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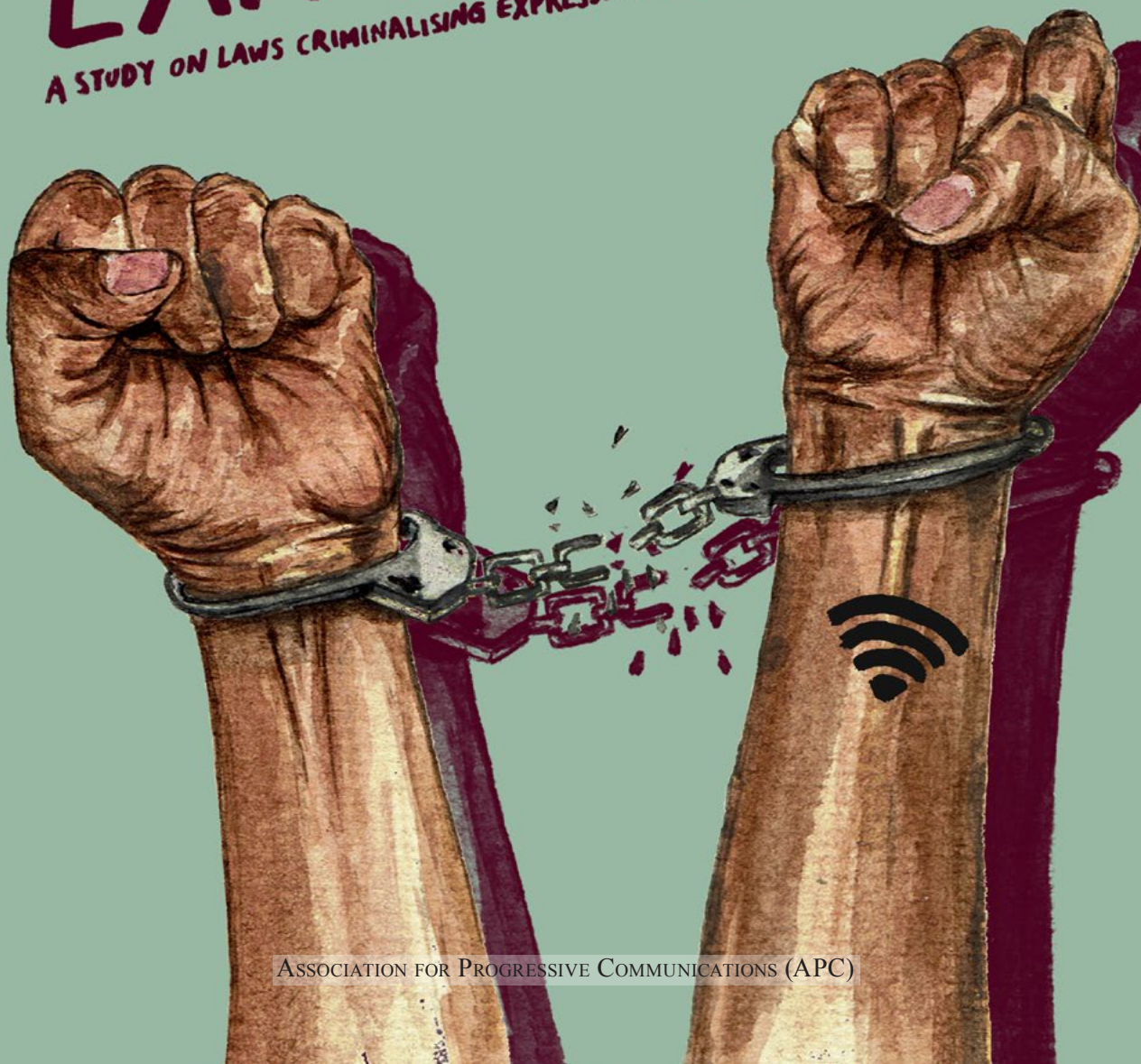
UNSHACKLING EXPRESSION:

A STUDY ON LAWS CRIMINALISING EXPRESSION ONLINE IN ASIA



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)

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Unshackling expression: A study on laws criminalising expression online in Asia

APC

Coordinating committee
Gayatri Khandhadai (APC)
Pavitra Ramanujam (APC)
Geetha Hariharan

Project coordinator
Gayatri Khandhadai (APC)

Edition coordinator
Geetha Hariharan

Assistant editor, publication production
Lori Nordstrom (APC)

Graphic design
Monocromo
info@monocromo.com.uy
Phone: +598 2400 1685

Cover illustration
Ivana Kurniawati

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Mapping the criminalisation of online expression: Cambodia

Anonymous

Introduction

> *The internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies.*
>
> Frank La Rue, former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, May 2011.[1]

The number of internet users in the Kingdom of Cambodia is growing exponentially. Reports from the Ministry of Posts and Telecommunications (MPTC) show that internet subscriptions have increased from only 43,417 in 2008 to 6,984,709 in June 2016. In November 2016, internet penetration stood at 46.4% with 7.25 million subscribers.[2] The internet has now surpassed all other forms of media as a source of news in Cambodia.

The internet is changing the information landscape by creating an alternative to the classical model of state and state affiliate-run news outlets. In 2015, Cambodia's Media Ownership Monitor found that the majority of traditional media (TV stations, radio stations and newspapers) were affiliated with the ruling Cambodian People's Party (CPP). It reported that of the 27 Cambodian media owners, 11 were on the government payroll, advisors to the government, or affiliated to a political party.[3] Even among news outlets without any overt link to the ruling CPP, self-censorship is rife, with many news outlets reluctant to publish information that may be overly critical of the government. While small numbers of independent radio stations and English-language newspapers were generally tolerated since the end of the Cambodian civil war in 1991, an unprecedented August 2017 crackdown against independent media led to the silencing of most independent traditional media in Cambodia, with 32 broadcasts reportedly shuttered.[4] The crackdown also extended to the shutdown of the *Cambodia Daily* newspaper, a publication renowned internationally for its critical investigative reporting.[5]

Due to the dominance of the Royal Government of Cambodia (RGC) in the traditional media, the Cambodian people have increasingly turned to the internet and social media (in particular Facebook) to gather and exchange information and opinions. In February 2017, Noun Vansuy of the Cambodian Center for Independent Media stated, "If people are able to use social media properly, they are unknowingly contributing to promote access to information and freedom of expression."[6]

The rise of the internet in Cambodia has also provided an unprecedented space for open political discussion and criticism of the RGC. Online expression has become a popular means of social advocacy, especially among activists and human rights defenders. During the 2013 National Assembly election, social media was used by the recently

1 La Rue, F. (2011). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/27&Lang=E

2 Khothara, H. (2016). Workshop on Economic Aspects of Spectrum Management. Ministry of Post and Telecommunications of Cambodia (MPTC), Tehran, Iran, 21-23 November. www.itu.int/en/ITU-D/Regional-Presence/AsiaPacific/Documents/Events/2016/Nov-SM-Economics/Presentations/Day%202%20-%20Session%204%20(Cambodia).pdf

3 mom-kh.com/en/pages/affiliations

4 LICADHO. (2017, 9 September). Restricting Critical Voices on Cambodian Airwaves. *LICADHO*. www.licadho-cambodia.org/articles/20170909/148/index.html

5 The Cambodia Daily. (2017, 4 September). Cambodia Daily Announces Immediate Closure Amid Threats. *The Cambodia Daily*. www.cambodiadaily.com/topstory/cambodia-daily-announces-immediate-closure-amid-threats-134283

6 Cambodian Center for Independent Media. (2017, 24 February). Smartphone and Internet: Weapon of Choice for Young Citizen Journalists. *CCIM*. www.ccimcambodia.org/what-we-do/citizen-journalism/155-smartphone-and-internet-weapon-of-choice-for-young-citizen-journalists

merged opposition Cambodia National Rescue Party (CNRP) as a tool to challenge the CPP-dominated media and to promote the party's platform in that election. This led to a historic result for the opposition CNRP, which came within a few seats of winning an unprecedented majority. Online networking also facilitated unprecedented anti-government protests following the election, as the opposition alleged electoral fraud. These protests merged with enormous garment worker demonstrations. This resulted in some of the biggest anti-government protests Cambodia has ever seen, which were organised and popularised primarily online. The year-long protests – based on accusations of electoral fraud, which allegedly denied the CNRP an outright victory – were violently suppressed in January 2014, resulting in numerous deaths and one enforced disappearance after security forces opened fire on demonstrators and passers-by.[7]

Since then, there has been a string of arrests, charges and convictions resulting from critical posts written on Facebook. For instance, political activists and ordinary people have been convicted for incitement, defamation and similar speech-related criminal offences. It is in this deteriorating climate for freedom of expression that Kem Ley, a much-loved political commentator known for his criticism of the ruling CPP, was murdered in July 2016. Observers have pointed to a potential political motivation for the assassination, while local and international organisations have slammed the ineffective investigation into the alleged perpetrators.[8] Several individuals who have dared to publicly link the assassination to the ruling party through Facebook posts have been prosecuted for defamation and related offences.

