Laos Legislative Drafting Programme

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http://hdl.handle.net/2144/22398

Boston University
March 22, 1996

THE LEGAL FRAMEWORK PROJECT:
AN EVALUATION AND PROPOSED NEXT STEPS
FOR THE DRAFTING COMPONENT

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This memorandum briefly evaluates the drafting component (hereafter called 'the project') of the Lao P.D.R. National Legal Framework Project Lao 95\002. It first outlines the project's history and substantial progress in the past year, noting its seeming difficulty in contributing to finalized draft priority bills. Suggesting that the substantive ministries have tended to view the project as a learning exercise for lower-level officials - - not a process for producing competent laws -- it proposes five steps to improve the project's output.

A BRIEF HISTORY AND PROGRESS TO DATE

In 1986, when the Lao P.D.R. government undertook the New Economic Mechanism, it recognized the need for a legal framework that permitted market actors to act with some degree of predictability about their actions' legal consequences, and structured appropriate institutions to underpin the new, market-driven economy. The new constitution evidenced the Lao P.D.R.'s decision to develop that framework through deliberative, open processes bound by the Rule of Law.

As in many other countries, the Lao P.D.R. first relied on foreign consultants, who provided 17 bills, often essentially copied from elsewhere. The consultants neither conducted in-depth
research as to Lao’s unique circumstances, nor provided reports describing those conditions.\(^1\) Furthermore, by substantially excluding Lao officials from the actual drafting process,\(^2\) they missed an opportunity to improve Lao’s self-reliant drafting capacity.

In January, 1995, a UNDP/World Bank-sponsored Programme Mission, together with the National Legal Framework Project Advisory Committee, redesigned the drafting process to accomplish two related tasks: to produce bills addressed the Lao PDR’s specific, transformatory needs; and in the process, to strengthen Lao drafting capacity.

The new project adopted a three-pronged strategy to:

1. Conduct workshops to equip middle-level ministry officials with the legislative theory and techniques required to produce preliminary drafts of research reports and priority bills;

2. provide foreign consultants, not to draft bills but to assist Lao officials learn from other countries’ experiences in trying to use law to resolve social problems; and

3. intensively to train a few Lao drafters as trainers who could institutionalize a sustainable, self-reliant process of strengthening Lao drafting capacity in the course of drafting the new laws the New Economic Mechanism requires.

That strategy assumed that, having produced preliminary drafts

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\(^1\) Laws cannot direct resources to develop themselves; they can only attempt to change and improve the behaviors of those who do manage resources. To do that, however, requires an in-depth knowledge of the country-specific circumstances likely to influence the behaviors of social actors in the face of the law. Without a report describing those circumstances, no one can assess whether or not the draft bill will likely change those social actors’ behaviors in the ways desired.

\(^2\) The UNDP/World Bank project did make considerable efforts to teach Lao lawyers and officials the substantive content of the bills produced.
bills and research reports in initial training workshops, responsible ministry officials would complete the research reports and bills.

The project did make progress in improving some Lao officials' drafting capacity, and took important steps towards institutionalizing the future training of Lao drafters. In July, 1995, at a one-month workshop, about 20 ministry officials formed teams to prepare three preliminary reports and bills concerning land use, government procurement, and cheques. In the process, they began to learn the legislative theory and methodology required to structure available Lao information for research reports and to draft effectively implementable bills. With the aid of foreign consultants as resource persons, they began to study relevant foreign law and experience. The CTAs and the foreign consultants also gave three one day workshops for members of the National Legal Framework Advisory Committee, on legislative theory and methodology, and on the foreign law and experience related to the three bills.

Following that first workshop, four of the participants -- two Ministry of Justice officials, the Deputy Dean of the Vientiane Law School, and a staff member of the National Assembly’s Legal Standing Committee -- undertook an intensive four month program to become trainers for the drafting project. They studied legislative theory and methodology; an introduction to social

3 In the Legislative Drafting Program for Democratic Social Change at the Boston University School of Law.
science research methods relating to drafting transformatory legislation; and methods of teaching legislative drafting. Each prepared a curriculum and a syllabus designed to assist the personnel in his or her particular Lao institution to learn how to draft and assess research reports and bills. The four also drafted a handbook in the Lao language for the project’s future training programs.

In March, 1996, the four trainers organized and led -- in the Lao language -- a two day workshop on legislative theory and methodology, followed by a two week workshop that focussed on drafting research reports and bills on mining, transportation, and electricity production and distribution. Two responsible officials from the Ministry of Transport and Communication and two from the Mining Department of the Ministry of Industry and Handicrafts attended most of the workshop sessions. Subject to their ministries’ approval, they will continue to work with the MoJ trainers to complete and forward the draft research reports and bills to the National Legal Framework’s higher drafting authorities for final revision and submission to the National Assembly in September.

