Naciones Unidas A/HRC/45/G/2

Asamblea General

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Tema 10 de la agenda
Asistencia técnica y fomento de la capacidad

Nota verbal de fecha 27 de julio de 2020 dirigida a la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos por la Misión Permanente de Camboya ante la Oficina de las Naciones Unidas en Ginebra

En relación con la nota de la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos de fecha 17 de julio de 2020 y la nota de la Misión Permanente del Reino de Camboya ante la Oficina de las Naciones Unidas y otras organizaciones internacionales en Ginebra de fecha 1 de julio de 2020, la Misión Permanente tiene el honor de transmitir a la Oficina del Alto Comisionado las observaciones fácticas adicionales formuladas por el Real Gobierno de Camboya en relación con el informe del Secretario General sobre la función y logros de la Oficina del Alto Comisionado en la prestación de asistencia al Gobierno y al pueblo de Camboya para la promoción y protección de los derechos humanos (A/HRC/45/56) (véase el anexo).

La Misión Permanente solicita que la Oficina del Alto Comisionado tenga a bien distribuir la presente nota verbal y su anexo* como documento del Consejo de Derechos Humanos en relación con el tema 10 de la agenda.

* Se reproduce como se recibió, en el idioma en que se presentó únicamente.

Annex to the note verbale dated 27 July 2020 from the Permanent Mission of Cambodia to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights

Explanation Note: Law on Amendment to Article 3, Article 17, Article 20, Article 21, Article 27, Article 28, Article 29, Article 54, Article 55 and Article 59 of the Law on Trade Union Promulgated by Royal Kram No. NS/RKM/0516/007 dated 17 May 2016

Article 3. *New* Scope

Law on Amendment to Law on Trade Union

This law covers enterprises or establishments and all persons under the provisions of the Labour Law.

Trade Union's Comments/Concerns

In Article 3 the GoC extended the scope of application of the Trade Union Law to domestic workers but this extension is meaningless given that Article 10 of the TUL still imposes enterprise union model, and does not allow for the creation of unions by sector or profession.

CEACR has repeatedly requested the Government to allow the formation of unions by sector or profession in order to give domestic workers access to freedom of association.

Cambodia's Explanation by Article

1. Article 3 was amended by deleting Paragraph 2 [This law also covers personnel working in the air and maritime transportation] and revising the Paragraph 1 by removing "working in enterprises and establishments" in order to make it consistent with Article 1 of the Labour Law, which includes domestic workers, personnel working in the air and maritime transportation and those who work in the informal sector under its scope of coverage.

2. Under this provision, domestic workers, workers in the informal economy and teachers who are not civil servants are free to form a worker union of their own choice to promote or protect their interests as long as the conditions stipulated under the Law on Trade Union are satisfied.

3. As stipulated in Article 2 of the Convention 87, workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organizations concerned, to joint organizations of their own choosing without previous authorization. In line with this provision, the Law on Association and Non-Governmental Organizations and Law on Trade Union are adopted to promote freedom of association and provide the same rights and benefits to both workers and employers in private and public sectors.

Article 17. *New* Maintenance of Registration

Law on Amendment to Law on Trade Union

To keep the approved registration valid, each worker union or employer association shall:

(a) Produce an annual financial statement and annual activity report, based on the financial books and records kept, as information for its members by the end of March of the following year and shall be audited by an independent audit firm legally registered in the Kingdom of Cambodia in case there is a request from:

- At least 10% (ten percent) of its total members or its donor for the local worker union and employer association.
- At least 5% (five percent) of its total members or any of its donor for federation of worker unions, confederation of worker unions and federation of employers.

These reports shall indicate:

- Total incomes during the reporting period by indicating the amount of income from all sources;
- All expenditures of the worker union or employer association;
- Activities of the worker union or employer association; and
- Number of members;

(b) Worker union or employer association must provide details of its bank account within 45 (forty-five) days following the issuance of registration; and

(c) Update information required by this law and whenever there is any change made thereto within 15 (fifteen) working days, except a change in the number of members.

Trade Union's Comments/Concerns

In addition to detailed annual financial reports, Article 17 allows for audits of trade union finances at any time, based on an unreasoned request of a donor or a group of at least 10% or 5% of members, respectively for a union or union federation.

