



CCHR Briefing Note – May 2014

The criminalization of defamation and freedom of expression in Cambodia

Executive Summary

This Briefing Note outlines the domestic and international legal framework regulating the criminalization of defamation in the Kingdom of Cambodia (“Cambodia”). The Royal Government of Cambodia (“RGC”) uses the defamation provisions of the Cambodian Criminal Code 2009 (the “Criminal Code”) as a tool to crack down on the exercise of free speech by journalists, the political opposition and human rights defenders and activists.¹ The criminalization of defamation further stifles the right to freedom of expression in Cambodia, where the right is already under threat, and thus violates the RGC’s obligations to its citizens under the Constitution of the Kingdom of Cambodia (the “Constitution”) and international law.

The first section of this Briefing Note outlines the defamation laws in Cambodia. The second section addresses the protection of the right to freedom of expression, in Cambodian and international law, as well as the allowed restrictions to the right to freedom of expression and the international guidelines for defamation legislation. The third section details case studies of defamation charges illustrating how they are used to restrict freedom of expression. This Briefing Note concludes with an analysis of current defamation restrictions in Cambodia and includes recommendations for change to the RGC, including the following key recommendations:

- Decriminalize defamation and repeal any laws that does not comply with the Constitution and international law standards on freedom of expression;
- As a temporary measure, limit the application of defamation laws to only the most serious of cases against individuals and amend the Criminal Code to clear up any vague terminology; and
- Take all necessary steps to prevent public bodies from wasting national resources and occupying valuable court time with trumped up charges for defamation.

This Briefing Note is written by the Cambodian Center for Human Rights (“CCHR”), a non-aligned, independent, non-governmental organization that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout Cambodia.

Background

The RGC has repeatedly recognized the need to reform Cambodia’s laws on defamation and has even stated an intention to decriminalize defamation entirely. On 14 February 2006, Prime Minister Hun Sen announced that defamation would be decriminalized.² However, in May 2006, when the

¹ CCHR, ‘Repression of Expression: The state of free speech in Cambodia’ (Report) (September 2013) <http://bit.ly/1lBgmaj>

² Ellen Nakashima, ‘Cambodia moves towards openness’ *The Washington Post* (10 March 2006) <http://wapo.st/1oV1YxZ>

National Assembly amended Article 63 of the United Nations Transitional Authority in Cambodia Penal Code 1992 (the “UNTAC Code”), only immediate imprisonment for defamation was removed.

The removal of imprisonment as punishment cannot be considered decriminalization, when the offense is still tried in criminal courts. Unfortunately, when the new Criminal Code came into effect on 30 November 2010, replacing the UNTAC Code, it maintained the criminal status of defamation under Article 305. Moreover, some of the restrictions on freedom of expression contained in the UNTAC Code, such as the disinformation regulations in Article 62, still remain in force and have been used to harass opposition, human rights defenders and the media.³

Article 305 of the Criminal Code defines defamation as follows: “*Defamation shall mean any allegation or charge made in bad faith which tends to injure the honor or reputation of a person or an institution.*” The Criminal Code widened the scope of defamation so that the defamation of institutions as well as individuals could result in criminal charges, whereas the UNTAC Penal Code had only specified individuals. Article 305 also lowered the threshold at which defamation charges can be instigated. Under the UNTAC Penal Code, an allegation would have to *actually* harm reputation or honor, while Article 305 states that a charge need only to *tend* to harm reputation or honor.

