

CAMBODIA 2040



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*INTERNATIONAL RELATIONS AND GOVERNANCE*

Volume 3

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# Chapter 8 | Rule of Law

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Sok Sopheap is the owner of a small wholesale company in Phnom Penh, supplying fresh produce as well as imported meats, cheese and wine to restaurants around the city. She started her business out of her house and took advantage of the six-month trial period for small businesses that allowed her to determine if her company would be profitable. Fortunately, her idea proved successful and she is now franchising out to other Cambodian entrepreneurs. When it came time to register her company, she took advantage of the online registration services offered by the Ministry of Commerce. The entire process took less than a week and she was not asked for an unofficial fee at any stage of the process. Sopheap is also confident that if a dispute arises with one of her suppliers or franchisees, she can take her dispute to court or the National Commercial Arbitration Center for resolution without worrying about corruption.

She regularly imports food and wine from different parts of the globe and has never had her shipments held up by a customs official looking for payment under the table. The customs process itself involves only one form, which she completes online for her monthly shipment. In fact, she never needs to interact with a government official in person as all of the regulatory requirements and payments of official fees for ensuring her business is legally compliant may be processed online. Her delivery drivers fan out across the city each day and none of them has ever been asked for a bribe by a police officer. Sopheap plans to acquire some of her produce suppliers in the provinces and knows that she will receive a valid and legally enforceable title to any property that she purchases.

No fears of unjust expropriation cross her mind as she weighs the risks and benefits of acquiring property. Her biggest concern is trying to get the best prices she can on high quality products for her customers.

## **I. Rule of Law: The Ideal Scenario**

The governance landscape that has emerged in Cambodia since the early 2020s is characterized by a public and private commitment to combating corruption through clear and evenly-applied rules that allow citizens and investors alike to live and work with confidence, which is one of the main aims of a legal system. Governance essentially means the rules that people live by in any particular society. When we talk about governance, we usually mean good governance, which results in good, though not perfect, outcomes. Human flourishing is much more likely when the rules are fair and fairly applied to all (Sunde, 2017), which is a good definition of the rule of law.<sup>28</sup> That definition leaves us with many questions, but it also provides a useful metric for examining the state of governance in a place like Cambodia, which has transformed itself into one where, in 2040, governance is fair, transparent, evenly applied and efficient.

Cambodia's transformation can also be conceived of as an increase in societal trust (Fukuyama, 1996). Low-trust societies are characterized by concerns about crime and corruption and the opposite is true in high-trust societies (Wike and Holzwart, 2007). Crime and corruption can be thought of as similar behavior in the private (crime) and public (corruption) spheres. They are both designed to gain an unjust advantage for the bad actor, though corruption is arguably worse as it can have much larger negative impacts on levels of trust throughout a society. Largely due to experiences under the Khmer Rouge, Cambodia remained in a low-trust rut for decades (Meas, 1995; Pran, 1997). Just as with the rule of law (Fukuyama, 2010), low-trust and high-trust societies exist on a

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<sup>28</sup> There are, of course, much more complex definitions and many factors to consider here. See, for example: Francis Fukuyama's 2010 paper: *Transitions to the Rule of Law*. See references section for citation. One of the authors, Tom Pearson, would like to express his gratitude to Dr. Fukuyama for providing insights on the topic of social trust in an interview during the development of this article.

spectrum (Ward, Mamerow and Meyer, 2014) and flow or ebb as people within a society, a firm or a relationship have more or less confidence in the leadership and other participants. By embracing dependability, transparency, fairness and competency, Cambodia's leadership helped to move Cambodia higher on the trust spectrum (Jaffe, 2018), which has resulted in much more trust in state institutions and fostered a higher level of social trust in general, which has in turn led to a flourishing and robust society.

In 2040, Cambodia respects its treaty commitments as meaningful obligations to its own people as well as being a responsible member of the international community. Gone are the days when the leadership in the country taunted donors and paid mere lip service to human rights commitments and democratic governance (Vong and Baliga, 2016). In today's Cambodia, fundamental human rights: social, economic and political are protected by law. Every citizen's right to speak freely, earn a living, associate with whomever they like, criticize the government, own and acquire property and many other fundamental rights and freedoms are freely exercised. Foreign migrant workers, other expatriates and tourists can also rely on legal protection of their rights and freedoms. This respect for human rights does not simply make Cambodia a place where people can live without fear of political predation, but also makes the kingdom a great place to start a business or non-profit, for locals and foreigners alike. Cambodia's tourism sector is thriving as is agriculture, light manufacturing, digital startups and service providers. These positive changes are reflected in the kingdom's move up various rule of law and development rankings. Starting from fairly low positions around 2020 on the Bertelsmann Transformation Index (BTI, 2020), the Corruption Perceptions Index (CPI, 2019), Economic Freedom of the World (EFW, 2020: 50), Freedom in the World (FITW, 2020), the Human Freedom Index (HFI, 2019: 106 - 107), the Rule of Law Index (RLI, 2020) and the World Bank's "Doing Business" (World Bank, 2020) report,<sup>29</sup> among others, Cambodia has climbed rapidly to levels reflecting the Royal Government's efforts

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<sup>29</sup> Despite the "data irregularities" for the 2020 and 2018 Doing Business reports, the Cambodian results for these years are consistent with previous years' reports and likely accurate (see World Bank, 2020, data irregularities statement).

at cleaning up corruption and moving toward liberal democracy and a genuine rule of law.

