Comment

on the

Draft Cambodian Penal Code

ARTICLE 19
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This Comment provides an analysis of the draft Cambodian Penal Code (draft Code).[1] The draft Penal Code has been passed by the Cambodian Council of Ministers and is now before the National Assembly.[2] We welcome efforts to reform the Penal Code, which currently includes a number of provisions which unduly restrict freedom of expression.[3]

This Comment assesses the draft Code against international standards on freedom of expression and, in particular, rules regarding restrictions on the content of what may be published or broadcast. The draft Code has a number of positive features but, at the same time, ARTICLE 19 has a number of concerns, as outlined below. This Comment does not detail all of ARTICLE 19's concerns with the draft Code; rather, it focuses only on the more important of these concerns.

1. General Comments

In many instances, the draft Penal Code makes an attempt to commit an offence punishable in the same way as commission of the primary offence (see, for example, Articles 303 and 319,

[1] We would like to thank Sinfah Tunsarawuth who helped draft this analysis.
[2] We are not aware of whether or not this is an official translation. ARTICLE 19 takes no responsibility for errors based on misleading or erroneous translation.
[3] See ARTICLE 19, *Cambodia: Freedom of Expression and the Media*, available at: http://www.article19.org/pdfs/publications/cambodia-baseline-study.pdf.

on attempt to infringe privacy, and Article 458, on attempt to provide false information). By definition, an attempt to commit a crime means the offence has not yet been committed. It is, therefore, legitimate to penalise an attempt to commit a crime involving the exercise of expression only in cases where the primary offence is a serious crime, such as treason. As a result, most of the provisions on attempt in the draft Code that are analysed in this Comment should be removed. Attempt should not be established in relation to minor offences, such as attempting to invade privacy or to take someone's picture without their consent. Furthermore, where attempt is punishable by law, it should be subject to a lesser penalty than the actual commission of the offence.

For many offences, the draft Code allows for the imposition of a number of additional penalties, over an above the main sanctions of fines and imprisonment. Many of these involve the imposition of limitations, normally for up to five years, for example being depriving of certain civil rights, not specified in the draft, being prohibiting from pursuing a profession, from driving, from taking up residency in the country, from leaving the country or from entering for foreigners, from carrying a weapon, or from operating an establishment. Some also provide for confiscation not only of materials used to commit the offence and the profits from it, and the closure of establishments used to this end for up to five years, but also confiscation of vehicles apparently unrelated to the offence. Finally, the court may require the offender to "post the decision" for up to two months, to publish the decision in a newspaper(s) and/or to broadcast the decision for up to eight days. These proposed additional penalties are wide-ranging and harsh and, in some of the proposed amendments, number as many as sixteen.

Some of these are serious punishments which should not be treated as supplementary but as part of the main penalty. Some of them, including the prohibition on practising one's profession, particularly if that is as a journalist, are unduly harsh. Furthermore, international standards require the criminal law to be specific regarding what punishment the court can impose after conviction for a crime, and these are normally limited in number. While the obligation to post the decision or broadcast it is limited in time, this is not the case for publication in a newspaper.

In many cases, the main penalty for offences includes a minimum term of imprisonment. Such a minimum term can be justified only for more serious offences, not including most of those discussed in this Comment. Otherwise, such a minimum term breaches the rule that sanctions for breach of rules restricting expression must be proportionate.

The draft Code refers at various places to the notion of a "public place" and a "public meeting" and calls for a more serious penalty for certain offences when they are committed in a public place or at a public meeting. Given their importance, and to ensure clarity in these offences, these terms should be defined in the law.[4]

Recommendations:

- Attempt should be a crime only for more serious offences and, even in this case, it should be subject to less serious penalties than commission of the primary offence.
- The more serious of the additional penalties should not be treated as supplementary but as part of the main penalty.

[4] Only part of the draft Penal Code has been made available to us so it is possible that these terms are defined elsewhere.

