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Cambodian Center for Human Rights



## **Joint Legal Analysis of the Draft Law on a Minimum Wage**

**March 2017**

### **EXECUTIVE SUMMARY**

The proposed introduction of a minimum wage for workers outside the garment sector in the Kingdom of Cambodia (“Cambodia”) is a welcome development. However, many of the provisions contained in the draft Minimum Wage Law (the “Draft Law”), released by the Ministry of Labor and Vocational Training, fail to comply with Cambodia’s human rights obligations, contained in both the Constitution of the Kingdom of Cambodia (the “Constitution”) and applicable international human rights law (“IHRL”). Chief among these concerns is the potential of the Draft Law to severely restrict the fundamental freedoms of assembly, association, and expression.

In its current form, the Draft Law would severely restrict the legitimate activities of unions, workers, civil society organizations (“CSOs”), journalists and academics. For example, the proposed ban on any form of ‘objection’ to the agreed-upon minimum wage (Article 26), and the prohibition on conducting independent research related to the minimum wage (Article 23), would constitute severe violations of the fundamental freedoms of expression, assembly and association. The excessive fines in the Draft Law’s punishment provisions - which disproportionately target workers and civil society, rather than employers - along with the criminal penalties for non-payment of fines (Article 22), combine to effectively criminalize the peaceful exercise of fundamental freedoms. The Draft Law’s processes for wage-setting also raise a number of additional concerns. For example, the participation of independent/democratic unions is not guaranteed, and the organization and functioning of the National Minimum Wage Council are not outlined in the draft law, leaving the details at the discretion of a ministerial Sub-decree (Article 18). The Draft Law also gives significant discretion to the Minister in Charge of Labor (the “Minister”) to set different minimum wages based on employment sector and geographic region, threatening to undercut the objectives and spirit of the law, overall (Article 9).

This legal analysis is conducted with the aim of recommending amendments and additions to the Draft Law, which would bring it into line with IHRL and constitutional human rights guarantees. For the purpose of this analysis, the Cambodian Center for Human Rights (“CCHR”), Solidarity Center (“SC”), and the International Trade Union Confederation (the “ITUC”) analyzed the Draft Law with reference to international standards and best practices, including the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and conventions of the International Labor Organization (“ILO”). Based on these comparisons, CCHR, SC and the ITUC provide a series of detailed recommendations and amendments to the Draft Law, including the following key suggestions:

1. The removal from the Draft Law of all unjustified restrictions on fundamental freedoms;
2. The guaranteed independence of the National Minimum Wage Council and the non-interference of the Royal Government of Cambodia (“RGC”) with its activities;
3. Transparency in the minimum wage consultation process;
4. The equal and non-discriminatory participation of unions in the minimum wage consultation process, based on verifiable union membership data.

This analysis reflects the views of CCHR, SC and the ITUC. CCHR is a non-aligned, independent, non-governmental organization (“NGO”), that works to promote and protect democracy and respect for human rights – primarily civil and political rights – throughout Cambodia. The ITUC is a democratic global labor confederation representing 181 million workers in 163 countries and territories and has 340 national affiliates. SC is allied with the AFL-CIO and is the largest U.S.-based international worker rights organization, working in more than 60 countries with unions and their civil society partners.

## **APPLICABLE HUMAN RIGHTS LAW**

### **Domestic Protection**

Article 41 of the Constitution guarantees for all Cambodian citizens the rights to freedom of expression, information and publication and the right to freedom of assembly. Under article 42, all Cambodian citizens are afforded the right to establish associations. Article 35 of the Constitution provides guarantees the right to participate actively in the political, economic, social and cultural life of the nation. Article 36 guarantees the right to form and to be members of trade unions. Additionally, Article 37 recognizes the right to strike and to organize peaceful demonstrations.

Importantly, Cambodia’s recognition of the human rights guarantees contained in international covenants and agreements is guaranteed by article 31 of the Constitution, and Cambodia’s Constitutional Council has authoritatively interpreted this article to provide for the direct applicability of IHRL in Cambodia’s domestic legal system.<sup>1</sup>

### **International Protection**

The ICCPR, to which Cambodia is a party, in Article 2(1) explicitly states that the rights of the ICCPR extend “to all individuals within its [the State’s] territory and subject to its jurisdiction.” The Human Rights Committee, the UN treaty body that may issue authoritative interpretations of the ICCPR in the form of “General Comments,” explained in its General Comment No. 15 that “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness,” and “[aliens] have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association.” As such, States are obligated to respect, protect and in some cases promote these rights to all peoples within their jurisdiction, irrespective of an individual’s citizenship. Governments must ensure that everyone under its jurisdiction - nationals and non-nationals alike - enjoys these freedoms.

This is particularly relevant in Cambodia, where the Constitutional guarantees (see, for example, articles 40 – 43) of fundamental freedoms only attach to “Khmer citizens”. Due to the direct

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<sup>1</sup> Constitutional Council of the Kingdom of Cambodia, Decision No. 092/003/2007, (10 July 2007)

applicability of the ICCPR, however, these guarantees must be interpreted to apply to all individuals under Cambodia's jurisdiction, including non-citizen workers.

