law are judicial decisions that must be made by the Cambodian courts. The power to issue judicial decisions should not be vested in any other government authority.

IV. Government Political Motivation

A number of other vague and arbitrarily enforceable provisions demonstrate the government's intent to use this law to exert control over potential mechanisms for dissent rather than strengthen workers' rights and benefit the development of the labor sector. For example, a union may be dissolved if its leaders are found guilty of an offense that is deemed to cause "substantial harm to the security of the State."²⁹ Unions may also be dissolved if the labor court determines that they were involved with "economic sabotage" or any activity against "the national interest."³⁰

Union leaders can be punished with fines from \$250 - \$1,500 for offenses such as not protecting the legitimate interests of workers, not promoting industrial relations, and not securing national development.³¹ Additionally, the law further states that it will be unlawful for unions or their representatives to "agitate for purely political purposes."³² As the decision on whether to increase the minimum wage is the responsibility of the government, it is easy to imagine that if a union or its members campaign for an opposing political party that supports raising the minimum wage then they could be deemed in violation of this provision.

These vaguely phrased provisions bear little relation to the practical regulation of trade unions and instead demonstrate the government's continuing efforts to control any potential large-scale social movements.

V. Conclusion and Recommendations

As it stands, the draft Trade Union Law would severely restrict the ability of workers and unions to join with other like-minded individuals and groups in order to protect their rights and demand fair labor practices. The government is delegated excessive control over all aspects of the law and without clear objective guidelines for government and judicial decision-makers to follow the law is susceptible to abuse.

The current draft fails to meet Cambodia's international obligations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which both guarantee the right to freedom of association and are enshrined in the Cambodian Constitution. The draft law also violates the ILO conventions that Cambodia has ratified on freedom of association and collective bargaining.³³

²⁵ ILO Convention 87, Art. 4 (stating "Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.")

²⁶ Trade Union Law, Art. 18.

²⁷ Trade Union Law, Art. 61.

²⁸ Compare Trade Union Law, Art. 78 with the Labor Law, Art. 337 (stating "The Labor Courts or, in the absence of the Labor Courts, the common courts, have sole jurisdiction to determine the legality or illegality of a strike.")

²⁹ Trade Union Law, Art. 30(d).

³⁰ Trade Union Law, Art. 30(e).

³¹ Trade Union Law, Art. 82.

³² Trade Union Law, Art. 66.

³³ See ILO Conventions 87 and 98.

Because this draft law poses such a serious threat to freedom of association in Cambodia, it must be significantly revised or quashed in favor of the current regulatory framework described in the Labor Law.

►►► **Recommendations**

- Reduce the excessively high minimum membership requirements for the formation of unions, federations and confederations.
- Remove or revise vague provisions that are highly susceptible to arbitrary decision-making by the government or judiciary with clear objective guidelines. For example, phrases such as “economic sabotage,” “caused trouble,” “for purely political purposes,” and “the national interest” must be removed or more clearly defined.
- Revise all provisions that improperly authorize the Ministry of Labor to exercise judicial review over alleged legal violations. Notably, in compliance with Cambodia’s obligations under Article 4 of ILO Convention 87, the authority to dissolve or suspend a union’s activities should only be exercised by the Cambodian courts.
- Remove the provision requiring pre-existing unions to undergo the burdensome registration process within 6 months of the law entering into force.
- Remove the requirement that union membership fees must be at least 1% of workers’ wages and ensure that unions have complete control to determine their own membership fees.
- Revise the provision that allows the Ministry of Labor or a single member of a professional organization to initiate an independent audit of a union’s finances.
- Remove the provision that unions must submit additional reports on foreign financial assistance on top of the annual reporting requirements.
- Remove or revise unreasonable requirements for union leaders, such as age and literacy requirements as well as the requirement that the leaders have never been convicted of any criminal charges.
- Remove or clarify penalty provisions that subject union leaders to the possibility of heavy fines.

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