During the March, 1996, workshop, the CTAs also conducted a one-day workshop for two Vice Presidents and leading members of the National Assembly’s Standing Committees, and the Minister and Vice-Minister of Justice. They focussed on prioritizing bills and the importance of accompanying every priority bill with a structured research report; without such a report, no law-maker can determine
whether the bill will likely attain its objectives in Lao’s unique circumstances.

In sum, the drafting component of the National Legal Framework Project appeared to make significant progress. To date, however, the six draft research reports and bills the workshop participants produced apparently remain incomplete and, some of them at least, unused. Unfortunately, with one possible exception, the responsible ministries did not build on the foundations the drafting teams laid at the July workshop. Donor agencies continued to supply foreign consultants who, without involving Lao drafters, apparently still drafted the bills by themselves. They still did not provide detailed research reports on the extent to which the bills might fit Lao conditions.

Examination of evolving Lao drafting structures helps to explain this seeming discontinuity between the project and the process of drafting actual bills. In drafting systems elsewhere, most bills originate in line ministries with expertise in the

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4 The draft land law, to be introduced in April, 1996, may have benefitted from the project. Two Australian consultants, funded by the World Bank to draft the bill, met at the workshop with the drafting team and the project consultant, Prof. Jacque Chonchol. That meeting, however, took place because the CTAs discovered, only by chance, that the Australian team had come to town to assist the Ministry of Finance Lands Department draft a titling bill.

5 A Hong Kong law firm under an ADB grant has produced a motor vehicle code for Lao, but its relevance to Lao circumstances does not appear on its face. (The proposed bill contains a provision -- obviously copied from some existing statute -- to the effect that no vehicle may travel on the highways without a driver in place, seemingly threatening the incarceration of the vehicle as punishment for the violation.) Swedish consultants produced an Electricity Law and Electricity Regulations. Another Swedish project worked on a Transport Law. (Both Swedish projects made considerable efforts to train Lao personnel in the subject-matter of the laws, but neither seem to have tried to equip Lao drafters with the theory, methodology or techniques required to draft the legislation.)
bills' subject-matter; each ministry develops the policy and a legislative program to implement it.⁶ A central drafting group then reviews (and may revise) the draft bills to ensure their technical quality and compatibility with the national legal framework.

In Lao P.D.R., the drafting system seems likely to evolve along similar lines, with bills originating in the ministries primarily responsible for dealing with the problems the bills purport to address. Only the Department of Transport in the Lao Ministry of Transport and Communication, for example, possesses the information about Lao's transport system which must form the basis for translating Lao's transport policies into a workable legislative programme. Presumably, that Ministry should first prepare and then send its draft bills to the MoJ. There, a high level drafting group exists, consisting of the most competent and distinguished Lao lawyers.⁷ These extremely busy, responsible senior lawyers have had great practical and legal experience. They do not, however, have time to conduct research to ensure that, in the Lao circumstances, the proposed law will accomplish the institutional transformations the New Economic Mechanism requires. They must rely on the research conducted by Ministry experts, which presumably should be adequately described in an accompanying

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⁶ In the British system, it bears the title of 'layman's draft'. In Belize they call it a 'concept paper' -- a useful title.

⁷ We understand that it includes two vice presidents of the National Assembly, the President of the Supreme Court, the Minister and Vice-Minister of Justice, and the Chief of the Cabinet of the Ministry of Justice (i.e., its senior civil servant).
project has contributed less than expected to producing acceptable final drafts of research reports and bills: The lack of agreed drafting procedures; the line ministries failure to assign responsible officials to the drafting project; the foreign consultants' perverse role; and an overburdened central drafting authority.

(1) **The absence of agreed-upon drafting procedures.**

As yet, the Lao P.D.R. has neither strongly-established drafting practices nor formal, written rules defining drafting procedures. Each originating ministry and the high-level MOJ unit has practically unlimited discretion to decide how to develop draft bills. Without a rule requiring research reports structured by an adequate legislative theory, ministry officials generally do not prepare them. With neither formal procedures nor an adequate theory to guide the transformation of policy into workable legislative programs, almost inevitably the originating ministries officials fell back on foreign consultants. Too often, without regard to Lao realities, those consultants import other countries' laws or 'international standards.' At least the resulting bills superficially looked professional and polished.

(2) **The line-ministries' failure to assign specific officials to complete draft research reports and bills.**

Few originating ministries sent officials to the workshops with an assignment to complete the drafts according to fixed deadlines. Many of the workshop participants seemed relatively
That apparently reflected a view that the workshops constituted only training exercises with no function in the actual drafting process. That misunderstanding may have arisen because the invitations to the workshop went to all the ministries, without specifying the need to assign responsibility for the particular bills under consideration.