### **Freedom of Association**

Article 22 of the ICCPR protects the right of individuals to form, join and participate in civil society organizations ("CSOs"), including trade unions, associations, and other types of CSOs. These CSOs may pursue a broad range of objectives; permissible purposes generally embrace all 'legal' or 'lawful' purposes and specifically include the promotion and protection of human rights and fundamental freedoms. Individuals are not required to form a legal entity in order to enjoy the freedom of association but international law protects the right of individuals to form a CSO as a legal entity. Whether a "declaration" or "registration/incorporation" system, the system of recognition of legal entity status must ensure that the process is truly accessible, with clear, speedy, impartial, and inexpensive procedures in place. In the case of a registration/incorporation system, the designated authority must be guided by objective standards and restricted from arbitrary decision making. More generally, the ICCPR provides explicitly that no restrictions may be placed on the exercise of this right other than those which are 1) prescribed by law and which are 2) necessary in a democratic society 3) in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

The ICESCR, which Cambodia has ratified, protects the right to form and join unions, along with the right of these unions to operate free from unreasonable interference. Of particular relevance to this analysis and the Draft Law, Article 7 of the ICESCR guarantees just and favourable conditions of work, including, inter alia, "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work" and a "decent living for themselves and their families".

ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organize has also been ratified by Cambodia. Under article 3 of this Convention, State authorities ought to refrain from any interference into the right of unions to organize their administration and activities in a lawful manner. Article 11 of the same Convention requires signatories take all steps necessary to facilitate the right of workers to organize.

### **Freedom of Expression**

Article 19 of the ICCPR requires States Parties to guarantee the right to freedom of expression, including the right to receive and impart information and ideas of all kinds regardless of frontiers:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right 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.*

Implicit in this provision is the protection of academic freedom, and of researching and sharing ideas and information. A three-part test in Article 19(3) of the ICCPR provides that the right to freedom of expression may only be subject to restrictions that are 1) provided by law; and 2) necessary 3) for a) respect of the rights or reputations of others, or b) the protection of national security or of public order (*ordre public*), or of public health or morals. In the UN Human Rights Committee's General

Comment no. 34 on the Freedoms of Expression and Opinion, special protection is given to the expression of views in relation to “public affairs” and “discussion of human rights”.

### **Freedom of Assembly**

The right to peaceful assembly is recognized by Article 21 of the ICCPR. The freedom of assembly is essential for the enjoyment of other human rights and freedoms, including the freedoms of association and expression. Any restriction or limitation to the freedom of peaceful assembly must: 1) be motivated to protect national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others; 2) be “prescribed by law” - the law must be accessible and its provisions must be formulated with sufficient precision; and 3) be “necessary in a democratic society.” Additionally, the restriction cannot be discriminatory.

### **Minimum Wage Setting**

The implementation of a minimum wage is stipulated in General Comment no. 23 on the Right to Just and Favorable Conditions of Work published by the UN’s Committee on Economic, Social and Cultural Rights. Further guidance on the fixing and maintenance of a minimum wage is offered by the ILO’s Convention 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries, and the related Recommendation 135. While it should be noted that Cambodia has yet to ratify this Convention, the principles it outlines, as well as those of the Recommendation, remain of relevance to the task the RGC is seeking to undertake. In particular, the Convention explicitly states that the process of minimum wage fixing should in no way prejudice the exercise of collective bargaining as a means of formulating a wage higher than the minimum. The Convention advocates formulating a minimum wage based on factors including the needs of workers and their families, the general level of wages in the country, the living standards of other social groups, and a variety of economic factors. Other provisions stipulated in the Convention and Recommendation would go a long way to bringing clarity to some of the more vague articles contained within the Draft Law, outlined below.

## **HUMAN RIGHTS ANALYSIS OF THE DRAFT LAW**

### **Chapter 1 – General Provisions**

Chapter 1 of the Draft Law outlines its purpose, objectives, and scope. While the objectives themselves are commendable, they are undermined by the inclusion of the regressive provisions outlined below. Efforts to bring Cambodia in line with IHRL standards with the introduction of a minimum wage are welcome. However, elements of the Draft Law are highly restrictive, and threaten to undermine and restrict the legitimate work of trade unions and the rights of workers and civil society in general.

### **Article 2**

*This law has the following objectives:*

- *Promote a decent standard of living and improve workers’ productivity*
- *Promote attractive and better investment and business environments*
- *Define the procedure for minimum wage discussion*

- *Arrange the organization and functioning of the National Minimum Wage Council*

The objectives outlined in this provision, while commendable, could be worded more definitively. In particular, by “ensuring” rather than “promoting” a decent standard of living, the Draft Law would be of greater impact. In addition, the Draft Law’s objectives ought to include the protection of human dignity, so as to bring it into line with the ILO’s Recommendation on Minimum Wage Fixing<sup>2</sup>.

- CCHR, SC, and ITUC recommend the Minimum Wage Law aim to ensure, rather than merely promote, a decent standard of living.
- CCHR, SC, and ITUC further recommend the inclusion of the protection of human dignity in the objectives of the Draft Law.

### **Article 3**

*The effect of this law covers those enterprises or institutions and individuals who are under the provisions of the Labor Law.*

The effect of this provision would be to exclude domestic workers, air and maritime transportation personnel, civil servants and judges, and workers in the informal economy from the proposed implementation of the minimum wage<sup>3</sup>. In addition to running afoul of the ILO’s wage fixing instruments, such exclusions would also be contrary to the ILO Convention 189 and Recommendation 201 on Domestic Workers<sup>4</sup> and Recommendation 204 on Transition from the Informal to Formal Economy, and would undermine and diminish the purpose of the Draft Minimum Wage Law.

- CCHR, SC, and ITUC recommend the amendment of this article to ensure universal coverage of minimum wage protection, including those who are remunerated in cash and/or in kind.