Commitments made and honored through scores of bilateral and multilateral investment treaties as well as free trade agreements have reduced tariff barriers,<sup>30</sup> opening up the world to Cambodia and vice versa, further bolstering investor confidence and encouraging more investment. That confidence has also been strengthened by an honest judiciary that competes for cases with the kingdom's well-developed alternative dispute resolution (ADR) institutions. Delivery of services has been modernized, decentralized and cleaned up, leading to greater trust in state institutions by citizens and economic migrants alike. Those living and working in Cambodia know that they can rely on the bureaucratic process to support the smooth functioning of economic relations. As a result, both locals and foreigners are expanding their businesses and starting new ones. The informal sector is the smallest that it's ever been and there is a feeling of hope throughout the country as the incentives for progress are aligned across all sectors in society.

As Phnom Penh has developed into a regional cultural and business hub, regaining its former luster as the "Pearl of Asia", its importance as the center of formal governance in the kingdom has lessened as official state services and functions are provided electronically or have been strategically decentralized with strong safeguards to the most local level possible, reducing corruption points and making for a much more responsive bureaucracy, where provincial and local officials are much more likely to be able to assess the needs of the citizens within the ambit of their responsibility and more easily muster available

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<sup>30</sup> Cambodia joined the WTO in 2004 and has signed almost 30 Bilateral Investment Treaties: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/33/cambodia>. Further, Cambodia recently signed its first bilateral Free Trade Agreement with China: <https://www.khmertimeskh.com/50772558/china-cambodia-sign-free-trade-agreement-in-record-time-to-inject-impetus-to-economic-recovery/> is a member of several multilateral FTAs: <https://aric.adb.org/fta-country> and is set to join, along with the other ASEAN members, the world's largest FTA, the Regional Comprehensive Economic Partnership by the end of 2020: <https://phnompenhpost.com/business/cambodia-ready-sign-rcep-trade-agreement>.

resources to meet those needs (Kahkonen and Lanyi, 2001) Though governance and administration in the kingdom remain imperfect, as in every nation to one degree or another, the Royal Government appears to have embraced Adam Smith's formula for a prosperous society: "...peace, easy taxes, and a tolerable administration of justice" (Stewart, 1795).

## Recent Reforms: Moving from Corruption to Competitiveness

The specific steps toward reform began with an examination of Cambodia's business environment spurred by threats to government revenue, which had been increasing as tax administration had improved over the years leading up to 2020 (Khmer Times, 2020; Akitoby, 2018). While reforms to tax administration were helpful, once those reforms reached the limit of gathering in most of the collectible tax revenue, donor nations responded by beginning to pull back funding for basic services, expecting the kingdom to pay for such services on its own as it climbed toward middle-income status (Jimeno, 2015; Hutt, 2016). This meant that a larger tax base would be needed to fund government functions.

The RGC hit upon a number of ways to increase total revenues. Realizing that in order to remain competitive, increasing taxes was not an option, they looked for ways to reduce costs while simultaneously increasing revenue. One way to achieve both was to divert the funds that had been going to bribes back into official channels. Every law or regulation is a potential bribery point when there is little oversight in enforcement of rules by government officials, especially when there are hundreds of little-used and vaguely-worded laws on the books. By moving toward efficient electronic systems of administration and at the same time examining the effectiveness and cost of laws and regulations, especially regarding enforcement actions, as well as taking steps to reduce those costs, increase effectiveness and promote trust, Cambodia has transformed channels of corruption into channels of revenue. The final step was to increase trust by tackling the uncertainty that corruption and other forms of poor governance caused.

This campaign of serious legal and governance reform began in the early 2020s and has helped raise the kingdom to an upper middle-income country by assuring citizens and foreign investors alike that their assets and investments

are secure. The result, which is continuing to emerge as reform efforts extend to more areas, has been remarkable. No longer are Cambodians storing significant wealth in easily-transportable gold jewelry.<sup>31</sup> Instead, more Cambodians and foreigners living in Cambodia are investing in businesses under the six-month startup program, which allows anyone to set up a small to medium-sized enterprise and operate for six months without observing the formalities of registration or any but the most essential regulations relating to health and safety. This policy has resulted in an explosion of new businesses, as it allows innovative ideas to be tested while keeping upfront costs to a minimum. Once the idea proves feasible, the business can register using the kingdom's online registration service in a matter of days, one of the first steps toward providing effective e-governance that continues to pay dividends. As a result of this and other deregulatory efforts, the income gap with more developed countries due to regulatory costs is shrinking (World Bank, 2020).

