

**RULE OF LAW NORMS  
GUIDELINES  
FOR CAMBODIAN LEGISLATORS**

**Preface**

These ***Rule of Law Norms Guidelines*** were prepared by William A.W. Neilson, Professor of Asia-Pacific Legal Relations, Faculty of Law and Director of the Centre for Asia-Pacific Initiatives, University of Victoria, Canada.

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The purpose of the *Guidelines* is to provide Honourable Members of the National Assembly and Senators and legislation-related staff of their respective Secretariats with essential background materials on the meaning of the Rule of Law and the application of its principles to their legislative review, lawmaking and law supervision responsibilities.

The *Guidelines* conclude with a list of *Rule of Law Norms Questions* that might be applied to all legislative proposals put before the National Assembly and the Senate.

Rule of Law Norms apply to the legislative process and also to the preparation of draft legislation by government and the adjudication of cases by courts. Because written laws or statutes are so numerous and affect so significantly the exercise of political, economic and social rights of the citizens, the process by which these laws are adopted by Parliaments or Legislatures is very important to the integrity and legitimacy of every state's legal system. Lawmaking and legislative review powers, if they are exercised in an open and democratic manner, constitute Parliament's role in building the Rule of Law.

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## **1. The Essence of the Rule of Law**

The Rule of Law is not a single principle or maxim. Rule of Law is really a concept or an ideal of what a democratic parliamentary legal system looks like and how it functions. A Rule of Law legal regime incorporates six basic principles:

- 1.1 supremacy of law**
- 1.2 separation of powers**
- 1.3 protection of life, liberty, safety and property of persons**
- 1.4 legal certainty**
- 1.5 equality before the law, and**
- 1.6 Rule of Law Norms in reality, not just in theory.**

### **1.1 Principle 1 -- Supremacy of Law**

**1.1.1** By Article 131, the Constitution is the 'supreme law' of the Kingdom of Cambodia and Parliament, not the State, by Article 90, is the supreme lawmaking body.

The *supremacy of law* means that the government and state agencies must follow and apply existing legislation and obey legal rules within the framework of the Constitutional order and Parliamentary supremacy.

Parliaments and the Courts, not the State, interpret the meaning of laws.

**1.1.2** A *Rule by Law* regime is **not** a *Rule of Law* regime.

*Rule by Law* refers to a legal system in which the government administers State power through legal rules whose interpretation and application are basically controlled by the government whose officials and agencies are not necessarily bound by the same laws.

*Rule of Law* is based on the principle of constraining State power, meaning that:

- (a) citizens can do anything not specifically prohibited by law, and
- (b) state agencies and officials can do only that specifically permitted by law.

## **1.2 Principle 2 -- Separation of Powers**

- 1.2.1** The principle of the *separation of powers* is found in Article 51 of the Constitution which provides that "the Legislative, Executive and Judicial powers shall be separate". The separation principle is basic to a Rule of Law State.
- 1.2.2** The *Judicial function* is to resolve legal disputes and to authoritatively interpret the content and meaning of valid laws through decisions in cases that are brought into open court before the judiciary. Judges are to be impartial and independent and are not to be subject to political influence or manipulation.
- 1.2.3** The *Legislative function* is to adopt general legal norms which are to bind all state officials and agencies.
- 1.2.4** The *Executive function* includes a legislative element but only of a delegated character. Any rules, regulations or other legal instruments issued by the Executive must be authorized by legislation adopted by the National Assembly and Senate. Separation of powers cannot exist if the Executive is also the basic lawmaker.
- 1.2.5** Separation of powers is the most important constitutional constraint upon the assumption and exercise of power by the Executive.

## **1.3 Principle 3 -- Protection of Life, Liberty, Safety and Property of Persons**

- 1.3.1** A basic Rule of Law norm is the recognition of *minimum universal standards* for the protection of human rights expressed in the 1966 United Nations Covenant on Civil and Political Rights.
- 1.3.2** A Rule of Law legal system includes institutions and laws which defend the individual from abuse by state bodies and, conversely, requires the state to protect the individual from other individuals and private organizations.
- 1.3.3** Any state coercion against individuals must be clearly regulated in accordance with the principle of legality. This right to protection and due process is guaranteed by Articles 31 and 39 of the Constitution.