### **Chapter 2 – Minimum Wage**

Chapter 2 provides an outline of the scope and applicability of the minimum wage, along with the criteria to be applied in its formulation. The RGC ought to be aware of the ILO’s 1970 Recommendation on minimum wage fixing, which provides guidelines in this regard.

### **Article 4**

*Minimum wage refers to the legal lowest wage fixed by a prakas of the Minister in Charge of Labor.*

The definition in Article 4 should better reflect the definition of minimum wage as provided by ILO Committee of Experts, which refers both to the binding nature of minimum wages, regardless of the method of fixing them, and to the need for a specific number of hours in calculating minimum wage (regardless of stipulated method of remuneration - since the minimum wage system should not lead to excessive working hours).

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<sup>2</sup> ILO Minimum Wage Fixing Recommendation 1970 (no. 135) <https://goo.gl/w1lWYv>

<sup>3</sup> Cambodian Labor Law 1997 <http://sithi.org/sogi/admin/upload/media/121-htjcccec1370826550.pdf>

<sup>4</sup> ILO Recommendation concerning Decent Work for Domestic Workers (no. 201) [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:2551502](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:2551502)

## **Article 5**

*The elements to be considered in defining the minimum wage shall focus on economic status, cost of living and actual condition of the country.*

*Those elements are as follows:*

*A- Social criteria including marital status, inflation rate, and cost of living.*

*B- Economic criteria including productivity, competitiveness of the country, labor market situation and profitability of the sector.*

Article 5 is out of step with existing Cambodian law, namely Article 107 of the Cambodian Labor law, which more closely tracks international law. The enumerating criteria should be made consistent with article 7 of the ICESCR and the ILO Convention 131 on Minimum Wage Fixing. This should take account of General Comment no. 23 on the Right to Just and Favourable Conditions of Work of the Committee on Economic, Social, and Cultural Rights, which provides an in-depth outline on the formulation and maintenance of a minimum wage.

ILO Convention 131 on Minimum Wage Fixing provides detailed guidelines for the fixing and maintenance of a minimum wage. This instrument specifically precludes any prejudice towards collective bargaining in formulating a minimum wage. The Convention requires taking into account factors including the needs of workers and their families, the general level of wages in the country, the cost of living and changes therein, the relative living standards of other social groups, and a variety of economic factors in formulating a minimum wage. Therefore, the RGC ought to expand on this article in order to encompass the ILO's recommended factors in fixing a minimum wage, and should not arbitrarily limit the criteria which can be taken into account, or the sources of information which can be consulted.

- CCHR, SC, and the ITUC recommend the inclusion of additional criteria to be taken into account in fixing a minimum wage, specifically those outlined in article 7 ICESCR and the ILO Convention 131 on Minimum Wage Fixing.
- CCHR, SC, and the ITUC further recommend that the sources of data which can permissibly be considered should not be arbitrarily limited.
- CCHR, SC, and the ITUC propose the removal of vague terms such as 'profitability of the sector' which will very likely be invoked by employer to moderate wage demands – often in absence of objective and verifiable data.

## **Article 6**

*Any written or verbal agreement that would remunerate the worker at a rate less than the minimum wage determined in the Prakas of the Minister in Charge of Labor shall be null and void.*

*Any written or verbal agreement that would remunerate the worker at a rate higher than the minimum wage determined in the Prakas of the Minister in Charge of Labor shall be continued.*

The explicit protection of the right of all workers to be paid commensurately for work done contained in this provision is welcome. In attempting to legislate for such a practice, the RGC is in line with IHRL standards. However, the vague language contained in the article, as it is currently drafted, could lead to mass terminations of contracts for failure to comply with the minimum wage without guarantees

of re-employment. The law should clarify that contracts currently in force that establish a wage below the minimum wage set by this law are effectively amended to match the minimum wage so as to avoid nullifying countless contracts of employment. Any new contracts, which set a wage below the minimum wage, should be null and void.

- CCHR, SC, and the ITUC welcome the inclusion of this article and its stipulation that workers be paid commensurately, in keeping with IHRL standards.
- CCHR, SC, and the ITUC recommend the inclusion of language providing for the effective amendment of existing contracts to match the minimum wage, so as to prevent the nullification of those contracts.

### **Article 7**

*For workers who are remunerated by piece rate pay, the wage shall be determined for workers with moderate skills who work during regular working hours to receive, for the same period of working hours, the wage that is at least equal to the guaranteed minimum wage in normal working hours and applicable to workers of its kind.*

*Workers who receive a piece rate-based wage shall be paid based on the actual outputs produced. In the event that the output produced is higher than the minimum wage, the workers shall be paid based on that higher amount. However, in case it is lower than the minimum wage, the employers shall supplement to make it equal to the guaranteed minimum wage.*

This provision is also welcomed, as it is a necessary inclusion in order to make the minimum wage effective across a diverse range of sectors.

- CCHR, SC, and the ITUC welcome the inclusion of this provision and its implementation of the minimum wage across a diverse range of sectors.

### **Article 8**

*For equal working conditions, professional skills, and output, equal remuneration shall also be provided to all workers who are under the scope of this law regardless of origin, sex, or age.*

While CCHR, SC and the ITUC welcome the inclusion of an anti-discrimination provision, the prohibited grounds of discrimination are too narrow, and should not be exhaustive. As such, CCHR, SC and the ITUC recommend an expansion of the prohibited grounds of discrimination to include race, ethnicity, color, disability, sexual orientation, gender identity, and other status.

- CCHR, SC, and the ITUC recommend the expansion of this provision to prohibit discrimination on grounds of race, ethnicity, color, disability, sexual orientation, gender identity / expression, and other status.