- Courts should not be able to prohibit individuals from practising as a journalist as punishment for a crime.
- The penalties that may be imposed for a crime under the penal code should be clear and limited in number.
- The law should establish a limit to the number of days offenders may be required to publish a court decision in a newspaper, for example of eight days, as is the case for broadcasting such a decision.
- The minimum term of imprisonment for offences should be removed.
- The terms "public place" and "public meeting" should be defined in the law.

2. Communication Privacy (Articles 301–304)

Article 301 makes it a crime, punishable by imprisonment of between one month and one year, and a fine of between 100,000 and 2,000,000 Riels (approximately USD24-485), to listen to or record what another person says, without the consent of that person. If the person is informed of the listening or recording and does not object to it, consent is presumed. Article 302 provides for the same punishment for taking a picture of another person in a private place without the consent of that person, while Article 303 provides for the same punishment for an attempt to commit these crimes. Article 304 provides for five additional penalties for these crimes.

Analysis

The provisions are designed to protect individual's privacy, including in relation to communications. However, simple intrusion into privacy, as defined in these provisions, should not be treated as a criminal offence, since claiming monetary damages through the civil law is an adequate remedy for the injured person.

Furthermore, simply listening to or recording someone's speech in a public place, or in any place where the individual does not have a legitimate expectation of privacy, should not be prohibited, although certain protection might be afforded against exploitation of private matters, including pictures, for commercial gain.

Finally, the law fails to provide for instances where an individual's privacy can be overridden in the overall public interest. Exposing corruption of a politician, for example, might well justify invading his privacy. Or when a cabinet minister is trying to conceal certain information that could negatively affect the general public, exposure of his correspondence or electronic messages may avert a greater harm.

Recommendations:

- Ideally, a dedicated law on privacy should be adopted instead of these provisions in the Penal Code. Such a law should specify the legitimate privacy interests to be protected, while allowing for a public interest override. In this regard, it should distinguish between protecting the privacy of an ordinary individual and politicians or those holding public office, who should benefit from less protection.
- In any case, these rules should be civil in nature rather than contained in the Penal Code.

3. Defamation and Insult (Articles 305-313, 445-447, 511)

Article 305 makes it a crime, punishable by a fine of between 100,000 and 10,000,000 Riels (approximately USD24-2,400), to make a statement publicly through speech, writing or audio-visual communications that undermines the honour or reputation of someone (defined as defamation). Article 307 makes it a crime subject to the same penalty to make a public statement through similar means that is scornful or contains verbal abuse (defined as insult). Articles 306 and 308 provide that defamation and insult through media shall be dealt with through the press law. Article 511 also defines insult, as expression via words, gestures and so on which undermines the dignity of someone. Insult directed against a civil servant or elected official is punishable by one to six days of imprisonment and a fine of between 1,000 and 100,000 Riels (approximately USD2-24).

Article 309 provides for cases involving officials to be filed by the head of the concerned institution, and for cases involving private individuals to be filed by them personally. The third paragraph of this article provides for charges to be filed by the prosecutor for defamation or insult based on the origin, ethnicity, race, nationality or religion of an individual. Article 310 provides for three additional penalties for these crimes.

Article 311 defines "slanderous denunciation" as making an allegation of fact which is known to be false and which may result in criminal or disciplinary sanctions against an individual, while Article 312 sets the penalty for this at imprisonment of between one month and one year and a fine of between 100,000 and 2,000,000 Riels (approximately USD24-485), and also sets the statute of limitation for this offence as one year from the day on which the complaint on slanderous denunciation is received by the competent authorities. Article 313 provides for three additional penalties for the crime of slanderous denunciation.

Article 445 makes it a crime, punishable by imprisonment of between one month and six months and a fine of between 100,000 and 10,000,000 Riels (approximately USD24-2,400), to publicly insult the King through speech or writing. Once again, pursuant to Article 446, insult committed through media is subject to the rules in the press law. Article 447 provides for ten additional penalties for this crime.

