

# DEATH KNEEL FOR DEMOCRACY

Attacks on Lawmakers and the  
Threats to Cambodia's Institutions

## An Analysis of Parliamentary Immunity

Annex I

# ANNEX I: AN ANALYSIS OF PARLIAMENTARY IMMUNITY

Over the past several years, the issue of parliamentary immunity has increasingly been discussed in Cambodia in the context of the rights and privileges of Members of Parliament (MPs), and particularly those of the opposition. As discussed below, Cambodian lawmakers are afforded parliamentary immunity in the country's Constitution, as well as other statutes, but this immunity has been lifted seemingly without justification and without adherence to the legislation and regulations that govern it. In many cases, there seems to be confusion over what parliamentary immunity under Cambodian law actually entails. This is, in part, due to legislative language that leaves a large amount of room for interpretation, as well as a lack of understanding as to the context and merits of parliamentary immunity. The Legal Analysis below presents a review of Cambodian legal provisions on parliamentary immunity and highlights the particularly problematic and vague aspects of these provisions.

## I. Parliamentary Immunity: An Introduction

Parliamentary immunity exists as a means to protect a group of individuals who are particularly vulnerable due to the political nature of the work that they undertake. As MPs are often required to take up controversial positions in order to effectively represent their constituents and carry out parliamentary oversight functions, parliamentary immunity is often critical to ensuring that they have the space and freedom to fulfill these roles. As such, immunity provides a way to guarantee the independence of not only individual parliamentarians, but also a legislature as a whole. As the European Court of Human Rights has held:

*“While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament [...] call for the closest scrutiny on the part of the Court.”*<sup>1</sup>

### Definitions and Scope of Parliamentary Immunity

Parliamentary immunity generally includes two main categories: absolute immunity (also called non-liability, substantive or functional immunity, or parliamentary privilege) and relative immunity (also called inviolability or personal immunity). The European Commission for Democracy Through Law's (Venice Commission) Report on the Scope and Lifting of Parliamentary Immunity defines absolute immunity or non-liability as “*meaning immunity against any judicial proceedings for votes, opinions and remarks related to the exercise of parliamentary office, or in other words, a wider freedom of speech than for ordinary citizens.*”<sup>2</sup> Relative immunity, or inviolability, meanwhile is defined as “*meaning special legal protection for parliamentarians accused of breaking the law, typically against arrest, detention and prosecution, without the consent of the chamber to which they belong.*”<sup>3</sup>

In other words, absolute immunity provides additional freedom of speech protections for parliamentarians exercising duties specifically related to their parliamentary mandate, while relative immunity provides a mechanism for legislatures to stop politically motivated prosecutions against members.

<sup>1</sup> European Court of Human Rights (ECtHR) *Castells v. Spain* (no. 11798/85), 23 April 1992, para. 42.

<sup>2</sup> Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

<sup>3</sup> *Ibid.*

Beyond their definitions, there are additional differences between absolute and relative immunity. First, the latter is less widespread and, where it does exist, more narrowly construed. Moreover, as the European Commission explains with regards to relative immunity, “there is no common model and great variety both as to what kind of legal offences are covered and as to what legal reactions the members are protected against [...] there is also great differences in how these are applied in practice, and in some countries they are considered outdated and not invoked.”<sup>4</sup> Most importantly, relative immunity can be lifted, whereas absolute immunity, in most countries, cannot be.<sup>5</sup>

In contrast to relative immunity, absolute immunity is a much more widely accepted institution. Nevertheless, what are considered to be “parliamentary duties” or “the exercise of parliamentary office” vary across countries. In many countries, this covers freedom of speech both outside and inside of the physical parliament. In others, only speech made during parliamentary sessions is covered.<sup>6</sup> For instance, the Court of Justice of the European Union has ruled that for Members of the European Parliament, absolute immunity is “intended to apply to votes and opinions expressed in the premises of the European Parliament,” but that “it is not impossible that an opinion expressed outside the European Parliament may amount to an exercise of a Member’s duties.”<sup>7</sup>