Cambodia's legal reform efforts have also transformed the judicial system. Beginning with modest steps toward recognizing and enforcing some fair trial rights at the appellate level (CCHR, 2019), the RGC systematically began reforming the judiciary by making mechanisms for the appointment of judges and prosecutors transparent, ensuring adequate salaries for all judicial personnel, insulating the judicial branch from political interference as well as providing an effective and anonymous means of reporting corruption, all of which had been significant issues in the Cambodian judicial system

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<sup>31</sup> Poor people in low-trust societies store wealth in gold jewelry given the ease with which it may be transported and a lack of faith in society's institutions. In high-trust societies, wealth is more likely to be invested in non-mobile capital enterprises as the investor has a relatively high degree of confidence that he or she will receive the profits from the business enterprise without fear of appropriation by the state or other citizens. Evidence of this mindset is everywhere in countries like Cambodia, India, etc., where even the poorest will usually have some gold jewelry, which they and especially their children wear because they can keep an eye on it and leave with it if need be. One of the authors, Tom Pearson, is grateful to Tom G. Palmer of the Atlas Network for mentioning this concept in a talk he gave to the Politikoffee discussion group at the Konrad Adenauer Foundation offices in Phnom Penh in March of 2015: "Achieving the Rule of Law and Economic Equality as a Condition of Social and Economic Development."

(International Bar Association (IBA), 2015). Reform efforts have also restored the Arbitration Council's role in effectively resolving collective labor disputes, which the Trade Union Law had shortsightedly diminished (Sen, 2018).<sup>32</sup> The more recent amendments to the Trade Union Law and Law on Associations and Non-Governmental Organizations (LANGO) have reduced the avenues for political interference in labor unions and NGOs as well as demonstrated to the international community that Cambodia's leadership is serious in its dedication to human rights and other democratic values. The RGC had taken baby steps to reform both laws after widespread criticism (Khuon, 2019; Long, 2020). but significant amendments over the last couple of decades have made both laws into instruments of effective governance rather than repression. Traffic police shaking down motorists has become a rare sight in Cambodia (Campbell 2015).

The kingdom has in many areas surpassed many more-developed countries in its efforts to provide lean, efficient services. Recognizing that donor nations and other outside funds were in short supply, the Royal Government began to examine the effectiveness of laws and state institutions with a view towards eliminating duplication and providing key services as cheaply as possible. This led to the closure or combination of several line ministries, the examination of the effectiveness of laws and regulations, the establishment of additional public-private partnerships, the decentralization of state functions and improvement

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<sup>32</sup> Established by the Labor Law of 1997, the Arbitration Council was set up to resolve collective labor disputes that could not be resolved through negotiation or conciliation. The law required referral of unresolvable collective labor disputes for arbitration. After the Council opened its doors in 2003, it heard and successfully arbitrated hundreds of cases until the passage of the Trade Union Law in 2016, which effectively stripped the Arbitration Council of its previous role in collective disputes precipitating a catastrophic plunge in the number of cases brought before it. More information is available here: <https://www.arbitrationcouncil.org/when-talk-about-labour-dispute-resolution-and-industrial-relations-in-cambodia-it-is-not-possible-without-mentioning-arbitration-council/> It's been heartening to see the RGC recognize the effectiveness of the Council and restore its authority to resolve collective labor disputes, not simply because of its remarkable record of success and party satisfaction, but because it is a traditional dispute resolution mechanism that has been successfully grafted into the formal judicial system, providing flexibility and institutional competition within the formal dispute resolution system.



of services, mirroring successful reform efforts in other ASEAN countries (Freiburg Southeast Asia Study Group, 2011; Eng, Vong and Hort, 2015). These policy changes have allowed Cambodia to grow tremendously while reducing internal and external uneasiness.

## **II. Scenario Space and the Key Factors for Legal Reform**

As noted above, a good definition of the rule of law is a society where formal rules are fair and fairly applied to all. More specifically, the rule of law entails equitable and transparent rulemaking and enforcement of those rules, a respect for individual rights, an absence of widespread corruption, open and fair dispute resolution processes and, generally, an environment in which individuals can know the law and have confidence that everyone within the society is subject to the same rules without exceptions based on a person's political or economic position. A society governed by law is one in which rules are stable and predictable, an environment where individuals can conduct their lives without fear of arbitrary and unjust action by the state (Stanford University, 2016).

The basis for the rule of law in a particular society is honest and transparent legal and regulatory rules and processes. Such rules and processes can be achieved through ensuring that graft is not tolerated in the making or enforcement of rules by effectively monitoring these processes. The key factors for achieving an environment of institutional trust in a society include: clear and efficient regulatory processes for starting and running a business, a secure and honest property titling and conveyance system, an independent and impartial judiciary, enforcement of laws and regulations with justice and equity by courts, police and other officials, effective redress and accountability for wrongful acts by government officials, open and honest courts and other dispute resolution institutions. We will examine these key factors in more detail below.

### **Rule of Law in the Kingdom: A Brief History**

Cambodia's legal history has not served it well. Ruled by a series of autocratic kings during the Angkorian Empire period, law was merely the whims of the king as it was in so many other areas of the globe. Toward the modern era, Cambodia

was invaded repeatedly by Thailand and Vietnam before becoming a French Protectorate in 1863. French governance lasted until Cambodia's independence in 1953. The kingdom worked with and adapted the French statutes from the 50s through the 70s, but they provided a thin veneer of a legal system. The rule of law was an aspirational concept at best and remained so through the early 1970s when the US-backed Lon Nol regime overthrew the monarchy and ousted Prince Sihanouk as the political leader of Cambodia. The Lon Nol regime attempted to set up a US-style republic, but as with their military efforts, the new legal system crumbled as soon as US support was withdrawn in 1975.

