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Research Brief



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## LEGITIMACY OF GOVERNMENT MEASURES IN CAMBODIA AMID COVID-19: The Limitations of Human Rights in Compliance with International Human Rights Law

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**Disclaimer:** This research brief is written by young law students who are member of KAS-For Legal Youth 2021 as part of their participation in the program. The views presented in this paper does not necessarily reflect those of the editors, the program or the Konrad-Adenauer-Stiftung Cambodia.

### Introduction

Since the 20th February 2021 community outbreak event of COVID-19 in Phnom Penh, Cambodia's public health is now at high risk. The Royal Government of Cambodia (RGC) has coercively moved to implement necessary health and administrative measures to tackle this pandemic. On 15th April 2021, the RGC

imposed the first blanket lockdown in Phnom Penh and Ta Khmao for three weeks. Then, it was replaced by a new administrative measure that divided all areas in Phnom Penh into "Yellow Zone," "Dark Yellow Zone," and "Red Zone," in which the government applies rules that differ depending on the rise of infections in that particular area. Although the measures have yielded positive results in coping with the spike

of cases, it also comes at the price of limitations of the fundamental human rights of Cambodian people, specifically freedom of movement, freedom of expression, and rights to food. Even in a public emergency, the restrictions of human rights should be used within the parameters provided by international human rights law, particularly the International Covenant on Civil and Political Rights (ICCPR), with the aim to restore a state of normalcy as soon as possible. The restrictions on rights are justified only when they are based on legal grounds, strictly necessary, based on scientific evidence, not arbitrary or discriminatory, of limited duration, respectful of human dignity, subject to revision, and proportionate to achieve their objectives.<sup>1</sup> Therefore, this research will seek to analyze the legality of the limitations on freedom of movement, freedom of expression, rights to food in Cambodia under the international human rights standards as a consequence of COVID-19 measures.

## Analysis and Finding

### A. Freedom of Movement

Article 12 of the ICCPR guarantees all individuals the right to freely move within its borders. In paragraph 3 of this Article, however, provides for exceptional circumstances when these rights may be restricted to protect national security, public order, public health or morals, or the rights and freedoms of others. The application of the restrictions under Article 12, paragraph 3, shall be permissible when it is provided by law, necessary in a democratic society for the protection of these purposes, and consistent with all other rights recognized in the Covenant as well as with the principles of equality and non-discrimination.<sup>2</sup> In short, the restrictions must meet four requirements which are: (1) legality; (2) necessity; (3) proportionality; and (4) non-discrimination.<sup>3</sup>

#### 1. Legality

The restriction must be “provided by law”, meaning that the limitation must be contained

in the national law of general application, which is in force at the time the limitation is applied.<sup>4</sup> Moreover, the law itself has to establish the conditions under which the rights may be limited.<sup>5</sup> On 11th March 2021, the Law on Measures to Prevent the Spread of COVID-19 and Other Serious, Dangerous, and Contagious Diseases entered into force (COVID-19 Law). The purpose of this law is to provide both health and administrative measures to prevent the spread of COVID-19 and other similar diseases to save the lives of the citizens, to ensure the public health and public order, and to minimize the impacts of the diseases on socio-economic in Cambodia.<sup>6</sup>

Article 4 of this law delegates the authority to the executive branch to impose any necessary measures provided under the Article, including the lockdown measure to combat COVID-19 in a timely manner. In that vein, the law permits limitations of fundamental rights, notably the freedom of movement. Following this Article, the RGC enforced its first lockdown measure on 15th April 2021 in Phnom Penh and Ta Khmao.<sup>7</sup> The lockdown, which restricted the freedom of movement, thus had operated under the direction authorized by the parent legislation.

#### 2. Necessity

The restriction must be necessary for the protection of one of the permissible grounds stated in the ICCPR, which include public health, and must respond to a pressing social need.<sup>8</sup> In the last two weeks before the lockdown, the virus has spread in restaurants, markets, small businesses, private gatherings, and parties across Phnom Penh and Ta Khmao.<sup>9</sup> Crowded places with close contact between people, and poor ventilation are considered high-risk settings. More importantly, it was almost Khmer New Year during which Cambodian citizens typically celebrate by having social gatherings at the pagoda, their hometowns, and other travel destinations. These factors posed an unimaginable threat to Cambodia’s public health, especially when its healthcare system is still deficient in both facilities and human

resources. The lockdown measure, therefore, was necessary to protect public health and to respond to a pressing social need.

