



## **ANALYSIS OF CAMBODIA'S STATE OF EMERGENCY DRAFT LAW**

**7 April 2020**

### **I. CONCLUSION**

The “Draft Law on Management of the Nation in a State of Emergency” will bestow sweeping and undefined powers upon the government with no meaningful checks or balances. Vague and ambiguous language can be broadly interpreted to justify a state of emergency in almost any scenario. No time limits are imposed, thus a declaration could potentially last forever. Fundamental freedoms could be subject to undue limitation. This includes freedoms of movement, assembly, association, employment, property, and expression.

The government would be empowered to perform unlimited surveillance on all citizen communication while banning the distribution of any information it chooses. The government could easily order martial law allowing the military to take control over civilian functions in order to manage the nation. Lastly, disproportionate and unforeseeable criminal penalties could be imposed on citizens using a series of vaguely worded offenses. Legal entities such as organizations or associations may face severe penalties like dissolution if they violate unclear state of emergency laws.

Concern that this new law is a pretext to further dismantle civil liberties is legitimate.

### **II. FACTS**

On 31 March 2020,<sup>1</sup> a bill titled “Draft Law on the Management of the Nation in a State of Emergency” was leaked to the public. The draft law was approved<sup>2</sup> by the Council of Minister’s Standing Committee, which was chaired by the Prime Minister.

The draft law is set for debate at the National Assembly. If approved by the National Assembly and Senate, the King could then promulgate the law. The Cambodian People’s Party (CPP) occupies all 125 seats in the National Assembly and 58 out of 62 seats in the Senate, leaving the draft legislation with no obstacles before promulgation. Session dates are unclear, but the draft could become law as soon as this week.

The draft law sets out formalities, procedures and terms for a declaration of a state of emergency. This analysis was prepared on the basis of an unofficial English translation dated March 31.

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<sup>1</sup> [https://www.facebook.com/ocmcambodia/posts/2753304201390242?\\_tn\\_=-R](https://www.facebook.com/ocmcambodia/posts/2753304201390242?_tn_=-R)

<sup>2</sup> <https://www.phnompenhpost.com/national/no-word-state-emergency>

### III. DRAFT LAW ON MANAGEMENT OF THE NATION IN A STATE OF EMERGENCY

#### CHAPTER 1 General Provisions

**Article 1: Purpose** - To specify the procedures and conditions for which the nation can be put under a state of emergency at a time when the nation is under immediate risk, as well as the management of the nation under said state of emergency in order to protect national security, public order, the lives and health of its citizens as well as property and the environment.

**Article 2: Scope** – The scope of this law is in line whenever a state of emergency has been declared in the country, as written in Article 22 (New) of the constitution.

#### Comments

Domestic Law: The Cambodian government may soon declare a state of emergency under Article 22 of the Constitution. Article 22 requires that the nation face “danger” and a joint approval be reached by the King, Prime Minister, and Presidents of the National Assembly and Senate. The King must then make a proclamation putting the country into a state of emergency.

International Law: Under international law, the central point of reference for a state of emergency is the International Covenant on Civil and Political Rights (ICCPR). Cambodia is a party to this covenant. Under Article 4(1), Cambodia may take emergency action, which derogate from its responsibilities under the ICCPR. However, legal limitations exist. The government’s actions must be strictly proportionate to address the emergency and cannot be inconsistent with Cambodia’s other obligations under international law. Cambodia cannot impose measures that:

- Discriminate against someone based solely on their race, colour, sex, language, religion or social origins.<sup>3</sup>
- Arbitrarily deprives someone of life.<sup>4</sup>
- Subjects someone to torture, cruel, inhuman, degrading treatment or punishment.<sup>5</sup>
- Hold someone in slavery<sup>6</sup> or servitude<sup>7</sup>.
- Imprison someone merely on the ground of inability to fulfill a contractual obligation<sup>8</sup>.
- Finds a person guilty of an offence that did not constitute a criminal offence, under national or international law, at the time when it was committed.<sup>9</sup>

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<sup>3</sup> Article 4(1) – ICCPR

