



Methods of Checking and Commenting a Draft Law

A) Introduction:

If political participation of the citizen is taken serious the members of civil society (NGOs, Bar Association, Trade Unions etc.) will be given the chance to give their comments on draft laws. This means they must have the chance:

- to **express their concerns** regarding the different articles of the draft law

and

- to **make proposals for amendments** of these draft law articles.

To do this properly in a systematic and efficient way they should check the draft law thoroughly. Then they should collect and summarize their concerns shortly and precisely **in relation to each article**. And finally they should propose amendments in a way that clearly shows which part of the draft text shall be erased and which text shall be added instead or additionally.

B) Checking the Draft Law Articles:

I) Rough checklist (FILTER 1):

In a first step the draft law can be checked roughly by taking each single article of the draft law and asking the three questions related to three main problems that lawmakers face:

1) Unclear Terms:

The question to be asked reads:

"Are there any unclear terms in the text of the article?"

(Note: Before this question is answered with "yes" the following articles of the draft law must be checked whether they already give a definition of this term).

The question about unclear terms is important regarding the principle of separation of power. If a term is unclear the lawmakers do not express the will of the people clearly enough. This opens the door for interpretations of the law by the executive or the judicial power who are not entitled to define the will of the people.



2) Human Rights:

The related questions read:

- " Does the article affect a human right?*
- If so does it regulate a restriction on this right?*
- If so is this purpose of restriction allowed by the constitution?*
- If so is the restriction proportionate ? "*

These questions are important because the lawmakers have to balance the individual human rights and find a fair solution to protect one right but not to restrict the other right too strong.

3) Delegation of Rule Making Power:

Here the questions read:

- "Does the article delegate any rule-making power from the legislative to the executive?*
- If so, does the law delegate too much power to the executive?"*

Any time the law text mentions the words **"Anukret"** or **"Prakas"** or mentions any other authorization for the executive power to set up further conditions this **indicates** that the article includes a **delegation of rulemaking power**.

The question of delegation of such power is important regarding the principle of separation of power (Article 51 III 2 and IV CC). This does not mean that any delegation violates the principle. But it must be clear that only the regulation of minor administrative details can be left to the executive whereas the main problems have to be solved by the law. Such problems are all those that are explicitly mentioned in the text of the Cambodian Constitution (for example: Article 41 II CC: "The regime of the media shall be determined by a law" or Article 42 I 2 CC: "The right (of free association) shall be determined by a law").

Additionally all those problems of society must be determined by a law that affect human rights and freedoms (by restricting or encroaching these rights. For example a road fee affects the freedom of property, profession and free travel). Furthermore all decisions that imply significant expenditures of the national budget can not simply be left to the executive but need a democratic decision making process.

The following checklist can be used for a rough but systematic **first** check of a draft law text (**FILTER 1**):

Draft Law Article	Does this article include any “unclear terms”?	Does this article take effect on human rights?	Does this article regulate a delegation of rulemaking power?
	Which one?	<ul style="list-style-type: none"> • Which one? • Is there a restriction of human rights? • What is the restriction purpose? • Is the restriction too strong? (violation of the “Principle of Proportionality”?) 	Is too much power delegated? (violation of the “Principle of Separation of Power?”)
Art. 1			
Art. 2			
Art. ...			

Using this checklist will already reveal the most intolerable mistakes of draft law.



II) Detailed checklist (**FILTER 2**):

To make sure that all frequently occurring law drafting problems are discovered the following detailed checklist should be **additionally** applied to the draft law text in a **second** step – **FILTER 2** (also see the graphic: “Checklist Law Drafting” page 64).