#### **1.4 Principle 4 -- Legal Certainty**

**1.4.1** The Rule of Law can be defined as a legal system in which the laws are known and understood by the public, clear in meaning and apply equally to everyone.

This means that all laws and regulations are published and available to the public in a timely manner and are accessible in practice.

**1.4.2** Laws should only grant limited and carefully defined discretionary authority to government officials. Their actions must be clearly permitted by legislation, follow due process procedures and are to be consistent with decisions involving similar cases.

**1.4.3** *Legal integrity* is an important part of *legal certainty*. Integrity means that the law fits properly and clearly into the larger legislative picture, does not conflict with existing legislation or otherwise undermine the integrity of legislation. Laws adopted by a Parliament must not violate the Constitution or international treaties or conventions to which Cambodia is a party. Regulations adopted by administrative bodies must not contradict statutes. Regional or local laws must be in conformity with their legal power.

#### **1.5 Principle 5 -- Equality Before the Law**

**1.5.1** According to Article 31 of the Constitution, "Every Khmer citizen shall be equal before the law...".

**1.5.2** This means that the normative content of legal rules is to be applied without discrimination and without exception in relation to race, religion, sex, social class, political connections or convictions, wealth or ethnic origin. This is what *justice* really means. All similar cases should be treated similarly. Law, by its very nature, is to apply generally. This means that the impartial and objective application of law requires *equality before the law*.

## **1.6 Principle 6 -- Reality, Not Just Theory**

**1.6.1** Rule of Law is more than a statement of intentions. *Rule of Law Norms are to be applied and followed in practice by Legislators, the Courts and the Executive.*

A Rule of Law legal system is one in which these three bodies work efficiently and fairly and enjoy the trust of the public.

## **2. Rule of Law is Different Than Rule by Law**

**2.1** Under *Rule of Law*, both governments and citizens are accountable for their actions. In a Rule of Law state, public officials have legal limits on their power and are expected to understand and respect these limits. The legitimacy of the legal system depends upon the co-existence and mutual respect of responsible lawmakers, an accountable executive and an independent judiciary. Legitimacy comes from obeying the law. In turn, the State recognizes the electorate at large and permits the operation and influence of civil society in public affairs.

**2.2** *Rule by Law* means that government actions may be law-based, however the laws are used primarily as a source of government authority and the government interprets the laws in its own interest. The laws are essentially a legitimization of state power rather than a constraint on state authority. The judiciary is neither independent nor respected by the citizens.

**2.3** This is why *Rule of Law Norms* speak to issues of constitutionality, legality, consistency of interpretation, transparency of administration, the publication of all laws, guarantees of due process, respect for human rights and a predictable and transparent framework of rules and institutions for the conduct of private and public business.

## **3. The Supremacy of Parliament**

**3.1** One of the defining features of a Rule of Law system is the *supremacy of Parliament*, as codified in the Constitution in Article 90. Parliament is the

supreme lawmaking body because only the National Assembly and the Senate, as recognized by the Constitution, can enact Laws which affect the entire population and also regulate the legal capacity of the Executive to produce regulations.

#### **4. Rule of Law and the Legislative Process**

- 4.1 Rule of Law Norms apply to the legislative process and also to the preparation of draft legislation by government and the adjudication of cases by courts. Because written laws or statutes are so numerous and affect so significantly the exercise of political, economic and social rights of the citizens, the process by which these laws are adopted by Parliaments or legislatures is very important to the integrity and legitimacy of Cambodia's legal system.
- 4.2 Lawmaking and legislative review powers, if they are exercised in an open and democratic manner, constitute Parliament's role in building Rule of Law.

