MEMORANDUM

on

the Cambodian Law on the Press

by

ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

This Memorandum analyses the existing Cambodian Law on the Press (Press Law, or Law) for compliance with international law and standards. The analysis has been requested by our partner organisation, ADHOC and is based on the published UN English version of the law.

Generally, ARTICLE 19 notes that, frequently, press laws are vehicles by which governments attempt to over-regulate and control – improperly and impermissibly from the point of view of the international law of freedom of expression – what newspapers and other periodicals may say, and who may practice journalism. Such improper controls may take such forms as broad and vague content restrictions directly applied to the press; registration requirements on newspapers and accreditation requirements on journalists, both of which may be open to serious abuse; and obligatory codes of conduct for journalists which potentially turn "independent" journalist associations into arms of government.

At the same time, a good press law can, instead of *regulating and constraining* the press, work to *ensure genuine press freedom.* A good press law should, for instance, prohibit prior censorship, protect the confidentiality of sources, protect the independence of journalists' associations and ensure access for the press to the workings of government and to the judicial process. It should *not* contain any press-specific content restrictions, although it might provide for the rights of correction and

reply.

The Press Law does contain some very positive provisions, including a guarantee of the "freedom of the press and freedom of publication", consistent with constitutional protections (Article 1); a categorical assurance that the confidentiality of sources is protected (Article 2); a prohibition on "pre-publication censorship" (Article 3); and a guarantee that no person shall face criminal liability for the expression of opinions (Article 20).

On the other hand, the Press Law contains various provisions which are plainly intended to regulate, or to control, the press. For example, various articles contain broad and vaguely-worded content restrictions which have the potential for restricting expression which should be protected; individual journalists are effectively (albeit indirectly) subjected to a wide and troubling range of obligations, particularly relating to content; and there is a registration requirement applicable to all media, with enforcement powers in the Ministries of Information and the Interior, which may subject the press to arbitrary denials of the right to publish or to equally arbitrary shutdowns.

Recent events in the country bear out both the positive and the negative aspects of the Press Law. On the one hand, a significant amount of information critical of government and government officials is actually published by press outlets, usually without governmental interference or resistance. On the other hand, we note that the Press Law has been used to fetter legitimate publication activity. For example, Article 12 power (discussed below) has been exercised to suspend the operation of some newspapers for 30 days, based on critical comments made in some articles relating to high government officials; government officials, including judges, have brought defamation lawsuits based on investigative and other reports; and in some cases journalists have been detained and questioned about their sources.

In Section III of this Memorandum, we describe in detail and analyse those provisions of the Press Law which, in our view, need to be amended or repealed altogether. Section II outlines the guarantee of freedom of expression in international law and in the Constitution of the Kingdom of Cambodia

II. International Law and Standards

II.A The Importance of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR) guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[1]

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

[1] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

The *International Covenant on Civil and Political Rights* (ICCPR),[2] ratified by Cambodia in 1992, imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

> 1. Everyone shall have the right to freedom of opinion.
> 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.

Freedom of expression is also protected in all three regional human rights instruments, at Article 10 of the *European Convention on Human Rights* (ECHR),[3] Article 13 of the *American Convention on Human Rights*[4] and Article 9 of the *African Charter on Human and Peoples' Rights*.[5] Although not directly binding on Cambodia, judgments and decisions issued by courts under these regional mechanisms offer an authoritative interpretation of freedom of expression principles in various different contexts.

II.B Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the press. As the UN Human Rights Committee has stressed, a free media is essential in the political process:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[6]

The European Court of Human Rights has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law".[7] It has said:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[8]

The Inter-American Court of Human Rights has similarly explained: "It is the mass media that make the exercise of freedom of expression a reality".[9]

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[2] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[3] Adopted 4 November 1950, in force 3 September 1953.
[4] Adopted 22 November 1969, in force 18 July 1978.
[5] Adopted 26 June 1981, in force 21 October 1986.
[6] UN Human Rights Committee General Comment 25, issued 12 July 1996.
[7] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[8] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[9] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

II.C Restrictions on Freedom of Expression

International law and most national constitutions recognise that expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

A similar formulation can be found in the European and Inter-American regional human rights instruments.[10]

The UN Human Rights Committee has explained that Article 19(3) of the ICCPR creates a three-part test which must be satisfied as a condition of justifying any restriction on freedom of expression. First, the interference must be provided for by law. As the European Court of Human Rights has explained with respect to the ECHR's substantially identical provision, a restriction meets this standard only where the law in question is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct".[11]

Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.