	ARTICLE	ARTICLE	ARTICLE
Part I : Goals and Definitions <ul style="list-style-type: none"> • <u>Purpose</u> of the law: unconstitutional? • <u>Definitions</u>: Unprecise or missing? • <u>Personal scope</u> of the law: Are exceptions compatible with the right of equality?
Part II: Rights and Duties <ul style="list-style-type: none"> • <u>Description of rights</u>: too narrow? • <u>Protection of rights</u>: Insufficient? • <u>Restriction purpose</u>: Unconstitutional? • <u>Restriction</u>: disproportionate? <ul style="list-style-type: none"> - General prohibition - Prohibition with exceptional permission - Duty to obtain permission - Duty to inform authority - Authorization of authority for intervention in case of abuse
Part III: Executive Agency and Administrative Proceeding <ul style="list-style-type: none"> • <u>Competencies</u>: Unclear/overlapping? • Granting of <u>extreme powers</u>? <ul style="list-style-type: none"> - unconstitutional/unnecessary power - <u>judicial powers</u> / or exclusion of <u>judicial review</u>? - delegation of too much <u>rule making power</u> ?
Part IV: Final Provisions <ul style="list-style-type: none"> • <u>penalties</u> : unconstitutional/disproportionate? • <u>timeframe</u> or <u>transitional provisions</u>: insufficient? • <u>abrogation clause</u>: unclear?
General requirements for all parts of the law <ul style="list-style-type: none"> • <u>language</u>: understandable? • <u>terminology</u>: inconsistent/conflicting? • <u>organization</u> of law chapters /sections: logical? • internal <u>inconsistencies</u>? • external inconsistency: <u>contradictions with other laws</u>?



Checking the draft law text roughly and additionally in the abovementioned detailed way will provide a lot of comments on each article of the draft law.

C) Final Conclusions and Proposals for Amendments:

To contribute in a valuable way to the law drafting process in many cases it is not sufficient just to point out the shortcomings of each article. It also helps very much to propose amendments of the criticized draft law article.

To make it easy for the reader to see which part of the draft law text shall be amended and in which way it shall be amended it is recommended to use the following type of diagram:

<p>In the left column the text of the draft law should be filled in article by article:</p> <ul style="list-style-type: none"> Those parts of the text that shall be erased according to the proposal shall be lined-out, so it is still clear for the reader what words shall not be used any more. Those text parts and single words that shall be additionally put to the draft law text shall be high lighted by underlining them. Parts of the text that raise doubt could be marked by using <i>italic letters</i>. 	<p>In the right column the critical comment and the reason for the amendment proposal should be filled in.</p> <p>The views of different commentators can be collected in the right column but it should be clear which comment comes from which source.</p>
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Amended text of draft law article (but still showing original text at the same time)	Comments and Reasons for Amendment Proposals
Art.1	
Art.2	
<p>Example Art. 31 Fishery Draft Law</p> <p>A. Catching, trapping, injuring, killing, transporting, selling, buying, processing, and stocking holding of all types of water birds and their eggs shall be prohibited.</p> <p>B. All the above activities may be conducted only when special <i>permission</i> is given.</p> <p>C. All types of <i>water birds</i> shall be determined by the Proclamation of the Ministry of Agriculture, Forestry and Fisheries</p>	<p>A. Change "stocking" to "holding of". Add "and their eggs" [MRC]</p> <p>B. This article is vague. The term "special permission" must be defined: Who can give permission, under what conditions, subject to what guidelines etc. Is it for research or other activities? Is it a license under draft Article 71.13? [COUNHCHR, Mekong Workshop, Swift]</p> <p>C. This article must be reviewed to ensure that it does not conflict with existing environmental law. Chapter 10 of the Forestry Law (Conservation of Wildlife) places all "birds" under the management of the Forestry Administration, but this article places "water birds" under the authority of MAFF (of which Forest Administration is a Department) [COUNHCHR]</p>



Study Question 20

Enumerate all human rights you can find in the Cambodian Constitution, name them and quote the respective articles.

Also name the **restrictions** of these human rights!



Study Question 21

Open the following web-page: www.online.com.kh/users/kid,

→ then go to **“Related Links”**,

→ then to **“Legal Education”**,

→ and then to **“Human Rights Network International (HRNi Bruxelles)”**.

Find the “UN-Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief”.

Quote the relevant article which regulates the limitation of the freedom of religion and name all reasons for limitations.



Study Question 22

Please fill in the table and train your law commenting skills!

Current Article of the Weapon Draft Law	Critical Comments on Drafted Article (Here fill in your critical comments)	Proposed Amended Article (Here fill in your proposal of amendment)
<p>Article 11 I: “The Ministry of National Defense is authorized to issue card of the use of all types of arms, explosives and munitions to Royal Cambodian Armed Forces.”</p>	<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>Article 12 III: “All arms shall be registered, and all types of arms shall be stored in and returned to the safe armories. Exception of this case can be available according to inter-ministerial Prakas of the Ministry of National Defense and Ministry of Interior.”</p>	<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>Article 20: “Any person, who violates Article 8 and Article 14 of this law, shall be liable to five (5) years to ten (10) years imprisonment, excluding other crime.”</p>	<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>