Making Institutions Matter
Drafting anti-corruption legislation for Cambodia

Nirav Shah, '07

Record readers may remember in our last issue we reported that Nirav Shah, a JD/M.D student at the University of Chicago, was awarded the prestigious Paul & Daisy Soros Fellowship for New Americans. This summer, Shah used the fellowship to work with Cambodian officials to help reform their justice system.

"Why isn't your country corrupt?"
The question temporarily stymied me. The questioner was Cambodia's Minister of Justice—an earnest man, to be sure, and sincerely interested in modernizing his country's rickety legal system.

It took me more than a second to form a reply. I started first by expressing a bit of humility—a necessary step in the diplomatic dance that was about to start. "I'm certainly no authority on these matters, sir." That was true. I felt uniquely unqualified to be doing the work I found myself doing. "I'm not sure if I'd label any government as free of corruption," I continued. "The corruption in Cambodia is simply of a different degree and kind from that found in other countries."

"Oh really, how's that?" he asked.

"Well, it's more widespread, more pernicious, and conducted with more impunity," I replied. So much for preserving the diplomatic dance. In the West, bridges get built even though some percentage of the budget may go missing. In Cambodia, the bridges never get built at all.

"But why? Why is our country more corrupt?"

"Institutions, sir. Institutions matter."

And it's true. Consider that, for example, late 18th century America was much poorer than the Cambodia of today. What the United States of 1787 had then that Cambodia lacks now are sound, transparent institutions. It is these institutions that drive development and progress. The strength of American institutions helped it prosper in the same way that the weakness of Cambodia's holds it back.

This past summer, thanks to generous support from the Chicago Legal Foundation and the Soros Foundation Fellowship for New Americans, I served as a legal advisor to the Cambodian Ministry of Justice in their ambitious efforts to draft a national anti-corruption law. Considering the vagaries of drafting codes in a foreign language (Khmer) and under a different legal system (civil rather than common law) along with the general difficulty of operating in a challenging political climate (strongman dictator with rich friends), I was just hoping that the project would stay together. Instead, the summer ended with a viable law that reflected hours of shuttle diplomacy and hard-won compromise.

Royal Palace, Phnom Penh
Endemic corruption is the predictable outgrowth of the broken institutions that have long plagued Cambodia. The system is broken at every level. The regulatory and administrative capacities of the government are non-existent and the legal system is in tatters, if it can be said to exist at all. In the resulting vacuum, people take what they can—not because they are immoral or inherently corrupt, as some claim—but because they are human. Government salaries are a pittance and opportunities to augment salaries abound. Faced with bleak economic prospects and the choice of taking money with impunity versus going hungry, most choose the former. Conventional wisdom for years held that corruption couldn’t be fought; it could only be managed until salaries rose such that graft became economically unpalatable option. Corruption was neither good nor bad, it was just “rent seeking” and was, at worst, inefficient. It doesn’t take a bevy of academic researchers, however, to show that corruption is a drag on economies. Ask any Cambodian about the unofficial fees that they pay just to keep what meager property they own and the effects of corruption become apparent. Ask any Cambodian about the bribes they pay to police at every traffic stop. At the end of the day, corruption amounts to a perversely regressive tax, taking money from the poorest and giving it to the wealthiest. Over years, the system has adjusted psychologically and financially. As in any society, a lie repeated often enough becomes entrenched as the truth. So it is in Cambodia, where bribes become “commissions,” police shakedowns become “on-the-spot fines,” and large-scale graft becomes a "salary bonus.” Nevertheless, the system never completely breaks: empty government coffers are quickly replenished by Western donors eager to show their dedication to helping the developing world.

So what to do? If corruption is nothing more than an institutional problem, then it requires nothing more than an institutional fix. That seems straightforward enough, but that’s the easy answer. The hard question is how to fashion a law that satisfies stakeholders without inviting unintended consequences. Just as important as institutional revisions, then, is political will—the *sine qua non* of any anti-corruption endeavor. But garnering political will is difficult in a country where corruption pays the bills. Striking a balance between a law that works and a law that works so well that it pinches off salaries (thereby drawing the ire of powerful politicians) was the central challenge.