Fines for defamation charges range between one hundred thousand and ten million Riels, approximately equating to \$25 to \$2,500 in United States dollars.⁴ This is no small sum in a country where the minimum wage of the garment sector has just been raised to \$100 per month.⁵ In addition, despite the removal of imprisonment as a direct consequence of defamation charges, Cambodians can be imprisoned under Article 525 of the Cambodian Criminal Procedure Code 2007 (the “CCPC”) for unpaid fines.⁶ Under the CCPC, the terms of imprisonment range from ten days to two years. A Cambodian could receive six months imprisonment for the non-payment of a fine between five million and one Riel, and ten million Riel, the maximum fine for defamation.⁷

In addition to Article 305, other articles of the Criminal Code provide further infringements on freedom of expression, including public insult (Article 307), the questioning of a judicial decision (Article 523), and the insult of a public official (Article 502). These laws are often vague, leaving them open to the interpretation of the court system. This wide judicial discretion to interpret the law, often results in multiple judges applying and interpreting the law in different ways, as it would in any nation’s legal system.

In addition, Cambodia’s Law on the Press 1995 (the “Press Law”) provides for imprecise restrictions on publications, including material “*which affects the good custom of society.*”⁸ Just as Article 305 of the Criminal Code allows a court to decide what “*tends to injure honor or reputation,*” the phrases in

³ For example the prison sentence for LICADHO employee Leang Sokchouen convicted of disinformation under Article 62 of the UNTAC Penal Code in 2010. See the LICADHO press release for more details, <http://bit.ly/1gJoB4T>.

⁴ Criminal Code, Article 305 <http://bit.ly/1fInnbx>

⁵ Aun Pheap and Colin Meyn, ‘Amid Strikes, Minister Raises Minimum Wage to \$100.’ *The Cambodia Daily* (1 January 2014) <http://bit.ly/1dtByPi>

⁶ Under Article 525 of the CCPC, the penalty for non-payment of a fine is imprisonment.

⁷ CCHR, ‘Briefing Note: an overview of Cambodian laws relating to freedom of expression’ (Briefing Note) (October 2012) <http://bit.ly/1kxh8sC>

⁸ Article 13 of the Press Law.

the Press Law allow a court to rule on what “*may*” affect public order, political stability or good custom of society.⁹ The court system is given too much power of interpretation on whether an offense has been committed. This would be an issue in a society with a completely independent judiciary, something that Cambodia is lacking.¹⁰

Defamation under international law

The criminalization of defamation, in any legal system, has been criticized by international bodies for violating the right to freedom of expression, including the United Nations (the “UN”) Human Rights Committee (the “HRC”), the body that oversees the implementation of the International Covenant on Civil and Political Rights (the “ICCPR”). Freedom of expression is provided for in both international law and domestic Cambodian law, and the provisions for this freedom must be considered when reviewing the legality and constitutionality of defamation law in Article 305 of the Criminal Code.

The Constitution independently upholds the right of all Khmer citizens to freedom of expression and a free press, under Articles 31, 35 and 41.¹¹ In addition, the Constitution enshrines the rights of Khmer citizens to “*actively participate in political life.*”¹² Article 31 of the Constitution provides that Cambodia shall recognize and respect the Universal Declaration of Human Rights (the “UDHR”) and the ICCPR, incorporating these and other covenants and conventions related to human rights, into domestic law.¹³ Under international law, Articles 19 of both the UDHR and the ICCPR uphold the right to freedom of expression. These international treaties and the HRC recognize the necessity of freedom of opinion and freedom of expression as the foundation stones for a developing and democratic society.¹⁴

However, the right to freedom of expression is not absolute. Certain restrictions of the right are permitted if necessary, under the specific circumstances. However, restrictions, including defamation legislation, are only legitimate in exceptional situations. Article 19 of the ICCPR states that freedom of expression may be subject to restrictions to protect “*national security or of public order, or of health or morals.*” If a State does choose to limit this freedom through a defamation law, it is up to that State to demonstrate the limitations (1) are provided for by law; (2) are necessary; (3) function proportionately; and (4) do not, in practice, serve to stifle freedom of expression.

