

Mandate of the Special Rapporteur on the situation of human rights in Cambodia

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Excellency,

I have the honour to address you in my capacities as Special Rapporteur on the situation of human rights in Cambodia, pursuant to Human Rights Council resolutions 36/32.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the draft amendments to the Constitution and to the Criminal Code, which were adopted by the Council of Ministers and submitted to the National Assembly on 2 February 2018. I am concerned that several of the proposed amendments may unnecessarily and disproportionately restrict the right to freedom of expression.

According to the information received:

On 1 December 2017, Samdech Sar Kheng, Minister of Interior, signed a decision to form a working group tasked with preparing the draft constitutional amendments. The 12-member working group was chaired by the Ministry of Justice. The other three vice-chairs and eight members were high-ranking officials from the Ministry of Interior, Ministry of Justice and the Council of Ministers.

On 2 February 2018, the Council of Ministers adopted amendments to five articles of the Constitution, several provisions of the Law on the Constitutional Council and the inclusion of a new chapter to the Criminal Code on "Insulting the King".

On 14 February 2018, the amendments are due to be discussed by the National Assembly.

Constitutional amendments

Article 34

The current phrase in article 34 reads as follows:

Provisions restricting the right to vote and the right to stand for elections shall be determined by the Electoral Law.

The proposed amendment is as follows:

*Provisions **disenfranchising** the right to vote and the right to stand as candidates for the elections shall be **set** by the law.*

The proposed amendment to article 34 effectively permits the withdrawal of the right to vote and to be elected under certain circumstances, rather than simply restricting the right as is currently established. The removal of the reference to the electoral law leaves the medium of the disenfranchisement to be determined. The reference to ‘the law’ is clearly broader than the Electoral Law and could leave open the possibility of restricting human rights through, for example, the introduction of sub-legislation.

In its General Comment No. 25 on article 25, the Human Rights Committee established that the exercise of the rights of every citizen to take part in the conduct of public affairs, the right to vote and to be elected may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.

The broad terminology of the amendment leaves open the possibility that the suspension or exclusion of the right to vote might be based on grounds which are neither objective nor reasonable. Furthermore, the exclusion of persons standing for election could potentially be based on unreasonable or discriminatory requirements, including discrimination on the basis of political affiliation.

Articles 42 and 49

The following additions to the constitution are proposed.

Political parties shall primarily uphold the national interest and shall not conduct any activities which either directly or indirectly affect the interests of the Kingdom of Cambodia and of Khmer citizens (article 42).

Every Khmer citizen shall primarily uphold the national interest and shall not conduct any activities which either directly or indirectly affect the interests of the Kingdom of Cambodia and of Khmer citizens (article 49).

First, it is important to mention that the current wording of the proposed amendment to article 42 could effectively deny political parties the essence of their existence. By definition, the conduct of a political party affects the interests of citizens and that of the country in which they are situated. The current wording could therefore potentially be used to deny a political party its very *raison d’être*.

More generally, the proposed additions to articles 42 and 49 contain vaguely worded provisions that could lead to an extremely broad interpretation and application of the Constitution and thus limit the legitimate rights of people, as exercised either through political parties or individually. The right to freedom of expression could be particularly affected. In this regard, any restriction to freedom of expression needs to be judged against three criteria in order to be deemed permissible: necessity, proportionality and the

restriction must be provided by law. And although permitted, these restrictions ‘may not put in jeopardy the right itself’.

In its General Comment No. 34 on Freedoms of opinion and expression (CCPR/C/GC/34), the Human Rights Committee stated that States parties to the ICCPR are required to guarantee the right to freedom of expression, including inter alia ‘political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism’, subject only to admissible restrictions (see above) as well as the prohibition of propaganda for hatred and incitement to hatred, violence and discrimination.

In its General Comment No. 25 on Participation in Public Affairs and the Right to Vote (CCPR/C/21/Rev.1/Add.7), the Human Rights Committee established that ‘[i]n order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.’ It requires the full enjoyment and respect for the rights and freedoms to ‘engage in political activity individually or through political parties and other organizations, to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.’

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights state that national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order, or as a pretext for imposing vague or arbitrary limitations. It may only be invoked to protect the existence of the nation or its territorial integrity or political independence against force or threat of force, and where there are adequate safeguards and effective remedies against abuse.