<sup>4</sup> Article 6(1) - ICCPR

<sup>5</sup> Article 7 - ICCPR

<sup>6</sup> Article 8(1) - ICCPR

<sup>7</sup> Article 8(2) - ICCPR

<sup>8</sup> Article 11 - ICCPR

- Removes a person’s right to recognition everywhere as a person before the law<sup>10</sup>.
- Restricts a person’s right to freedom of thought, conscience and religion. This includes the right to adopt a religion or belief of choice and manifest this belief in worship, observance, practice and teaching.<sup>11</sup>

## CHAPTER 2

### Procedures and Conditions for the Declaration of a National State of Emergency

**Article 3: Procedures and Conditions for the Declaration of a National State of Emergency** – When the nation faces danger, the King shall make a proclamation to the people putting the country in a state of emergency after agreement with the Prime Minister and the President of the National Assembly and President of the Senate.

Declaring a state of emergency shall be done via a royal decree, and may or may not be assigned a time limit. In the event that a state of emergency is declared without a clear time limit, such a state of emergency shall be terminated by the issuance of a royal decree when the situation allows it.

#### Comments

Vague and ambiguous “danger” standard: The vague use of the word “danger” is problematic. While Article 3 of the draft law follows the state of emergency mechanism set out in Article 22 of the Cambodian constitution, the word “danger” is undefined in both documents. Without clarification, this article risks broad interpretation with the possibility that a state of emergency could be declared in almost any scenario perceived as “dangerous”.

The King’s power is undermined by the Constitution: Article 7 of the Constitution claims that the King is head of state for life and “inviolable.” However, the same article asserts the King may not govern<sup>12</sup>. Article 17 reinforces the King’s limitation by stating Article 7 “shall never be amended.”<sup>13</sup> In the event the King is unable to perform normal duties as Head of State, Article 11 of the Constitution clarifies that the President of the Senate “shall perform the duties of the Head of State as the King’s regent.”<sup>14</sup> This sequence and interaction of articles suggests that during a state of emergency—if the King is unable to perform his normal duty due to something like a “serious illness”<sup>15</sup>—the trio of the Prime Minister, President of the National Assembly and the President of the Senate are empowered to reach a joint agreement to declare a state of emergency. Article 28 allows the King to “delegate the power of signing Royal proclamations and Royal decrees to the Acting Head of State”<sup>16</sup> which would likely be the President of the Senate. Under these circumstances, the King’s power is expendable.

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<sup>9</sup> Article 15(1) - ICCPR

<sup>10</sup> Article 16 - ICCPR

<sup>11</sup> Article 18(1) - ICCPR

<sup>12</sup> Article 7 – Constitution of Cambodia

<sup>13</sup> Article 17 – Constitution of Cambodia

<sup>14</sup> Article 11 – Constitution of Cambodia

<sup>15</sup> Article 11 – Constitution of Cambodia

<sup>16</sup> Article 28 – Constitution of Cambodia

Must notify the United Nations (UN) Secretary-General: A joint agreement between the King, Prime Minister, and Presidents of the National Assembly and Senate is only one step. Article 4(3) of the ICCPR states that “any state party” shall immediately inform the UN Secretary-General of “the provisions from which it has derogated and of the reasons by which it was actuated.”<sup>17</sup> In other words, Cambodia must notify the UN Secretary-General by identifying which international provisions it is diminishing and why.

Risk of permanent state of emergency: Once declared, a state of emergency could become permanent under this draft law. A state of emergency which “may or may not be assigned a time limit” and can only be terminated by royal decree “when the situation allows” could last indefinitely. Article 4(1) of the ICCPR requires proportionality. State parties may take emergency measures which derogate from their obligations under international human rights law only “to the extent strictly required by the exigencies of the situation”. States of emergency cannot lawfully be maintained for so long that they become a permanent or quasi-permanent part of a country’s internal legal system.

**Article 4: Conditions for the Declaration of a National State of Emergency** – Declaring a state of emergency can be done whenever the nation is facing a great risk, such as in the event of accidents borne out of war or an invasion by foreign forces, an imminent danger to public health caused by the expansion of a pandemic, grave disruption to national security and public order, or a grave natural disaster that presents a risk or could cause widespread danger across the nation.