Finally, the restriction must be *necessary* to secure one of those aims. As the European Court has explained, again in the context of substantially similar language in Article 10 of the ECHR, the requirement of necessity means that even where restrictions seek to protect a legitimate interest, the government must demonstrate that there is a "pressing social need" for the measures; moreover, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify it must be relevant and sufficient.[12]

II.D Constitutional Provisions

Article 31 of the Cambodian Constitution provides that Cambodia "shall recognise and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights [and] the covenants and conventions related to human rights…." Additionally, Article 41 of the Constitution provides that all citizens have "freedom of expression, *press*, *publication* and assembly" [emphases supplied]. That article goes on to provide: "No-one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security".

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[10] The African Charter employs a rather different formulation.

[11] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

[12] *Ibid.*, para. 62. These standards have been reiterated in a large number of cases.

III. Analysis of the Press Law

The Press Law contains a number of provisions of specific relevance to the press which, with modifications suggested below, may well be retained in the Press Law. However, other provisions, for instance those relating to access to official information or to restrictions on content (except as pertains to a right of retraction or reply) do not have anything specifically to do with the press and, ideally, should be repealed. The danger of including such provisions in a media-specific law is that they give the misleading, and sometimes false, impression that it is appropriate to treat the press, and journalists in particular, differently from other citizens with regard to what they may say or request, from whom and so on. Yet, as the Constitution itself makes clear, the right to freedom of expression and the press is a right which applies to every citizen without distinction.

We turn now to an analysis of the Press Law's specific provisions.

III.A Content Restrictions

Article 11 prohibits the publication of "anything that may affect public order by directly inciting one or more persons to commit violence". "Victims" of such publications are given the right to bring civil suits with respect to the offending material. The article goes on to instruct the court to "examine the relationship between the inciting article and the act". The limitations period for an action under this article is three months.

Article 12 prohibits the press from publishing or reproducing "any information that may affect national security and political stability". In addition to possible criminal penalties (not specified by this article), the "employer, editor or author" may be fined between 1m and 5m riels (between USD260 and USD1300). Moreover, the Ministries of Information and the Interior are accorded the right to confiscate the "offending issues of the press" and also to "suspend the publication for a maximum of 30 days and transfer the case to the court" (we will refer to this latter as the suspension provision).

Article 13 prohibits the publication or reproduction of "false information that humiliates or contempts [sic] national institutions". Fines of between 2m and 10m riels are provided for.

Article 14 prohibits the publication of "anything that affects the good customs of society". The article goes on to provide "primary" examples, including "curse words", words "directly describing sexual acts", "[d]rawings or photographs depicting human genitalia, or naked pictures, unless published for educational purposes", and "degrading pictures that compare particular human being[s] to animals". Fines for violating these prohibitions are provided for, ranging from 1m to 5m riels.

Article 15 prohibits the publication, except where there is permission from the court, of any information which would make possible the identification of (a) parties in a civil suit relating to marriage, paternity, divorce or child custody; (b) any youth under the age of 18 involved in a civil or criminal suit; or (c) a woman who is a victim or rape or molestation.

Finally, Article 16 prohibits the publication of any false advertisement, defined as any

commercial advertisement which "exaggerates the quality or value of a product [or] service and leads to consumer confusion". However, press outlets do not have "legal responsibility" for the publication of these advertisements unless they continue to publish them after having received "written warnings" from a court or competent ministry.

Analysis

Our primary concern with all of these provisions is that, fundamentally, there is simply no reason why the Press Law should contain *any content restrictions at all* with respect to the press.[13] Some restrictions on what may be expressed are permissible under the international law of freedom of expression, provided they comply with the three-part test described in Section II above. However, nothing in the legitimate aims recognised in the three-part test, or in the necessity analysis required under that test, has any exclusive application to the press. In particular, the restrictions contained in the Press Law have no *particular* application to the press; as a result, they should, to the extent that they are legitimate (see below), be contained in laws of general application to all citizens. As we have already argued, imposing specific content restrictions on the press may give the false impression that the free expression rights of the press are somehow different, and perhaps somewhat less fundamental, than those of others. To the extent that these restrictions duplicate laws of general application, they create a regime of double standards, which may well give rise to confusion, with the authorities seeking to apply the more stringent standard to the press.

Further to this general recommendation, we are of the view that a number of the content restrictions in the Press Law would be objectionable even were they to be placed in a law of general application. Our concerns with these specific restrictions is outline below.