Analysis

A key problem with these provisions is that defamation and insult are treated as a criminal offence. It is welcome that the main provisions on defamation and insult only provide for fines, although the law still envisages imprisonment for certain forms of defamation. Many countries have completely decriminalised defamation and international law rules out criminal penalties for this offence since civil rules leading to damages provide adequate protection for reputation. The rules regarding defamation and insult should be removed from the Penal Code and provided for, as necessary, in the civil code. At a minimum, imprisonment for defamation should be done away with.

The definition of defamation and insult is very broad, allowing for misuse or abuse. These rules should apply only to incorrect factual statements made without reasonable grounds. It should not be an offence to make a defamatory statement which is true or which is a reasonable opinion. As the draft provisions stand now, a true statement or reasonable opinion can still attract sanction.

The draft Code provides greater protection for officials, and particularly for the King, both in terms of penalties (defamation of officials may lead to imprisonment, in the case of the King

for up to six months), and in terms of procedure (cases involving officials may be lodged by the head of a public institution, thereby relieving officials of the burden and cost of taking such cases themselves). This is contrary to clear international rules, which provide, instead, for officials to tolerate a greater degree of criticism. Special protection for a high official like the King is particularly unreasonable.

Article 309 clearly deals with procedural aspects of filing a defamation or insult case; it may be preferable to address this through the procedural code. The third paragraph of Article 309 appears to be address the issue of hate speech. This is quite different than defamation and insult and should be treated separately from defamation, so as to avoid any confusion.

Recommendations:

- Defamation and insult should be removed from the Penal Code and instead addressed through the civil law. At a minimum, the sanction of imprisonment for defamation should be removed.
- The definition of defamation and insult should be restricted to false statements of fact made without reasonable grounds.
- Special protection for officials, and particularly for the King, should be removed from the law. Instead, officials should be required to tolerate a greater degree of criticism.
- Everyone wishing to prosecute a defamation claim should be required to lodge the case themselves.
- The rules on hate speech should be classified under that heading, rather than being included with the defamation provisions.

4. False Information and Insurrection (Articles 428-9, 457-8, 466)

Pursuant to Article 428, it is a crime, punishable by imprisonment of between one and two years, and a fine of between two and four million Riels (approximately USD 485-1,000), to communicate false information with the intention of creating an impression that harm is likely to result. Article 429 lists sixteen additional penalties that may result from this crime.

It is also a crime, punishable by imprisonment of between two and five years, and a fine of between four and ten million Riels (approximately USD1,000-2,400), to provide Cambodian military or civilian authorities with false information with a view to serving the interests of a foreign State (Article 457). Pursuant to Article 458, an attempt to commit this crime attracts the same punishment.

Article 466 makes it a crime, punishable by imprisonment of between seven and fifteen years, to provoke an assembly of those likely to participate in insurrection.

Analysis

It is clearly undesirable that individuals should promulgate false information, particularly with an intention to cause harm. At the same time, the serious risk that provisions on false information may be abused, due to the lack of clarity regarding what is false, as well as the very general nature of the intention involved, has lead international courts and officials to reject the idea of prohibitions on false news, absent a defamatory intent, as a restriction on freedom of expression. It is inevitable that journalists, in discharging their responsibility to provide information of public interest, will make mistakes. Professional codes therefore

require them only to make a reasonable effort to promulgate accurate news. Breach of these codes may normally only lead to a requirement to correct the mistake.

Article 457 provides for a more clearly defined offence and hence may avoid the criticisms noted above. However, it lacks a clear requirement of intent.

Insurrection is a serious offence and incitement to insurrection may legitimately be penalised. However, Article 466, which makes it a crime merely to provoke an assembly of those likely to be engaged in insurrection, is overly broad and should be restricted to incitement to insurrection.