### **Article 9**

*The minimum wage determined by a Prakas of the Minister in Charge of Labor shall be established without distinction among professions or jobs. This may vary according to region based on economic factors that determine the standard of living.*

*The Minister in Charge of Labor may prioritize the scope in which the minimum wage is applicable based on the economic activities, professionalism, occupation, and region according to the economic and social condition of the country after obtaining approval from the National Minimum Wage Council.*

This second paragraph of this article is vague and has the potential to undercut the purpose and spirit of the law. The reference to the prioritization of the scope in which the minimum wage is applicable would give discretion to the Minister to exclude certain professions and sectors from the scope of the law, and apply different minimum wages in different regions. The RGC should be guided by article 4 of ILO Convention 131, which urges states to keep the “numbers and groups of wage earners not covered” to a minimum. The application of the minimum wage should also be universal, and represent the lowest figure that employers can legally pay workers in all professions and regions. We therefore urge against variable minimum wages based on geography.

We recommend that Article 9 simply provide that *“The minimum wage determined by a Prakas of the Minister in Charge of Labor shall be established without distinction”*. In the alternative, the law should at the very least provide for the formal consultation of employers’ and workers’ organizations concerning any potential prioritization or exclusions from the Minimum Wage Law. In order to enable legal certainty and to guarantee an effective minimum wage, excluded groups should be explicitly listed in the law.

- CCHR, SC, and the ITUC recommend that the article provide for the universal application of the minimum wage, and at the very least provide for formal consultations with social partners, should any exceptions be made.

### **Chapter 3 – Minimum Wage Discussion**

Chapter 3 outlines the process for the discussion and formulation of the minimum wage. The vague language contained in this chapter leaves its interpretation and application open to misinterpretation and abuse. Ill-defined grounds for the intervention of the RGC in the minimum wage discussion and formulation process threaten to undermine the work of independent unions.

#### **Article 10**

*The discussion of the minimum wage shall conform to the following principles:*

- A- *The discussion of minimum wage shall take place annually*
- B- *The minimum wage shall be the predictable figure or increment rate that grows gradually steady*
- C- *The win-win policy shall be adhered to.*
- D- *The discussion shall be based on the official and legal data of the national institution or entity in charge of compiling statistics and adopting social and economic criteria stated in Article 5 of this law.*

In Part B, the reference to a steady and gradual increment should be removed. In the case of Cambodia, the current minimum wage does not even meet minimum requirements to live, and remains some distance from what could be considered a ‘living wage’. Until that happens, gradualism will mean that workers continue to be locked in wages below a living wage.

The reference to the “win-win” policy in Part C appears to be an inappropriate inclusion. The policy, utilized by Prime Minister Hun Sen in his efforts to end the Cambodian civil war – and involving the incorporation of senior leaders of the Khmer Rouge into government positions – bears little or no relevance to the setting of the minimum wage, and in any case lacks a clear definition. As such, it should be removed.

Further, Part D of the above article unnecessarily restricts the sources that can be consulted during the discussion on the minimum wage, leaving the potential to bar legitimate, independent sources of data. Further, the present draft article would appear to exclude consideration of data emanating from internationally recognized actors such as the World Bank and international non-governmental organizations (“INGOs”). CCHR, SC and ITUC recommend that all sources of economic and social data should be allowed, with determinations as to relevant to be made by the National Minimum Wage Council (the “Council”). If the data sources are to be limited, they must also include recognized international data sources.

- CCHR, SC, and ITUC recommend the removal of Parts B and C.
- CCHR, SC, and ITUC recommend that Part D be amended to allow for the fair consideration of all data sources.

#### **Article 11**

*The discussion of minimum wage shall be conducted according to the following schedule:*

*A- July of each year, the commencement of internal discussion on minimum wage by each party of the National Minimum Wage Council to reach official position of each party for discussion with other parties.*

*B- August of each year, the inauguration of bilateral minimum wage discussion.*

*C- September of each year, the convening of tripartite minimum wage discussion among within the National Minimum Wage Council.*

*D- October of each year, the adoption of minimum wage to be applied in the following year shall be sent for a recommendation from the Minister in Charge of Labor.*

*E- The first of January of the following year, the new minimum wage shall be applied.*

*In the event of force majeure or necessity, the Minister in Charge of Labor may issue a Prakas to suspend or adjust the schedule for discussion of the minimum wage. In this case, the previous year’s minimum wage shall be further applied until the new minimum wage is determined.*

The reference to a “force majeure or necessity” in this provision ought to be clarified, so as to prevent over-broad interpretations. Without proper clarification, this provision could undercut the minimum wage discussion process, allowing the Minister to bring the discussions to a halt in unspecified circumstances. The ILO Committee of Experts has already emphasized that the fundamental principle of consultation with social partners “assumes particular importance in periods of economic and social crisis, owing to the considerable repercussions that decisions relating to the fixing and periodic adjustment of minimum wages are likely to have on economic policy and the purchasing power of workers.” The proposed law should encourage consultation in cases of emergency or force majeure, not limit it.

- CCHR, SC, and ITUC recommend adding clarification of the meaning of “force majeure or emergency”, in order to ensure the Minister cannot exercise inordinate influence over the minimum wage formulation process. The law must also guarantee consultation with social partners should a force majeure/necessity situation arise.