#### **Comments**

Overly broad and vague conditions: A state of emergency can be imposed “whenever” the nation faces a “great risk”. The draft law lacks clarity on how or when a risk becomes “great” and who is empowered to make that determination. The possibility of a Cambodian state of emergency was initially triggered in response to rising COVID-19 infections. This reality is reflected in the draft’s example of an imminent “expansion of a pandemic.” However, the draft further expands conditions to include the vaguely worded “grave disruption to national security and public order.” Without guidelines or limitations, this provision could be broadly misinterpreted to justify a state of emergency “whenever” national security or public order are perceived to be threatened. Read together, Articles 1-4 would allow a state of emergency to continue even after “great risk” conditions have ended.

### **CHAPTER 3**

#### **The Management of the Nation during a State of Emergency**

**Article 5: Measures taken whilst the Nation is under a State of Emergency** – When a national state of emergency has been imposed, the Royal Government has the right to take the following measures:

1. Banning or restricting the right of freedom of movement.

#### **Comments**

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<sup>17</sup> Article 4(3) - ICCPR

Freedom of movement is protected by domestic and international law: Under this provision, the Cambodian government has complete authority to restrict freedom of movement of its citizens. No timeframe is provided. Article 40 of the Constitution states that the “freedom of citizens to travel near and far and their right to legal settlement shall be respected<sup>18</sup>. Article 12(1) of the ICCPR states that everyone shall have the “right to liberty of movement and freedom to choose his residence.<sup>19</sup>” Restrictions against freedom of movement are permissible if they are “provided by law” and are “necessary to protect national security, public order, public health”.<sup>20</sup> Any restrictions on freedom of movement should be temporary and narrowly tailored using the least restrictive means to achieve the government’s purpose to address a public health emergency.

2. Banning or restricting the right of association or of meetings of people.

### **Comments**

Freedom of assembly and association are protected by domestic and international law: Under this provision, the Cambodian government has complete authority to restrict freedom of assembly and association. Article 37 of the Constitution protects the right to “organize peaceful demonstrations<sup>21</sup>”. Article 41 protects “freedom of assembly<sup>22</sup>”. Article 42 states that Khmer citizens have “the right to establish associations” and may take part in “mass organizations<sup>23</sup>”. The ICCPR recognizes the “right of peaceful assembly<sup>24</sup>” under Article 21 and the “right to freedom of association” under Article 22(1)<sup>25</sup>. During a public health emergency, temporary restrictions on large meetings between people in close proximity to one another could be reasonable. However, the expansion of the government’s ability to ban or restrict the “right of association” is troubling and unnecessary. Restricting an individual’s right to voluntarily join or leave a group for a collective purpose is an overreach of the law.

3. Banning or restricting work activities and occupations.

### **Comments**

The right to choose any employment is protected by domestic law: Under this provision, the government would have the authority to outlaw specific occupations. No clarity is provided on how or why certain occupations would be chosen, banned, or restricted. During a public health emergency, temporary restrictions on non-essential work activities could be a reasonable measure to prevent escalation. However, a ban on occupations is both perplexing and inconsistent with domestic law. Article 36 of the Constitution states that Khmer citizens “shall enjoy the right to choose any employment according to their ability and the needs of the society.”<sup>26</sup> The draft law provides no justification why banning an occupation is necessary during a state of emergency.

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<sup>18</sup> Article 40 – Constitution of Cambodia

<sup>19</sup> Article 12(1) - ICCPR

<sup>20</sup> Article 12(3) - ICCPR

<sup>21</sup> Article 37 – Constitution of Cambodia

<sup>22</sup> Article 41 – Constitution of Cambodia

<sup>23</sup> Article 42 – Constitution of Cambodia

<sup>24</sup> Article 21 - ICCPR

<sup>25</sup> Article 22(1) - ICCPR

<sup>26</sup> Article 36 – Constitution of Cambodia

4. Banning or restricting individuals from leaving their dwellings or any place of residence.
5. Putting in place measures concerning quarantine or isolation in the event of imminent danger to public health caused by a pandemic.
6. Putting in place measures concerning the mobilization or relocation of people in response to the state of emergency.