(3) The potentially perverse role of foreign consultants.

Few ministry officials anywhere, let alone in the Lao PDR, have the experience or knowledge to use law to transform institutions in order to resolve social problems. Not surprisingly, therefore, some Lao ministry officials apparently assumed the consultants the donors provided were experts, not only in the substantive fields -- cheques, land use, or transport -- but also in drafting the relevant laws. Few officials realized that few of those consultants have any developed legislative theory, and hence no guide to conducting the research needed to draft bills organically related to Lao needs.

10 Although the World Bank had conditioned a $17 million tranche on passage of a cheque law, the Central Bank sent a relatively junior lawyer to work on it at the July, 1995 workshop; the other team members, drawn at random from various unrelated ministries, had the barest minimum knowledge of the Lao, far less the international, banking and payments system. Following the March, 1996, workshop -- after another foreign consultant had produced a bill copied from the Thai negotiable exchange law without a research report -- the Deputy Director of the Central Bank agreed to work with an MoJ trainer to complete a draft research report and a bill designed for the realities of the existing Lao payments system.

11 In contacting roughly a hundred potential foreign consultants for the five year UNDP Drafting Project in China, the CTAs discovered that few, if any, had any theory of how to ensure proposed bills might help overcome the transformational problems as they appeared in country-specific circumstances. To understand why requires reviewing the literature relating to legal education and legislative practice (see, eg, Ann Seidman and Robert B. Seidman, "The Present State of Legislative Theory and Proposals for Remediying its Sad Condition" Seoul Law Journal, spring, 1995).
(4) An overburdened central drafting authority.

The high-level MOJ drafting group enjoys the broad general knowledge inherent in the seniority and experience of its members. That broad knowledge, however, cannot substitute for the line ministries' accumulated knowledge about their own work. Without adequate reports from the originating ministry that specify the relevant facts relating to Lao's unique conditions, the MOJ drafting group inevitably mainly critiques the bills' form. With only their own unsystematic knowledge of the facts about Lao realities, in such complex matters as electricity generation or highway construction, not to mention the banking system, the group has little basis on which to assess whether the draft bill will likely contribute to the on-going process of institutional transformation required by Lao’s New Economic Mechanism.

No formal rules for drafting; no assignment of senior officials responsible for attending the project workshops and drafting specific bills and reports; the easy availability of consultants all too willing to draft bills without investigating Lao conditions; and the resulting high-level MOJ drafting authority's lack of access to the relevant facts about those conditions: These four sets of interrelated causal factors seem to explain why, to date, the project has not contributed sufficiently to the drafting of priority bills.

III.

PROPOSALS FOR THE PROJECT’S NEXT STEPS

The explanations of the Lao P.D.R.'s National Legal Framework Project's difficulty in producing actual draft bills backed by
adequate research reports suggest that, in the 1996-97 phase, the Ministry of Justice, under the guidance of the Project’s Advisory Board and the continued assistance of the international donors, should take the following steps: (1) Discuss with the line ministries the project’s relationship to their drafting responsibilities; (2) propose draft regulations (also accompanied by a research report that justifies the draft) to prescribe an open, accountable Lao process for drafting priority bills and research reports; (3) arrange workshops to draft priority bills and reports while training Lao officials in legislative theory and techniques; (4) send additional MoJ and line ministry trainers for a four month intensive legislative drafting program; (5) provide a two day workshop for top ministry officials about the project’s legislative theory and aims; and (6) educate the donors to support the project.

**STEP 1: MINISTRY OF JUSTICE DISCUSSIONS WITH THE LINE MINISTRIES**

The Ministry of Justice should initiate discussions to persuade line Ministry personnel to assume the following responsibilities for drafting priority bills that originate in their ministry:

(a) **Appointment of the Chair of the drafting team.** The Minister of the originating ministry should appoint a well-qualified official as Chair of the drafting team.

(b) **Appointment of drafting team members.** The originating Minister should consult other ministries with an interest in the bill to identify other qualified personnel to serve on the
team. The Ministry of Justice should assign one MOJ trainer\(^\text{12}\) to assist the team to draft the research report and the bill, and in the process help the team members to learn legislative theory and techniques.

(c) **Terms of Reference.** The originating Minister should send a letter to all drafting team members, stating their terms of reference, specifying their responsibilities and fixing the dates for completing the draft report and bill.

(d) **Attendance at the drafting workshops.** The participating ministries should ensure that the members of the drafting team attend the workshop and subsequently complete the draft research report and bill.

(e) **Foreign consultancy.** If the originating Ministry so desires, the Ministry of Justice should arrange for a foreign consultant to give the drafting team a two-week in-depth seminar in relevant foreign law and experience as a basis for strengthening the bill and report.