For these proposed constitutional amendments to be in accordance with the applicable international standards, they would need to be elaborated with further precision, particularly the terms ‘primarily uphold the national interest’, ‘any activities’ and ‘directly or indirectly affect the interests of the Kingdom of Cambodia and of Khmer citizens.’ With regard to the term “national interest”, the Human Rights Committee has established that, ‘the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights....’

Article 53

The proposed amendment to article 53 reads as follows:

The Kingdom of Cambodia absolutely opposes any interference from abroad conducted through any forms into its own internal affairs.

The inclusion of the term ‘interference’ in article 53 should be clearly defined, to avoid its subjective interpretation and application and thus the limitation of people’s rights beyond the narrow restrictions permitted by international human rights law.

Addition of a new chapter in the Criminal Code

With regard to the amendments to the Criminal Code establishing the crime of ‘Insulting the King’, the draft includes a punishment from one to five years in prison and a fine of two to 10 million Riels for any ‘speeches, gestures, writings, paintings or items that affect the dignity of individual person’. Additionally, it states that legal entities may be found criminally responsible for this offence as well, setting out a long list of penalties, aside from a fine. These include dissolution, placement under judicial supervision, prohibition from carrying out activities, closure, confiscation of funds, property, etc., as well as the publication of the decision in the media.

In its General Comment No. 34, the Human Rights Committee stated that the harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19. ‘Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, *lèse majesté*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.’

On *lèse majesté* provisions in Thailand (CCPR/C/THA/CO/2), the Human Rights Committee has expressed concern that criticism and dissent regarding the royal family is punishable with a prison sentence. In its Concluding Observations on Kuwait (CCPR/C/KWT/CO/3), it expressed concern about ‘...the application of restrictive, vague and broadly worded provisions to prosecute activists, journalists, bloggers and other individuals for expressing critical views or views deemed to ‘insult’ the Emir...’. In both cases, it asked the State Parties to review its legislation to bring it in line with article 19 of the International Covenant on Civil and Political Rights.

The process of discussing and adopting the amendments and lack of participation

In addition to the substantive issues addressed above, I am also concerned that the draft amendments were only made available after they had been submitted to the National Assembly, and that no consultation process has taken place or is scheduled to take place before their adoption. According to the Human Rights Committee’s General Comment

No. 25, citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives. As such, and following the principle of participation, the contents of proposed legal amendments should be made accessible not only to those directly concerned, but to the general public. In addition, the public should also have the possibility of freely debating the amendments and having their say on their adoption. Such consultation is of particular significance when amending the constitution. It is a matter of particular concern, considering the fact that the National Assembly currently comprises unelected representatives, following the redistribution of the seats of the dissolved CNRP to unelected members of other parties.

Freedom of expression and Cambodia

In conclusion, I wish to refer to the concluding observations of the Human Rights Committee to the Royal Kingdom of Cambodia in relation to its implementation of article 19 of the International Covenant on Civil and Political Rights in 2015. The Committee recommended that the Government ‘...ensure that everyone can freely exercise his or her right to freedom of expression and association, in accordance with articles 19 and 22 of the Covenant and the Committee’s general comment No. 34 (2011) on freedoms of opinion and expression.’

The Committee also recommended that Cambodia refrain from prosecuting journalists, human rights defenders and other civil society actors as a means of deterring or discouraging them from freely expressing their opinions; consider decriminalizing defamation and bring any other relevant provisions of the Criminal Code into line with article 19 of the Covenant; and review its current and pending legislation, including the draft laws on cybercrimes and on associations and NGOs, to avoid the use of vague terminology and overly broad restrictions, to ensure that any restrictions on the exercise of freedom of expression and association comply with the strict requirements of articles 19 (3) and 22 of the Covenant.

In view of these comments, I would urge your Excellency’s Government to undertake a rigorous and thorough reassessment of the draft amendments to ensure their compliance with international human rights laws and standards. I would also like to call on your Excellency’s Government to allow sufficient time for the interested public to thoroughly review and debate the proposed amendments. I welcome any additional information on or responses to my observations and concerns above.

I would appreciate receiving a response within 60 days. Your Excellency’s Government’s response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

I intend to publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Rhona Smith
Special Rapporteur on the situation of human rights in Cambodia