Recommendations:

- Article 428, prohibiting dissemination of false news, should be removed from the law.
- The law should make it clear that Article 457 requires an intention to serve the interests of a foreign State.
- It should only be a crime to incite to insurrection, and not merely to promote a gathering of those likely to be involved in insurrection.

5. Secrecy (Articles 314-15, 455-459, 486-492)

The draft Code contains a number of provisions on secrecy in different sections, some imposing secrecy obligations on officials and some applying to everyone.

As regards officials, Article 314 makes it a crime, punishable by imprisonment of between one month and one year, and a fine of between 100,000 and 2,000,000 Riels (approximately USD 24-485), for anyone who holds information of a "confidential nature", which is not defined, by virtue of their profession or position (i.e. an official) to disclose that information to an unauthorised person. Pursuant to Article 315, this is not an offence when information disclosing ill-treatment of minors younger than 15 years old is provided to judicial, administrative or medial authorities. Article 316 provides for limited additional penalties of disseminating the sentencing decision for the Article 314 crime.

Articles 486-492 establish a more specific regime of classification of secrets. Article 486 provides for the government to establish "protective measures", presumably including by affixing a classification label, for information the disclosure of which is likely to undermine national security, while Article 487 defines such information as national defence secrets.

Pursuant to Article 488, it is a crime, punishable by imprisonment of between two and five years, and a fine of between four and ten million Riels (approximately USD 1,000-2,430), for an official to reveal a defence secret to an unauthorised person. Where this occurs due to neglect, presumably as opposed to intentionally, the sentence is reduced to imprisonment of between six months and two years, and a fine of between one and four million Riels (approximately USD 243-1,000). An attempt to commit an Article 488, or an Article 489 or 490 crime (see below), is punishable by the same penalty (Article 491), while Article 492 provides for five additional penalties for these crimes.

The draft Code also imposes secrecy obligations on everyone. Article 455 makes it a crime, punishable by imprisonment of between five and ten years, to provide information which may undermine national defence to a foreign State or its agents, with a view to 'delivering power'

to that State. Article 456 makes it a crime, punishable by imprisonment of between seven and fifteen years, to destroy, damage or embezzle documents or materials when this undermines national defence. Article 459 provides for eleven additional penalties for these crimes.

Pursuant to Article 489, it is a crime, punishable by imprisonment of between two to five years, and a fine of between four and ten million Riels (approximately USD 1,000-2,430), for an unauthorised person to have in his or her possession a defence secret (as defined in Article 487). Article 490 makes it a crime, punishable in the same way, to destroy or copy an Article 487 defence secret.

Analysis

There is significant overlap between the Article 314 and 488 offences for officials disclosing secrets. One difference is that the former applies to information which is by nature confidential while the latter applies to information subject to protective measures (presumably classification) as a defence secret. This is a serious problem with Article 314, inasmuch as it is not clear to individuals what may be by nature confidential. Another difference is that the penalties for the Article 488 offence are much more severe.

The Article 488 crime applies to the disclosure of all classified information by officials. Under international law, information held by public bodies may be protected, but only where disclosure of that information to the public would cause harm to a protected interest. It may be noted that the mere fact that information is classified does not meet this standard. Information might have been wrongly or overbroadly classified, or the harm that would have resulted at the time of classification, which may have been many years ago, might have disappeared.

International law also provides for the disclosure of information, even where this would cause harm to a legitimate interest, where this serves the overall public interest. Article 315 appears to recognise one form of public interest – namely the protection of minors – but this is far too limited to meet international standards. Article 488 does not appear to recognise any overriding public interests. Other public interests which may warrant the disclosure of information might be the exposure of corruption, human rights abuse or serious harm to the environment.

There is also a high degree of overlap between the various offences which apply to everyone. Articles 456 and 490 both apply to the destruction of confidential information. The former requires some actual harm to defence, while the latter applies to all classified information. Articles 455 applies to possession of confidential information with the intention of providing it to foreign powers, while Article 489 makes it a very serious crime simply to possess classified information.