This power vacuum allowed the Khmer Rouge (KR), with the support of Sihanouk, who had been duplicitously promised his old position, to take over and install a Maoist regime, which surpassed the brutality of Mao's own regime in China. The KR renamed the nation Democratic Kampuchea and imposed a horrific "system" of governance that was given the label of legal system, but which had more in common with the regimes of Cambodia's emperor-kings in the Angkorean period. The KR consciously encouraged this analogy by calling their organization, to which all of society was subservient: Angkar. Beginning in 1979, the new regime, the People's Republic of Kampuchea established a communist legal system, which had rudimentary laws, courts and procedures. After the departure of the Vietnamese in 1989, Cambodia underwent a transitional independent period for about three years, where laws were very basic and there was not much protection from those holding power. The United Nations Transitional Authority in Cambodia (UNTAC) soon took control in Cambodia and began passing laws and regulations through a body known as the Supreme National Council (Holligan, et al., 2019; Kong, 2012: 5-21).

Post-UNTAC, one commentator observed that Cambodia at this point "lacked any meaningful tradition of the rule of law" (Marks, 1994: 17). After UNTAC, however, a number of countries set themselves to the task of assisting Cambodia with drafting, implementing and interpreting laws and regulations. Civil law nations, such as France, Germany and Japan provided significant rule of law development assistance (Menzel, 2012: 477-493) as did common law nations like Australia, Canada and the US among others (Kong, 2012: 8). Notable among these is Japan, which aided in the drafting of the Civil Code and spent

years training Cambodian judges and prosecutors (Kuong, 2018). These efforts were not without critics (Nicholson and Kuong, 2015), but were a major component of Cambodia's journey toward the rule of law.

Since the late 1990s, when the civil war that had plagued the kingdom from the 1970s on was finally put to rest as the last vestiges of the Khmer Rouge menace devoured itself (Ker, 1998), the kingdom has enjoyed relative peace and political stability. Cambodia's growth strategy during this time focused on continued foreign aid for expenditures such as medical care, education and public health while at the same time providing competitive tax rates (Senase, 2019) and a relatively stable and low-regulation environment for foreign investors, although corruption increased the cost of doing business (Business Tech, 2015). The prospects for successful legal and economic development at this time were bright indeed (Sok, 2008).

The road to reform and prosperity was not a smooth one, however. Despite the efforts at rule of law assistance after UNTAC, the historical and informal system of patronage networks that functioned as a governance system continued to evolve and adapt to new realities (McCarthy and Un, 2015; Petersson, 2015; Strangio, 2014). Though some aversion to international legal norms in countries without a rule of law tradition is due to a distrust of transplanted institutions due to colonial exploitation using legal norms as part of a system of control (Darmawan, 2020), the reality on the ground in Cambodia was more complicated. People within the kingdom had pushed for change for decades and without outside pressure, the remarkable reforms of the last two decades would likely have remained illusory.

Indeed, donor nations had tried for decades to cajole Cambodia into reform by tying donor funds to reform proposals and their implementation. These efforts made genuine headway in limited sectors, but were mostly co-opted into the existing system rather than reflecting a genuine commitment to international legal norms (McCarthy and Un, 2015). A case in point is the Convention Against Corruption, one of the international community's best efforts at putting in place rules and enforcement mechanisms designed to combat a fundamental issue that is endemic in low-trust societies. After UNTAC, Cambodia signed onto many

treaties, regardless of whether the nation had the ability to comply with its terms. Though some treaties are necessary to participate in the international community and global marketplace, like those necessary to join the WTO, the kingdom's membership in many other treaties, like the Convention Against Corruption (CAC), was primarily due to donor or other international pressure (Reuters, 2007).

Cambodia's accession to the CAC was half-hearted at best, as there was very little commitment to eliminating the corruption that propped up the kingdom's elaborate patronage networks, which had characterized the nation's governance structure for much of its history (Petersson, 2015). Most, if not all, nations have a history of corruption and patronage networks if you go back far enough. The difference is that Cambodia's remained in place until nearly the third decade of the 21st Century. Cambodia signed on to the CAC to appease donors and provide reassurance to foreign investors that Cambodia adhered to international legal norms, such as the rule of law and respect for human rights. As nearly any observer of legal reality at that time in Cambodia might have predicted, the CAC did not eliminate corruption. Instead, once the domestic legislation, the Law Against Corruption, was passed to incorporate the terms of the treaty into domestic law, and the Anti-Corruption Unit established, the new law and enforcement institution were used to persecute officials who failed to toe the party line (Hutt, 2019).<sup>33</sup> That is, the existing system of corruption was shored up using the very anti-corruption apparatus and legal rules that the international community pushed the nation to adopt (Strangio, 2014: 151). The CAC was perhaps the most notable example, but there were many other efforts at taking international legal rules and modifying them for other purposes.

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<sup>33</sup> One of the authors, Tom Pearson, who moved to Cambodia in 2011 after the law was passed, but prior to its implementation, went to a briefing on the implementation of the Law on Anti-Corruption. Speakers from the international business community were positive that the law's implementation would achieve the intended effects. No one wanted to hear the opinion that the regime might use the new law for purposes other than combating graft.