(f) **Overseas study.** If the originating Minister deems it advisable, the Ministry of Justice should arrange for a leading member of the drafting team to attend the four month Boston University program in legislative drafting theory and techniques, at which he or she will also study in depth the foreign law and experience relevant to the Ministry's mission. After the 4 month training period, that member should be required to return to the line ministry for not less than two years to guide other ministry personnel in drafting further reports and bills (including appropriate decrees and regulations) as required by the Ministry's legislative program.

(g) **Completion of the draft bill.** Working under the leadership of the official from the originating ministry, and guided by an MoJ trainer, the drafting team should undertake to complete the draft bill and report and submit it to the MoJ higher-level drafting group.

**STEP 2: A PRIORITY BILL FOR REGULATIONS ON LEGISLATIVE DRAFTING PROCEDURES**

As a matter of priority, the Ministry of Justice should prepare and submit to Cabinet a draft set of regulations specifying

\(^{12}\) That is, an MOJ official who has completed Boston University School of Law's the four month legislative drafting program or its equivalent.
the legislative drafting process for bills. Almost every country has at least a Cabinet Memorandum specifying legislative drafting procedures. Other countries’ experience, furthermore, underscores the importance of creating an open, accountable legislative drafting purpose as an important aspect of strengthening a nation’s Rule of Law.

The procedures prescribed by the regulations should substantially follow those mentioned under step 1 above. If the MoJ proposed a draft bill embodying those proposed procedures, together with a research report, that would facilitate national discussion of the bill-creating and law-enacting processes. That discussion would help the Cabinet, National Assembly members, and Lao citizens to think through the best ways of building self-reliant Lao drafting capacity for strengthening Lao’s National Legal Framework.

**STEP 3: WORKSHOPS FOR TEAMS DRAFTING PRIORITY BILLS.**

For 1996 and 1997, the Ministry of Justice should arrange further workshops to enable appointed teams to draft priority bills and research reports. At these, Ministry of Justice trainers should assist the team members to learn the legislative theory and methodology they need to write competent bills grounded in Lao circumstances. If desired, the Ministry of Justice could arrange

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13 See proposed draft attached.

14 Experience everywhere indicates that the more open and accountable that procedure becomes, the more likely will the legal system serve the needs, not of a narrow ruling elite, but of the majority of the people.
for foreign consultants to provide information relating to other countries’ efforts to employ law to deal with similar problems.

**STEP 4: TRAINING ADDITIONAL TRAINERS**

In the 1996-97 phase of the Project, at least two more Ministry of Justice officials should take the four month Boston University Legislative Drafting program. This would increase the Ministry’s capacity, not only to guide the drafting of legislation to strengthen the Lao PDR’s legal framework, but also to train other ministry officials in legislative drafting. In addition, the Ministry of Justice could work with the line ministries to identify other officials for further training in the Boston University program (see f, in Step 1, above).

**STEP 5: A TWO-DAY WORKSHOP FOR HIGH-LEVEL MINISTERIAL OFFICIALS**

A two-day workshop on legislative theory and methodology for high-level line-ministry officials could help to ensure their active support for the project strategy. If desired, the CTAs, together with the MOJ trainers, could conduct this workshop during the proposed June, 1996, workshop.

**STEP 6: IMPROVING THE DONOR AGENCIES’ ROLE**

Donors may play an important role in supporting the Ministry of Justice’s drafting project. It would be very helpful if, at their 1996 review session, the donor agencies agreed that, instead of providing foreign experts to draft bills for separate ministries, they would provide consultants in the context of the National Legal Framework Project. Such consultants should see their assignment, not to draft the desired law, but to act as
resource persons to inform the Lao drafters about the relevant foreign law and experience, and generally to counsel them on writing research report and the bill. To enable each consultant to prepare to play this role before coming to Lao PDR, the Project office should send him or her materials on the project, especially its theory and methodology, and the team's draft research report and bill.

**SUMMARY AND CONCLUSION**

A review of the project's first year of substantial progress reveals a gap in its contribution to strengthening Lao PDR's National Legal Framework. Analysis of the causes of that gap suggests that the Ministry of Justice, guided by its Advisory Board and with donor agency assistance, should undertake six steps. These include: discussing with the line ministries their responsibilities in relation to the project; drafting regulations and a research report to structure an open, accountable Lao drafting process; arranging workshops to train Lao officials in drafting theory and techniques while drafting priority bills and reports; sending additional officials, as future trainers, for an intensive legislative drafting course; providing a two day workshop for top ministry officials in legislative theory and practice; and persuading the donor agencies to contribute to strengthening the project's efforts to strengthen Lao drafting capacity.