The criminalisation of individuals who speak out on social media is likely to increase as the legal framework tightens around the freedom of expression and the 2018 election draws closer. The space for freedom of expression was already not up to international standards, but recent legislative developments such as the Law on Telecommunications adopted in 2015 have acted to further restrict this space. The situation is likely to deteriorate even further if the draft Cybercrime Law currently under consideration is passed. These legislative developments have been accompanied by an increase in the numbers of arbitrary judicial actions taken against individuals for expressing themselves online. Moreover, with a pivotal national election coming in July 2018, the RGC is multiplying its attempts to extend control over individuals with respect to the exercise of their freedom of expression online. At the beginning of August 2017, the National Police announced they were monitoring Facebook to detect and prevent "rebel movements" of "the enemy".[9] Under such surveillance, it is easily conceivable that people feel ever less comfortable freely expressing themselves online, leading to self-censorship out of fear of the government's reprisals.[10]

Methodology

Cambodian laws, policies, reports and other official documents were the primary data sources for this report. Expert analysis of the content of these documents, through a desk review process, was used to assess the degree to which legal guarantees are in place to ensure the freedom of expression online. The documents were primarily located from Cambodia's Royal Gazette – a weekly government-issued publication, which is supposed to contain all new primary and secondary laws.

An initial review of the Constitution of the Kingdom of Cambodia (the Constitution), Criminal Code, Civil Code, Code of Criminal Procedure and Code of Civil Procedure was added to by consulting Cambodian legal experts regarding the identification of other legislation which impacts upon freedom of expression online. Finally, case studies were selected by drawing upon an existing database of relevant case law, which is maintained by a Cambodian human rights organisation.

Lay of the legal land

Legal foundations and fundamental laws and freedoms

Domestic law

Constitution of Cambodia

The Constitution explicitly protects the right to freedom of expression and related rights. However, it should be noted that these protections fail to meet international standards because they

7 Freedom House. (2014). *Freedom on the Net 2014*. https://freedomhouse.org/sites/default/files/FOTN_2014_Full_Report_compressedv2_0.pdf

8 Human Rights Watch and others. (2017, 7 July). Joint Letter on Investigation Into Killing of Kem Ley: Request for Cambodian Government to Create a Commission of Inquiry. *Human Rights Watch*. https://www.hrw.org/news/2017/07/07/joint-letter-investigation-killing-kem-ley

9 Handley, E. (2017, 1 August). Government's 'chilling effect' on free speech. *The Phnom Penh Post*. www.phnompenhpost.com/national/governments-chilling-effect-free-speech

10 Vida, T. (2015, 8 September). Monitoring the Internet. *The Phnom Penh Post*. www.phnompenhpost.com/national/monitoring-Internet

explicitly extend only to "Khmer citizens" rather than all individuals subject to the jurisdiction of Cambodian law. For example, Article 41 states that "Khmer citizens shall have freedom of expression of their ideas."[11]

Article 80 guarantees the right to freedom of expression of members of the National Assembly. It states: "No assembly member shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his (her) duty."

The Constitution also safeguards freedom of expression by guaranteeing closely related rights. Article 35 promotes an environment in which citizens are empowered to exercise their right to freedom of expression and involve themselves in public affairs. It states: "Khmer citizens of either sex shall have the right to participate actively in the political, economic, social and cultural life of the nation. All requests from citizens shall be thoroughly considered and resolved by institutions of the state."

Article 39 ensures the right to denounce public officials for a breach of the law committed during the course of their duties. It states: "Khmer citizens have the right to denounce, make complaints, or claim for compensation for damages caused by any breach of the law by institutions of the states, social organizations or by members of such organizations."

Article 40 of the Cambodian Constitution confers upon citizens the "right to privacy of residence, and to the secrecy of correspondence by mail, telegram, fax, telex and telephone." As the Constitution was drafted at the beginning of the 1990s, no reference to the internet or ICT was included.[12]

Law on the Press (Press Law)

At first glance, the Press Law seems to take a relatively liberal and protective approach to freedom of expression.

Article 1 provides: "This law determines the regime of the press and assures freedom of the press and freedom of publication in conformity with article 31 and 41 of the Constitution of the Kingdom of Cambodia."[13]

Article 3 provides for the right to freedom from pre-publication censorship: "To maintain the independence of the press, pre-publication censorship shall be prohibited."

According to Article 4, "[t]he publication of official information such as statements, meetings, meeting minutes or reports, etc. may not be penalized if such publication is fully true or an accurate summary of the truth."

Finally, in its Article 20, the Press Law provides that no person shall face criminal liability for the expression of opinion: "Any act committed by an employer, editor or author of a text which violates the criminal law shall be punished according to the criminal law. No person shall be arrested or subject to criminal charges as the result of the expression of opinions."

Nevertheless, the Press Law also contains broad restrictions and obligations intended to regulate or to control the press. Freedom of expression may be endangered. See the section on sectoral laws for more detail.

Law on the Election of Members of the National Assembly (LEMNA)

The importance of human rights in the context of elections is recognised by the LEMNA. Article 73 provides: "During the electoral campaign period and on polling day all political parties and candidates, members and supporters of political parties [...] shall respect the principles of human rights and democracy enshrined in the Constitution of the Kingdom of Cambodia."[14]

The LEMNA also contains numerous restrictions on freedom of expression that appear to be applicable to online expression. See the section on sectoral laws for further details.

Law on Education (Education Law)

Article 18 of the Education Law stipulates that "[h]igher education shall teach learners to have complete personality and characteristic and promote the scientific, technical, cultural and social researches in order to achieve capacity, knowledge, skill, morality, inventive and creative ideas and enterprise spirit to the development of the country."[15] These goals will be difficult to reach if freedom of expression is not ensured.

11 Constitution of the Kingdom of Cambodia (1993). English translation referenced from: sithi.org/admin/upload/law/2008_02_19_Constitution(EN)_including%20Amendment%20(1).pdf

12 CCHR. (2016). *Digital Wrongs? An Overview of the Situation of Digital Rights in Cambodia*. cchrcambodia.org/admin/media/analysis/analysis/english/2016_03_03_CCHR_Briefing_Note_Digital_Wrongs_ENG.pdf

13 Law on the Press (1995). English translation referenced from: sithi.org/admin/upload/law/Law%20on%20the%20Press%20(1995).ENG.pdf

14 Law on the Election of Members of the National Assembly (1997). English translation referenced from: sithi.org/admin/upload/law/Law%20on%20the%20Election%20of%20the%20Members%20of%20the%20National%20Assembly%20(1997)%20with%20first,%20second%20and%20third%20a.pdf

15 Law on Education (2007). English translation referenced from: www.moeys.gov.kh/images/moeys/laws-and-regulations/48/EducationLaw-EN.pdf

In that respect, Article 35 affords students the right to "free expression of their academic views" and the right to "freedom of study."[16]

See the section on sectoral laws for an analysis of the restrictions on freedom of expression contained in the Education Law.

International human rights law enshrined in domestic law

Article 31 of the Constitution enshrines international human rights law into Cambodian domestic law. It states: "The Kingdom of Cambodia recognises and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights and the covenants and conventions related to human rights, women's rights and children's rights."

The direct applicability of international human rights law was confirmed by a 10 July 2007 decision by the Constitutional Council of Cambodia – the body tasked with constitutional interpretation.[17] The decision states that no law should be applied by the courts in such a way that violates the Constitution or the human rights treaties to which Cambodia is a party.

As a consequence, individuals subject to the jurisdiction of Cambodian law – and not only "Khmer citizens" as outlined elsewhere in the Constitution – can, in theory, invoke international standards for the protection of their right to freedom of expression. It should be further noted that Cambodia has a high rate of ratification of international human rights treaties, having ratified eight of the nine core treaties[18] (with the exception being the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).

Freedom of expression

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 19 of the Universal Declaration of Human Rights (UDHR) guarantee the right to freedom of expression. Article 19 of the ICCPR specifies that freedom of expression "shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Both the UDHR and the ICCPR were drafted with the foresight to include and accommodate technological developments through which individuals are able to exercise their right to freedom of expression, owing to the explicit inclusion of a provision that states that everyone has the right to express him or herself through any media. The treaty body responsible for interpreting the ICCPR – the United Nations Human Rights Committee – has advised that modes of expression do include all forms of electronic and internet-based methods of communication,[19] meaning that international human rights law – and by extension, Cambodian law – is equally applicable to new and developing communication technologies, such as the internet and social media networks.[20]

This was confirmed on 5 July 2012 by the United Nations Human Rights Council (UNHRC) in a resolution – the first of its kind – to protect human rights online.[21] The resolution states that "the same rights that people have offline must also be protected online." The resolution also acknowledges that "the internet can be an important tool for development and for exercising human rights."

Right to privacy

The right to privacy is enshrined in Article 12 of the UDHR, and Article 17 of the ICCPR. The latter states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Traditionally, the reference to "correspondence" in the UDHR and the ICCPR was interpreted to mean written communication; however, as stated above, this term now applies to all forms of communication, including via the internet.