According to the HRC, all state parties to the ICCPR should consider the decriminalization of defamation.¹⁵ However, while defamation should not be a criminal offense, if legislation for the criminalization and penalty of defamation exists, it should follow the guidelines of Article 19 of the ICCPR¹⁶: governments must ensure that the law remains necessary and proportionate to the aim of protecting the reputation of citizens, while the courts must fairly and impartially interpret and apply the law. Any government seeking to criminalize defamation must prove that reputation cannot be

⁹ Ibid, Article 12 and 13.

¹⁰ CCHR: ‘Judicial Reform’ (Briefing Note) (February 2013) <http://bit.ly/1kmEsq5>

¹¹ Article 41 of the Constitution.

¹² Ibid, Article 35.

¹³ As confirmed by the decision of the Constitutional Council dated 10 July 2007, Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007 (10 July 2007) <<http://bit.ly/1rmdbcj>>.

¹⁴ UN Human Rights Committee General Comment No. 34 (2011), paragraph 2.

¹⁵ UN Human Rights Committee Concluding Observations on Italy, CCPR/C/ITA/CO/5; UN Human Rights Committee Concluding Observations on the Former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/2.

¹⁶ UN Human Rights Committee General Comment No.34 (2011).

protected by any other means short of criminalization, that this criminalization is in accordance with the law, and that it does not restrict the right to freedom of expression.

When employing such a law, the HRC states that it should not apply to pure opinion or estimation¹⁷ and should allow the defense of truth to serve as a legitimate argument in the face of defamation charges.¹⁸ Other guidelines include: (1) not penalizing the accidental publishing of untrue statements;¹⁹ (2) allowing public interest to be a legitimate defense of potential defamation;²⁰ and (3) above all, avoiding excessively harsh penalties.²¹

Defamation charges should only be applied in the most serious of cases, with restrictions. Imprisonment should be avoided as well, and trials should proceed expeditiously. The restrictions also demand the acquittal of persons charged with defamation if their allegedly defamatory statement is in fact true, made without malice, or related to a subject where criticism is in the public interest. The HRC also states that media outlets, publishers or journalists cannot be punished solely for being critical of the government or the political system.²²

The HRC also addresses the differences in defamation legislation when applied to public and private entities. All public figures, including the highest political authority, are legitimately subject to criticism and political opposition.²³ The limits of acceptable criticism for politicians are wider than for private individuals,²⁴ and public bodies should not be permitted to bring defamation charges against an individual or organization. Public figures cannot be seen as having a “reputation” as they lack any emotional or financial interest in preventing damage to their good name. It can also be considered improper to spend public money on defamation suits. These outlines exist to protect the right to freedom of expression. Article 305 of the Criminal Code violates these criteria, especially as defamation can be made to injure the honor or reputation of an “institution.”

Interim Measures

Article 19, a leading international NGO working to uphold freedom of expression, free access to information and free media, has published interim measures for addressing defamation offenses, pending full decriminalization.²⁵ These minimum standards, complying with international law, include:

1. *No-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;*
2. *The offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or*

¹⁷ UN Human Rights Committee General Comment No.34 (2011).

¹⁸ UN Human Rights Committee Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² UN Human Rights Committee Concluding Observations on Peru, CCPR/CO/70/PER.

²³ UN Human Rights Committee General Comment No.34 (2011).

²⁴ *Lingens v Austria* (1986) 8 EHRR 407.

²⁵ Article 19, ‘Criminal Defamation’ <http://bit.ly/1jKtYki>

recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;

3. *Public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;*
4. *Prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practice journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.*

In Cambodia, implementation of the law is used to stifle expression in violation with the HRC as is demonstrated by the case studies in the following section. The criminal offense of defamation in Cambodia, in Article 305 of the Criminal Code, is neither a necessary nor proportionate restriction on the right to freedom of expression and in practice serves to stifle legitimate opposition, criticism and the freedom of individuals and the media. This violates citizens' right to freedom of expression, a necessary staple for the development of a democratic society.