All of the secrecy crimes which apply to everyone are overbroad in scope. They are not limited in scope to officials and there is no requirement of intent. International law places the onus on public bodies to protect secret information, not on private individuals to whom it may be leaked. Indeed, international law recognises that leaks of public interest information by whistleblowers are an important democracy tool. Furthermore, under these rules, an individual might be liable for publishing or destroying information which that individual believed to be harmless, if in fact that was deemed to result in some harm to national security. Article 455, at least, does appear to incorporate a requirement of intent to aid a foreign State, and to this extent is much narrower than Article 489, which criminalises simple possession.

The problems with protecting all classified information, noted above, apply with even more force to cases involving non-officials, including the need for a risk of harm and for a public interest override.

Recommendations:

- Ideally, a fully-fledged secrecy law, providing for a system of classification and the protection of information only based on the risk of harm from disclosure, and subject to a public interest override, should replace these minimal secrecy provisions in the Penal Code.
- Articles 314 should be removed and Article 488 should incorporate a harm test and be subject to a public interest override. Consideration should be given to reducing the penalties provided for breach of Article 488.
- Article 455 should be restricted in scope to cases where individuals provide information which is clearly secret directly to a foreign State with the specific intention of undermining national security, and where that is likely to result in fact.
- Article 456 should be restricted in scope to cases involving information which is clearly secret and where individuals act with the specific intention of undermining national security, and where that is likely to result in fact.
- Articles 489 and 490 should be abolished.

6. The Administration of Justice (Articles 529-537)

Article 529 makes insult, as prescribed in Article 307 and Article 511, a more serious crime when directed at a judge, punishable by imprisonment of between six days and one month and a fine of between 10,000 and 100,000 Riels (approximately USD2-24). Where an insult is made during a court hearing, the punishment is raised to imprisonment of between one month and three months and a fine of between 100,000 and 500,000 Riels (approximately USD24-120).

Article 533 punishes any publication prior to the final ruling on a case which aims to influence the court's decision by imprisonment of between one month and six months and a fine of between 100,000 and 1,000,000 Riels (approximately USD24-240). Article 534 provides for the same punishment for any criticism of a court decision with an aim of creating "disturbance of public order" or endangering the "institutions of the Kingdom of Cambodia". Article 535 again provides for the same punishment for any "denunciation by lying" to the court or any administrative authorities of any fact related to an offence where such act leads to a "useless investigation". Article 536 makes an attempt to commit the crimes prescribed in Article 530 and Article 535 (although this seems to be a mistake and it may be that these references are supposed to be to Articles 532 and 537) punishable by equal penalties and Article 537 provides for seven additional penalties for these crimes.

Analysis

Article 529 protects judges, rather than the administration of justice, from criticism since it does not refer to any harm to the administration of justice. International standards on freedom of expression rule out special protection for judges or any other public officials against criticism.

Article 533, which uses the term "influence" a court decision, and Article 534, which uses the terms "create disturbance of public order" and "endanger institutions of Kingdom of Cambodia", are very broad and open to misuse and abuse by the court in punishing those who

may have reasonable arguments to present. These provisions, if strictly applied by the judiciary, may block any arguments or criticism against what the court has done or plans to do in relation to cases concerned with the public.

Article 535 does not spell out clearly what constitutes "lying" and a "useless investigation". Lying should be understood to mean the act of telling an intentional falsehood. The use of the term "useless investigation" is rather unfit here. The term "mislead an investigation" will probably be more appropriate.

Recommendations:

- Article 529 should be restricted to statements which are intended and are likely to undermine the administration of justice.
- Articles 533 and 534 should be narrowed down to apply only where it is clear that the purpose of the statements are to undermine the ability of a court to dispense justice.
- It should be made clear that the term 'lying' in Article 535 means intentionally telling a falsehood and this provision should apply only where the lie is made with the intention of misleading an investigation.

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On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

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