Article 12, in restricting any publication or reproduction of information which "may affect" national security and political stability", legitimates the restriction of a vast amount of expression which is in fact protected by international law. Indeed, at least in translation, this does not even require a risk of a negative impact.[14] More importantly, the term 'may affect' does not apply only where a publication *actually* affects national security, or where it has a significant *probability* of doing so. It applies whenever a publication *might* affect national security and political stability. A vast range of statements *might* have some (negative) effect on national security and political stability: some particularly sensitive reader, for instance, could be angered at a (true) allegation regarding a public official and *might* try to take some violent steps against such official. But remote possibilities of this sort simply cannot justify restrictions on the press.[15]

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[13] Rules relating to retraction and reply are rather different in nature; if consistent with international standards, these provide for a special remedy against the media, as opposed to establishing different standards of liability.

[14] The term 'impact' does not imply that any effect is harmful; a positive contribution would also impact on national security.

[15] To argue, as some might, that Article 12 is not currently being employed in this way, and that political and other criticism by the press is generally tolerated, does little to remedy this problem. The term 'may affect' is inherently weak and this might be taken advantage of to discourage or prohibit press reporting which is critical of the authorities. It is precisely this sort of possibility which renders an overbroad law unjustifiable.

In addition, It is unclear what the term "political stability" means. At least in translation, the article requires an impact on *both* national security *and* political stability, which would appear to be a narrower concept than national security alone. However, it is possible that, in practice, the 'and' will be treated as an 'or', so that an impact on either of these concepts could be a basis for applying this article. If so, it may be noted that the term political stability is vague and therefore subject to potentially very broad interpretation, contrary to international law. For example, certain officials in a position to administer and enforce Article 12 may make the judgment that "political stability" requires the maintenance in power of the incumbent government and on that basis might attempt to employ Article 12 improperly to stifle publications critical of that government.

For Article 12 to comply with the necessity prong of the three-part test, it must require a much closer nexus or link between the impugned publication and the risk of harm to national security and political stability. In particular, publication must pose a serious risk of imminent and substantial prejudice to national security and political stability before it may permissibly be restricted.

Article 12 may be contrasted with Article 11 in this regard. While Article 11 also uses the term 'may affect' in relation to public order, it then appears to go on to require that this result has been brought about by a direct incitement to violence. It would appear that the article contemplates actual violence occurring. This view is strengthened by the article's admonition to the court to examine the "relationship" between the inciting article and the act", which strongly implies that the article contemplates the actual *occurrence of an act of public disorder.*

The suspension provision of Article 12 is also deeply problematical. As we understand the reference to 'publication', it would appear that this provision permits the Ministries of Information and the Interior not only to seize a particular issue containing offending material but also effectively to suspend entirely the *press outlet itself* for a period of 30 days. We are of the view that granting the power to political authorities such as ministries to seize newspapers is highly problematical, particularly on such open grounds as those stipulated in Article 12. Such power is likely to be abused for political ends.

The power to suspend a publication is far more draconian and unwarranted. It appears to contradict Article 3, which prohibits pre-publication censorship. International law also allows for such censorship only in the very most limited circumstances – probably never for newspapers – and only where there are clear judicial controls on it. It is one thing to act, after the fact, to restrict the publication of material which is manifestly illegal; it is quite another to *punish* the publication of illegal material by suspending a whole publication, thereby preventing publication of *other* material which may have no relation whatever to the problematic material.

Article 14 is seriously problematic as well. Like Article 12, it uses the term 'affect', although not, apparently, qualified by 'may', and we recommend that this be replaced by language which implies a more direct connection to the envisaged harm, such as poses a serious risk of substantial and immediate harm.

Equally importantly is the use of the term 'good customs' in Article 14. The list of examples provided after this term is not exhaustive and so any content which "affects the good customs of society" may be punished. Thus, the legitimacy of this restriction hinges on whether or not the term 'good customs' has a clear meaning.

No definition of 'good customs' is provided. It is possible that the term is meant to coincide with the term 'morality' and the article is intended to be in the service of the legitimate aim of protecting public morals. Although public morals are recognised as a grounds for restrictions on freedom of expression,[16] it is not adequately precise for a particular legal restriction to meet the standard of necessity as required under international law. Regardless, the article leaves wide scope of discretion to government officials to interpret this term. As a result, it could be abused and applied to promote allegiance to the incumbent government as a necessary part of such good customs. It could be understood as requiring Cambodian society to be insular, so that information about what is happening elsewhere in the world might negatively affect "good customs". As always, when such wide discretion is left in the hands of officials in a matter relating to restrictions on press content, the predictable results are chill and censorship.