The governance environment in 2040, which has remarkably emerged over the past two decades from the legal history sketched above, including piecemeal legal reform efforts, which had occurred unevenly since the 90s (Vann, 2016) or, as noted, were used to legitimize authoritarian restrictions (Palatino, 2018), made significant strides in the early 2020s when a number of factors combined to threaten the kingdom's average annual growth rate of eight percent (World Bank, 2019). Those factors included short-term emergencies: a catastrophic drop in tourism due to the novel coronavirus COVID-19 epidemic (Hoekstra and Yon, 2020), partial suspension of the European Union's Everything But Arms Treaty (EBA) due to ongoing human rights violations (European Commission, 2020), which showed that the donor community was finally willing to hold the kingdom accountable and over-reliance on China as a trading and development partner, which makes for a less robust economy and has put strains on the kingdom's other strategic relationships, for example, tensions within ASEAN (Mahbubani and Sng, 2017) as well as longer-term issues: continued pressure by trading partners and multi-nationals to clean up the supply chain and the rise of better governance in competing jurisdictions, meant that corruption, which was already a significant limit to growth, proved completely untenable. These factors raised the specter of destabilization by annihilating the kingdom's record of growth, pushing the rate significantly into negative territory (ADB, 2020), and inspiring the nation's leadership to rethink governance and the legal system.

Cambodia's largest economic sector, tourism, accounting for more than a third of GDP (World Data Atlas, 2020), was directly and devastatingly impacted by the coronavirus (Hoekstra and Yon, 2020). Textiles, another critical component of Cambodia's economic growth at the time, accounting for over 15 percent of GDP and more than half a million jobs (Rastogi, 2018), was severely impacted by the coronavirus (Blomberg and Mech, 2020) as well as by the partial suspension of EBA, which meant that some garments, footwear and travel goods would no longer receive preferential treatment under the EBA, but would be subject to EU customs duties under normal WTO rules (Russell, 2020). Ethical supply chain concerns from companies as well as human and labor rights organizations continued to highlight Cambodia's human rights violations as well (Barrie, 2020). Key members of the international community continued to put pressure on

Cambodia for sustainable reforms, but began backing that pressure with real consequences as the EBA example illustrates (Heng and Var, 2019).

Relying on China, the kingdom's largest foreign donor since 2010 (Zhou, 2019) and the major source of FDI and tourists for the kingdom in the years leading up to 2020 (Nguon and Mao, 2018), became more untenable as China's lightning growth rate began to cool in the years leading up to the pandemic for various reasons (Rapoza, 2019; Pettis, 2019) and the People's Republic continues to face a demographic crisis due to an aging population (Campbell, 2019). China also faced an economic slump due to the Covid-19 pandemic (Crossley and Yao, 2020) and due to multinationals concerned about the optics of supply-chain ethics pulling out of the country (Fink, 2020), further reducing that nation's ability to support Cambodia. Further, sanctions placed on Cambodia by western nations means that Cambodia is less attractive as an investment space since investors won't be able to benefit from the tariff reductions and other preferences that the kingdom enjoyed for more than a decade (Heng and Var, 2019). These economic factors combined with poor governance threatened the kingdom's strong record of economic growth and augured destabilization.

Faced with potential social unrest as the workers most affected by these significant economic impacts began to demand work (Nierhoff, 2020; Kong 2020), the Royal Government of Cambodia (RGC) instituted temporary measures to help keep the affected industries afloat, including providing tax holidays, but also easing regulatory restrictions on imports and exports among other measures (Medina, 2020; Heng, 2020). As the economic situation worsened, the RGC found it necessary to relax or reform additional regulations (Angkor Research/Future Forum Economic Impact and Wage Worker studies, 2020) and, eventually, when combined with the long-term pressures described below, to confront corruption and other forms of poor governance as a limit to growth (International Monetary Fund, 2016).

Up until the early 2020s, Cambodia remained in last place in ASEAN on Transparency International's Corruption Perceptions Index (CPI) and was ranked near the bottom of the global list as one of the most corrupt countries in the world (CPI, 2020) and corruption was deemed to be "rampant" in the kingdom

by other observers as well (GAN Integrity, 2017). The kingdom was slipping further down the World Bank's "Doing Business" list, cementing its reputation as a place where getting things done was increasingly difficult (World Bank, 2020). Meanwhile, Cambodia's neighbors, including Malaysia, Thailand and Vietnam, were moving up that list (World Bank, 2020) and at least slightly improving on their already superior positions on the CPI (CPI). In short, other states in ASEAN continued building on past reforms to their legal and regulatory systems in order to attract more investment (Ruland, 2013). This put competitive pressure for legal reform on the kingdom as foreign investors sought jurisdictions with greater legal and regulatory certainty (Prak, 2020).

Though economic pressure relating to the EBA and coronavirus as well as other long-term factors pushed Cambodia toward a breaking point, the RGC deserves credit for putting the kingdom on a path to reform that has had impressive results. This began with the recognition of corruption as a limit to growth. While some scholars have found that corruption actually aids growth by enabling things to actually get done in a regulatory environment characterized by excess bureaucracy, the long-term effects of such corruption are to reduce institutional trust in society, leading to less investment both domestically and from outside as other jurisdictions with higher levels of trust begin to look more attractive (Kochanova, 2015; VOA, 2012).