#### **5. The Timely Publication of Legislative Agendas**

- 5.1 Session planning must be undertaken to ensure that draft legislation is properly considered by the appropriate Commissions and the two Chambers. This requires the preparation of a Legislative Agenda which is normally a public document that should be released on or before the opening of the particular Session.
- 5.2 The Legislative Agenda may be amended from time to time but it should be clear and comprehensive from the outset. Citizens and legislators alike require clear *advance notice* of the Legislative Agenda so that they can prepare for and participate in the review of draft legislation.

#### **6. Statements of Purpose for Bills**

- 6.1 In most legal systems, government Bills are accompanied by a document that attempts to explain the purpose of the proposed legislation. In some

jurisdictions like Cambodia, the document is called a Statement of Purpose. In other countries, it may be called an Explanatory Note. These notes are meant to inform legislators of the reasons for the new legislation, the problems addressed by the Bill and its connection to existing laws.

**6.2** Legislators also need to understand the available legislative or regulatory options, the government's implementation strategy and, in appropriate cases, compliance costs that will be borne by affected citizens. Informed lawmakers add to the credibility and integrity of the lawmaking system.

**6.3** Statements of Purpose must do more than simply recite the title of the Bill and the language of a couple of key Articles.

*A Statement of Purpose that satisfies contemporary Rule of Law Norms should contain:*

- (1) a summary of the principal issues that the proposed legislation is intended to address
- (2) reasons why legislation is, in fact, the best policy choice
- (3) a summary of the proposed Law's coverage
- (4) the impact of the proposed Law on existing legislation and how legislative integrity is to be maintained
- (5) whether the proposed Law arises from particular regional or international obligations, and
- (6) assurance that resources and government support are available to ensure fair and efficient implementation of the proposed Law.

## **7. Law Drafting Standards**

**7.1** Legislators are entitled to require that draft laws put before them for review and adoption are drafted in *clear language* that leaves no doubt about the law's meaning or the legal consequences of the law's application.

**7.2** The drafter must fully understand the legal subject area from both the technical and policy points of view. The law should be written in *'Plain*

*Language'* to the greatest extent possible, so that the Law is understood by as many citizens as possible.

**7.3** Lawmakers must be very cautious in handling Bills that are essentially *Khmer translations from foreign legislation*. Legislative drafting based on translations is very difficult and prone to misinterpretation and other errors.

**7.4** There are six specific *Rule of Law drafting principles* that should be followed by drafters. Legislators are entitled to expect that these rules will be followed. If they are not, the reasons for non-compliance should be clearly explained to the lawmakers' satisfaction.

The six Principles are:

**7.4.1** *Constitutionality* -- legislators will want to assure themselves that all issues of constitutionality have been satisfactorily addressed.

**7.4.2** *No retroactive application of a Law* -- Laws should not punish past conduct that was lawful at the time. Laws are to be applied from the time of their adoption.

**7.4.3** *Standard Format* -- There should be a standard format for a Bill in line with prevailing international standards. This allows the legislator and other readers to move logically through the Bill.

**7.4.4** *Sanctions, Penalties and Remedies* -- The penalties for failing to comply with the Law should be clearly set out. Likewise, any remedies, benefits or recourse rights should be clearly identified.

**7.4.5** *Legal Certainty* -- Laws should only grant limited, carefully defined authority to government officials. This means that relative, not absolute, discretionary authority are to be delegated to any government official or agency. Any regulations or sub-decrees that give such authority to government officials must conform to the clear authority identified in the head Law. Legal certainty, in both Laws and regulations, sub-decrees and other regulatory instruments, must be explicit.

**7.4.6** *Legal Integrity* involves the assurance that the Bill fits properly into the larger legislative picture and does not conflict, overlap or otherwise undermine existing legislation.

If the drafter does not fully understand how the proposed Law might overlap or conflict with existing laws, then that issue should be researched to ensure that any possible conflicts or overlaps will be eliminated. Otherwise, a basic Rule of Law Norm is offended and citizens are left uncertain as to the state of the law. That risk should not be placed on citizens. New laws should enhance the certainty and integrity of legal rules, not create public confusion about laws passed by Parliament.