Even the list of 'primary' examples are problematical. The term 'curse words' is undefined and may be interpreted to include merely coarse words, words which are important to use in a wide range of press contexts where the importation of local flavour is vital to the story or report being published. Equally, even so-called genuine 'curse words' have a role to play and their employment should hardly be the object of national legislation. Equally, the restriction relating to "degrading" pictures comparing human beings to animals is unacceptably vague. The term 'degrading' is, again, undefined, leaving it open to officials effectively to censor a wide range of material which should be protected; a political cartoon in a weekly magazine having birds or fish speak in the Khmer tongue might be an example.

Finally, Article 13 is similarly problematical. First, it is increasingly being recognised that national institutions simply do not have reputations and therefore cannot be humiliated or otherwise dishonoured. Even if they do have reputations, there are very good reasons why these should not be protected by law. We have already noted the fundamental role of the press as "watchdog" for the public, particularly with respect to government. This necessarily entails that it be free to investigate and to comment critically on government institutions. Officials may well see such critical comment as humiliating or dishonouring of national institutions, and subject to restriction on that basis. We recommend, therefore, that this article be removed in its entirety from national legislation.

Article 15 establishes a presumption that the identification of certain parties to court cases is prohibited, which the courts may override. While we acknowledge that privacy in these matters is of substantial importance, we also believe that there are circumstances in which the public interest in the identification of some such persons – for example, potentially a case of divorce or marriage proceedings involving high level public officials or politicians – is considerable. A provision allowing for the

[16] As already indicated, Article 19(3) does provide that the protection of public morals is a legitimate aim in the context of restrictions on freedom of expression.

identification of such persons when the public interest so demands would therefore be welcome.

It is unclear why Article 16 been included in the Press Law, given that its relates primarily to advertisers and presumably to the materials commercial entities themselves publish; for the most part, press outlets are protected from legal liability for the printing of this class of "false" advertisements. We also note that "advertisers" enjoy significant protections under the international law of freedom of expression for their commercial expression. Given this, we are concerned that the definition of "false advertisement" – in particular, the phrase "leads to consumer confusion" – is hardly precise and may be employed in a way that inappropriately curbs that right.

Recommendations:

- Ideally, all of the content restrictions provided for in Articles 11 to 16 of the Press Law should be repealed.
- Article 12 should be amended to provide that restrictions on the publication or reproduction of information relating to national security and political stability are permissible only if such publication or reproduction would, or would be likely to, pose an immediate and substantial risk of serious prejudice to national security and political stability.
- The suspension provision of Article 12 should be repealed.
- Article 13 should be repealed.
- Article 14 should also be repealed. In the event that it is retained, however, (1) the term 'good customs' should be defined in an appropriately narrow and clear manner; (2) liability should not ensure unless the impugned expression would, or would be likely to, substantially prejudice public morals; and (3) any specific categories under this article should be redrafted so as to ensure their compliance with the necessity prong of the three-part test.
- Article 15 should be amended to provide for a public interest override.
- Article 16 should be repealed from the Press Law; if retained, it should apply only to advertising material which poses a clear and serious risk of harm to consumers.

III.B Responsibilities of Journalists

Articles 6 and 7 govern the "responsibilities" of journalists. Article 6 recognises the right of journalists to establish independent associations and it goes on to prescribe certain features of such associations, including that they must adopt by-laws consistent with national law and that the "head" of any such association must be elected by a "democratic process".

Article 7 requires all journalists' associations to establish codes of ethics. In 11 subarticles, Article 7 goes on to set out certain principles which each such code must establish as binding on every journalist. Among such principles are that journalists must: "make fair commentaries or criticism consistent with a sense of justice"; retract any information "that is imprecise and leads to a misunderstanding"; "[s]trictly respect Khmer grammar in writing articles"; and not publish obscene or graphically violent materials. Additionally, the code must provide that it is a grave professional abuse to plagiarise, fraudulently misinterpret, defame or accept bribes.

Analysis
There are various substantial difficulties with this article. Perhaps most fundamental among them is the considerable tension between the article's commitment to the *independence* of the journalist associations and the fact that the article imposes sufficiently many substantial obligations on these associations to render them, to a considerable degree, instruments of government regulation.