Case Studies

The following cases, where Cambodian citizens used their freedom of expression in legitimate ways, yet faced persecution and criminal charges, exemplify the way in which the criminalization of defamation, both previously under the UNTAC Penal Code and currently under the Criminal Code, continues to impede upon freedom of expression in Cambodia. Moreover, some of these cases highlight a clear trend of the RGC using defamation charges to silence those who voice criticism of the RGC and its policies.

Dam Sith

Dam Sith, the editor-in-chief of the pro-opposition Khmer-language newspaper *Moneaksekar Khmer*, was arrested and charged with disinformation and defamation under Article 63 of the UNTAC Penal Code in June 2008 for publishing an article that quoted an accusation by Sam Rainsy that then-Foreign Minister Hor Namhong had links to the Khmer Rouge. He was held for over a week in prison on pre-trial detention before being released on 15 June 2008, after Prime Minister Hun Sen requested his temporary release.²⁶ The charges were later dropped. One month later, Khim Sambor, a journalist for *Moneaksekar Khmer* who frequently reported on allegations of government corruption, was shot to death along with his 21-year-old son.²⁷

On 7 July 2009, Dam Sith was again summonsed to the court to answer charges of defamation, disinformation and incitement. A week later, the charges were dropped after he was made to write a letter of apology to Prime Minister Hun Sen and offered to close the newspaper in return for the cessation of criminal charges against him.²⁸ Earlier that same year, editors of two other pro-opposition newspapers – the *Serei Pheap Thmei* and the *Khmer Mchas Sork* papers – were also

²⁶ Cheang Sokha, 'Opposition newspaper editor freed from jail pending defamation trial' *The Phnom Penh Post* (16 June 2008) <http://bit.ly/1jf4c86>

²⁷ For case studies of all journalists killed in Cambodia since 1994: <http://bit.ly/1iCLvW>.

²⁸ CCHR, 'Dam Sith's apology is evidence of government campaign to silence opposition' (Press Release) (13 July 2009) <http://bit.ly/1eqR0yy>.

charged with defamation and disinformation. One of them, Mr. Hang Chakra, editor of the *Khmer Mchas Sork*, was convicted of disinformation and sentenced to one year in prison.²⁹

These cases demonstrate a clear use of the criminal offense of defamation by the RGC to silence journalists and editors who voice criticism of the RGC and the ruling party. In light of the criminal charges – including disinformation and defamation charges – against opposition leaders Sam Rainsy,³⁰ Mu Sochua³¹ and Ho Vann³² in 2009 and 2010, the charges against Dam Sith and other editors can only be seen as direct attacks on the opposition and those who support them.

Phel Phearun³³

On 24 January 2013, schoolteacher Phel Phearun was riding his new motorbike in central Phnom Penh when he was pulled over by two police officers due to the fact that he was missing license plates. The police officers asked Phel Phearun to provide legal documentation of ownership of the bike, which he did later at the police station. Nevertheless, the police officers decided to impound his motorbike until the next morning.

After the incident, Phel Phearun posted the details on his public Facebook account, including posting a picture of the police letter saying that they had impounded the motorbike with a caption reading “*watch out for the procedures of Chamkar Mon District Police.*” In addition, the post asked if readers thought police procedures should be improved in such cases. The case was reported on the news website *Sabay* two days later and quickly spread online. In February, Phel Phearun was summonsed to the police station for questioning regarding a potential defamation complaint. On 19 March 2013, the police decided against pursuing the charges, after Phel Phearun signed a letter promising that he would not engage in similar activity in the future.

This case is believed to be the first time a Khmer citizen’s comments on a social networking site has led to threats of defamation charges, representing an attempt of suppression by the RGC of criticism in new media. It demonstrates that criticism, even at a low level and based on a factual account of

²⁹ Ibid.