*“We stand on the brink of a national tragedy because of COVID-19. Despite our best efforts, we are struggling to control the virus. New cases occur every day and we are racing against the virus. Unless we can stop the outbreak, Cambodia’s health system is at high risk of being overwhelmed, which would have disastrous consequences,” said Dr. Li Ailan, WHO Representative to Cambodia.<sup>10</sup>*

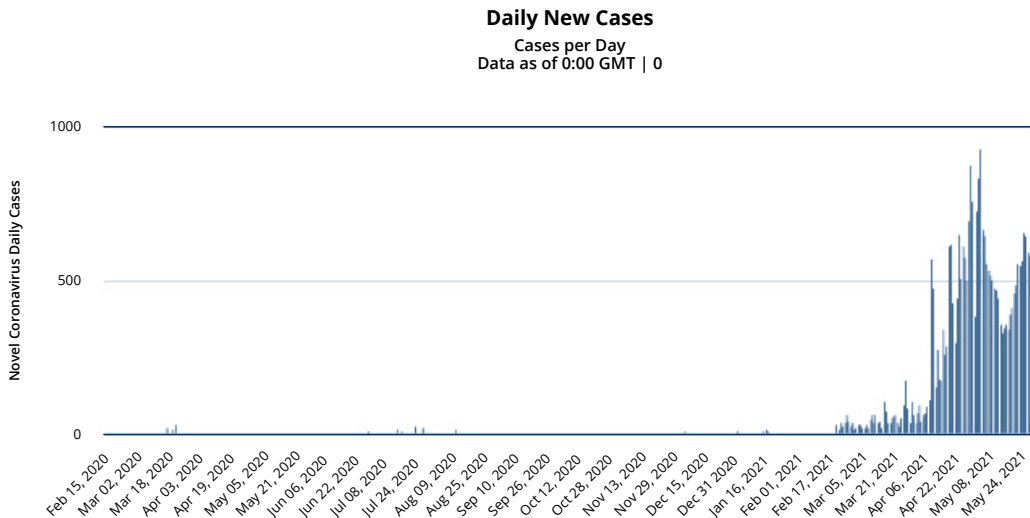
### 3. Proportionality

The restriction must be proportionate to the interest at stake in the sense that it must be an appropriate means to achieve its protective function, and it must be the least intrusive option among those that might achieve the desired result.<sup>11</sup> In order to control the spread of the virus and to protect public health, breaking the chain of infection has to be done by stopping people

from moving and interacting with each other.<sup>12</sup> The most common public health measure taken by States against COVID-19 is the lock-down or stay-at-home instruction. According to data compiled by the Oxford COVID-19 Government Response Tracker, more than 100 countries and territories in 2021 have imposed or re-imposed the lockdown measure.<sup>13</sup> This measure is widely recognized by States and the United Nations as a practical and necessary measure to stop virus transmission, prevent healthcare services from becoming overwhelmed, and thus save lives.<sup>14</sup>

Before deciding to impose the lockdown, the RGC already used their utmost efforts to deal with the increasing number of cases by implementing school and some business activities closure, travel restrictions, curfew, and so forth. These measures, however, were not effective enough to cope with the spread of COVID-19 in Cambodia.

Figure 1: Daily New Cases of COVID-19 in Cambodia.



Source: Worldometer.<sup>15</sup>

This figure shows that after the lockdown measure was imposed, the number of new cases per day also started decreasing. Nevertheless, when the government ended the lockdown on

6th May, the rise of new COVID-19 cases could be seen again. This figure is a sign that the lockdown measure was indeed efficient and effective.

More importantly, the restrictions must be adequately scrutinized and regularly reviewed considering the rapidly evolving COVID-19 situation to ensure that the restrictions go no further than the absolute necessity.<sup>16</sup> Noticeably, the lockdown was only imposed in Phnom Penh and Ta Khmao, where the infection rate was high. Additionally, after three weeks, when the infection rate had reduced, the lockdown was replaced by a new administrative measure which divided all areas in Phnom Penh into “Yellow Zone,” “Dark Yellow Zone,” and “Red Zone”, based on the rise of new cases in each area accordingly.<sup>17</sup> With different rules and procedures imposed on each zone, this measure aims to lighten or eliminate the restrictions in some areas. For instance, those who live in Yellow Zones are allowed to travel freely without any restriction, while those who live in Red Zones are not allowed to leave their home until their area becomes Dark Yellow Zone or Yellow Zone. For that reason, the restriction of freedom of movement as a result of the lockdown measure went no further than absolute necessary which is clearly proportionate.