In 2013, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, stated that there were interrelations between the rights to privacy and the right to freedom of opinion and

16 CCHR. (2012). *Fundamental Freedoms Series: Freedom of Expression and Academic Freedom*. cchrcambodia.org/admin/media/factsheet/factsheet/english/2012_03_16_CCHR_Fundamental_Freedoms_Series_Fact_Sheet_Freedom_of_Expression_and_Academic_Freedom_March%202012_(ENG).pdf

17 Constitutional Court of Cambodia. (2017, 10 July). Decision No. 092/003/2007.

18 www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

19 UN Human Rights Committee. (2011, 12 September). General Comment 34: Freedoms of Opinion and Expression, CCPR/C/GC/34 (GC 34) [12]. www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

20 CCHR. (2016). Op. cit.

21 UN Human Rights Council. (2012, 29 June). The promotion, protection and enjoyment of human rights on the Internet, Resolution 20/8, A/HRC/RES/20/8. documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement

expression.[22] He noted that "[u]ndue interference with individuals' privacy can both directly and indirectly limit the free development and exchange of ideas," and therefore have a chilling effect on freedom of expression.

Regional law

In November 2012, the 10 member states of the Association of Southeast Asian Nations (ASEAN) – including Cambodia – adopted the ASEAN Human Rights Declaration (AHRD).

The AHRD affords every person the "right to freedom of opinion and expression" under Article 23, including the right to "hold opinions without interference [...] in writing or through any other medium."[23]

The AHRD contains a general limitation clause in Article 8 of its opening principles, whose ultimate effect is to undermine its acknowledgement of the non-derogable or absolute nature of several human rights under customary law and the ICCPR. It holds that limitations on the exercise of fundamental freedoms can be subject to a wide range of limiting factors, including "the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society." This is problematic as its wide scope and potential field of application fail to recognise that some human rights can never, under any circumstances, be restricted by the state. Conversely, derogations from civil and political rights protected by the ICCPR may only be made in strict accordance with the ICCPR itself, and some rights are specifically non-derogable.[24] In this context, the AHRD is inconsistent with Cambodia's international obligations, and in fact, undermines them.[25]

Governance of online and networked spaces

The Law on Telecommunications governs online and networked spaces in Cambodia. It is the only Cambodian law that specifically addresses online activity. Indeed, the law defines telecommunications as "the science and technology in sending and receiving the signals, data, sound, pictures or types of other information by using the energy in the form of electro-magnetic, electricity, radio, light, or other forms."[26]

Even though it is not enacted yet, it is also important to consider the draft Cybercrime Law, which would also regulate online content.

Law on Telecommunications

The 2015 Law on Telecommunications contains multiple restrictions on the right to freedom of expression, which are not in line with Cambodia's international and constitutional human rights obligations. The law poses a threat to private, confidential communications as well as online public expression and increases the control of the MPTC over the telecommunications sector. Several of the new criminal offences introduced by the Law on Telecommunications can lead to imprisonment and significant fines, and are disproportionate and overly broad.

Some of the most serious threats posed by the law can be summarised under the following themes: surveillance powers, criminalisation of expression and restriction of rights, and excessive state control.[27]

Surveillance powers

The Law on Telecommunications gives the government the power to secretly monitor the telecommunications of any individual in Cambodia with a near-complete absence of checks and balances, and no requirement for judicial oversight.

Article 6 states: "All telecommunications operators and persons involved with the telecommunications sector shall provide to the Ministry of Posts and Telecommunications the telecommunications, information and communication technology service data." Under this provision, telecommunications operators appear to be required to pass over data on their service users, without any recourse to judicial or other independent oversight. The meaning of "service data" is undefined in the law and as such could be interpreted to include all user communication records, browsing history and other confidential information. This appears to be in violation of Article 40 of the Constitution, which ensures the right to confidentiality.

Furthermore, Article 97 criminalises eavesdropping by private individuals, with sanctions of

22 La Rue, F. (2013, 17 April). *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*. A/HRC/23/40. www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

23 www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf

24 ICPPR, Article 4(2). No derogation is permitted from Articles 6, 7, 8(1)(2), 11, 15, 16 and 18.

25 CCHR (2016). Op. cit.

26 Law on Telecommunications (2015), Annex: Glossary for using this law. English translation referenced from: sithi.org/admin/upload/law/20150127_TelecommunicaitonDraftLaw_En%20edited-2.pdf

27 LICADHO. (2016). *Cambodia's Law on Telecommunications: A Legal Analysis*. www.licadho-cambodia.org/reports/files/214LICADHOTelecomsLawLegalAnalysis_March2016ENG.pdf

imprisonment from one month to one year and a fine from 100,000 riels (USD 24) to two million riels (USD 480), but permits secret surveillance with approval of a "legitimate authority". Arguably, this provision allows the monitoring of individuals' phone calls, emails, texts and social media activity and other online correspondence without their knowledge.[28] Moreover, "legitimate authority" is an undefined term, which may simply refer to administrative or internal authorisation, rather than the independent judicial oversight necessary to protect individual rights. In effect, this provision appears to give carte blanche surveillance powers to the Cambodian government.

Criminalisation of expression and restriction of rights

The law also introduces new criminal offences with heavy sanctions for telecommunications activity. These provisions could not only be used to criminalise freedom of expression online, but may also be further abused to "spy on high profile individuals and selectively interpret the content of their communications as criminal activity."[29]

Article 80 creates a broad criminal offence that imposes high sentences. It states: "Establishment, installation, or modification of telecommunication infrastructure and network or establishment, installation and utilization of equipment in telecommunication sector, if these acts lead to national insecurity, shall be sentenced in prison from 7 (seven) years to 15 (fifteen) years." Furthermore, Article 81 states that violation of Article 80 can lead to fines from 140 million riels (USD 33,600) to 300 million riels (USD 72,000). No telecommunication activity (the term is undefined) appears to be excluded: any form of expression, public or private, and conducted by any electronic means of communication could be criminalised if it is deemed to create "national insecurity". Such a vaguely drafted provision, which potentially includes a wide range of legitimate expression within its scope, cannot be considered proportionate, narrowly defined, transparent or easy to understand. While such broad criminalisation of expression affects all individuals and groups in Cambodia, it is of particular concern to associations who may in their work be critical of the government and could easily be subject to targeting by authorities choosing to construe their internal or external communications as contributing to "national insecurity".

Similarly to Article 80, Article 66 includes a general prohibition on telecommunications activity stating that the "establishment, installation, utilization, and modification of telecommunication infrastructure… which may affect public order and lead to national insecurity are prohibited." Again, there is no requirement of actual harm, but rather activity that "may" affect public order or national security. Therefore, an activity that causes no harmful or palpable consequences may be criminalised.

Articles 93-95 are offences new to the Law on Telecommunications but replicate existing Criminal Code provisions on expression, whilst imposing higher penalties. Article 93, which prohibits "threats", carries sanctions from one month to three years imprisonment and fines from 100,000 riels (USD 24) to six million riels (USD 1,440). Equally, Articles 94 and 95 further criminalise threats and impose heavy sanctions. This is problematic not least because there is a risk of conflict between these provisions and those in the Criminal Code.

Article 65(b) preserves the "[r]ights to privacy, security and safety of using the telecommunications service." However, this protection is nullified by the exception clause authorising the government to disregard it should it be "[o]therwise determined by other specific laws." Unfortunately, in claiming to protect the right to privacy, as enshrined in the Constitution, the provision includes an exception clause, which renders it unconstitutional and a violation of the right to privacy.

Excessive state control

Article 7 provides that "[i]n the event of a force majeure, MPTC […] may order relevant telecommunications operators to take necessary measures," which could likely encompass internet shutdowns. Troublingly, there is no definition of what constitutes a "force majeure"; however, this provision could be used to inhibit internet usage, including forms of messenger and means of social mobilisation.[30] Further competencies are afforded to the MPTC under Article 24, which states: "Telecommunications infrastructures and networks and supporting telecommunication infrastructures shall fall under the competence of MPTC." Under these provisions, the government appears to be granted control of the entire telecommunications industry including activity and infrastructure. This is particularly threatening to organisations and individuals who are critical of the government and whose work may be affected by the prospect of surveillance.

28 Ibid.

29 Ibid.

30 Ibid.

Cybercrime Law

First draft

In May 2012, the RGC announced its intention to adopt Cambodia's first ever Cybercrime Law in order to regulate online content and to prevent the "ill-willed" from "spreading false information."[31]

A first draft was leaked in April 2014, but the RGC refused to publicly release an official version. This first draft contained several provisions which would have unduly restricted freedom of expression online.

One of the most controversial provisions was Article 28 of the law. This article severely limited the content of online activity and websites. It sought to prohibit content deemed to "generate insecurity, instability and political incohesiveness," as per Article 28(3), or "deemed damaging to the moral and cultural values of the society," including "manipulation, defamation, and slanders", under Article 28(5)(c). Article 28(4) prohibited content "undermining the integrity of any governmental agencies." These broad terms could have led to abuses that clearly would have fallen afoul of Cambodia's international human rights obligations.[32]

Violations of these prohibitions would have been sanctioned by imprisonment from one to three years and heavy fines ranging from two million riels (USD 480) up to six million riels (USD 1,440).