This tension is reflected most dramatically in the prescriptions in Article 7 for the codes of ethics. In fact, the independence of journalists' associations ought to be reflected first and foremost in their being accorded complete freedom to regulate journalists in the way they see fit, including in relation to the development of codes of conduct, disciplinary mechanisms and so on. They are the professionals, after all, and they are best placed to make the detailed judgements about how journalism should be practiced.

In sharp contrast to this, Article 7 provides detailed and, in many cases, substantively inappropriate, prescriptions for all codes of ethics. We address just two of the more serious examples. First, associations are to ensure that fair commentaries are to be made "consistent with a sense of justice". It is entirely unclear what this prescription means. It might be read as requiring, for example, that all commentaries be even-handed. It is, however, perfectly legitimate for journalists to take partisan positions and to publish partisan opinions. Is it also unclear clear whose "sense of justice" is to be complied with. It is possible that some associations, out of fear for the consequences of doing otherwise, will interpret this provision to require journalists to conform to the government's views on justice, thereby preventing the media from performing its watchdog role and being critical of government.

Second, the codes must ensure that there is strict respect for Khmer grammar. Surely, however, the matter of style is quintessentially something to be left to independent editorial decision rather than being regulated by central government. Indeed, there are all sorts of reasons for deviating, from time to time, from the dictates of strict grammar: for rhetorical effect, to reflect spoken rather than written language, to capture local colour and nuance, and so on. While it is to be expected that the codes will take some position on the appropriate use of language, they must be entitled to have a flexibility which is quite absent from Article 7.

The tension is also reflected in the part of Article 6 requiring the head of a journalists' association to be elected democratically and to be a member of the Board of Directors. Independence also applies to the manner in which such bodies elect or otherwise appoint their executive.

Recommendation:
- Article 7 and the part of Article 6 that prescribes how journalists' associations are to be governed should be repealed.

III.C Right of Retraction/Reply

Article 10 provides for rights of retraction and reply, in the event that "any person believes that any article or text, even if the meaning of the article or text is implied, or any picture, drawing or photograph of any press is false and harms his or her honor or dignity". A retraction or reply must be published within seven days or in the

following issue. In addition, it must be published on the same page and in the same type size as the objectionable material.

This same article specifies that any person asserting a right of retraction or reply may, at the same time, bring a suit in defamation, libel or humiliation. In the event that a person brings a civil suit in defamation, a court may order the press to publish a retraction, pay compensation or both.

Courts may, in addition to the orders and awards just mentioned, impose fines of between 1m and 5m riels and may order the publication of its decision at the expense of the defendant (not to exceed 1m riels).

Finally, this same article provides: "In the case of a public figure, any false allegation or imputation which the journalist publishes or reproduces with malicious intent against such public figures is libel and is prohibited".

Analysis

We note that Article 10 contains provisions relating to both defamation and the rights of retraction and reply. In our view, defamation provisions, like the other content restrictions already discussed, have nothing specifically to do with the press, and should find their place (if anywhere) in a law of general application. It is, subject to their being in accordance with international law, appropriate to deal with the rights of retraction and reply in media-specific legislation as these remedies are peculiarly tailored to the media.

We note one positive feature of this article. Apparently in recognition of the fact that public figures should recognise that they may be subject to scrutiny and critical comment by the press, the article imposes a "malicious intent" requirement for libel of public figures so that a journalist cannot be found to have libelled a public figure by publishing false information or allegations about him or her unless it can be shown that the journalist actually intended to harm the public figure by so publishing. This provision, therefore, protects journalists – so far as libel charges go – from liability for publishing information about public figures which, though untrue, was published in good faith.

Article 10 contains two distinct remedies: a right to demand a retraction (which we assume is analogous to the more commonly known right of correction) and a right to demand a reply. We note that a right of retraction is far less intrusive than a right of response inasmuch as the former merely involves retracting and correcting mistaken allegations while the latter requires a media outlet to provide a platform for the complainant.

We note that, in part because it constitutes a substantial interference with editorial independence, a right of reply is a highly disputed area of media law. In the United States, at least as regards the print media, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence.[17] In Europe, in contrast, the right of reply is the subject of a resolution of the Committee of Ministers of the

[17] See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Council of Europe.[18] In many Western European democracies, the right of reply is provided for by law and these laws are effective to a varying extent.

Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply:

- The reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader or viewer doesn't like.
- It should receive similar prominence to the original article or broadcast.
- It should be proportionate in length to the original article or broadcast.
- It should be restricted to addressing the incorrect or misleading facts in the original text and not be taken as an opportunity to introduce new issues or comment on correct facts.
- The press should not be required to carry a reply which is abusive or illegal, or whose publication would constitute a punishable offence, or where it would be considered contrary to the legally protected interests of third parties.[19]

The conditions for application of the rights of retraction and reply both meet the first condition above, but they are both triggered where a person merely *believes* that a published text is false and harms his or her honour or dignity. It is unclear from this article when, if ever, a press outlet may refuse to issue a retraction or grant a reply. Readers have particular sensibilities and may believe, on very flimsy evidence or with no evidence at all, that certain published articles contain false and defamatory information about them. It would hardly be appropriate for such unfounded beliefs to form the basis, under this article, for an entitlement to a refutation or reply. Rather, the article should make it clear that these rights are triggered only where the material is in fact false and defamatory of the complainant. If the press outlet believes this is not the case, they may refuse the claimed right, subject to appeal to the courts.

Second, the conditions on the right of reply set out above are not reflected in Article 10. In particular, it is not required to be proportionate to the original article, to be restricted to redressing the incorrect or misleading facts or to be legal in nature.

Third, the rules regarding the rights of retraction and reply, as well as the other remedies for defamation, should respect the principle that sanctions for breach of a rule restricting freedom of expression should always be strictly proportionate. A right of retraction is far less intrusive than a right of reply so, whenever the former is sufficient to remedy any harm done, no right of reply should arise.

Furthermore, Article 10 explicitly provides for the further sanctions/remedies of compensation and fines. The Press Law should recognise a hierarchy of intrusiveness

[18] Resolution (74) 26 on the right of reply, adopted on 2 July 1974. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986).

[19] See Resolution (74) 26 of Council of Europe, Committee of Ministers, "On the Right of Reply – Position of the Individual in Relation to the Press" (CoE Resolution), Appendix at para. 4. It should also be noted emerging international practice rules out granting a right of reply to State and other public authorities. See para. 4(i) of this Resolution.

among these sanctions/remedies, whereby a retraction is the least intrusive remedy, followed by a reply, compensation and then a fine. The sanction/remedy applied should be the least intrusive remedy which redresses the harm done. If a retraction is sufficient, no other remedy should be applied, and so on. Fines, a form of punitive remedy, should be applied, if at all, only in the very most egregious situations.

Recommendations:

- The defamation and libel provisions of Article 10 should be repealed and provided for, as necessary, in a law of general application.
- Article 10 should specify that a right of retraction or reply is available only where the publication complained of was in fact false and dishonoured the complainant.
- Conditions should be placed on replies, in accordance with standards articulated above.
- Article 10 should provide that, where a retraction would redress the harm complained of, it should be the favoured remedy. The article should generally establish a hierarchy of remedies, along the lines indicated in the text.

III.D Registration Regime

Article 8 provides: "Before distribution of the press, the employer or editor shall submit an application to the Ministry of Information in order to identify itself". Failure to comply with this "formality" prior to publication results in a fine of between 500,000 and 1m riels; repeated violations may result in fines of double that amount.

Article 9 provides that the "formality" described in Article 8 "shall *primarily* consist of" the provision of identifying the press outlet, the names and address of the employer or editor and of the printing house, and a "certification of criminal record". Changes in any of this information must, outside of exceptional circumstances, be submitted to the Ministry of Information five days in advance.

Analysis

We are informed that these provisions in fact constitute a registration regime; that the press is obligated to register only one time with the Ministry of Information; that the process is indeed a mere "formality" in the sense that applications which meet the conditions specified are approved; and that the procedure is not onerous for the press. Moreover, we are informed that the Ministry has the power to revoke registrations under certain conditions and that, while on occasion it has used such power, such instances are rare.

These facts are positive but they do not allay our concerns with the registration regime, at least as it is set out in principle in the Press Law. In the first place, our view is that registration regimes for the print media are not necessary and that they may be abused by government as a means of controlling the press. While registration regimes may be quite neutral on their face, and may indeed seem quite benign, even the best systems may be abused by regimes intent on constraining press freedom. As a result, our primary recommendation is that the registration system be abolished.

While we acknowledge that the Press Law's registration regime is not at present being abused, it is important to recognise that its *terms* create the *possibility* for abuse.

While it is a possibility not presently being exploited, the fact remains that it might be exploited in the future unless certain changes are made. Our comments below provide an alternative to our main recommendation – that the registration system be abolished – in an attempt to ensure that, should it be retained, it is as immune as possible from abuse.