The scope of absolute immunity, including whether it applies to speech made outside of the physical premises of parliament, is also an evolving concept. As a 2004 European Parliament report notes:

*“Historically parliamentary privilege was limited to speech in Parliament because, at the time, political discourse was concentrated within Parliament. In modern democracies, political discourse and debate on matters of public relevance takes place in a much broader forum, which includes printed and electronic media and the internet. Members of Parliaments are now expected to engage in dialogue with the civil society and present their ideas not only on the floor of Parliament, but also in the fora that civil society provides; consequently, the criterion determining which statements were made in the exercise of a Member’s duties cannot be spatial, since the spatial criterion would be too narrow.”<sup>8</sup>*

The sections below analyze Cambodian legislation regarding parliamentary immunity within this context of international norms and jurisprudence on the matter.

## II. Parliamentary Immunity Under Cambodian Law

### Definition and Scope of Parliamentary Immunity

Cambodia’s 1993 Constitution guarantees parliamentary immunity for members of the National Assembly in Article 80 and for Senators in Article 104 (see Box 1). These articles explicitly state that lawmakers “shall enjoy parliamentary immunity” and that no lawmakers “shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his/her duties,” a clear provision for absolute immunity. The Articles go on to specify that prosecutions, arrests, and detentions of lawmakers can only be undertaken with the explicit approval of the respective legislative body (or its standing committee in between sessions), which seemingly refers to relative immunity.

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4 Ibid.

5 Ibid.

6 Robert Myttenaere, “The Immunities of Members of Parliament,” report adopted at the Moscow Session (September 1998), available at: <http://www.ipu.org/ASGP-e/Myttenaere.pdf>.

7 European Parliament, Directorate-General for Internal Policies, The Immunity of Members of the European Parliament (2014), available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509981/IPOL\\_IDA\(2014\)509981\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509981/IPOL_IDA(2014)509981_EN.pdf).

8 Ibid.

## BREAKDOWN OF CAMBODIAN CONSTITUTION ARTICLES ON PARLIAMENTARY IMMUNITY

(Text from Article 80, which covers the National Assembly; Article 104 contains identical language, while substituting “Senator” in place of “Member of the National Assembly”)

### **Overall guarantee of parliamentary immunity:**

Members of the National Assembly shall enjoy parliamentary immunity.

### **Absolute immunity provision:**

No Member of the National Assembly shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his/her duties

### **Relative immunity provision:**

A Member of the National Assembly may only be prosecuted, arrested or detained with the permission of the National Assembly or by the Standing Committee of the National Assembly between sessions, except in cases of flagrant delicto offences

### **Procedure for “flagrante delicto” cases:**

In that case, the competent authority shall immediately report to the National Assembly or to the Standing Committee and request permission. The decision of the Standing Committee of the National Assembly shall be submitted to the National Assembly at its next session, for approval for a two-third majority vote of all Members of the National Assembly

### **Provision to suspend any existing case against a lawmaker:**

In any case, the detention or prosecution of a Member of the National Assembly shall be suspended if the National Assembly requires that the detention or prosecution be suspended by a three quarter majority vote of all Members of the National Assembly

An issue with the Constitution’s language on parliamentary immunity is the lack of a specific definition of “*during the exercise of his/her duties.*” The Law on the Status of the National Assembly Members (LSNAM) and the Law on the Status of Senate Members (LSSM), however, define parliamentary immunity more specifically in Article 4,<sup>9</sup> explicitly splitting the provision into two parts: absolute and relative immunity. The first – absolute immunity or non-liability – is “*to ensure the expressing of opinions or ideas in any decision-making by the National Assembly members/Senators in the framework of exercising their duties.*” The second – relative immunity or inviolability – is to “*ensure that the National Assembly members/Senators are free from being prosecuted, detained or arrested.*”