Furthermore, Article 6 of the first draft law would have established a 14-person body called the National Anti-Cybercrime Committee, composed of high-ranking members of the government, which would have had control over the implementation of the law.[33]

Second draft

In response to the outrage expressed over the first draft, a second draft was leaked to certain non-governmental organisations (NGOs) from the Ministry of Interior in September and October 2015.

Although the second draft removed some of the most troubling provisions contained in the first draft – such as Articles 28 and 6 – it nonetheless contains new provisions which also threaten freedom of expression online. Article 27 allows for the dissolution of legal entities – including NGOs – on the basis of the cybercrimes of individuals affiliated with the organisations.[34]

Additionally, the draft confers overly broad and intrusive powers upon police and investigators to search and seize the property of those suspected of cybercrimes, with a complete lack of judicial oversight and procedural safeguards, threatening the right to privacy and the right to freedom of expression.

The individual crimes enumerated in the draft are very broadly defined, and would give significant scope to the RGC to implement the law abusively against its perceived opponents, in violation of national and international human rights guarantees. For example, Article 13(1) criminalises obtaining data that "are considered to be confidential and which are specifically protected against unauthorized access." There is no intent element; a person may be imprisoned for receiving an email containing such data, even if that email was sent by mistake or the receiver did not know that they did not have permission to view it.

Sectoral laws

In Cambodia, many sectoral laws impose administrative penalties that can be used to stifle freedom of expression. Often, opposition political parties, NGOs and civil society organisations (CSOs) which are critical of the government are targeted in this manner.

None of the sectoral laws outlined below explicitly refer to online activities. Nevertheless, case studies suggest their uniform applicability to the online world. See the section below on curtailment of freedom of expression for more detail.

Law on Associations and Non-Governmental Organizations (LANGO)

The LANGO curtails freedom of expression through a number of vague provisions.

Article 24 states that "[d]omestic non-governmental organizations, foreign non-governmental organizations, or foreign associations shall maintain their neutrality towards political parties in the Kingdom of Cambodia."[35] This vague provision leaves space for serious violations of freedom of expression and abuses by authorities in order to silence dissent and criticism. There are a number of legitimate civil society activities which could potentially fall under the scope of this vague provision.

31 Di Certo, B., & Yuthana, K. (2012, 24 May). The 'ill-willed' spark cyber law: officials. *The Phnom Penh Post*. www.phnompenhpost.com/national/'ill-willed'-spark-cyber-law-officials

32 CCHR. (2016). Op. cit.

33 Wilwohl, J., & Reaksmey, H. (2014, 10 April). Cybercrime Law May Silence Critics, NGOs Say. *The Cambodia Daily*. www.cambodiadaily.com/archives/cybercrime-law-may-silence-critics-ngos-say-56288

34 CCHR. (2016). Op. cit.

35 LANGO (2015). English translation referenced from: sithi.org/admin/upload/law/Unofficial-Translation-LANGO.pdf

CASE STUDY: CAMBODIA'S POLITICAL PRISONERS

In May 2016, Justice Ministry officials warned human rights group LICADHO that its new webpage documenting Cambodia's "political prisoners" could be in contravention of the LANGO, arguing that the page could violate Article 24 of the law, which requires political neutrality. Justice Ministry spokesman Kim Santepheap said the following in a Facebook post: "Licadho is walking away from its professionalism and its statute." He added: "I want to inform public opinion that Cambodia does not have political prisoners at all. In all prisons and correctional centers throughout Cambodia, there are only inmates jailed over criminal offenses."[36]

Article 30 (1) governs the consequences of non-compliance with Article 24. It states that any domestic organisation which does not comply with Article 24 will first be issued a warning, then have their activities suspended for 90 days, and if there is continued non-compliance, the Ministry of Interior shall remove it from the register.

The LANGO also prohibits both domestic associations and NGOs, under Article 30(3), and foreign associations and NGOs, under Article 35, from conducting activities that adversely affect "security, stability and public order" or that "harm security, stability, and public order, or endanger the national security, national unity, culture, good traditions and customs of Cambodian national society." The broad wording of these provisions could easily encompass legitimate expression made by associations and NGOs, for example, commenting on political events or criticising government action. This is particularly concerning for CSOs working in the field of human rights and the rule of law.[37] "National unity" and "good traditions and customs of Cambodian national society", being undefined in the law, are particularly open to subjective and discriminatory interpretation to serve political ends.

36 Narim, K., & Wright, G. (2016, 20 May). Rights Group Warned Over 'Political Prisoners' Page. *The Cambodia Daily*. www.cambodiadaily.com/archives/rights-group-warned-over-political-prisoners-page-112823

37 As noted by then Special Rapporteur on the Situation of Human Rights in Cambodia, Surya Subedi, following a visit to Cambodia in 2014, in relation to the (then draft) LANGO and draft Cybercrimes Law, "Any laws regulating freedom of expression online and the formation and operations of associations and NGOs are necessarily a direct concern for civil society." Subedi, S. (2014, 24 June). Press Statement. cambodia.ohchr.org/sites/default/files/pressstatementsource/SR_statement24062014_Eng.pdf

CASE STUDY: THE "SITUATION ROOM"

A loose and ad hoc coalition of NGOs known as the "Situation Room", which was formed to monitor the 2017 Commune Council elections, was threatened with legal action under the LANGO. On 4 July 2017, the Interior Ministry issued a letter to the Situation Room ordering it to cease its activities in alleged violation of the neutrality requirement of the LANGO.[38]

Article 30 (3) provides for sanctions in case of breaches of Article 35, entailing a penalty of deregistration for domestic associations and NGOs. Article 35 entails a penalty of termination of the memorandum of understanding for foreign associations and NGOs. Deregistration is the ultimate form of limitation of expression for associations, because, according to Articles 9 and 12 of the LANGO, all NGO activities are prohibited unless the NGO is registered.

Law on the Election of Members of the National Assembly (LEMNA)

The LEMNA contains numerous restrictions on freedom of expression linked to electoral campaigns, which could be applied to online activities.

Article 71 restricts political parties and candidates or supporters from making verbal remarks or written statements that are "immoral" or that "insult" candidates, their supporters or any person. This provision is vague and could therefore lead to abuses. Simply disagreeing with a political party could be characterised as "insult".[39]

Article 72 states that electoral campaigns can only occur during a 21-day period and must stop 24 hours before the polling day. There is no reason given in the law for this restriction of freedom of expression, and campaign activities outside the sanctioned period could be subject to punishment.

Political neutrality of NGOs is also enforced in the LEMNA. Articles 84 and 137 rule that organisations, both local and international, as well as all foreigners, must be "neutral and impartial" in the elections. Furthermore, Article 84 lists a number of direct or indirect activities that are prohibited

38 Sokhean, B., & Paviour, B. (2017, 5 July). Interior Ministry Issues Stop-Order to Situation Room NGOs. T*he Cambodia Daily. ww*w.cambodiadaily.com/news/interior-ministry-issues-stop-order-to-situation-room-ngos-132133

39 European Union Follow-up Mission to Cambodia. (2015). *Final Report*. eeas.europa.eu/sites/eeas/files/efm_cambodia_2015_final_report_publ.pdf

for local and international organisations, including "releasing a statement or doing any activities with the aim of supporting or showing bias towards or against a political party or candidate." There is no similar provision for government employees. Therefore, any activity could be seen as a violation of the law even if it is not intended to support a party. For instance, Article 84 of the LEMNA could be interpreted by the authorities to mean that monitoring groups commenting on elections violate the requirements of impartiality and neutrality.

Article 85 prohibits foreigners from "carrying out direct or indirect activities in the election campaign to support or oppose a political party." This restricts the activities that foreigners can be involved with around the election period and restricts their freedom of expression regarding political parties or candidates. Once again, the vagueness of this provision could lead to abuses. Terms like "indirect" or "foreigners" are indeed not defined.

Articles 140 to 161 state the penalties for the various violations of the LEMNA. A violation of Article 84 leads to the removal of the responsible person from the voter lists for five years (Article 147). A violation of Article 85 leads to the deportation of the foreigner who expressed his/her opinion (Article 149). Article 152 outlines high penalties (five million to 10 million riels – USD 1,200 to USD 2,400) for "any person who [...] publicly insults a political party or a candidate running in the election." This is another example of how the law may be abused to sanction legitimate criticism of a party, policy or candidate.

Law on Political Parties (LPP)

The LPP contains multiple undue restrictions on freedom of expression, many of which appear to apply in the online sphere.

Article 6 of the LPP prohibits political parties from "caus[ing] secession that leads to the destruction of national unity and territorial integrity", "subvert[ing] the liberal multiparty democracy and the constitutional monarchy", "affect[ing] the security of the state", "recruit[ing] armed forces" and "incitement that would lead to national disintegration."[40] Terms such as "subversion", "incitement", "destruction", "integrity" and "disintegration" are undefined. They are vague, unquantifiable and subjective and therefore leave the provisions open to arbitrary interpretation.