The RGC also refocused attention on trade and other relationships with all nations rather than focusing on China alone. Cambodia's leaders recognized that the obvious counter to corruption as a limit to growth was continued growth through the elimination of corruption. This was a long and arduous process, but built upon the precedents with ASEAN and the WTO, by cordoning off certain institutions from the system of patronage, beginning with the Ministries of Education and Health, which already made significant gains. The E-Government initiatives also helped by reducing interactions between the public and officials, which eliminated corruption points in otherwise corrupt institutions. As the process continued, there were fewer and fewer "spaces" for corruption to operate. Because of a strong commitment to eliminating corruption due to international economic and political pressure as well as increased demand from citizens, the RGC slowly wound up the networks of corruption in the kingdom.

## Initiatives Toward Good Governance and a Genuine Rule of Law

Two of the most prominent and successful in recent memory are those of Singapore and Peru. Singapore's transformation was largely due to fairly authoritarian measures imposed by its legendary leader Lee Kuan Yew (Lee, 2016) while Peru's more liberal reforms were shepherded through by economist Hernando de Soto and a regime desperate to rid the country of the murderous Shining Path guerillas (de Soto, 1989). In Cambodia, at least prior to the reforms of the 2020s, little impetus existed for improving governance. There was, however, a genuine desire to leave a lasting legacy among the leadership (Wallace, 2017). Once the economic shocks due to the coronavirus pandemic, corruption and the other factors outlined above threatened that legacy, the political leadership of the country began to look for ways to ensure that future Cambodians would look back on their efforts with admiration and gratitude. Reorienting toward honest and transparent government would not merely bring about renewed and sustainable growth, which would improve life for all Cambodians, but it would give the kingdom legitimacy in the eyes of the international community. That change from criticism to praise must also have been appealing. With these goals in mind, the RGC set out on a remarkable campaign of legal reform.

### III. Key Initiatives for Effective and Transparent Governance

#### E-Government

Cambodia is not Estonia, a nation that has achieved remarkable improvements in government through digital governance initiatives (Erlenheim, 2013). However, Cambodia, due to the economic pressures noted above began to explore ways to streamline services and eliminate the diversion of funds through corruption by providing an online business registration procedure that combines the registration processes at the Ministries of Economy & Finance, Commerce, Labor and Interior as well as the General Department of Taxation and the Council for the Development of Cambodia, if applicable, into one online process. This reform meant that the business registration process went from



three or more months to about a week and more than halved the costs (Turton, 2020). This effort, which built on an earlier 2016 effort to make the registration process at the Ministry of Commerce electronic (Campbell and Thomas, 2019: 15), was another way to redirect funds formerly used for corruption into state coffers as it eliminated the need for interactions with officials. This also demonstrated the RGC's commitment to being competitive in the region. Another early e-government effort was a property tax payment app (Sorn, 2020), which also reduced opportunities for corruption and encouraged the kingdom to complete its land-titling efforts, and was eventually expanded to include all tax payments. The move towards e-government was recognized early on as a way to make government services more efficient (Mok, 2020).

## Judicial Reform and Dispute Resolution

In the decades leading up to the reforms, the judiciary was one of Cambodia's most corrupt institutions (Seiff, 2015). Previous efforts at providing oversight for the judiciary, popularly known as the "three Laws on the Judiciary" passed in the mid-2010s, were roundly criticized internationally and domestically as providing mechanisms for the executive branch to interfere with the judicial branch under the pretense of law (IBA, 2015; Soy, 2015). By some estimates, up to 90 percent of cases were determined by bribing judges (IBA, 2015: 29). Now, though the odd case of courtroom corruption appears in the local media, most courts are on notice that corruption is actively being prosecuted as a threat to the economic health of the nation (Kochanova, 2015; Gaspar, Muhleisen and Weeks-Brown, 2020). Another long standing issue, informal fees for becoming a lawyer or judge, previously in the thousands of dollars (Voice of America (VOA) Khmer, 2009; IBA, 2015: 7-8; Gagne-Acoulon, 2020). have been eliminated and the Bar Association of the Kingdom of Cambodia as well as the Ministry of Justice work together to monitor transparency in the practice of law and the judiciary.

Alternative dispute resolution (ADR) also provided beneficial pressure during this period of significant reforms. For example, though judges already had the power to recognize negotiated settlements in civil matters and issue a judgment reflecting the settlement (Austermiller, 2012) in practice, courts would not necessarily encourage such settlements, especially if either party had paid a

bribe to influence the outcome. Competitive pressures from ADR bodies offering arbitration and mediation services inside and outside the country began to make judicial corruption less profitable as commercial disputants increasingly sought out private dispute resolution firms. Indeed, the National Commercial Arbitration Center (NCAC) has become a leading ADR service provider since its founding over 30 years ago (Boltenko, 2015). Investors enjoy the flexible rules of commercial arbitration and the fact that binding awards can be enforced in court (Gaillard and Siino, 2019). Those too poor to use such services, or to use the court system before the development of a robust legal aid system, continued to rely on traditional informal mechanisms of negotiation, mediation and arbitration, which have a long history in Cambodia (Kong, 2012) and also serve as competition to the formal judicial system.