## **8. The Publication of New Legislation and Public Education**

**8.1** Article 93 of the Constitution mandates that "all laws promulgated by the King shall be published in the official Journal and published throughout the country". The Constitution provides that publication will take place in Phnom Penh within 10 days after the King's signature and within 20 days elsewhere in Cambodia. This requirement recognizes that the public is entitled to know how laws affect their rights and duties. Unfortunately, timely nation-wide publication of new laws does not always happen. Publication may be late or incomplete. Also, few citizens have access to or read the Official Gazette.

**8.2** Parliamentarians have a duty to explain new laws to all citizens, especially those who are most directly affected by the legislation. This *duty of public education* also falls upon those government officials who are responsible for implementing the new legislation.

Obedience to the law is a hallmark of a Rule of Law system. Obedience and compliance requires public awareness and public acceptance of the law.

## **9. Parliamentary Oversight of Laws**

- 9.1** Parliaments enact laws. Governments administer laws. In Cambodia, as in most legal systems, governments issue regulations, sub-decrees, circulars, directives or other legal instruments to implement and enforce general laws passed by Parliament. These subsidiary or subordinate regulations are often more numerous than the laws themselves and are often more important in terms of direct public impact.
- 9.2** Parliament's supervision of legislative implementation is made possible by Articles 89, 90 and 94 of the Constitution. The exercise of parliamentary oversight is an important Rule of Law Norm, reflecting the supremacy of Parliament as the nation's primary lawmaking body.
- 9.3** Parliamentary oversight means the right of Parliament to review
- 9.3.1** the *legality of regulations* and other instruments issued by ministries, regulatory agencies and government officials under the authority of Laws passed by Parliament; and
  - 9.3.2** to call Ministers to account for their implementation and administration of Laws passed by Parliament.

## **10. Parliamentary Review of Proposed Legislation**

- 10.1** Under current parliamentary practice in Cambodia, a particular Commission of the National Assembly, and then of the Senate, is assigned the responsibility by the respective Permanent Standing Committee to review a Bill. The review is reported back to the Permanent Standing Committee and then to the plenary Session of the National Assembly or the Senate.
- 10.2** The Commission's review is the first significant opportunity for legislators to closely assess the draft legislation. Commission members normally have an opportunity to address questions to the Minister who is sponsoring the Bill and his/her officials.
- 10.3** Here are some examples of questions that might be asked of the Minister and officials:

- 10.3.1** Is there clear Constitutional authority for the proposed Law?
- 10.3.2** What policy issues call for new legislation? Is legislation the best way to solve or treat these issues?
- 10.3.3** How does the proposed Law affect existing legislation? Will citizens understand and support the new Law?
- 10.3.4** If this is a foreign-source Bill, how has it been shaped to fit the Cambodian situation? Are there any translation issues that should be addressed?
- 10.3.5** Does the format of the Bill make sense? Does it use Plain Language?
- 10.3.6** Is government also bound by the law? If not, why not?
- 10.3.7** Many laws are drafted to prohibit or penalize specific conduct or activities. Are the penalties, sanctions and remedies in this Bill clearly identified and reasonable?
- 10.3.8** Has the impact of the proposed legislation on different parts of the community been considered? In particular, what is its impact on human and constitutional rights? Women? Children? The poor? Small and medium-sized businesses?
- 10.3.9** Who will administer the legislation once it becomes law? Has any delegated authority been clearly expressed?
- 10.3.10** Have officials been selected and trained to administer the legislation?
- 10.3.11** Are sufficient funds available to properly implement the legislation? What compliance costs will be borne by the citizens or businesses governed by the new legislation?
- 10.3.12** Assuming that regulations must be issued to put the Law into effect, is the authority to do so clearly expressed? What is the timetable for issuing regulations? Will they be published for comment before they go into effect?

**10.3.13** What will the Ministry do to inform people about their rights and obligations under the new Law?

**10.3.14** Are there plans to report on the Law's implementation, for example, after its first year of operation?