³⁰ Sam Rainsy has faced defamation and disinformation charges multiple times. In February 2009, his parliamentary immunity was lifted after Prime Minister Hun Sen filed a criminal defamation complaint against him based on comments he made accusing Hun Sen of corruption; see Human Rights Watch, ‘Cambodia: Opposition Leader Sam Rainsy’s Trial a Farce’ (Press Release) (29 January 2010) <http://bit.ly/1eYR1tP>; CCHR, ‘Analysis of the Legal Grounds for Conviction and the Fairness of the Judicial Proceedings in the Criminal Cases Against Sam Rainsy’ (February 2011) <http://bit.ly/1i4KsW0>.

³¹ On 27 April 2009, Mu Sochua filed a lawsuit against Prime Minister Hun Sen alleging defamation under Article 63 of the UNTAC Penal Code in response to a speech in which the Prime Minister referred to an unnamed female opposition parliamentarian as “*cheung klang*”, a derogatory term that, especially when used in reference to a woman, implies a prostitute. After Hun Sen refused to retract his comments, Mu Sochua filed a lawsuit seeking 500 riel in symbolic compensation. The Prime Minister responded by filing a countersuit claiming that Mu Sochua had defamed him with comments that alleged that the derogatory language of the Prime Minister affected all Khmer women. Read more: CCHR, ‘The Case of the Kingdom of Cambodia v. Mu Sochua’ (Legal Analysis) (May 2010) <http://bit.ly/1tvBVzN>; CCHR, ‘An Overview of Parliamentary Immunity under Cambodia Law’ (Briefing Note) (December 2012) <http://bit.ly/1gOqQAZ>.

³² In September 2009, parliamentarian Ho Vann was tied on charges of defaming 22 military officers closing linked to the CPP based on quotes reported in the English-language newspaper *The Cambodia Daily*. The editor-in-chief, Kevin Doyle, of the newspaper and the author of the article, Neou Vannarin, were also charged with libel under the Law on the Press. Ho Vann, who argued that he had been misquoted in the article, was acquitted, while Kevin Doyle and Neou Vannarin were ordered to pay four million riels each. Meas Sokchea and James O’Toole, ‘Court exonerates Ho Vann’ *The Phnom Penh Post* (Phnom Penh, 23 September 2009) <http://bit.ly/1kVwG8K>.

³³ CCHR, ‘Case Study Series: Phel Phearun accused of defamation over a Facebook post’ (Factsheet) (March 2013) <http://bit.ly/1geX7Rx>.

events, will not be tolerated. Most importantly, it is a clear example of the problematic nature of the inclusion of the protection of the “honor and reputation” of institutions in Article 305.

Sen San

On 22 November 2013, Mr Sen San, a representative of the Cambodian National Rescue Party (“CNRP”), and Mrs. Ouk Sambo, a woman from his village in Kandal Province, were sued by tycoon Try Pheap for defamation. They were charged for their quotes in a Cambodian Human Rights Task Force (“CHRTF”) report that accused Mr. Pheap of illegal logging and widespread land grabbing.³⁴ The report, released on 20 November 2013, claimed that Mr. Pheap’s companies, on government economic land concessions, had expanded to around 70,000 hectares, displaced at least 1,445 families, facilitated an illegal-logging syndicate and violated Article 49 of the Land Law of 2001.³⁵

Mr. San did not speak to the CHRTF directly, but was reported stating that Mr. Pheap had become rich from his logging businesses and alleging that Mr. Pheap regularly bribed the Prime Minister’s family. Mr. San admitted to saying that Try Pheap’s wealth was due to his logging business and rubber plantations, but maintained that this was done at home. The only physical proof of his words is a tape recording, whose validity Mr. San has disputed. Mrs. Ouk Sambo’s charges were dropped after she denied her accusations against Mr. Pheap and blamed Mr. San, while he was convicted of defamation under Article 305 of the Criminal Code, with a fine of two hundred thousand riel and a compensation of two million riel to Mr. Pheap. Mr. San’s lawyer filed an appeal request on 28 February 2014, but the date of the appeal hearing has yet to be set. If Mr. San is unable to pay the fines, the approximate equivalent of \$550 United States dollars, he could face imprisonment under Article 525 of the CCPC.