Although the distinction between absolute immunity and relative immunity in Article 4 provides a bit more clarity as to the scope of parliamentary immunity under Cambodian law, the language still provides too much room for interpretation. Again, the phrase “*in the framework of exercising their duties*” is not further specified. In addition, the phrase “*any decision-making*” could be either interpreted narrowly, to refer only to decision-making processes within the Parliament itself, or more broadly, to cover activities such as public speeches, visits to constituencies, and investigative

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<sup>9</sup> The Law on the Status of National Assembly Members (LSNAM) and the Law on the Status of Senate Members (LSSM) include nearly identical language in the corresponding articles. For the sake of space and clarity, this Annex references both the LSNAM and LSSM articles together, and all article numbers referenced correspond to both laws. The text from those articles reproduced here uses “National Assembly member/Senator” throughout, though the individual statutes explicitly refer only to the relevant type of legislator (i.e. LSNAM refers only to “National Assembly members,” and LSSM refers only to “Senators”).

activities, as those may lead to decision-making by parliamentarians.

Furthermore, there is no mention as to whether immunity is retroactive, that is, whether an MP can be prosecuted for crimes committed before taking office without having his or her immunity lifted first. On this point, it seems that authorities have argued that they can (see, for instance, the case of Chan Cheng described in the “Judicial Attacks” section of this report).

The European Parliament has held that relative immunity also covers “*actions committed by the Member before his/her election,*” effectively shielding MPs from “*being tried, during their mandate, even for facts committed before its beginning – but only until they are MEPs.*”<sup>10</sup> In other words, relative immunity must be lifted before a prosecution can be undertaken, regardless of when the alleged crime was committed. Once an MP’s term is over, however, relative immunity no longer applies and he or she can be tried for alleged crimes committed both before taking office and during the mandate.<sup>11</sup>

Additional confusion arises from Article 5 of the LSNAM and the LSSM, which states that “*Members of the National Assembly/Senators shall not abuse their parliamentary immunity to harm the dignity of others, the good traditions of society, public order and national security.*” Not only are terms such as “*the dignity of others*” and “*the good traditions of society*” ill-defined and arbitrary, but the article itself seems only to further undermine the fundamental concept of parliamentary immunity by providing an exceedingly vague justification for voiding or lifting immunity. Although it is unclear what consequences may arise from such “*abuses,*” the article has the effect of qualifying parliamentary immunity.

As noted above, international jurisprudence is split, with jurisdictions applying varied definitions as to the spatial, temporal, and substantive scope of immunity. In many countries, case law often provides further insights as to how “*in the exercise of parliamentary duties*” should be interpreted, when not already specified sufficiently in the legislation. However, this is not the case in Cambodia, and the endemic lack of independence of Cambodia’s judiciary makes the lack of clarity in Cambodian law particularly problematic.

### **Lifting Parliamentary Immunity**

Reading Article 4 of the LSNAM and LSSM in light of international jurisprudence, one can assume that this article implies that absolute immunity can never be lifted, while relative immunity can, under the procedures laid out in subsequent articles. Articles 7 through 11 of the LSNAM and LSSM provide for the lifting of parliamentary immunity of a National Assembly member or Senator, although they problematically do not specify that those provisions should only be utilized for the lifting of relative immunity. While it should be assumed, based on context and international jurisprudence, that absolute immunity cannot be lifted under any circumstances, it is unclear whether the authorities in Cambodia are under that same impression.

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<sup>10</sup> European Parliament, Directorate-General for Internal Policies, *The Immunity of Members of the European Parliament* (2014), available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509981/IPOL\\_IDA\(2014\)509981\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509981/IPOL_IDA(2014)509981_EN.pdf).

<sup>11</sup> *Ibid.*

#### Article 7

The accusation, arrest, or detention of any National Assembly member/Senator who commits a crime shall be made only in accordance with the law and procedures and only once his/her parliamentary immunity has first been removed.

#### Article 8

The request for removing the parliamentary immunity of any National Assembly member/Senator shall be submitted by the Minister of Justice to the National Assembly/Senate President and shall enclose a statement of reasons.