#### **Comments**

Measures in Article 4, 5, 6 should be proportional and temporary: Any restrictions requiring citizens to remain home in self-isolation or relocate should be temporary and narrowly tailored using the least restrictive means in order for the government to address the public health emergency. Restrictions of these rights should only occur for the minimum time the emergency situation requires.

7. Putting in place measures concerning the mobilization, revocation, management, and assignment of all possessions as well as services that are necessary in response to the state of emergency; The procedures related to mobilization and compensation shall be determined by the royal government.

#### **Comments**

Government expropriation of private property should be clearly defined and fairly compensated: Article 31 of the Constitution recognizes that the Kingdom of Cambodia respects the human rights stipulated in the Universal Declaration of Human Rights (UDHR).<sup>27</sup> Article 17 of the UDHR states that “everyone has the right to own property”<sup>28</sup> and “no one shall be arbitrarily deprived”<sup>29</sup> of their property. Article 44 of the Constitution reflects the UDHR and adds that “[e]xpropriation of ownership from any person shall be exercised only in the public interest as provided for by law and shall require fair and just compensation in advance.”<sup>30</sup> Article 7 of the draft law should more clearly define what possessions or property are “necessary” in response to a state of emergency. The government would then be constitutionally required to make advance payments of “fair and just compensation” to any citizen before their property has been taken.

8. Putting in place measures concerning the fixing of prices of necessary goods and services in accordance to the state of emergency.
9. Putting in place measures concerning the closure of any public or private spaces deemed necessary in accordance to the state of emergency.

#### **Comments**

Closing public spaces should be proportional and temporary: Temporarily closing public spaces may be necessary in order for the government to effectively address a public health emergency.

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<sup>27</sup> Article 31 – Constitution of Cambodia

<sup>28</sup> Article 17(1) – Universal Declaration of Human Rights

<sup>29</sup> Article 17(2) – Universal Declaration of Human Rights

<sup>30</sup> Article 44 – Constitution of Cambodia

These spaces should only be closed for the minimum time an emergency situation requires. Public spaces are essential to citizens' freedom of association and assembly and therefore must become accessible as soon as safely possible.

10. Putting in place measures to monitor, observe and gather information from all telecommunication mediums, using any means necessary, in response to the state of emergency.

#### **Comments**

The right to privacy is protected by domestic and international law: This provision would empower the government to conduct unlimited surveillance. The ability to "monitor, observe and gather information from all telecommunication mediums, using any means necessary" is an extremely broad power with no visible oversight mechanism. Article 40 of the Constitution guarantees "confidentiality of correspondence by mail, telegram, fax, telex, and telephone".<sup>31</sup> Article 17(1) of the ICCPR states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence"<sup>32</sup>. The law fails to distinguish whether the provision applies to public vs. private communications. Unrestrained government surveillance of all communication is dangerous and a violation of domestic and international law.

11. Banning or restricting the distribution of information that could scare the public, unrest, or that can negatively impact national security, or that can cause confusion in response to the state of emergency.

#### **Comments**

Freedom of expression, information, and publication are protected by domestic and international law: This provision is overbroad and vaguely defined. Implementation during a state of emergency could lead to government control or dissolution of all media platforms including independent or social media. Individuals may be criminalized for sharing opinions perceived to "negatively impact national security" or "cause confusion." Article 41 of the Constitution states that "Khmer citizens shall have freedom of expression of their ideas, freedom of information, freedom of publication"<sup>33</sup>. This right is reflected in Article 19(2) of the ICCPR, which states that freedom of expression "shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."<sup>34</sup> An ambiguous and undefined ability to ban or restrict the "distribution of information" which might "scare the public" is inconsistent with Cambodia's obligations under domestic and international law.