In March and July 2017, the National Assembly passed two separate amendments to the LPP. Both these amendments received widespread criticism from human rights organisations due to their severe and unjustifiable restrictions on freedom of expression and other fundamental freedoms. Many of the amended provisions apply to the online space, as they regulate the types of images and symbols which can be used by political parties, and they further invoke severe sanctions – including suspension and dissolution – for political parties that communicate with any individual who has committed any misdemeanour or felony at any point in their lives.

The first amendments to Article 6 of the LPP state that political parties should not:

> (6) Use [...] voices, messages, images, written documents or activities of a person convicted of felony or misdemeanor for political gains/interests of its party.
>
> (7) Openly or tacitly agree or conspire with a person convicted of felony or misdemeanor to carry out any activities for political gains/interests of its party.
>
> (8) Support or develop any plans or conspire with any individuals who carry out activities aiming at opposing the interest of the Kingdom of Cambodia.

These amendments drastically expand the scope of Article 6 and further burden the right to freedom of expression. The provisions are excessively broad and unpredictable. They exacerbate the ambiguous nature of Article 6. For example, Article 6(7), by prohibiting the "tacit" agreement of a political party with the supportive statement of any convicted person, could entail the dissolution of a political party unless it dissociates itself from every convicted person who expresses support for the party online, every time such support is expressed. This would likely be practically impossible to enforce; and in fact, many observers have commented that the two amendments were introduced purely to target former opposition leader Sam Rainsy.

The amended LPP also introduced new articles, including Articles 11 and 45. Article 11 (3) states that "[t]he symbol/logo of a political party should not be copied or taken from a national symbol or picture representing a religion, Angkor Wat temple or pictures of sculptures of all Khmer Kings or the picture of a physical person." The prohibition on the use of "the picture of a physical person" constitutes an excessive and unjustifiable restriction on freedom of expression. Banning all images of all individuals from political

40 CCHR. (2017). *Legal analysis of the July 2017 proposed amendment to the LPP*. cchrcambodia.org/admin/media/analysis/analysis/english/2017-07-19-CSO-ssubmit-Legal-Analysis-of-Proposed-Amendment-to-LPP-to-CC_ENG.pdf

party symbols does not serve any legitimate aim, such as public health or national security, as outlined in Article 19 (3) of the ICCPR. As such, this provision constitutes an impermissible restriction on freedom of expression.

CASE STUDY: SAM RAINSY

In February 2017, the opposition leader, Sam Rainsy, resigned as president of the CNRP in the face of threats by Prime Minister Hun Sen to pass an earlier amendment to Article 6 of the LPP. This amendment barred convicts from political leadership and dissolved parties led by individuals convicted of crimes by Cambodia's courts.[41] Sam Rainsy was sentenced numerous times since he left Cambodia in November 2015. He had to resign to avoid the possible dissolution of the CNRP, just months ahead of the Commune Council elections.

Trade Union Law (TUL)

The TUL severely restricts the freedom of expression of workers and trade unions by limiting the scope of their legitimate activities. It is likely that these provisions apply to online speech, though there have not yet been any relevant cases to verify this.

Article 65(f) provides that it is unlawful for a union "to agitate for purely political purposes or for their personal ambitions or committing acts of violence at the workplace and other places."[42] Unions have long been legitimate centres of political activity; indeed their key objectives of protecting and promoting the rights of workers will inevitably entail engagement with political issues, institutions and processes. Similarly, regardless of the moral or social merits of "personal ambitions", it cannot seriously be argued that they should render a union's activities unlawful. The subjective and broad nature of these terms also means that they could easily be abused by authorities to characterise a union leader's social media commentary as unlawful.[43] Further, Article 71 considers as "interference, incitement or interruptions" acts by which minority unions demand to express their views.[44]

Anti-Corruption Law

The Anti-Corruption Law contains numerous provisions which restrict the right to freedom of expression.

The law not only fails to provide a legal framework for the physical and legal protection of individuals who blow the whistle on corrupt practices; in fact, Article 41 creates a criminal offence if "defamation or disinformation complaints [...] lead to useless inquiry."[45] Such an offence is subject to serious penalties: imprisonment from one to six months and a fine from one million riels (USD 240) to 10 million riels (USD 2,400). "Useless inquiry" is not defined in the law, and there is no requirement of intention in relation to a false complaint. It is therefore unclear whether an incorrect complaint, rather than a deliberately false one, constitutes an offence under the law. These provisions, and the lack of certainty as to how they will be interpreted, are likely to instil fear in people, and therefore act as deterrents to those who might come forward with information about corruption.[46]

The Anti-Corruption Law also gives significant and unchecked surveillance powers to the Anti-Corruption Unit (ACU). According to Article 27 of the law, the ACU is authorised to "monitor, oversee, eavesdrop, record sound and take photos, and engage in phone tapping" where there is a "clear hint of corruption." It is also authorised to "check documents and documents stored in the electronic system." This means that the subjective interpretation of a "hint" of corruption could open an individual's private communications to scrutiny and monitoring.

Law on the Press (Press Law)

The Press Law contains many vague provisions which restrict the right to freedom of expression, not only of journalists, but also of newspaper

41 Naren, K. (2017, 11 February). Sam Rainsy Resigns as Opposition Party President. *The Cambodia Daily*. www.cambodiadaily.com/morenews/sam-rainsy-resigns-opposition-party-president-124975

42 Trade Union Law (2016). English translation referenced from: sithi.org/admin/upload/law/trade_union_law_eng.pdf

43 CCHR. (2016). *Trade Union Law 2016 (the "TUL")*. cchrcambodia.org/admin/media/factsheet/factsheet/english/2016_08_24_cchr_fs_lcs_trade_union_law_ENG.pdf

44 For more detailed analysis of this and other provisions of the TUL, see: Office of the United Nations High Commissioner for Human Rights in Cambodia. (2016). *A Human Rights Analysis of the Draft Law on Trade Unions*. cambodia.ohchr.org/~cambodiaohchr/sites/default/files/FINAL%20OHCHR%20Analysis%20on%20Trade%20Union%20Law-%20En%20%20FOR%20NA%20SUBMISSION.pdf and International Center for Not-for-Profit Law. (2015). *Analysis of Draft Trade Union Law*. www.icnl.org/programs/asia/ICNL%20Legal%20Analysis_TradeUnionLaw.pdf

45 Anti-Corruption Law (2010). English translation referenced from: sithi.org/admin/upload/law/National%20Assembly_Feb%2024,2010_Draft%20Law%20on%20Anti-Corrution%20in%20Eng.pdf

46 CCHR. (2011). *Law on Anti-Corruption*. cchrcambodia.org/admin/media/factsheet/factsheet/english/CCHR%20Fact%20Sheet%20-%20Law%20Review%20Series%20-%20The%20Anti-Corruption%20Law%202010%20(ENG).pdf

owners, editors and publishers working within the media.

For instance, while Article 20 claims to guarantee freedom of expression, no indication or guidance is given as to what would constitute the expression of a protected opinion as opposed to an act of defamation or libel, which means that the effectiveness and reliability of this carve out is unfortunately compromised due to the loose drafting of the provision.[47]

Moreover, the Press Law imposes content restrictions in relation to anything which "may affect the public order by inciting directly one or more persons to commit violence" (Article 11) or which "may cause harm to the national security and political stability" (Article 12) or which affects "the good custom of society" (Article 14). The Press Law also constrains criticism of public officials and institutions by providing that "[t]he press shall not publish or reproduce false information which humiliates or contempts national institutions" (Article 13).[48]

These terms remain undefined and therefore undermine the scope of Article 1, which, as stated earlier, takes a protective approach. They are potentially problematic because they involve high financial sanctions and, in the case of Article 12, the possibility for the Ministries of Information and Interior to suspend publications for up to 30 days, without any recourse to appeal.[49]

Law on Education (Education Law)

Article 34 of the Education Law states: "Educational institutions and establishments shall respect the principles of neutrality. Political activities and/or propaganda for any political party in educational establishments and institutions shall be completely banned." It is unclear whether this provision applies to online activity, although it can be assumed that it does, based on the general trend of laws in Cambodia restricting expression being applied online despite lacking any overt mention of online activity.

This provision, by preventing political groups from organising events or conducting activities in educational contexts, and preventing the formation of political groups in educational institutions and establishments, constitutes a severe restriction on freedom of expression. Vague terms like "neutrality" and "propaganda" can be used to target activities by groups not aligned with or deemed not supportive of the ruling party. It is worth highlighting that, in practice, Article 34 does not apply equally to all political parties.

Article 52 outlines high penalties for violations of Article 34. The fine is normally between one million riels (USD 240) and five million riels (USD 1,200); it will be doubled in the case of a repeat violation. Article 52 also outlines larger and more punitive sanctions for legal entities: the fine will be between 10 and 20 million riels (USD 2,400 and USD 4,800); this amount will be doubled in the case of a repeat violation. For educational institutions, nevertheless, a recidivous violation will lead to the suspension or the permanent revocation of the educational licence of the establishment.

