Informalizing the Formal: Labor Relations in Cambodia
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Introduction

It is far easier to make law than it is to realize its normative potential. In theory, the expectation of enforcement allows the law to cast its shadow over the way in which people, businesses and bureaucracies behave. But what happens when the agencies of law enforcement (judicial and administrative) are inaccessible or corruptible, or when normative orders outside the formal legal system cast far deeper shadows than the law? This is so often the case in the countries in which we work as to make it one of the central questions of law and development.

The doctrinal answer to this question is that the agencies of law enforcement must be reformed so as to play their proper role. But this is at best a long term goal. The case study presented below - looking at labor reforms in Cambodia - highlights innovative ways in which the normative potential of law can be harnessed without relying on formal enforcement mechanisms. Further, it argues that providing support for collective contests - and whatever institutional spaces allow such contests to be played out most equitably in a given political moment - should be at the forefront of our thinking as law and development practitioners.

Labor Law & Industrial Relations in Cambodia

The Cambodian labor law of 1997 provides a detailed framework for the regulation of most private sector employment. It provides a framework for industrial relations, including the inclusion of the right for workers to form and be members of unions; the elaboration of the right to bargain collectively; procedures to protect the right to strike; and the establishment of a formal system for the resolution of labor disputes.

Once promulgated, however, it was unclear how the law would be translated into the workplace. The ‘rule of law’ orthodoxy suggests that legislation is implemented through administrative and judicial mechanisms which either monitor compliance systematically or respond to grievances from claim holders\(^1\), and through the anticipation of such enforcement. In the Cambodian context, however, there was little expectation that the labor law would be enforced by the courts or the labor inspectorate, which were not viable due to weak institutional capacity, perceptions of bias and acknowledgement that the standards set out in the law were far removed from the norms which governed employment in most workplaces.

The rapid emergence of Cambodia as a garment exporter in the mid-1990s provided space for innovation in the regulation of employment. With export oriented factories employing a growing number of workers, a degree of formalization of the employment relationship was required. At the same time, local unions were becoming more active, industrial action was increasing,
and international labor rights groups were drawing attention to working conditions in Cambodia’s factories. This combination of factors informed the negotiation of a bilateral trade agreement between the US and Cambodia. The agreement, concluded in January 1999, imposed quotas on a range of Cambodia’s garment exports. However, the agreement also provided that Cambodia would support the implementation of “a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law”; and created incentives for such improvements by agreeing to increased quotas where “working conditions in the Cambodia textile and apparel sector comply with such labor law and standards”.

Thus the agreement created immediate commercial incentives for all stakeholders for improved implementation of the labor law. For employers there was the prospect of more business and for unions the promise of increased membership. Crucially, the agreement also put in place incentives for government, which was able to generate revenues (formal and informal) from allocating quotas. The question remained, however, how the labor standards clause would be implemented, absent credible country systems for enforcing the law or resolving disputes.

2 Cambodia-US Trade Agreement 1999, Art. 10

Using Law: Institutional Innovations

After some negotiation, this question was answered by the establishment of two ILO projects (funded primarily by the US): one which would “operate an independent system to monitor working conditions in garment factories” (the monitoring project), and another which focused on the development of “transparent, fair and expeditious dispute procedures” (the labor dispute resolution project).

Factory Monitoring
The monitoring project - now known as Better Factories Cambodia (www.betterfactories.org) - produces regular reports on working conditions in Cambodian garment factories. It is generally accepted that this initiative has improved compliance with the labor law in Cambodia’s garment industry. A number of factors, including immediate incentives created by the US-Cambodia trade agreement, appear to have influenced this success.

While improved compliance had financial benefits (increased quotas) at the industry level, one might have expected free-riding at the enterprise level. This was avoided by conditioning granting of export licenses on participation in the ILO monitoring system; development of a system whereby employers could be deprived of their export licenses if they were found to be involved in continued breaches of core labor standards; and generating pressure for improved ‘corporate citizenship’ by publishing information on individual factories.

It is difficult to assess the relative importance of these factors, but the willingness of both the Government and the employers to continue with the monitoring after the expiry of the quota system in 2004 suggests that the financial incentives established by the trade agreement, while instrumental in the establishment of the system, were only part of the story in terms of its long term attractiveness. Whether monitoring and associated processes can generate the necessary incentives to drive long term improvements in terms of core labor rights (absent the direct carrot and stick effect of access to US markets) is yet to be seen. Also questionable - as discussed below - is the extent to which improvements in the garment sector will have flow-on effects for the rest of the labor market.
Labor Dispute Resolution
The second set of initiatives focused on dispute resolution. Under this heading, the ILO labor dispute resolution project provided technical assistance to the Ministry of Labour in consultation with the union movement and employers' associations. The monitoring project described above stressed, at least in its initial phases, the need for reliable monitoring of working conditions in the garment sector. By contrast, however, the labor dispute resolution project was an attempt to engage with the question of how labor rights and more equitable industrial relations could be promoted using country systems. The core problem in this respect was the lack of credible institutions for law enforcement and dispute resolution.