### Legislative and Regulatory Reform

At the same time, the RGC took steps to build on some of the uneven legal and regulatory reforms that had already taken place since the 1990s (Kong, 2012; Vann, 2016). Among the most important of these reforms were the effort to publish official fees at the various ministries and other agencies (Kang and Kohlbacher, 2016) and a willingness to re-examine laws and regulations that were falling short of providing effective governance.

This willingness to re-examine laws and regulations led to the establishment of a separate review process within the Constitutional Council, which was originally tasked with reviewing the constitutionality of the laws passed by Parliament (Hor, 2012: 59) In addition to the constitutionality of a law, the reform measure granted the power to review the effectiveness of laws and regulations based on their actual impact on the intended problem after being in force for five years. This effort led to the revision or removal of significant bureaucratic hurdles in many areas, especially registration and regulation of legal entities, such that one-window service for all types of legal entities was established at the Ministry of Commerce, Ministry of Foreign Affairs and Ministry of Interior, which are responsible for regulating companies, international NGOs, and local NGOs respectively. In addition, this body was also tasked with reviewing administrative regulations, with the result of elimination of some of the kingdom's most

egregious regulations as well as the reform and regularization of processes by which ministries and other administrative agencies make rules.<sup>34</sup>

This effort also led to an analysis of duplicative rules and functions within government. The number of line ministries was reduced from 29 to 15. Many of the functions that had once been centralized through the ministries were devolved to the provincial, district or commune levels (Freiburg Southeast Asia Study Group, 2011; Eng, Vong and Hort, 2015). Some central oversight remained, but much of the service provision moved to as local a level as possible, thus allowing those with the most immediate knowledge of the issues to act in the best interest of the citizens within their remit. This also allowed the citizens most affected by a particular government action to provide direct feedback to the decision-maker, who can then adjust policy. That governance-feedback loop has improved the provision of governance and services and encouraged fiscal responsibility as wasteful or unwanted efforts are sunsetted. This sustained policy of decentralization has added elements of a federal system to Cambodia's constitutional order and allowed policy experimentation at the sub-national levels, much like in established federal systems.

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<sup>34</sup> See, for example, Ministry of Foreign Affairs Notification N. 402 (2011), which prohibited foreign men from marrying Khmer women unless they were under 50 years of age and earned more than \$2,500 per month. This was clearly a violation of the human right to marry whomever you choose and was partially recognized as such when the age requirement was removed. The income requirement remains in place: <https://www.embassyofcambodiadc.org/blog-post/foreign-men-wishing-to-marry-cambodian-women>. Another regulation that had little to no basis in law or reason was the prohibition against selling shisha (flavored tobacco used in hookah pipes) or smoking shisha, National Authority for Combating Drugs Circular No. 001/14 (2014). The regulation blamed all sorts of bad behavior by youths in the kingdom on hookah smoking, but rather than making a reasonable age restriction, the kingdom decided to prohibit scores of businesses from selling shisha, seize products and smoking paraphernalia and "educate" 31 employees or owners of shisha lounges: <https://www.phnompenhpost.com/national/shisha-crackdown-nationwide>.

## Property Rights Reform

Another major part of the RGC's effort was a reformed land-titling project. The original land-titling push was strongly criticized by organizational observers (Human Rights Watch, 2013) and scholars (Dwyer, 2015) beginning as it did in an era where patronage and other forms of corruption counted as governance in the kingdom (Strangio, 2014). A reconstituted land-titling project also involved a substantial reform of the laws and practices surrounding the granting of land concessions after a high-profile case involving a foreign rubber company once again highlighted the human rights and environmental abuses being perpetrated by many concessionaires (Lindsay, 2020). The RGC abolished Economic Land Concessions, which had been used as a major avenue for corruption and exploitation. The new land-titling project, patterned after an earlier, successful effort in Peru (De Soto, 1989), but using drones to provide precise GPS measurements and boundaries for real property in the kingdom along with an online, publicly accessible database of property ownership, gave Cambodians, especially vulnerable people and Indigenous groups living in rural areas, legally-recognized, transferable and enforceable deeds to their own property. In addition, Article 44 of the Constitution was amended to permit foreigners to own real estate outright, which eliminated another area of corruption and corruption and complex nominee landholding arrangements.<sup>35</sup> These reforms made property rights more secure and enforceable by limiting the use of eminent domain or other forms of state taking for the benefit of private investors or government officials (De Soto, 1989).

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<sup>35</sup> It also made real estate in Cambodia more valuable. As one of the authors, Tom Pearson, noted to his graduate and undergraduate classes at the Royal University of Law & Economics, if you legally prevent a large swath of potential buyers from having the ability to purchase your property, the competition among potential buyers will be less and you will receive a lower price than you might have otherwise. Therefore, your property is less valuable. Imagine proposing to any other business a rule that your customer base will be reduced by a certain percentage.

## Police Reform

Prior to the early 2020s, most Cambodian citizens distrusted the police (Global Corruption Barometer, 2017). Given low salaries, many police officers were accustomed to asking for bribes to supplement their incomes on thin or no legal pretence. Mostly, this occurred through shakedowns of motorists (Soth, 2019; VOA, 2012) Though the situation was somewhat different, the Georgian example of police reform provided a useful template for the kingdom. Georgia had also undergone a significant transition in the early 1990s with the fall of the Soviet Union and paid police very low wages as well. In Georgia, the police forces had become so corrupt that bribe paying was a regular feature of driving in the Republic. Those who refused such bribes were often taken to police stations and beaten (Kharitonov, undated).