#### 4. Non-discrimination

The restriction of freedom of movement is not permitted if conducted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status.<sup>18</sup> As enshrined in Article 2 of the Decision on the lockdown of Phnom Penh and Ta Khmao City of Kandal Province to curb the spread of COVID-19, every individual in these two areas is prohibited from leaving their residence or lodging unless it is for necessary purposes provided under this Article, including traveling to conduct work and business permitted by this decision (e.g., work or business activities relevant to the public services, food, or daily necessities supply chain), traveling to purchase food, traveling to hospitals for urgent health reasons, traveling for purposes that serve public interests, and traveling to COVID-19 testing sites or vaccination. Other than that, all operations, occupations, or businesses that do

not serve the daily necessity are banned; and all gatherings are prohibited. In addition, Prime Minister Hun Sen personally encouraged the authorities to enforce the law and send those violating the law to court without exception.<sup>19</sup> “I want to stress that from now on, the lockdown measure applies to all – even high-ranking officials are not exempted,” said Prime Minister Hun Sen. Those who were caught violating the COVID-19 measures have been arrested and sent to court, regardless of their status.<sup>20</sup> The lockdown thus was applied to every individual, meaning that the freedom of movement was not restricted on the ground of discrimination.

#### B. Freedom of expression

Freedom of expression is an essential tool in a democratic society, and a basic condition for its progress and development.<sup>21</sup> Without sufficient protection of freedom of expression, the public is deprived of rights to free speech and rights to information which is extremely important during a public health crisis like the pandemic. These rights effectively ensure the free flow of legitimate information and communication between the people and the government – as a democratic society intended to be.<sup>22</sup> However, freedom of expression is not absolute and can be subjected to restriction when the government can demonstrate that such restriction is (1) provided by law and (2) meet the necessity and proportionality test in achieving a legitimate purpose.<sup>23</sup>

##### 1. Provided by law standard

Under the “provided by law” standard, not only must the law be set out, but also the scope, meaning, and effect of the law must be sufficiently clear to allow individuals to regulate their conduct to avoid violation.<sup>24</sup> Using broad and vague terms in the provisions that give much discretion to the officials are not sufficient and compatible with this standard.<sup>25</sup>

Under Article 11 of COVID-19 Law, acts considered to be obstructions of the administrative measure, and acts deemed as causing serious

impact on public health are not clearly defined. Moreover, other unspecified administrative and other measures under the COVID-19 Law are ambiguous. Because of its broad and vague terminologies in the law, it can be easily led to subjective interpretation and the abuse of power by the RGC to target people including those who voice opposing views on government response to the COVID-19.<sup>26</sup> Therefore, although restriction is governed by the law, such law does not meet the “Provided by law standard of the ICCPR”.

## **2. Necessity and Proportionality Vs Public Health threat**

For the restriction to be proportionate, they must be appropriate to achieve the protective function, be the least intrusive to the interest to be protected.<sup>27</sup> Many forms of unnecessary and disproportionate restriction on freedom of expression were executed – ranging from the silence of individuals over criticism regarding government response against COVID-19 to the journalists who reported the situation in the Red Zone.<sup>28</sup> The authority has arrested 30 individuals for voicing critical views against the government measures against COVID-19.<sup>29</sup> Three individuals were prosecuted for criticizing the vaccination campaign of the Chinese made Vaccine under the Covid-19 Law.<sup>30</sup> In furtherance, the attempt to silence critical voice also occurred in the health care sector, where a frontline medical staff was accused of spreading fake news to cause social unrest and insecurity, and misconduct.<sup>31</sup> The term Fake News was not clearly defined in the Cambodian legal framework. Hence, it paves the way for the local authority to abuse the term and interpret it as they see fit, especially when they find any expressions that may threaten the legitimacy of the government’s COVID-19 response.<sup>32</sup> On the media and journalism side, the Ministry of Information issued a warning that journalists should halt all actions immediately to protect social security and prevent COVID-19 from spreading.<sup>33</sup> Failing to comply would mean facing legal actions. It added that local and foreign media coverage of the Red Zone has confused the public and provoked social chaos that leads

to more widespread covid cases. The fact that government only allows the pro-government media or journalists to report from the Red Zone,<sup>34</sup> demonstrates the transparent double standard enforcement of the law intending to deprive the public of the free flow of information from independent media and journalists.