Asset declaration is a good example. The law contained a provision requiring political officeholders to declare their assets every other year. This measure, undoubtedly useful for ferreting out the corrupt from the clean, was staunchly opposed by every politician who would fall within its reach. But at the same time, stakeholders from civil society and the donor community saw it as a deal breaker—the absence of which would mean an ineffective law.

The drafting committee was charged with brokering a compromise among all the groups. I realized that finding such a compromise was much more about diplomacy than draftsmanship. How to address the demands of donors while assuaging the fears of powerful politicians was perhaps the most valuable lesson of my summer.

Simply passing a new law sounded simple enough at the outset. We knew what the law should accomplish—the creation of an Anti-Corruption Bureau to fight corruption at all levels of Cambodian society. The hard questions emerged later.

First were the structural issues. For an Anti-Corruption Bureau to have any effect, it would have to operate independently from the rest of the government. Without autonomy, such a bureau would risk being perceived as another tool of an already deeply corrupt government. But autonomy has drawbacks. Too much autonomy and the Anti-Corruption Bureau risked becoming corrupt itself. So a tradeoff was necessary. But how to reflect that balance of power in the law? The first step was to secure the
budget and make the agency independent. The problem was that, at some level, the budget must have approval from the government. As in other countries, crushing the budget of an unpopular agency is the surest way to hobble it. We settled on a compromise: the budget would be set for five-year periods to ensure that ongoing investigations could be completed, and any budgetary change could take effect no earlier than ten years into the future—well beyond the political life expectancy of many members of Parliament.

Soon into our work, the Prime Minister called on the forthcoming law to be a “strong” law. I learned quickly that a strong law is a Very Good Thing without ever learning exactly what a strong law is. My concern was that the law would be too strong. To be sure, the law must provide for the investigation and prosecution of corrupt activities. But a law designed to punish the corrupt could soon go the way of many laws in developing countries. That is, the law is used not to punish the truly bad, but the provisionally bad. Political enemies, in other words. Asia in particular is notorious for using anti-corruption laws not to fight corruption as we know it, but to fight once and future political rivals.

And so I was lost. Creating a law strong enough to deter and prosecute would-be grafters would also mean a law strong enough to force possibly honest officials from their positions. Like so many problems, there are no right answers—though there are wrong ones. Allowing the Anti-Corruption Bureau to have unfettered investigative power would surely lead to abuse, as would giving it prosecutorial powers as well as investigative power. In both cases, we clipped the wings of the Bureau—requiring a nominal check from either the executive or judicial branches before proceeding too far with an investigation.

Another problem were the judges themselves. For corrupt officials to be thwarted, they would have to be prosecuted and sentenced under the eyes of a non-corrupt judge. The donor community argued strongly that judges should be rotated from district to district every three years to prevent the judges from forming relationships with officials. These special relationships, it was thought, would compromise judicial neutrality and hinder any effective prosecution. But there was a problem with rotation. True, it would reduce these relationships, but it would also create an extreme short-term bias for judges to behave as corruptly as possible before moving on to their next posting. Rather than discouraging corruption, rotation could actually (and perversely) lead to more of it. Again, we struck a compromise with the donors—judges would still be rotated, but every five (instead of three) years. We felt that the longer time would provide a disincentive for corrupt judges to fleece the townspeople, given that the judge would have to live within the community for a longer period.

In the end, the passage of the Anti-Corruption Law will make little difference. Indeed, the law could be passed tomorrow and nothing would change. Regardless of the evidence gathered by the Anti-Corruption Bureau, effective sanctioning still requires corruption-free prosecutors and judges. Nonetheless the law is the first necessary step. Its true benefits will be realized not by the Cambodians of today, but by the Cambodians of generations to follow. A law such as this one is the beginning of sound, transparent institutions in a country left without them for almost three decades. In the end, I realized, it is these institutions that separate Cambodia from many countries in the West. And while strengthening them is necessary, it is hardly sufficient to foster real change. Real change doesn’t come through quick fixes. It requires years incremental gains—a process that Cambodia is just starting.

Three monks sit on the banks of the Mekong River, across from an urban renewal project in Phnom Pehn