The reform government of Mikheil Saakashvili in Georgia, which came to power after the Rose Revolution in 2003, made police reform a priority and took drastic measures to ensure it. In stages, the government fired most of the police forces in Georgia and recruited fewer new officers to take their place. They received funding and training assistance from European nations and the US as well as private businesses in Georgia and the state raised the salaries of officers to be competitive, which reduced the need for bribe taking in the first place. In addition, as a brilliant symbolic measure, they set up transparent all-glass police stations, so that anyone could see what was going on inside (Rosenberg, 2013). The reforms worked fairly well, though Saakashvili was eventually forced from power. (Centre for Public Impact, 2016).

Cambodia took similar steps, but looked for ways to replicate the results for less, as Georgia's reforms were quite costly (Kharitonov, undated) and went too far, especially during demonstrations against Saakashvili's regime. In Cambodia, many police officers were dismissed and Singaporean and German police officials were brought in to train the new recruits and retrain those who had been allowed to remain. As in Georgia, legacy officers were pulled off the streets and assigned desk jobs to reduce the opportunities for corruption. The RGC also began, as did Georgia, with a pilot project in the capital city, Phnom Penh, and then rolled reforms out to the rest of the kingdom once that proved successful

(Centre for Public Impact, 2016). The successful experiment with police reform demonstrated the RGC's commitment to reform to both external and internal observers. Without strong backing from the government, this project would have failed (Kakachia and O'Shea, 2012).

## Incentivizing Growth and Registration for SMEs

Long heralded as the key to future economic growth in the kingdom (Tan, 2019) and comprising the main source of employment (Ma'aji, Sok & Long, 2020). Most small to medium-sized enterprises (SMEs) in Cambodia were unregistered before 2020 (Hang, 2017). Previous reforms had granted SMEs a tax holiday of three to five years, decentralized the registration process (Phnom Penh Post, 2018) and SMEs with an investment capital of less than \$3,000 USD were not required to register at all due to their small size (Sok, 2016) and remain exempt from taxation even today. These carrot as opposed to stick reforms were successful, but further carrots were needed to spur additional growth in the sector. The RGC, while keeping in place prior reforms, implemented a new rule permitting any business under eight employees, the threshold in the Labour Law for several regulatory requirements,<sup>36</sup> to operate as a business or non-profit for six months without going through formal registration procedures. Such an entity would still be required to notify the relevant authority that they intended to open and what the purpose of operations would be. They would also be required to follow a list of essential health and safety regulations, but would be exempt from registration, tax, and most regulatory requirements for a period of six months, after which time if they wished to continue the enterprise, they would be required to register and begin following all of the regulations established for that type of entity. This trial period essentially permitted the bulk of Cambodia's SMEs, most of which operated informally to test whether their businesses could be successful prior to incurring all of the costs. In addition, it provided the RGC with valuable feedback regarding which regulations and registration processes

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<sup>36</sup> See, for example, Articles 17, 22, 31, 278 and 283 of the Labor Law of 1997. Available at: <http://metheavy.com/File/Media/CAMBODIA%20LABOURLAW.pdf> [Last accessed: 02 September 2020].

were actually essential, which opened up additional avenues for reform. Too, it reduced corruption as proprietors were able to point to their trial period documentation as evidence of legal compliance rather than being open to bribe solicitation at any time as black-market enterprises (Wood, 2004). As a result of these changes and other reforms like online business registration noted above (Turton, 2020), the kingdom has further streamlined the business registration process and this in addition to the tax and regulatory breaks have encouraged most firms operating in the black market to enter the formal sector, which is yet another sign of legitimate governance and increasing social trust in Cambodia.

#### **IV. Baseline Scenario**

Had the factors outlined above not aligned and the political will necessary to move Cambodia in a positive direction not emerged, the kingdom would have continued to lean towards a path of unsustainable growth (Kijewski, 2018). Though Cambodia's economic success prior to the reforms of the early 2020s provided a better life for many Cambodians, factors discussed above, like corruption as a limit to growth and the economic shocks of 2020 would have seen that growth slow significantly, threatening to erase the gains of the previous decades. Not to mention that Cambodia's rapid growth in the 90s and first two decades of the 21st Century was due to "catching up" and that rate of growth would have proven unsustainable over time (Sundaram and Popov, 2019).

Similarly, the system of uneven justice with moderate and often temporary reforms (Human Rights Watch, 2019) would have kept the kingdom near the bottom of the good governance rankings, further eroding investment opportunities as investors sought more reliable legal and regulatory environments elsewhere. The international community, already suffering from donor fatigue, would have tired of Cambodia's strategies of playing donors off of each other (Turton, 2016), and treating human rights and international law as chess pieces (UN HRC, 2019) and would have simply pulled out of the country.

In short, to use Sebastian Strangio's apt phrase, the "mirage on the Mekong" would have continued as long as it could have with the result that law would

continue to be used as a shield for poor governance as human rights violations continued apace and donors, including investors and trading partners, shied away from corrupt Cambodia as other jurisdictions proved more attractive. The international community would have abandoned Cambodia and Cambodians themselves would have given up hope for a brighter future as much of the rest of the world passed them by.



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