First, we note that Article 8 does not explicitly say that newspapers need only register once and that Article 9 does not make it clear that changes in the information required for initial registration do not trigger a new registration requirement.

Second, Article 9 sets out merely information that is "primarily" required in the registration process, thereby leaving it open to officials in the Ministry of Information to require yet more information as a condition of their granting registration requests. There is nothing in Article 9 which would prevent officials from requiring, quite unreasonably and unjustifiably, information about the proposed content or proposed target audience of the applicant press outlet. If such information were required, there is little in Articles 8 and 9 which would prevent officials from denying registration if they disapprove of the outlet's proposed content.

Third, the meaning of the requirement to provide a certification of criminal record is unclear, at least in translation. It could mean that the editor-in-chief, or perhaps the publisher, must provide proof that he or she does not have a criminal record. Perhaps the requirement, however, is that all employees must not have criminal records. Regardless, the implication is that at least some persons in the applicant press outlet must prove they do not have a criminal record as a condition for registration. This is inappropriate. Everyone, including those with criminal records, enjoy the right to freedom of expression. While these rights may be subject to certain restrictions during imprisonment, a rule absolutely barring anyone from starting a newspaper cannot be justified. Former prisoners, once free, should enjoy the same freedom of expression rights in relation to starting newspapers as anyone else. Accordingly, the mere existence of a criminal record amongst the ownership or employees of a press outlet should have no bearing whatsoever on its eligibility for registration.

Finally, the Press Law is silent on the matter of revoking registration, which may be interpreted by the Ministry as a license to do so. Our view is that revocation of registration for a print media outlet is never legitimate. Fines and compensation awards for breach of laws of general application, as well as the application of the criminal law to individual officers of the outlet, are sufficient to redress any harm. We note, in this regard, the following observation of the UN Human Rights Committee in respect of Cambodia:

> The Committee is ... concerned at the Press Laws which impose license requirements and prohibit publications which, inter alia, cause harm to political stability or which insult national institutions. These broadly defined offences are incompatible with the restrictions permissible under paragraph 3 of article 19 of the covenant.[20]

[20] These comments were part of the Human Rights Committee's Concluding Observations on Cambodia as part of its regular reporting. See UN Doc. CCPR/C/79/Add.108, 27 July 1999, para. 18.

Recommendations:

- Ideally, Articles 8 and 9 should be repealed.
- Assuming that these articles are retained, the following rules should apply:
  - It should be clear that newspapers need only register once and changes of information, while they may be required to be communicated, do not constitute re-registration.
  - The information required to be submitted pursuant to Article 9 should not be allowed to be added to.
  - The Ministry of Information should be *required* to grant registration requests once the requisite information has been submitted.
  - The Press Law should make it clear that, once granted, registration may not be revoked unless the print media outlet effectively ceases to exist.

III.E Freedom of Information

Article 5 creates a highly abbreviated access to information regime, specifically for the press. Article 5(A) recognises the "right of access to information in government-held records", subject to a number exceptions, including where release of requested information would cause "harm" to national security or relations with other countries, would invade the "rights of individuals", would expose commercial or financial documents, would affect the right of any person to a fair trial, or would interfere with public officials carrying out their duties.[21]

Article 5(B) provides that information requests should be in writing and should specify clearly which information is requested. Responses must be provided within 30 days and denials must be accompanied by reasons.

Analysis

The right to access information held by public bodies is a right held by everyone, not just members of the media. As a result, freedom of information should be governed by a dedicated law, which secures to everyone the right of access to information. At present, however, Cambodia does not have a general freedom of information law, although we understand that the authorities have made a commitment to pass one in the near future. Our primary recommendation is that Cambodia enact a full-fledged freedom of information law which guarantees the right of access to all, which sets out in detail the procedure by which such information may be accessed (including provisions ensuring that the access procedure is affordable), which provides for a fair, speedy and inexpensive appeals process (preferably in which an information commissioner is created and plays a pivotal role), which places a clear duty on public bodies to publish a wide range of information of public interest, and which provides protection for whistleblowers.[22]

Until such time as a law of general application is adopted, and because of the vital importance of the press having access to information held by public authorities to perform its role of informing the public about matters of public importance, we believe that the access provisions of the Press Law should remain in effect. In that

[21] Our translation reads: "Danger to public officials carrying out the law or their duties."

[22] For details on the general provisions which such a law should contain, subject, of course, to the contextual needs of the country, see ARTICLE 19's *A Model Freedom of Information Law*, Available at: http://www.article19.org/docimages/1112.htm.

light, and repeating that the Press Law is not the place for the creation of a full-fledged freedom of information regime, we point out two fundamental areas in which the Press Law's freedom of information protection for the press could be improved.