12. Putting in place other measures that are deemed appropriate and necessary in response to the state of emergency.

#### **Comments**

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<sup>31</sup> Article 40 – Constitution of Cambodia

<sup>32</sup> Article 17(1) – ICCPR

<sup>33</sup> Article 41 – Constitution of Cambodia

<sup>34</sup> Article 19(2) – ICCPR

Catch-all provision bestows unlimited power: This provision solidifies the government's unchecked powers. An ability to enact "other measures" whenever they are "deemed appropriate and necessary" creates enormous uncertainty and enables the government to implement new restrictions or penalties at will without oversight. The provision is equally vague and powerful, therefore the potential for abuse is high.

13. These measures can be implemented throughout the entire country or in a certain demarcated area.

If needed, the royal government can set up a mechanism, delegate the right to a certain government authority or make use of the armed forces, in order to ensure that the aforementioned measures are implemented.

In the event of war, or in any other circumstances in which there is a serious risk to national security, the management of the nation while under a state of emergency can be done under martial law.

### **Comments**

Sweeping ability to implement martial law: While the ability to declare a state of emergency under the draft law is arbitrary enough, this provision carelessly ensures that martial law can be invoked just as easily. Martial law may be imposed "in any other circumstance" where there is a "serious risk to national security." The overbroad and undefined nature of "other circumstances" may be interpreted to justify martial law in limitless scenarios where "serious risk" to national security is perceived. Military control over civilian functions should be narrowly tailored and clearly defined to avoid overbroad application and abuse.

**Article 6: Means of informing the National Assembly and the Senate on measures taken under a state of emergency** - The royal government must inform on a regular basis the National Assembly and the Senate on the measures it has taken during the state of emergency. The National Assembly and the Senate can request for more necessary information from the royal government under the framework of monitoring and evaluating the measures it has taken while the nation is under a state of emergency, in accordance to the constitution of the Kingdom of Cambodia.

### **Comments**

Bill fails to provide any oversight after granting extensive executive powers: There are no deliberate or meaningful checks or balances drafted into this law. This provision states the government must "inform on a regular basis" the National Assembly and the Senate. Aside from making a "request for more necessary information" there are no other checks, balances or continued oversight mechanisms built in. Perhaps the only unintended check on the government's ability to declare a state of emergency is the fact that a joint agreement must be reached by the King, Prime Minister, President of the National Assembly, and President of the Senate. Presumably, any one of these individuals could disagree thus denying a state of emergency declaration under Article 22 of the Constitution or the provisions in this draft law. However, if Article 11 of the Constitution is asserted due to the King's inability to perform normal duties, a joint agreement may only need to be reached by the other three parties. A disagreement between the Prime Minister, President of the National Assembly, and President of the Senate is technically possible but unrealistic at this time.

## CHAPTER 4 Penalties

**Article 7: Crime of obstructing the execution of the state of emergency** – Aside from existing laws in the penal code, the crime of willfully blocking or obstructing the execution of measures related to the state of emergency shall be punishable with jail from one to five years and a fine of one million to five million riels.

The crime of willfully blocking or obstructing the execution of measures related to the state of emergency shall be punishable with jail from five to 10 years in jail if this causes civil unrest or affects national security.

**Article 8: Crime of disobeying the implementation of the state of emergency** – Aside from existing laws in the penal code, the crime of willfully disobeying measures taken by the royal government and mentioned in Article 5 of this law shall be punished with one month to one year in jail and a fine of 100,000 to one million riels.

The crime of willfully disrespecting measures taken by the royal government and mentioned in Article 5 of this law shall be punished with one year to five years in jail and a fine of one million to five million riels if this causes civil unrest.

### Comments

Vague and overbroad criminal penalties in Articles 7 and 8 are unforeseeable and violate international law: Criminal penalties for vague offenses such as willfully blocking, obstructing, or disrespecting “measures taken by the royal government” are disproportionate and unforeseeable. “Disrespecting” can be interpreted as anything from deliberate physical disobedience to sharing critical opinions in private. A maximum 10-year imprisonment can be levied against anyone whose actions are alleged to have caused “civil unrest or affects national security.” Article 4(2) of the ICCPR identifies specific human rights a government may not derogate during a state of emergency<sup>35</sup>. Fair trial rights under Article 15 of the ICCPR are a non-derogable obligation. Article 15(1) states “No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”<sup>36</sup> An offense must be clearly defined and consequences of an act should be known. The unpredictability of the offenses make them unforeseeable and thus inconsistent with Cambodia’s fair trial obligations under Article 15 of the ICCPR.