In addition, the "Instruction on preventing political activities or political propaganda at public and private academic institutions" (also known as the Education Circular) – a form of secondary law which outlines in greater detail the scope of the Education Law – provides that the fines established in the Education Law[50] for violation of Article 34 apply to academic staff, in addition to educational institutions, as already provided for in the law, adding a further restriction on individual freedom of expression.

Article 42 deals with advertising or propagandising educational information. It gives significant powers to the Ministry of Education, Youth and Sport (MoEYS), which is in charge of authorising such information. Article 53 outlines severe penalties for violations of Article 42. The fine is normally between two million riels (USD 480) and 10 million riels (USD 2,400); it will be doubled in the case of a repeat violation and may lead to the suspension or the cancellation of the educational licences of educational institutions or establishments.

Education Circular

On 11 August 2015, the MoEYS published an Education Circular which goes beyond the text of the Education Law to impose additional restrictions on the freedoms of expression and association in an educational context. It appears to directly contradict the rights guarantees contained in Articles 35 and 37 by imposing a sweeping ban on freedom

47 CCHR. (2012). *An overview of Cambodian laws relating to freedom of expression and a summary of recent case examples to show how laws are used and abused to stifle dissent*. cchrcambodia.org/admin/media/analysis/analysis/english/2012_10_30_CCHR%20Briefing%20Note%20_%20Cambodian%20laws%20relating%20to%20freedom%20of%20expression%20and%20recent%20case%20examples%20-%20ENG.pdf

48 Sopheap, C. (2015, 19 February). Cambodia: a long way towards freedom of expression. *WACC*. www.waccglobal.org/articles/cambodia-a-long-way-towards-freedom-of-expression

49 CCHR. (2011). *The Law on the Press 1995 ("the Press Law")*. cchrcambodia.org/admin/media/factsheet/factsheet/english/CCHR Fact Sheet Law Review Series - Press Law (ENG).pdf

50 Law on Education (2007). English translation referenced from: www.moeys.gov.kh/images/moeys/laws-and-regulations/48/EducationLaw-EN.pdf

of association in the context of educational institutions and establishments.

Article 1 of the Education Circular states: "Associations, NGOs or any agencies are not allowed to conduct any activities at the educational institutions without the permission from the Ministry of Education, Youth and Sport." Therefore, the Education Circular provides a greater restriction upon the right to freedoms of expression and association than contained within the Education Law. Whereas the Education Law allowed for associations and NGOs to conduct "neutral" activities at educational institutions, there is now a blanket ban on all activities carried out by any NGO, association or agency unless permission has been granted by the MoEYS.

Any restriction on the freedoms of expression and association must be prescribed by law, necessary and proportionate. The Education Circular effectively imposes a complete restriction on freedom of association in educational institutions, subject to permission from the MoEYS. The Circular is vaguely drafted and restricts a wide range of persons and activities. Thus, in addition to limiting CSOs that wish to conduct activities in educational institutions, it will also apply more broadly; for example, to students wishing to form associations or societies.

Circulars are lower down in the hierarchy of Cambodia's legal framework. They are ministerial implementing measures, and thus are designed to organise the implementation of other legislation, rather than to create new law. As a restriction on a constitutionally protected fundamental freedom, and given that the Circular appears to be inconsistent with the Education Law itself, it is unclear whether the measures provided for in the Education Circular are valid in the domestic legal order, adding a further lack of clarity to the legal framework governing freedom of expression and freedom of association.

Law on the Denial of Crimes Committed During Democratic Kampuchea (Denial Law)

The Denial Law states that anyone who refuses to recognise, denies, opposes the existence of or promotes the crimes committed during the Khmer Rouge era could face up to two years imprisonment and up to four million riels (USD 1,000) in fines.[51] It is likely that this law also applies to the online space, though there are no cases to confirm this assumption.

The Denial Law is contrary to provisions protecting freedom of expression under both domestic and international law. Education, debate, discussion and research into the Khmer Rouge era are essential in helping the country to move on and to prevent similar events from reoccurring. A law aiming at restricting opinions and debate about the crimes perpetrated by the Khmer Rouge could potentially stifle such invaluable discussion. Furthermore, the Denial Law could be used for political purposes to control the historical narrative surrounding the Khmer Rouge – which is particularly problematic given that many figures in the current Cambodian government were themselves Khmer Rouge commanders and officials.[52]

Law on Access to Information

The right to information is crucial for the protection of other human rights like the freedom of expression. As stated by the UN General Assembly during its first session in 1946, "freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."[53]

The Draft Law on Access to Information contains important restrictions on the right to information.

According to Article 20 of the Draft Law, any information that would (1) damage Cambodia's national security and public order, (2) affect international relations, (3) threaten the economy or finances, or (4) affect case files or confidentialities of the court, could be withheld from the public. Public institutions may also deny providing information to the public if the disclosure of such information would (5) violate the personal privacy of individuals, (6) endanger law enforcement agencies and their missions, or (7) be harmful to legal documents and other prohibitive provisions on confidential information.

The Draft Law gives examples of which types of information would be considered confidential. It mentions civil servants' cases, health-related cases and case files of private rights litigation. This list is not limited and could therefore be interpreted broadly. These provisions are vague and could be misused to prevent the disclosure of a wide range of information.[54]

51 Freeman, J. (2014, 6 June). KR denial law sees no cases in 1st year. *The Phnom Penh Post*. www.phnompenhpost.com/national/kr-denial-law-sees-no-cases-1st-year

52 CCHR. (2013). CCHR expresses grave concern relating to the potential impact of a Khmer Rouge crimes denial law on Freedom of Expression in Cambodia. cchrcambodia.org/media/files/press_release/391_20ocpcecrtpkrcdle_en.pdf

53 UN General Assembly. (1946, 14 December). Calling of an International Conference on Freedom of Information. A/RES/59. www.refworld.org/docid/3boof0975f.html

54 Turton, S. (2015, 10 June). Officials' affairs may be secret under law. *The Phnom Penh Post*. www.phnompenhpost.com/national/officials-affairs-may-be-secret-under-law

Curtailment of freedom of expression

Criminal Code

The Criminal Code is increasingly used to curb freedom of expression, and provides for heavy and disproportionate punishments for violators. While there is no mention of online speech in the Criminal Code, case studies show that provisions used to limit freedom of expression are applicable in the online world. These provisions can be classified in various categories, outlined below.

Defamation and related offences

Provisions on defamation are often invoked to target opposition figures or those critical of the government. In March 2017, the ASEAN Parliamentarians for Human Rights (APHR) warned that "criminal trials over cases of alleged defamation have become prevalent and normalized."[55]

Article 305 outlines the definition of public defamation: "Any allegation or charge made in bad faith which tends to injure the honour or reputation of a person or an institution."[56] This article provides for infringements on freedom of expression by not requiring an actual harm to an individual's honour or reputation but by stating that a charge only needs to tend to harm reputation and honour.[57] Moreover, the commission of the offence merely requires that the defamation be made by means of "any words whatsoever uttered in a public place or in a public meeting." This implies that individuals may be prosecuted for private conversations.

Defamation is punished by a fine of 100,000 to 10 million riels (USD 24 to USD 2,400). Many Cambodians would not be able to pay a heavy fine, which would lead to their imprisonment for 10 days to two years (Article 525 of the Cambodian Code of Criminal Procedure).

The blanket criminalisation of all forms of defamation is not consistent with international human rights standards and best practices, and, in particular, the existence of such a broadly drafted criminal offence must be considered to be disproportionate. While defamation laws can be a permissible restriction on freedom of expression to protect the reputation of others, the UN Human Rights Committee has made clear that such laws must not in practice stifle freedom of expression, that they should include defences such as truth and public interest in the subject of criticism, and that application of the criminal law should only be permitted in the most serious cases.[58] In its General Comment No. 34 (2011) on Article 19 of the ICCPR (Freedoms of opinion and expression), the Human Rights Committee further called on ICCPR states parties to "consider the decriminalization of defamation" and noted that "the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[59] It is worth mentioning that on 21 April 2006, the RGC removed the custodial sentence of eight days to one year for defamation under Article 63 of the 1992 Criminal Law, commonly known as the UNTAC Law.[60]

CASE STUDY 1: SAM RAINSY

On 28 July 2016, the Cambodian opposition leader Sam Rainsy was convicted of defamation against National Assembly President Heng Samrin and ordered to pay USD 37,500 in compensation. Mr. Rainsy had posted on Facebook a video clip of a speech by former King Norodom Sihanouk in the early 1980s. Under the video clip, you could read: "We remember that the regime born on 7 January 1979 used their tribunal to sentence our late King Norodom Sihanouk to death by accusing him of being a traitor."[61] On 27 December 2016, Rainsy was convicted of forgery and incitement in relation to this case and was sentenced to five years in prison.[62]