First, the exceptions are generally in line with international standards – because they generally serve legitimate aims, including national security – and the law generally requires disclosure unless this would pose a risk of *harm* to the protected interests. However, no explicit consideration is given to the public interest. In our view, even where the release of information would in fact harm a legitimate interest, it should still be releases absent a showing that the harm would outweigh the public interest in release of the information. This might be the case, for example, where information which was private in nature also exposed corruption within government.

Second, at present, Article 5 provides for no recourse in the event that an information request is denied. As a result, all that a government official need do if he or she wishes to hide certain information from public view, regardless of the public interest in its release, is to deny requests for it and to specify the "reasons for the denial". This is not enough to avoid potential abuse. Instead, the Press Law should provide for a right of appeal, preferably to an independent administrative entity such as an Ombudsman. Appeals to such a body should be swift and cheap, in view of the fact that information sought by the press is so often a highly perishable commodity.

Recommendations:

- A full-fledged freedom of information law, with provisions along the lines of those in ARTICLE 19's *A Model Freedom of Information Law*, should be enacted.
- Until such enactment, the provisions of Article 5 of the Press Law should be bolstered, at a minimum, by the addition of:
  - a requirement to release requested information when the public interest so requires; and
  - a right of appeal, preferably first to an independent administrative body, and, in any event, to the courts.

III.F Competition

Articles 17 and 18 relate to Khmer language newspapers. Article 17 provides: "No natural or fictitious person may own or possess more than two Khmer language newspapers in the Kingdom of Cambodia". Article 18 provides that the total foreign ownership of any Khmer language newspapers published in the country cannot exceed 20 percent, although an existing foreign-owned newspaper will not lose its right to publish solely due to a reduction of the number of Khmer language newspapers.

Analysis

Both articles are problematic. With regard to Article 17, there is no good reason, at least in principle, for such a broad ban on the number of Khmer language newspapers a particular natural or fictitious person may own. While measures to prevent the domination of the newspaper sector by a particular individual or a small number of individuals may be legitimate, this restriction is too draconian and may actual serve to limit the availability of Khmer language publications. It would, for example, prevent

one individual from owning two small city weeklies, operating in different cities, a situation which cannot be compared to an individual owning two national dailies.

As a general matter there should be no blanket restrictions on press ownership based on citizenship. It may be appropriate to impose certain restrictions on foreign ownership of *broadcast* media based, among other things, on the desire for local control over this public resource, although even here it would not be appropriate to impose a blanket restriction on foreign ownership. Article 18 does not impose such a blanket restriction but does seriously limit the participation of foreigners in the local media market. It may be noted that the guarantee of freedom of expression applies regardless of frontiers and that foreign investment and participation in local media can often bring much needed capital and expertise.

Recommendation:

- Consideration should be given to amending Articles 17 and 18 so that they are far less draconian in nature.

III.G Publication of Official Information

Article 4 provides: "The publication of official information … may not be penalised if such publication is fully true or an accurate summary of the truth". Following this general rule, the article defines the term "official information" to include information relating to statements, meetings and reports from the National Assembly, and from the executive branch, and "all aspects of the judicial process", with some exceptions which are generally unproblematic.

Analysis

We assume that the requirement that the publication be "fully true or an accurate summary of the truth" is met if the publication is an accurate quotation or report of what was in the statement, meeting, report, or so on. In the event, of course, that Article 4 only protects from liability the publication of *true* official information, its protections would be far too narrow. Journalists should be able to further distribute official information of the sort listed in Article 4, even if the original information is inaccurate.

Assuming that our reading of the truth requirement is correct, we believe that this provision is positive. However, it does not go far enough. In particular, there is no reason to restrict the protection of journalists with respect to their publishing official information, to official information from the National Assembly, executive and courts. The proceedings, for example, of local government bodies, and the statements of local government officials, are also of some public interest, at least to the local population, and the immunity for journalists should also cover these bodies. Furthermore, the immunity does not apply to any court processes where the matter is still under investigation by the courts. This would appear to exclude witness statements, statements by lawyers, etc., all of which may be of public interest and, outside of a specific gag order by the court, should normally be reported.

Recommendations:

- The definition of "official information" in Article 4 should be expanded to include pertinent materials from local government bodies and officials.
- Court information should still be protected even where the matter is under

investigation, absent a specific court gag order prohibiting publication.