**Article 9: Criminal responsibilities of legal entities** – Legal entities can be deemed criminally responsible as stated under Article 42 of the Penal Code (criminal responsibilities of legal entities) for any of the offenses stated in Article 7 of this law. Legal entities shall be punished with a fine of 100 million to one billion riels, as well as to one or several of the additional penalties as stated in article [168] of the Penal Code.

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<sup>35</sup> Article 4(2) – ICCPR

<sup>36</sup> Article 15(1) – ICCPR

Legal entities can be deemed criminally responsible as stated under Article 42 of the Penal Code (criminal responsibilities of legal entities) for any of the offenses stated in Article 8 of this law. Legal entities shall be punished with a fine of 50 million to 500 million riels, as well as one or several of the additional penalties as stated in Article [168] of the Penal Code.

### **Comments**

Serious risk for organizations and associations: Under this provision, any organization, association, union or other group may be dissolved if one member is found guilty of violating vague state of emergency orders. Under Article 42 of the Criminal Code, legal entities may be held “criminally responsible” for offences committed by representatives or natural persons<sup>37</sup>. A legal entity may then be dually punished under arbitrary Articles 7 and 8 of this draft law, as well as Article 168 of the Criminal Code. Article 168<sup>38</sup> of the Criminal Code identifies fourteen separate penalties against legal entities including:

1. Dissolution
2. Placement under judicial supervision
3. Prohibition from undertaking one or more activities
4. Disqualification from public tender
5. Prohibition from making a public offering
6. Prohibition from issuing checks other than checks certified by a bank
7. Prohibition from using payment cards
8. Closure of the establishment which was used to plan or to commit the offence
9. Prohibition from operating an establishment that is open to or used by the public
10. Confiscation of any instruments, materials or items which were used or intended to be used to commit the offence
11. Confiscation of the items or funds with which the subject of the offence
12. Confiscation of the proceeds or property arising out of the offence
13. Confiscation of the utensils, materials and furnishings in the premises in which the offence was committed
14. Publication of sentencing decision, publication of the sentencing decision in the print media or communicating the decision to the public by audio-visual communication

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<sup>37</sup> Article 42 – Criminal Code

<sup>38</sup> Article 168 – Criminal Code

This provision creates a strict vicarious liability mechanism where the government is empowered to shut down any organization for a crime committed by a single member. Under Article 8, mere “disrespect” of government measures can result in dissolution. Cambodia’s already endangered space for dissent and activism may disappear entirely under this state of emergency.

**Article 10: Abrogation** – Any provisions contrary to this law shall be abrogated.

#### **Comments**

Identify laws to be abrogated: This draft law is far reaching in its scope and application. Multiple domestic and internationally protected rights will be eliminated if this draft becomes law in its current state. The government should specifically identify which of its own laws and international obligations it will annul or repeal in the event of a superseding state of emergency. This clarification should be made both for citizens who are expected to follow the law, and authorities who would be tasked with implementing it.

**Article 11** – This law is announced in an urgent manner.

#### **IV. CONCLUSION**

The “Draft Law on Management of the Nation in a State of Emergency” will bestow sweeping and undefined powers upon the government with no meaningful checks or balances.

In an emergency situation, Cambodia’s action in the field of human rights should be limited by Article 4 of the ICCPR and the principles of an exceptional threat, official proclamation, non-derogability of certain rights, strict necessity, compatibility with other international legal obligations, and international notification.

Cambodia’s draft law fails to strike a balance between the needs of the State and the right of individuals to have most of their rights and freedom effectively protected during a public emergency. Fundamental freedoms such as expression, association, and assembly will be subject to undue limitation.

Concern that this new law is a pretext to further dismantle civil liberties is legitimate.