## **Article 12**

*To participate in the discussion of minimum wage, each party to the National Minimum Wage Council shall seek its own official position using the criteria stated in Article 5 of this law.*

*In the event that its own official position cannot be unanimously reached, each party [shall reach a decision] based on the majority voice through an internal vote to determine its official position and shall not violate the official position decided by its party for discussion.*

*The decision on the figures or rate of increase of minimum wage by the National Minimum Wage Council shall be based on the rules unanimously approved by the members present at the meeting. In the event that an agreement on any points cannot be unanimously reached 2 (two) times at 2 (two) different meetings, the decision shall be made based on the majority through secret vote at the 2nd (second) meeting. In the case of a tied vote, the voice of the chair shall take precedence.*

This article raises a number of concerns, primarily relating to the composition of the Council and freedom of expression. The requirement that “each party [shall reach a decision] based on the majority voice through an internal vote to determine its official position and shall not violate the official position decided by its party for discussion” could result in independent unions losing their voices entirely. Due to the nature and composition of Cambodia’s trade unions, it is likely that the unions participating in the Minimum Wage Council will have divergent opinions about the appropriate minimum wage. In order to allow minority positions on the Council be voiced, and to guarantee the freedom of expression of those in the minority, CCHR, SC and the ITUC recommend the amendment of this article to enable the expression of minority views.

Further, the provision for a simple majority vote is concerning when read in the context of article 17, which provides that union representatives will make up only one-third of council members, with the other two-thirds being made up of employer and government representatives. This voting system could result in the Council’s union representatives being outvoted systematically.

The requirement that Council members be present at meetings also provides cause for concern, unless the relevant provision is amended. Considering the fact that many independent union leaders and activists often face imprisonment, it is essential that any union represented on the Council have the right to propose a replacement delegate, in the event that the nominated Council member is unavailable for any meeting.

Furthermore, in the interests of transparency and accountability, all votes relating to the minimum wage ought to be made publicly, and as such, the reference to a secret vote in the event of a lack of unanimous agreement should be removed.

- CCHR, SC, and the ITUC recommend the amendment of this provision to allow minority voices on the Council to be expressed and heard.

- CCHR, SC, and the ITUC recommend the explicit inclusion of a guarantee that any unions represented on the Council have the right to send replacement delegates in case their Council members are unavailable for a meeting.
- CCHR, SC, and the ITUC recommend that all votes of the Council be public, and that secret ballots not be allowed.
- CCHR, SC, and ITUC further recommend the adoption of a voting process that will ensure union voices are heard; for example a requirement that for a decision on the minimum wage to be adopted, it must secure a majority of votes from each group represented on the Council i.e. a majority of government representatives, employer representatives and union representatives.

### **Article 13**

*After the decision has been made on the figures or rate of increase of minimum wage in accordance with the procedure stated in Article 12 of this law, the National Minimum Wage Council shall use this result as the recommendation for the Minister in Charge of Labor. If necessary, the Minister in Charge of Labor may request for an agreement in principle from the Royal Government before issuing the Prakas on Determination of the Minimum Wage for implementation in the subsequent year.*

This provision would appear to give the RGC the final determination of the minimum wage, regardless of the Council's decision. While the agreement of the RGC is not contrary to international best practice, the scope for RGC involvement in setting the minimum wage should be minimized; otherwise, the function of the Council risks being completely undercut. Therefore, it is recommended that this provision be amended to only allow for RGC intervention to alter the Council's recommendation in exceptional and narrow circumstances which are clearly justified.

- CCHR, SC, and the ITUC recommend the amendment of this provision to limit the scope for RGC interference in the minimum wage fixing process, to exceptional circumstances only.

Several articles in Chapter 3 provide cause for concern. Ambiguity surrounding the composition and powers of the Council leave its independence open to manipulation. Independent unions are at risk of being sidelined or silenced, undermining the content of articles 36 and 42 of the Constitution, which guarantee the freedom of association.

### **Chapter 4 – Minimum Wage Council**

Chapter 4 outlines the composition and duties of the National Minimum Wage Council. Contained within this chapter are unjustifiable restrictions on freedom of expression, as guaranteed under article 41 of the Cambodian Constitution and IHRL. In the interests of transparency, clarification of the language surrounding the selection of members of the Council and its independence from the RGC is also required.

### **Article 16**

*The National Minimum Wage Council shall perform the following duties:*

- *Conduct scientific studies on matter related to minimum wage*
- *Facilitate and enable all relevant parties to study, meet and discuss the minimum wage*

- *Provide recommendations on minimum wage, benefits and the scope of minimum wage implementation to the Minister in Charge of Labor*
- *Disseminate and raise awareness and social dialogue on the determination of minimum wage*
- *Perform other tasks related to minimum wage as requested in the Minister in Charge of Labor*

*When required, the National Minimum Wage Council may establish a technical working group to assist in carrying out its tasks.*

*Unless approved by the Minister in Charge of Labor, no one but the National Minimum Wage Council may conduct research on tasks related to minimum wage.*

The final paragraph of Article 16 gives the National Minimum Wage Council an exclusive competence to conduct research relevant the minimum wage discussion, which is highly problematic from a human rights perspective. The inclusion of this paragraph would clearly violate Cambodia's obligations in respect of freedom of expression, guaranteed under article 41 of the Cambodian Constitution and IHRL. The effective ban on research into the minimum wage would severely hinder the ability of unions and CSOs to carry out their work. Moreover, it would raise serious concerns surrounding the independence of the media and academic freedom, with even unapproved newspaper articles and academic studies potentially falling within the scope of the prohibition. Under article 41 of the Cambodian Constitution, all citizens are entitled to freedom of expression. The substance of this freedom extends to sharing and receiving information.