#### Article 9

The removal of the parliamentary immunity during the National Assembly/Senate sessions shall comply with the following procedures:

- The National Assembly/Senate may convene a meeting in camera at the request of the National Assembly/Senate President or at least one tenth of the members of the National Assembly/Senate or the Prime Minister.
- The quorum of the meeting is over one third of all Members of the National Assembly/Senators.
- The adoption shall be made by two-thirds majority vote of all Members of the National Assembly/Senators.

#### Article 10

Between sessions of the National Assembly/Senate, the Standing Committee of the National Assembly/Senate shall convene and adopt in accordance with the National Assembly/Senate Internal Rules of Procedure.

#### Article 11

Any decision made by the Standing Committee of the National Assembly/Senate shall be submitted to the National Assembly/Senate at its next session for adoption by a two-thirds majority vote of all Members of the National Assembly/Senators.

Although no specific guidance is given regarding the basis on which decisions to lift immunity should be made, the intent of the law – and of relative immunity in general – is to provide Parliament with the authority to protect parliamentarians from political prosecutions. The European Parliament describes the common practice of its Committee on Legal Affairs with respect to decisions to lift immunity:

*“In particular, the Committee’s practice has been to propose to waive immunity unless there is a *fumus persecutionis*, that is to say, a well-founded suspicion that the legal proceedings have been instituted with the intention of causing political damage to the Member [...] Moreover, in the past Parliament has clarified the concept of *fumus persecutionis* in general terms: thus, when a prosecution is initiated by a political adversary, without proof to the contrary, immunity is not to be waived if there are reasons to believe that it aims to damage the Member (not to obtain reparation); proceedings based on anonymous accusations and requests made a long time after the alleged facts*

*are to be treated as indicia of fumus persecutionis; and the failure to prosecute other participants in the alleged offence, so that the MEP alone has been criminally charged for a fact involving a plurality of suspects, has also been treated as suspicious.*<sup>12</sup>

Many of these indicators have been present in the judicial proceedings against oppositions MPs in Cambodia, as laid out in this report.

Another problem with the abovementioned articles of the LSNAM and LSSM is the fact that they make no mention of a parliamentarian's right to defense, nor do they include an appeal procedure for parliamentarians who have had their immunity stripped. The Inter-Parliamentary Union (IPU) has held that "it is a principle of natural justice that parliamentarians be heard and entitled to defend themselves, even if such right is not explicitly mentioned in relevant law."<sup>13</sup> Particularly given the politicized nature of most of the Parliament's decisions in Cambodia, the lack of a specific mention of a right to a defense and appeal is especially problematic.

The Venice Commission in its 2014 Report on the Scope and Lifting of Parliamentary Immunities provided best practices for procedures to lift inviolability, which included, inter alia, the following aspects:<sup>14</sup>

- The request should be assessed either by an appropriate standing committee or by a special committee, reflecting the political composition of parliament;
- The committee responsible should if possible seek assistance from outside experts that are of undoubted integrity and independence;
- The committee should have the right to ask the competent authorities for any information or explanation that it deems necessary in order to assess the case;
- The member concerned should have the right to be represented, either by another member or by outside counsel;
- The member concerned should have access to the documents of the case, and should have the opportunity to be heard and to present any document or other form of evidence deemed by the member to be relevant;
- The committee should assess the case on the basis of the relevant and established criteria, the arguments put forward by the parties, and the facts of the case, and not on any other considerations;
- The committee should not make any examination of the merits of the case in question and should not, under any circumstances, pronounce on the guilt or otherwise of the member concerned, or on whether or not the allegations made justify prosecution;
- The committee should make a proposal for a reasoned decision on whether to lift or maintain inviolability, making clear the criteria on which the conclusion is based;
- The proposal of the committee should include all aspects of the request, and should consider whether inviolability may be lifted partially, and from what sorts of legal

<sup>12</sup> European Parliament, Directorate-General for Internal Policies, The Immunity of Members of the European Parliament (2014), available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509981/IPOL\\_IDA\(2014\)509981\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/509981/IPOL_IDA(2014)509981_EN.pdf).