55 ASEAN Parliamentarians for Human Rights (APHR). (2017). *Death Knell for Democracy*. aseanmp.org/wp-content/uploads/2017/03/APHR_Cambodia-MPs-Report_Mar-2017.pdf

56 Criminal Code (2009). English translation referenced from: sithi.org/admin/upload/law/Criminal_Code_Book_with_cover_Jan_2014.pdf

57 CCHR. (2014). *The criminalization of defamation and freedom of expression in Cambodia*. cchrcambodia.org/admin/media/analysis/analysis/english/2014_05_27_CCHR_Briefing_Note_Defamation_in_Cambodia_(ENG).pdf

58 UN Human Rights Committee. (2011, 12 September). Op. cit.

59 The UN Human Rights Council's recommendation in the Report of the Working Group on Cambodia's second Universal Periodic Review (A/HRC/26/16, 27 March 2014) that Cambodia "Repeal or amend relevant articles of the Penal Code, such as those regarding defamation or the discrediting of judicial decisions, which would bring Cambodia's domestic legislation into line with its international human rights obligations on freedom of expression" was noted, but not accepted, by the Cambodian government. See "Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review", A/HRC/26/16/Add.1. www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A.HRC.26.16.Add.1_AV.doc

60 Asian Human Rights Commission. (2006, 24 April). CAMBODIA: New law removes custodial sentence for defamation but restricts freedom of expression. www.humanrights.asia/news/ahrc-news/AS-078-2006

61 Khmer Times. (2016, 28 July). Rainsy Fined For Defamation *Khmer Times*. www.khmertimeskh.com/news/27778/rainsy-fined-for-defamation

62 Sovuthy, K. (2016, 28 December). Jail Time Piles Up for Sam Rainsy. *The Cambodia Daily*. www.cambodiadaily.com/news/jail-time-piles-sam-rainsy-122536

On 8 November 2016, Rainsy was found guilty of defamation after posting on Facebook that Prime Minister Hun Sen's Facebook likes were bought from "click farms" in India and the Philippines.[63]

CASE STUDY 2: KEM LEY

Political commentator and activist Kem Ley was assassinated on 10 July 2016 at a petrol station in Phnom Penh. Since then, several people have been charged and convicted for accusing the Cambodian government of being responsible for his death.
In November 2016, opposition Senator Thak Lany was convicted of defamation and incitement *in absentia* and sentenced to 18 months in prison for alleging that Prime Minister Hun Sen was behind the assassination of Kem Ley. The offending remarks were made in a video – later uploaded to Facebook – of a speech to party supporters in Ratanakkiri province.[64]
In February 2017, political commentator Kim Sok was arrested under charges of defamation and incitement after having made comments in an interview with Radio Free Asia, in which he accused the government of being involved in the death of Kem Ley.[65]
In March 2017, Sam Rainsy was found guilty of defamation and incitement for stating in a Facebook post that the death of Kem Ley was "state-backed terrorism."[66] He was given a 20-month sentence and a fine of 10 million riels (USD 2,400). The Appeal Court upheld the sentence on 11 August 2017.[67]

Defamation is accompanied by a plethora of other offences in the Criminal Code, which severely limit the right to freedom of expression, and almost completely undermine the government's removal of the custodial sentencing for defamation. In practice, defamation is often coupled with complementary charges, which do carry custodial sentences.

Article 307 (Public Insult) makes it a crime subject to the same penalties as the offence of defamation to use any "[o]utrageous expression, term of contempt or any invective that does not involve any imputation of fact." Like under Article 305, the commission of the offence requires that the insult be made by means of "any words whatsoever uttered in a public place or in a public meeting." This implies that individuals may be prosecuted for private conversations.

Article 502 (Insult of a Public Official) criminalises individuals whose words, gestures, written documents, pictures or objects are held to undermine the dignity of a public official or "holder of public elected office", while Article 523 criminalises any criticism of court decisions which is said to be aimed at "disturbing public order" or "endangering an institution" of Cambodia.[68] Violators of Article 502 are subject to punishments of one to six days imprisonment and a fine from 1,000 riels (USD 0.2) to 100,000 riels (USD 24). Violators of Article 523 are subject to punishment of one to six months imprisonment and a fine from 100,000 riels (USD 24) to one million riels (USD 240).

Article 311 penalises "malicious denunciation", which is defined as:

> The act of denouncing a fact that is known to be incorrect and it is so knowingly to result in criminal or disciplinary sanctions constitutes a slanderous denunciation, when it is addressed to: (1) a competent authorities, such as a judge, a judicial police officer, or an employer; (2) or a person with power to refer the matter to the competent authorities.

This provision limits freedom of expression by discouraging whistleblowers and those who may be critical of government or judicial actions, such as human rights defenders. The punishment for this offence includes imprisonment of between one month and one year and a fine of between 100,000 riels (USD 24) to two million riels (USD 480).

Article 42 of the Criminal Code is also noteworthy. It indicates that where expressly provided by law and/or statutory instruments, legal entities may be held criminally liable for offences committed on their behalf by

63 Titthara, M. (2016, 9 November). Rainsy Convicted of Defamation. *Khmer Times*. www.khmertimeskh.com/news/31841/rainsy-convicted-of-defamation

64 Sarom, K. (2017, 11 August). Court hears Thak Lany appeal defamation conviction. *The Phnom Penh Post*. www.phnompenhpost.com/national/court-hears-thak-lany-appeal-defamation-conviction

65 Odom, S. (2017, 17 February). Commentator Kim Sok Jailed Over Defamation, Incitement Charges. *The Cambodia Daily*. www.cambodiadaily.com/news/commentator-kim-sok-jailed-defamation-incitement-charges-125375

66 Chheng, N. (2017, 30 March). Sam Rainsy handed jail time in defamation case against PM. *The Phnom Penh Post*. www.phnompenhpost.com/national/sam-rainsy-handed-jail-time-defamation-case-against-pm

67 Odom, S. (2017, 11 August). Appeal Court Upholds 20-Month Sentence for Sam Rainsy. *The Cambodia Daily*. www.cambodiadaily.com/news/appeal-court-upholds-20-month-sentence-sam-rainsy-133552

68 CCHR. (2012). *An overview of Cambodian laws relating to freedom of expression and a summary of recent case examples to show how laws are used and abused to stifle dissent*. cchrcambodia.org/admin/media/analysis/analysis/english/2012_10_30_CCHR%20Briefing%20Note%20_%20Cambodian%20laws%20relating%20to%20freedom%20of%20expression%20and%20recent%20case%20examples%20-%20ENG.pdf

their organs or representatives. The criminal responsibility of the legal entity does not exclude the criminal responsibility of natural persons for the same acts. This provision is particularly relevant to advocacy NGOs, newspapers and political parties, as individuals accused of an offence can also be held liable, regardless of any charges brought against the legal entity itself.[69]

Incitement to commit felonies or discrimination

Article 495 (Incitement to Commit a Crime) and Article 496 (Incitement to Commit Discrimination), which do not on their face require a crime to actually take place as a result of the incitement in question, constitute unjustified restrictions of freedom of expression. Courts in Cambodia have the tendency to misuse incitement provisions to restrict certain legitimate advocacy activities.[70]

CASE STUDY 1: KONG RAYA

On 15 March 2016, university student Kong Raya was charged with incitement based on a post on his personal Facebook account, which called for a "color revolution in order to change the cheap regime running Cambodian society."[71] He was released on 23 February 2017 after serving an 18-month sentence.

CASE STUDY 2: SENATOR HONG SOK HOUR

On 7 November 2016, after 450 days of pre-trial detention, Senator Hong Sok Hour was convicted of forgery and incitement and sentenced to seven years imprisonment for displaying an allegedly fake border treaty between Cambodia and Vietnam in a video clip posted on the Facebook page of CNRP president Sam Rainsy.[72] Sam Rainsy, as well as two CNRP staffers who worked on his Facebook page, were convicted of being accomplices the following month.[73]

CASE STUDY 3: UM SAM AN

In October 2016, CNRP Member of Parliament Um Sam An was sentenced to two and a half years in prison for critical comments he made on Facebook about the government's demarcation of the Vietnam-Cambodia border. His comments were considered to constitute incitement.[74]

CASE STUDY 4: SOURN SEREY RATHA

On 13 August 2017, the president of the Khmer Power Party, Sourn Serey Ratha, was arrested after issuing a Facebook post criticising the deployment of Cambodian troops to the Laos border. Sourn Serey Ratha wrote in his post: "The Cambodian children in the army will die horribly on the battlefield, but their commanders will be promoted, collect money and have fun with girls."[75] On 15 August 2017, Sourn Serey Ratha was detained and charged with inciting soldiers to disobey orders.

CASE STUDY 5: KEM LEY

As stated before, since the murder of the political commentator and activist Kem Ley, several people were arrested and convicted of incitement for accusing the Cambodian government of being responsible for his death. For instance, in July 2017, the anti-terrorism police arrested a woman, Heng Leakhena, for linking Prime Minister Hun Sen and his family to the murder of Kem Ley during a Facebook Live broadcast. The video was made in Kem Ley's childhood home in Takeo province, where a ceremony was held for the first anniversary of the death of Kem Ley.[76] She was charged with incitement.