- CCHR, SC, and the ITUC recommend the removal of the final paragraph of this article, as it is in clear violation of the right to freedom of expression.

### **Article 18**

*The composition, organization and function of the National Minimum Wage Council shall be determined by subdecree.*

*The regular and alternate members of the National Minimum Wage Council shall be determined by a Prakas of the Minister in Charge of Labor.*

The composition of the Council is key to its independence and legitimacy; as such, the appointment of the trade union members to the Council ought to be conducted on a pro-rata basis, based on verifiable union membership data. Appointing Council members based on union membership data should ensure a representative minimum wage formulation process. Without the guaranteed involvement of Cambodia's independent/democratic unions in the Council, the wage setting process would lack legitimacy and effectively deprive workers affiliated with these unions of their right to participate in public life. We also underscore our concerns over the lack of legitimacy of the existing wage setting body due to a lack of genuine representativity.

- CCHR, SC, and the ITUC recommend that the procedures for appointments to the Council be clearly outlined in the law, rather than left to a Prakas.
- CCHR, SC, and ITUC further recommend that the composition, organization, and functioning of the Council be clearly outlined in the law, rather than left to a Sub-decree.

- CCHR, SC, and ITUC further recommend that the selection of unions to be represented on the Council be based on verifiable union membership data, on a pro-rata representative basis. The Ministry in charge of labor should ensure that data of union membership and employer membership will be available for scrutiny by social partners.
- CCHR, SC, and ITUC also recommend that the law ensure the fair, effective and genuine representation of all workers and employers at the National Minimum Wage Council, through representation by worker organizations and employers from a broad range of sectors of the economy.

## **Article 20**

*Other than the meetings stated in Article 11 of this law, the chairperson of the National Minimum Wage Council may convene the council at any time as deemed necessary or requested by any of the vice chairpersons. The request must specify the valid reason and necessity.*

*The required quorum for all meetings of the National Minimum Wage Council shall have at least 50%+1 (fifty percent plus one) of all members of the National Minimum Wage Council.*

*Members of the National Minimum Wage Council shall attend the meetings as determined and invited by the chairperson of National Minimum Wage Council.*

*The General Secretariat of the National Minimum Wage Council shall make the meeting invitation letter and attach it with relevant documents related to the meeting to be provided to the regular and alternate members within at least 15 (fifteen) days prior to the meeting. In cases of necessity and urgency the period for the invitation is based on the actual situation.*

*When requested by the chairperson or one of the vice chairpersons, the National Minimum Wage Council may invite any qualified individual other than the members to attend and provide comments on the issues to be discussed, but that individual shall not be entitled to voting at the meeting.*

*The meeting minutes need to be signed by the chairperson of the National Minimum Wage Council attached with the attendance list and sent to all full and reserved members within 15 (fifteen) days after the meeting.*

In order to ensure the equal participation of all parties, the quorum requirement should be amended to at least 50%+1 (fifty percent plus one) of **each party** of the National Minimum Wage Council, rather than being based on the overall membership of the Council, as in the current Draft Law.

Further, the undefined inclusion of a “necessity” clause may threaten to undercut the safeguards contained in this article. Without well-defined circumstances in which the necessity clause may be triggered, hastily-arranged meetings could operate to the exclusion of certain groups, such as independent unions. As such, and similarly to the analysis of Article 11, above, clarification of what constitutes a “necessity” should be included, in the interests of legal certainty and avoiding misuse of this provision.

- CCHR, SC, and the ITUC recommend amending this provision to make the quorum apply separately for each party (unions, employers and the RGC).
- CCHR, SC, and ITUC recommend clarification of the scope of the application of the “necessity” clause in this provision.

## **Article 21**

*The National Minimum Wage Council has one general secretariat as the executive body under the Ministry in Charge of Labor.*

*The organization and functioning of secretariat of the National Minimum Wage Council shall be determined by subdecree.*

The details of the organization and functioning of the secretariat of the Council are important to any assessment of its independence and compliance with international best practices. As such, these details should be clearly outlined in the primary legislation, rather than left to a a Sub-decree. Specifically, the insertion of a provision guaranteeing the non-discriminatory, pro-rata participation of labor unions is essential to the legitimacy and independence of the Council.

- CCHR, SC, and ITUC recommend the inclusion in the law of a clear outline of the organization and functioning of the secretariat of the Council, in the interests of legal certainty, accountability and parliamentary scrutiny.

## **Chapter 5 – Administrative Action and Punishment**

CCHR, SC and the ITUC have serious concerns about the proposed contents of this chapter. It provides for heavy and disproportionate administrative fines (Articles 23, 25, 26, and 28) for the legitimate and protected exercise of fundamental freedoms. Of further serious concern, there is no right of appeal included for any of the offences created in this Chapter. Moreover, these fines, if unpaid, would lead to criminal proceedings (Article 22). Considering the likely inability of many workers and labor union leaders to afford such heavy fines, these provisions cumulatively lead to the effective criminalization of the peaceful exercise of fundamental freedoms. Given the serious questions about the independence of Cambodia's judiciary, and the long history of trade union leaders facing criminal charges in relation for their work<sup>5</sup>, the application of this Chapter could have severe implications for the exercise of fundamental freedoms. Furthermore, by limiting the capacity of minority voices on the Council to express dissent in respect of the minimum wage (Article 12), substantive labor rights are also likely to be seriously restricted, including the right to collective bargaining and potentially the right to just and favourable conditions of work. As such, CCHR, SC and the ITUC recommend the removal of Chapter 5, with the exception of the provisions to punish employers who fail to pay their employees the minimum wage, which should be retained.