<sup>13</sup> UNDP, "Parliamentary Immunity - Background Paper prepared by the Inter-Parliamentary Union" (September 2006), available at: <http://www.agora-parl.org/sites/default/files/UNDP-IPU%20-%20Parliamentary%20Immunity%20-%202006%20-%20EN%20-%20Parliamentary%20Institution.pdf>.

<sup>14</sup> The Venice Commission's 2014 report provides a full list of best practices for procedures to lift inviolability. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e).

action the member should be immune (arrest, detention, prosecution or punishment), as well as the duration of any form of inviolability;

- The proposal of the committee should be considered and decided by the plenary at the earliest opportunity and without any delay. The plenary session should be open and discussions should be confined to the arguments for and against the proposal.

### **In Flagrante Delicto Cases**

Under the Cambodian Constitution, an exception to the prohibition on the prosecution, arrest, and detention of lawmakers is made for so-called “*flagrante delicto*” cases, although the Constitution still demands that the competent authorities report to the parliamentary body after arrest and “*request permission*.” Similar provisions are found in Article 12 of the LSNAM and LSSM, which states that “*In the event that any Member of the National Assembly/Senate commits a crime in flagrante delicto, the competent authority may prosecute, detain or arrest him/her and shall immediately notify the National Assembly/Senate (or to the Standing Committee between the sessions) for a decision.*”

There is a lack of clarity in the LSNAM and LSSM as to what the “competent authorities” are supposed to be asking permission for and what form that permission should take in “*flagrante delicto*” cases. Although it is implied that the relevant body is to make a decision on the legality of the case (i.e. that the case is not political), the LSNAM and LSSM make no mention of the proper procedure to follow, particularly whether the decision should be approved by a certain percentage of the plenary and/or Standing Committee. Nevertheless, while this is not specified in the LSNAM or LSSM, the Constitution does include a requirement that such decisions made by the Standing Committee be forwarded to the plenary at its next session and that those decisions must be approved by a two-thirds majority vote of all Members of the relevant legislative body. Therefore, although this omission from the LSNAM and the LSSM is problematic, Cambodian legal hierarchy is clear that the Constitution, which does include greater specificity on this question, trumps any subsequent legislation.

It should be noted that providing an exception for parliamentarians caught “*in flagrante delicto*” is a fairly standard feature of legislation governing parliamentary immunity. It is generally assumed that the nature of such cases make it extremely difficult, if not impossible, for them to be politically motivated.<sup>15</sup> However, as the cases examined in depth in this report have demonstrated, this is not the case in Cambodia. In fact, most of the “*flagrante delicto*” cases against parliamentarians have included evidence of being of a political nature, such as being pursued years after the alleged facts, which, as mentioned above, is typically treated as a red-flag.

Indeed, in a 2006 paper prepared for the United Nations Development Program (UNDP), the IPU noted that, “*Although flagrante delicto is a logical restriction on parliamentary inviolability [...] it may serve as an ideal loophole for arresting a parliamentarian protected by immunity. As the experience of the IPU Committee on the Human Rights of Parliamentarians has shown, flagrante delicto is sometimes easily invoked even failing any ingredients of a flagrante delicto offence [...] The Committee has consequently recalled that a broad interpretation of flagrante delicto may amount to voiding immunity itself of any real meaning.*”<sup>16</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> UNDP, “Parliamentary Immunity – Background Paper prepared by the Inter-Parliamentary Union” (September 2006), available at: <http://www.agora-parl.org/sites/default/files/UNDP-IPU%20-%20Parliamentary%20Immunity%20-%202006%20-%20EN%20-%20Parliamentary%20Institution.pdf>.