While recognizing the need to fight disinformation and misinformation during the pandemic, there are least intrusive measures recommended by the Human Rights Council.<sup>35</sup> Furthermore, it emphasizes that the promotion of diverse and reliable information is an obvious antidote to disinformation and misinformation. Therefore, the RGC should fulfill its duty to ensure the right to information, firstly, by increasing its transparency and by proactively disclosing official data online and offline and, secondly, by reaffirming its commitment to media freedom, diversity, and independence.

## **C. Non-discrimination Principle in Accessing Food**

Under Article 11 of ICESCR, the right to food can be described as the moment that every person has physical and economic access at all times to adequate food or means for its procurement.<sup>36</sup> It is essential to perpetuate the right of people under the non-discrimination principle in accessing food by ensuring that access to food must be guaranteed to people in any circumstances especially, in the event of natural disease or outbreaks<sup>37</sup> such as COVID-19 life-threatening pandemic. Nonetheless, the United Nations Covid-19 Social Impact Assessment Study shows that 1 in 5 Phnom Penh households experienced food insecurity during COVID-19 lockdowns.<sup>38</sup>

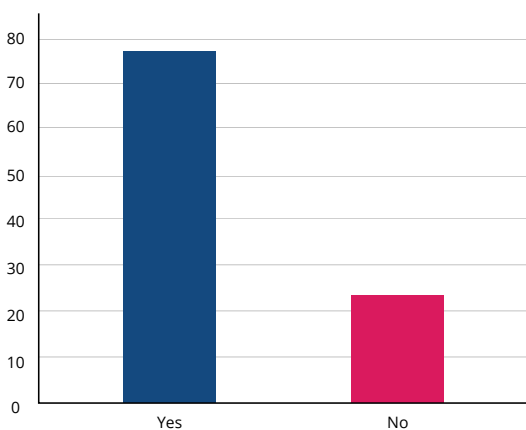
Discrimination refers to any exclusion made on the basis of various grounds which affect the equal enjoyment or exercise of human rights and fundamental freedoms.<sup>39</sup> However, non-discrimination and equality do not require identical treatment in every circumstance. Instead, states are required to recognize and provide for the differences and specific needs



of different groups, particularly the most marginalized and disadvantaged.<sup>40</sup> Indeed, the RGC had distributed food donations to 184,406 families who were suffering during the lockdown from 10 to 30 April in Phnom Penh.<sup>41</sup> Also, Civil Societies and NGOs had also provided food assistance to the poor.<sup>42</sup>

However, with the tremendous effort put by the government, there were still some vulnerable groups such as factory workers and tenants who resided in the red zones faced the food shortage and could not receive the food donations until a month, while some could not receive at all.<sup>43</sup> Moreover, it is not just low-income families, but also middle-income families in red zones facing the same problem.<sup>44</sup> Vulnerable groups are left with relatively sparse resources to anticipate the effects of food shortage as the primary concern. According to the survey study by the collaboration of People in Need, DanChurch Aid, and World Relief in 2020 illustrate that 77% of 2936 respondents reported having insufficient food over the past seven days was found in red zones.<sup>45</sup>

**Figure 2.** *The number of respondents reported having insufficient food over the past seven days during the lockdown.*



**Source:** *Danovaro, A., et al 2021.*<sup>46</sup>

Furthermore, States must provide an enabling environment in which citizens can feed themselves by their means when the

government cannot provide adequate food to every household.<sup>47</sup> Although the Ministry of Commerce has been continuing its campaign to sell foods and water to residents within the Red Zones,<sup>48</sup> there have also been those who return empty hands due to heightened demand from citizens during the pandemic.

## Conclusion

Although the lockdown and other measures taken are crucial to protect public health and save lives, the government should avoid widespread and unnecessary restrictions on the movement and liberty of people, rights to food, and freedom of expression. Only mandatory restrictions should be imposed when they are scientifically warranted and necessary and when mechanisms for supporting those affected are ensured. While it is essential to restrict the movement of people to curb down the COVID-19 cases, other restrictions that include prohibiting journalists and food access to the Red Zones are unnecessary for protecting public health. Therefore, the government should allow independent journalists and media to report the information to keep the public informed and allow substantial access to food through food distribution and food delivery services to the people in Red Zones.

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