## **Article 22**

*The punishment in this chapter includes written warnings and transitional punishment.*

*The written warning and transitional punishment is within the competency of the Minister in Charge of Labor.*

*The payment of transitional fine lead to the extinguishment of criminal action.*

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<sup>5</sup> See, for example, the concerns outlined by the ILO in its 'Report of the Committee of Experts on the Application of Conventions and Recommendations', February 2017. Available at: [http://www.ilo.org/ilc/ILCSessions/106/reports/reports-to-the-conference/WCMS\\_543646/lang--en/index.htm](http://www.ilo.org/ilc/ILCSessions/106/reports/reports-to-the-conference/WCMS_543646/lang--en/index.htm)

*In the event that the offender refuses to pay the transitional fine, the case shall be forwarded to the court for further action in accordance with the procedure.*

This article effectively criminalizes many of the punishments outlined elsewhere in this chapter, as it is likely that many individuals will be unable to pay the heavy fines provided for in other articles. As will be outlined below, many of these prohibitions are arbitrary and non-compliant with Cambodia's IHRL obligations. Further, the article lacks any explicit right of appeal. Giving criminal effect to the administrative offences outlined in the Draft Law would have drastic consequences for the ability of unions, workers and civil society to exercise their fundamental freedoms. As such, it is recommended that this article be removed from the Draft Law.

- CCHR, SC, and the ITUC recommend the removal from this provision of the potential criminalization of the exercise of fundamental freedoms.
- CCHR, SC, and the ITUC further recommend the inclusion of an appeals process for any administrative fines.

### **Article 23**

*There must be a written warning for any individual who violates the provisions of Article 5 of this law.*

*In the event of refusal to comply with the above warning, he/she shall be subject to a transitional fine of not more than 5,000,000 (five million) riels.*

Non-compliance with Article 5, which stipulates the sources and criteria to be consulted when discussing the minimum wage, would occur should any member of the Council seek to consult any alternative, unapproved form of economic or social data. Such a restriction represents a violation of the right to freedom of expression and information, as guaranteed by article 41 of the Constitution and IHRL. Furthermore, the prescribed maximum fine of 5,000,000 (five million) riels is disproportionate and would likely lead to criminal proceedings and imprisonment in many cases, with ordinary workers and trade unionists unable to pay. As such, it is recommended that this article be removed from the Draft Law.

- CCHR, SC, and the ITUC recommend the removal of Article 23, in order for the Draft Law to comply with Cambodia's human rights obligations.

### **Article 24**

*The fine of not more than 20,000,000 (twenty million) riels shall be imposed on any employer who violates the provisions of articles 4, 6, 7 or 8 of this law.*

*In addition to the above punishment, the employer who pays the worker at a rate less than the minimum wage shall repay the violated amount to the worker.*

Article 2(1) of Convention No. 131 and Paragraph 14(c) of R135 require that failure to apply minimum wages shall make the person or persons concerned liable to appropriate penal or other sanctions. However, Article 24 establishes a fine ceiling of 20,000,000 riels (\$5000) and does not specify what should be the penalty in case of repeat offences. Instead of imposing a ceiling, the law should specify a minimum fine for each violation and provide for the increase of the penalty in case of repeat offences.

It is also not clear how offenses are counted. For example, it is unclear whether the failure to pay the minimum wage to multiple workers is counted as a single infraction, or whether each person not paid the minimum wage is considered a separate infraction (failure to pay 200 workers minimum wage being counted as 200 infractions). The fine will be significantly lower if calculated on the first basis rather than the second. The law is unclear in this regard.

- CCHR, SC, and the ITUC recommend the revision of this Article in order that it complies with Article 2(1) of Convention No. 131 and Paragraph 14(c) of R135, by removing the fine ceiling for employers who violate the law, and including specific minimum fines for each violation, and increases in fines for repeat offenders.

#### **Article 25**

*There must be a written notice of warning for any individual who commits any illegal act that causes obstruction or pressure on the discussion of minimum wage determination or that violates Article 12 of this law.*

*In the event of refusal to comply with the above warning, he/she shall be subject to a transitional fine of not more than 5,000,000 (five million) riels.*

Considering the long record of criminalization of trade union activity in Cambodia<sup>6</sup>, and the fact that numerous Cambodian laws criminalize activity which is legitimate under IHRL, the blanket barring of supposed “illegal acts” could seriously undermine the legitimate work of labor activists in campaigning for improvements to labor conditions. This is exacerbated by the potential application of Article 26, which bans any “objections” to the decisions of the Council – thereby rendering any “objection” vulnerable to characterization as an illegal act. The combined effect of these provisions could be to criminalize any form of protest, advocacy or objection in respect for the minimum wage.

Moreover, the requirement for consensus within each of the three parties (RGC, employers, and unions) of the Council (Article 12), and the prohibition on expressing any dissent regarding the “*official position decided by its party*” seriously threatens the freedom of expression, and raises particular concerns in respect of independent unions who may be in a minority vis-à-vis pro-government unions, among the union representation ‘party’ of the Council. As such, this article must be removed from the draft, to ensure compliance with IHRL and the Constitution.

- CCHR, SC, and the ITUC recommend the removal of this article, in order for the Draft Law to comply with Cambodia’s human rights obligations.