These charges are an example of a powerful Cambodian businessman using the courts to threaten those who speak out against their illegal activities. Mr. Pheap is closely connected to officials from the Ministries of Interior and Agriculture, the military, forestry officials and other concessionaires, including Choeung Sopheap, the owner of the Pheapimex Company and wife of the Cambodian People’s Party (“CPP”) senator and Sukaku Inc owner Lao Meng Khin. These charges and extreme measures taken against Mr. San can be seen as politically motivated; the director of the Cambodian Defenders Project, Sok Sam Oeun, reiterated that neither the company nor the police would have taken such steps if the comments were made by common villagers.³⁶

The interpretation and application of Article 305 by the police, prosecutors and the courts clearly demonstrates that in practice the criminal offense of defamation acts to restrict the right to freedom of expression in a way that is contradictory to the Constitution and to international law. This suppression prevents Khmer citizens exercising their rights to freedom of expression and actively participating in the political, economic, social and cultural life of their country.

Conclusion

The continuing criminalization of defamation represents a failure by the RGC to give effect in domestic law to the commitments it has made to the international community and the Cambodian

³⁴ May Titthara, ‘Defamation suits follow NGO report,’ *Phnom Penh Post* (24 November 2013) <http://bit.ly/QW8597>

³⁵ Ibid; Article 49 states that an individual can only own a total of 10,000 hectares of ELCs.

³⁶ Ibid.

citizens. While defamation provisions contained in the Criminal Code may be seen as necessary in order to protect the reputation of citizens, the criminalization of defamation is disproportionate to this aim. Although the Press Law provides the option to pursue civil cases of defamation, the fact that defamation is still criminalized in the Criminal Code creates legal uncertainty and provides an avenue for the RGC to apply the law to meet political ends. Due to strong connections between the judiciary and the RGC, defamation and other charges are regularly misused to illegally stifle free expression and restrict criticism of issues important to the Cambodian people. High-ranking officials are willing to resort to criminal offense in the face of criticism, rather than publicly addressing accusations, and the current laws in place enables them.

The criminalization of defamation through Article 305 of the Criminal Code and the way in which it is applied is unconstitutional. It breaches the guarantees in Article 41 and 35 of the Constitution. Any restrictions on these freedoms must be avoided except in the most extreme cases, and the RGC has yet to demonstrate the necessity of punishing defamation and protecting reputations through criminal charges. Furthermore, the provisions laid out in Article 305 and other articles of the Criminal Code, lack clarity and definition and are open to wide interpretation and therefore abuse.

During Cambodia's UN Universal Periodic Review ("UPR") in both 2009³⁷ and 2014,³⁸ the RGC was advised to redefine the definition of defamation and to avoid disproportionate responses. The RGC accepted these recommendations in both UPRs but has thus far failed to act upon them. As a result, Cambodian law continues to fail to completely protect the right to freedom of expression and adhere to the principles of international human rights treaties. This indicates a clear need for a change in the current defamation legislation.

As such, CCHR recommends that the RGC:

- Decriminalize defamation under Article 305 of the Criminal Code;
- Decriminalize insult of public officials under Article 502 of the Criminal Code and discrediting of judicial decisions under Article 523, as both are incompatible with the ICCPR and therefore with the Constitution;
- As a temporary measure, limit the application of defamation laws to only the most serious of cases against individuals and amend the Criminal Code to clear up any vague terminology; and
- Take all necessary steps to prevent public bodies from wasting national resources and occupying valuable court time with charges for defamation.

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³⁷ Recommendation A – 46 (e) by the United Kingdom <http://bit.ly/1bKGOiT>

³⁸ Recommendations 118.103 by Germany and 119.27 by the United States of America, <http://bit.ly/1fi4ryh>.