## Suspending Cases

The Constitution, the LSNAM, and the LSSM all provide for the suspension of an ongoing case against a parliamentarian through a three-fourths majority vote of the full plenary of the relevant legislative chamber. This provision is found in the last sentence of Article 80 of the Constitution, which states that “*in any case, the detention or prosecution of a Member of the National Assembly shall be suspended if the National Assembly requires that the detention or prosecution be suspended by a three quarter majority vote of all Members of the National Assembly,*” as well as in Article 104 in the case of Senate Members. Article 13 of the LSNAM and of the LSSM provide for the same procedure.

Although authorities have argued – such as in the case of Um Sam An – that this provision is meant to be read along with the previous sentence in Article 80 of the Constitution regarding cases committed “*in flagrante delicto,*” it is clear that it is meant to address any and all cases of judicial actions being taken against parliamentarians. This is reinforced by the fact that it is included as a stand-alone provision in both the LSNAM and the LSSM that does not mention “*in flagrante delicto*” but rather “*in all cases above.*”

## Additional Provisions

Articles 14, 15, and 16 of the LSNAM and LSSM provide additional provisions regarding parliamentary immunity and the prosecution of parliamentarians.

### Article 14

The National Assembly member/Senator whose immunity has been removed and is being prosecuted in the courts shall have rights and privileges like those of the National Assembly members/Senators in general.

The National Assembly member/Senator who is subject to temporary arrest or detention shall lose the right to attend the meetings of the National Assembly/Senate and other Commissions and is entitled to receive remuneration except for meeting fees, mission per diems or money for fuel.

The National Assembly member/Senator, upon final judgment or verdict rendered by the court as a convicted person with jail term, shall completely lose his/her rights, privileges and membership as a National Assembly member/Senator.

### Article 15

Any National Assembly member/Senator, who has been convicted [of a crime] and is granted a pardon by the King, shall have his/her eligibility, immunity and privileges restored.

### Article 16

Any National Assembly member/Senator, upon final judgment or verdict rendered by the court, who has been judged innocent, shall automatically have his/her full immunity and privileges restored.

Particularly problematic with the above articles is the lack of mention of procedures to follow if a parliamentarian is convicted but not given a custodial sentence. Moreover, confusion has arisen over the lack of clear instructions in these articles as to the process to follow to restore immunity, particularly in the case of a royal pardon as provided for in Article 15.

### III. Conclusion

In a 2006 analysis of parliamentary immunity, the IPU argued:

*“There is no doubt that a well-defined system of parliamentary immunities is absolutely necessary for the functioning of a parliament, without which parliaments would degenerate into polite and ineffective debating forums. It is clear that this protection is all the more necessary for parliaments operating in a difficult environment as is the case in transitional societies. But parliaments do not operate in a vacuum and are largely dependent on their political environment and its respect for democratic and human rights principles. It is therefore also clear that parliamentary immunity in itself is not sufficient to create the space of liberty and independence that parliaments require.”<sup>17</sup>*

As highlighted in the above analysis, Cambodian legal provisions regarding parliamentary immunity are often vague and ill-defined, resulting in much confusion over the scope of parliamentary immunity – both absolute and relative – and the procedures that are to be undertaken by parliamentary bodies when responding to requests to lift immunity. This is particularly problematic given Cambodia’s judicial and political context, where cases against parliamentarians are often – if not always – political motivated, and neither the judicial nor the legislative branches are able to act as checks on executive power.

In sum, there is an urgent need for legislative reform in Cambodia regarding parliamentary immunity to ensure that the legislation not only reflects the intents and purposes of parliamentary immunity in a general sense, but also that it protects parliamentarians from political persecution. As noted earlier, parliamentary immunity is an essential tool in providing a legislature with the independence and freedom to fulfill its core functions in a democracy. As such, the abuse of parliamentary immunity affects Parliament as an institution and threatens Cambodia’s fragile democratic space.

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<sup>17</sup> UNDP, “Parliamentary Immunity – Background Paper prepared by the Inter-Parliamentary Union” (September 2006), available at: <http://www.agora-parl.org/sites/default/files/UNDP-IPU%20-%20Parliamentary%20Immunity%20-%202006%20-%20EN%20-%20Parliamentary%20Institution.pdf>.