#### **Article 26**

*There must be a written warning for any individual who incites or provokes any objection to the Prakas on the Determination of Minimum Wage.*

*In the event of refusal to comply with the above warning, he/she shall be subject to a transitional fine of not more than 10,000,000 (ten million) riels.*

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<sup>6</sup> CCHR ‘Factsheet: Escalation of Violent Repression of Trade Union Activists’  
[https://www.cchrcambodia.org/admin/media/factsheet/factsheet/english/2016\\_03\\_09\\_CCHR\\_Fact\\_Sheet\\_Escalation\\_of\\_Violence\\_Against\\_Trade\\_Unions\\_ENG\\_Final.pdf](https://www.cchrcambodia.org/admin/media/factsheet/factsheet/english/2016_03_09_CCHR_Fact_Sheet_Escalation_of_Violence_Against_Trade_Unions_ENG_Final.pdf)

This provision represents a serious threat to freedom of expression and related rights, and must be removed from the Draft Law. To forbid “any objection” to the minimum wage contradicts the most basic principles of a democratic society. Such a broad formulation in theory includes all expressions of dissent, ranging from media articles and public speeches, to street demonstrations, and everything in between. Further, the application of the provision to “any individual” who objects has enormous implications for the fundamental freedoms of all Cambodian workers, activists, journalists, unions, members of civil society, and citizens and residents generally. Additionally, the potential fine of 10,000,000 (ten million) riels is severely disproportionate and, if applied, would very likely lead to criminal proceedings and potential imprisonment as a result of inability to pay on the part of those targeted by the provision.

In direct contravention of articles 41, 37, 35 and 31 of the Constitution and Articles 19 and 22 of the ICCPR, the effect of this article would be to silence dissent or disagreement on the issue of the minimum wage. Considering the prominence and scale of minimum wage demonstrations in recent years in Cambodia, the inclusion of this provision appears to be an attempt to effectively criminalize any repeat of these legitimate actions. In order to fulfil its international and domestic legal obligations, it is essential that this provision is removed from the Draft Law.

- CCHR, SC, and the ITUC recommend the removal of this article, in order for the Draft Law to comply with Cambodia’s human rights obligations.

#### **Article 27**

*There must be a written warning for any employer who violates the provisions of Article 14 of this law.*

*In the event of refusal to comply with the above warning, he/she shall be subject to a transitional fine of not more than 5,000,000 (five million) riels.*

The proposed introduction of a punishment procedure for employers who fail to post the minimum wage rate is welcomed by CCHR, SC, and ITUC. However, the proposed maximum fine is quite low and, in any case, unnecessary.

- CCHR, SC, and the ITUC welcome the implementation of a punishment procedure for non-compliant employers outlined in this provision, though a dissuasive minimum fine would be more appropriate.

#### **Article 28**

*There must be a written warning for any individual who violates the provisions of paragraph 3 of Article 16 of this law.*

*In the event of refusal to comply with the above warning, he/she shall be subject to a transitional fine of not more than 10,000,000 (ten million) riels.*

Paragraph 3 of article 16 states: “Unless approved by the Minister in Charge of Labor, no one but the National Minimum Wage Council may conduct research on tasks related to minimum wage”. The prohibition of any research regarding the minimum wage by anyone outside the Council would represent another serious violation of freedom of expression and related rights. Similarly to the analysis of Article 26, above, the restriction would apply to all citizens and residents of Cambodia, including independent unions, CSOs and journalists. This provision would have a particularly severe

impact upon academic freedom, with economists and other academic experts prevented from conducting vital research on economic and social issues.

The right to freedom of expression and information is inherent and universal, and as such, cannot be granted or revoked by the decision of any minister or government. As such, the Minister should have no role in deciding who can conduct research; rather, the right of all people to freely conduct research on the minimum wage should be explicitly guaranteed in the Draft Law.

The substance of this article is in direct contravention of article 3 of ILO Convention 87 Concerning Freedom of Association and Protection of the Right to Organise Convention<sup>7</sup>, which provides for the right of unions to conduct activities free from state interference. Article 11 of the same Convention provides for the right of freedom of association, which would also be undermined by the application of this provision.

- CCHR, SC, and ITUC recommend the removal of this article, in order for the Draft Law to comply with Cambodia's human rights obligations.

## **Conclusions**

CCHR, SC and the ITUC welcome the proposed creation of a national minimum wage for all workers in Cambodia, which would finally bring Cambodia into compliance with Article 7 of the ICESCR and other binding international labor rights instruments. However, the current Draft Law is unacceptable from an IHRL perspective, and it requires a number of significant amendments, from a human rights perspective. The substantive effect of many provisions of the Draft Law would be to undermine and potentially criminalize the legitimate work of unions, labor rights activists and CSOs, and the current draft would undercut the stated purpose of the law, while seriously violating a number of binding human rights guarantees.

Other provisions in the Draft Law would muzzle and potentially criminalize journalists, academics and concerned citizens who express their views on the minimum wage. Further, workers and unions would potentially be barred from organizing peaceful demonstrations, effectively crippling the work of independent unions. Moreover, the Draft Law fails to guarantee the equal participation of independent unions in the wage-setting process, and the Draft Law contains a number of disproportionate and inappropriate punishments for those who fail to comply with provisions, which themselves fail to comply with IHRL and constitutional human rights guarantees.

The Draft Law repeatedly fails to comply with domestically and internationally protected fundamental freedoms. The freedoms of expression, association, and assembly are all expressly guaranteed under the Cambodian Constitution and a number of international covenants and agreements which are directly applicable in Cambodia; yet the Draft Law in its current form represents a serious threat to these freedoms, and the overall democratic space in Cambodia.

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<sup>7</sup> International Labor Organization Convention Concerning Freedom of Association and Protection of the Right to Organize 1948 <https://goo.gl/fHVHbR>

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