69 Ibid.

70 OHCHR. (2009, 6 October). Comments on certain provisions of the Penal Code in relation to international human rights standards. cambodia.ohchr.org/~cambodiaohchr/sites/default/files/OHCHR%20Comments%20on%20provisions%20of%20the%20Penal%20Code,%20En,%20Oct%202009.pdf

71 Sony, O., & O'Connel, T. (2016, 16 March). Student Gets 18 Months for Call for 'Color Revolution'. *The Cambodia Daily*. www.cambodiadaily.com/news/student-gets-18-months-for-call-for-color-revolution-109944

72 Chheng, N., & Turton, S. (2016, 8 November). Senator Sok Hour given seven years for forgery and incitement. *The Phnom Pen Post*. www.phnompenhpost.com/national/senator-sok-hour-given-seven-years-forgery-and-incitement

73 Odom, S. (2017, 30 June). Court Upholds Sok Hour, Rainsy Border Treaty Convictions. *The Cambodia Daily.* www.cambodiadaily.com/news/court-upholds-sok-hour-rainsy-border-treaty-convictions-131973

74 Sovuthy, K. (2016, 11 October). CNRP Lawmaker Guilty of Incitement for Facebook Posts. *The Cambodia Daily*. www.cambodiadaily.com/news/opposition-lawmaker-sentenced-facebook-posts-119092

75 Sokchea, M. (2017, 14 August). KPP head arrested for Facebook post criticising deployment of troops to Laos border. *The Phnom Penh Post*. www.phnompenhpost.com/national/kpp-head-arrested-facebook-post-criticising-deployment-troops-laos-border

76 Sokhean, B. (2017, 13 July). Woman Arrested for Linking Hun Sen to Kem Ley Murder. *The Cambodia Daily*. www.cambodiadaily.com/news/woman-arrested-for-linking-hun-sen-to-kem-ley-murder-132449

Offences related to judicial decisions and investigations

Articles 522 and 523 criminalise publication of commentaries intending to put pressure on a court and to criticise a court decision, respectively. Article 522 provides that "any publication, prior to the final decision of the court, of any commentaries aiming at putting pressure on the court where a law suit is filed, in order to influence over the decision of the court" is punishable with up to six months imprisonment and a fine of up to one million riels (USD 240). Article 523 provides for the same penalties for "any act of criticizing a letter or a court decision aiming at creating disturbance of public orders or endangering institutions of the Kingdom of Cambodia." These provisions create a real risk that they will be used abusively to harass and punish associations that legitimately seek to analyse, comment on and criticise judicial processes and decisions. In particular, for associations working in the field of human rights and the rule of law, large areas of their work could potentially fall within these vague and broadly drafted provisions, which are neither narrowly defined, transparent, nor easy to understand.

Regulations and guidelines

The Ministry of Culture's 2010 Code of Conduct aims at promoting the "preservation, maintenance of arts, culture, tradition and the identity of the nation" and at preventing "any negative effects of the arts and tradition of the nation."[77] The most recent version of the Code has 12 guidelines.[78]

The Ministry of Culture's Guidelines on Classification guide the Ministry in determining film ratings and whether or not a movie should be banned. One provision reads: "Movies which display lives of homosexual persons are clearly not in line with social values. Those movies should not promote or encourage homosexuality as appropriate."[79]

77 Soumy, P. (2017, 27 April). Gov't bans actress for a year for violating "Code of Conduct". *The Cambodia Daily*, www.cambodiadaily.com/news/govt-bans-actress-for-a-year-for-violating-code-of-conduct-128703

78 Sen David, S., & Maza, C. (2016, 28 September). Ministry's code of conduct for artists closer to reality. The Phnom Penh Post. www.phnompenhpost.com/national/ministrys-code-conduct-artists-closer-reality

79 Kijewski, L., & Meta, K. (2017, 9 May). Rules allowing censorship of depictions of homosexuality criticized. *The Phnom Penh Post*. www.phnompenhpost.com/national/rules-allowing-censorship-depictions-homosexuality-criticised

CASE STUDY: DENNY KWAN

In April 2017, the Cambodian actress Denny Kwan, who has more than 300,000 Facebook followers, was banned from appearing in any movie for a year. The Ministry of Culture found her clothes to have violated the 2010 Code of Conduct. She said she had only learned of the ban online.[80]

Summary and conclusion

Certain trends can be identified from the analysis of the different laws involved in the criminalisation of expression online and from their implementation. These trends indicate a common purpose: reducing the scope of the right to freedom of expression in Cambodia.

Deterrence

Laws in Cambodia deter people from exercising their freedom of expression. Two deterrence strategies are recurring:

- *Vague terms:* Laws in Cambodia often use broad and vague terms without defining them. Terms like "national security", "immoral", "public order" and "good customs of society" are subject to subjective and possibly arbitrary interpretation and threaten freedom of expression. Case studies indicate that these vague terms are consistently interpreted broadly and in a discriminatory manner. Such sweeping interpretations in turn deter individuals from exercising their freedom of expression.
- *High fines and prison sentences:* The exercise of freedom of expression in a way that violates Cambodian laws can lead to heavy fines and prison sentences. With the exception of Article 502 of the Criminal Code (Insult of a Public Official), which provides for a fine from 1,000 riels (USD 0.2) to 100,000 riels (USD 24) and a prison sentence from one to six days, the fines mentioned in this report go from 100,000 riels (USD 24)[81] to 300 million riels (USD 72,000)[82] and the prison sentences from 10 days[83] to 15 years.[84] With a minimum wage of USD 153/month in 2017 in Cambodia,[85] most Cambodians

80 Soumy, P. (2017, 27 April). Op. cit.

81 See, for example, Articles 93 and 97 of the Law on Telecommunications.

82 See Articles 80 and 81 of the Law on Telecommunications.

83 See Article 525 of the Cambodian Code of Criminal Procedure.

84 See Articles 80 and 81 of the Law on Telecommunications.

85 tradingeconomics.com/cambodia/minimum-wages

would not be able to pay a heavy fine, which could lead to their imprisonment for up to two years according to Article 525 of the Cambodian Code of Criminal Procedure. The severity of this punishment combined with the vagueness of the offences are likely to deter people from exercising their freedom of expression.

Neutrality

The principle of neutrality appears in the LEMNA, the LANGO, the LPP and the Education Law. The neutrality restriction is valid on its face, but its vagueness can lead to abuses. In the name of neutrality, the government could decide to regulate only certain topics or viewpoints. In practice, it can be seen that these provisions are never used in respect of the ruling CPP, but rather they are applied to target opposition parties as well as independent civil society groups, who are painted as pro-opposition by the government.

State control

Having long ago exerted its control over the traditional media, the RGC is progressively extending its control over the internet as well. The Law on Telecommunications contains new surveillance powers for the RGC (embodied by the MPTC), which represent a troubling trend towards suppressing the freedoms of individuals in exchange for an increase in state control. The draft Cybercrime Law would only exacerbate this trend.

State control is becoming the norm. For example, according to a report from July 2017 by the National Police Chief Neth Savoeun at police headquarters in Phnom Penh, the National Police are monitoring Facebook to repress attempts to create a "rebel movement against the government" through negative posts and are working to better control civil society groups that have "opposition trends" and try to cause instability in society.[86]

Targeting of high-profile individuals and human rights defenders

There is little evidence of a desire on the part of the Cambodian government to implement laws which criminalise expression on a systematic basis. Rather, targeted prosecutions of high-profile individuals and human rights defenders are preferred, in order to retain political control and to act as a deterrent for the general public. The government is aware of the prominent role these individuals play in mobilising people against human rights violations. Therefore, it imposes restrictions on freedom of expression to silence its most outspoken critics.

86 Dara, M. (2017, 25 July). Cambodia's Facebook crackdown: Police are monitoring site for 'enemies' and 'rebel movements'. *The Phnom Penh Post*. www.phnompenhpost.com/national/cambodias-facebook-crackdown-police-are-monitoring-site-enemies-and-rebel-movements

GLOBAL INFORMATION SOCIETY WATCH 2017 SPECIAL EDITION

UNSHACKLING EXPRESSION:
A study on laws criminalising expression online in Asia

Freedom of expression and opinion online is increasingly criminalised with the aid of penal and internet-specific legislation. With this report, we hope to bring to light the problematic trends in the use of laws against freedom of expression in online spaces in Asia.

In this special edition of GISWatch, APC brings together analysis on the criminalisation of online expression from six Asian states: Cambodia, India, Malaysia, Myanmar, Pakistan and Thailand.

The report also includes an overview of the methodology adapted for the purposes of the country research, as well as an identification of the international standards on online freedom of expression and the regional trends to be found across the six states that are part of the study. This is followed by the country reports, which expound on the state of online freedom of expression in their respective states.

With this report, we hope to expand this research to other states in Asia and to make available a resource that civil society, internet policy experts and lawyers can use to understand the legal framework domestically and to reference other jurisdictions.

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