When the project was established in 2002, there were basically three ways to deal with labor disputes: (i) negotiated outcomes could be sought; (ii) the issue could be referred to the Ministry of Labour for conciliation or enforcement proceedings; or (iii) rights disputes could be dealt with by the courts. Each of these methods of dispute resolution had significant drawbacks. Systems to handle grievances at the factory level were under-developed and the failure to manage conflict was leading to increasing levels of (often violent) industrial action. The labor inspectorate, responsible for both the conciliation of labor disputes and the enforcement of the law suffered from all of the deficiencies of the Cambodian public service, including limited capacity, low wages, and lack of credibility. The courts suffered from similar problems.

There existed a range of possible responses to these circumstances. A labor court was provided for in the labor law. A rights-based approach to industrial relations could have led to a focus on the judiciary, with the argument that equitable institutions for the enforcement of law are the sine qua non of rights. However, the ILO concluded that it would be difficult to get classical institutions of the rule of law (i.e., those which are both independent and have the power to make binding decisions) to work in Cambodia without them being stalled during set-up or immediately captured by powerful government and private sector interests. As a result, it was decided to focus on the establishment of a new tribunal called the Arbitration Council (AC), a body which was also provided for in the 1997 law but had never been operationalized.

Non-Binding Arbitration
The AC, established by Ministerial Proclamation in 2002, is a tripartite body with arbitrators nominated by unions, employer organizations and the government. Each case which is referred to the AC is decided by an arbitration panel of three. Though arbitration is a mandatory part of the process for the resolution of collective labor disputes under Cambodian law, decisions or awards of the AC are generally non-binding. Though awards are enforceable if the parties have agreed in writing to be bound to the award or are bound by a collective agreement which provides for binding arbitration, or if neither party files an opposition within a specified time limit, it is not expected that enforcement would be feasible due to the costs and delays involved in court proceedings; uncertainties as to the legal status of the Council's awards; and the susceptibility of the courts to corruption.

As a body that generally issues non-binding and practically unenforceable awards, the AC is something of a hybrid between a rule of law institution and a forum for social dialogue between organized labor and management. Yet it would appear from the Cambodian experience that this sort of institution can be used as a tool for focusing and legitimating collective action with a view to the development of more harmonious industrial relations. According to its own statistics, the AC had received 388 cases as of April 2007, 68% of which were reported as resolved successfully, 36% because of an agreement reached prior to the issuance of an award, 23% because the parties fully or substantially implemented an award, and 9% because the parties reached a settlement based on the award.

This said, the AC is not without its critics. Representatives of the union movement complain that enterprises do not give effect to arbitral awards and argue it would be better if the AC could issue binding awards, or if a labor court existed with greater power. While generally supportive of the AC, employers have on occasion criticized the council for displaying a pro-worker bias. Nevertheless, the peak organization of Cambodian garment manufacturers continues to recommend its use to its members. The employer position appears to be that Cambodia relies on a 'sweatshop-free' reputation, and that there is a need for a legal institution that impartially adjudicates questions of law.

The most significant concern for the AC appears to lie in its relationship with government. As a statutory institution the Council is clearly 'of the state'. However, the history of its development meant that it was allowed to emerge very much outside of usual state systems. Unsurprisingly perhaps, this novel set of institutional arrangements has been the cause of tensions between the Council and the Ministry.

Reflections

Classically, law on the books is enforced through administrative and judicial mechanisms which monitor compliance systematically and/or respond to grievances from claimholders. Though actually enforced in few cases, the anticipation of enforcement will give the law a more general normative effect. In the context of the Cambodian workplace, however, these enforcement mechanisms were perceived as not being viable due to high transaction costs, perceptions of bias and corruption. Absent the anticipation of systematic enforcement, legislation was just one of many sets of norms competing for legitimacy and ascendancy in how decisions are made. Working conditions were determined at the enterprise level with reference to the market and the particular constellations of culture and power which emerged in employment relationships. While the law was not absent from the workplace, other norms played a defining role; for example, those emerging from the managerial culture of employers, corporate codes of conduct imposed by global buyers, and the culture of spontaneous collective action which emerged in the dormitories housing young migrant workers.

The basis for labor relations based on the law began to emerge in the late 1990s. The extent to which these efforts were successful rested on (a) the provision of incentives for reform; and (b) the willingness and ability of key players to engage with the inherently contested nature by which rights are attained. Thus rather than investing primarily in more detailed regulation, administrative or judicial capacity, none of which would have led to good contests, a number of alternative initiatives were undertaken. The programs described above contain the implicit recognition that there may be advantages to supporting the emergence of rights through ongoing processes of contestation and negotiation - where issues of power are at once more overt and more fluid - before trying to fix them in formal legal and enforcement frameworks.

It is thus argued that the Labor Law's main effects have been: (i) establishing a set of (mostly) agreed working condition standards, which even though not formally enforced can, in certain circumstances, be drawn upon to legitimate an argument as to what working conditions should be; and (ii) providing a framework for collective action by legalizing unions, providing for dispute resolution procedures and legitimizing the right to strike.

These examples illustrate how law on the books can be translated into action by facilitating the emergence of sites of contest outside the formal legal system - but it also shows some clear limitations of this approach. First, the law is applied almost exclusively in enterprises (primarily garment factories and hotels) which are accountable to an international public through their branding. Second, it must be acknowledged that the systems referred to above operate primarily at the level of the collectivity. In practice, the current regulatory system neither protects workers rights as individuals, nor does it extend to vulnerable workers, such as those in small and medium sized enterprises producing for local markets.