The procedure for internal control of trade union finances (on members' request) should be regulated by internal trade union by-laws. The authorities should not have the power to carry out inspections and request information at any time. Financial audits and investigations should be applied only in exceptional cases when justified by grave circumstances. Article 17 allows for discretionary power of the authorities over trade unions by providing for excessive financial control.

Cambodia's Explanation by Article

1. To address the concerns of trade unions with regard to the submission of financial report to the Ministry of Labour Law and Vocational Training, Article 17 was amended to eliminate such requirement by deleting the phrase "and make a copy to the Ministry in charge of labour by the end of March**."**

2. The development of financial report as required under this amended law is **only** for their members and donors. And **no-one** besides their members or donors can request for an auditing to that financial report and choose an independent auditing firm to do it.

3. Under this provision, trade union is not required to copy their annual financial and activities reports to the Ministry of Labour and Vocational Training. And this new provision also does not create an extraordinary work for trade union because they are normally required by their donors to submit an audited financial report already.

4. It is to note that the Committee on Freedom of Association in its decisions does not prohibit the audit of the financial report of trade union.

Article 20. *New* Requirements for the Leaders and Persons Responsible for the Administration of Worker Union in the Enterprise or Establishment

Law on Amendment to Law on Trade Union

Khmer nationals who are leaders and persons responsible for the administration of a worker union must meet the following requirements:

(a) Be at least 18 (eighteen) years of age or the minors who have been emancipated;

(b) Make a self-declaration on a specific and lawful residential address;

Foreign nationals who are leaders and persons responsible for the administration of a worker union must meet the following requirements:

(a) Be at least 18 (eighteen) years of age or the minors who have been emancipated;

(b) Be able to read and write Khmer language;

(c) Have been working in the Kingdom of Cambodia for at least 2 (two) years;

(d) Have the right to reside and have a permanent residence in the Kingdom of Cambodia in compliance with the Law on Immigration of the Kingdom of Cambodia.

Trade Union's Comments/Concerns

Article 20 lists minimum age of 18 years as eligibility criterion for trade union leaders and managers. In relation to migrant workers, Article 20 lists additional eligibility criteria, such as literacy requirement and permanent residency requirement. Cambodia does not offer permanent residency as its ordinary visa can be extended "indefinitely" every 3, 6 or 12 months, subject to a decision by Ministry of Interior.

CEACR has already repeatedly asked the GoC to revise these provisions. The minimum age as eligibility criterion should reflect the statutory age for wage employment - which, according to the Cambodian Labour Law, is 15 years of age (Section 177). Literacy requirement for non-nationals is considered incompatible with Convention 87 since it might disproportionately restrict access of migrant workers to trade union leadership positions. Residency requirement should be "reasonable". This is not the case where workers' residency status is subject to decision of immigration authorities every 3, 6 or 12 months.

Cambodia's Explanation by Article

1. This amendment is the result of the tripartite consultation, in which the concerns of trade union have been addressed.

2. Under this provision, Khmer nationals who are 18 years old or minors who have been emancipated in accordance with the Cambodian Laws can be elected as a trade union leader and person responsible for the administration of worker union. Thus, Khmer nationals who are 15 years old with emancipation can also be elected for this position.

3. It is noteworthy that the original minimum age of a trade union leader under the Labour Law used to be 25 years old. But it was amended to 18 years old under the Trade Union Law and now further reduced to 15 years old.

4. In respect of the Khmer literacy requirement for foreign worker who wants to be a trade union leader, the Committee on Freedom of Association decides that literacy requirement for foreign nationals to become leader and person responsible for the administration is not incompatible with Convention No. 87. This incompatibly happens only when the legislation requires not less than 60% of members shall be literate before workers can form a trade union.[1]

5. Regarding the residency requirement under this provision, it is in compliant with the Convention No. 87. In its decision, the Committee on Freedom of Association provides that "Legislation should be made flexible so as to permit the organizations to elect their leaders freely and without hindrance, and to permit foreign workers access to trade union posts, at least after a reasonable period of residence in the host country."[2]

[1] Compilation of decisions of the Committee on Freedom of Association, Sixth Edition, 2018, Para. 375, page. 68.

[2] Compilation of decisions of the Committee on Freedom of Association, Sixth Edition, 2018, Para. 623, page. 117.

Article 21. *New* Requirements for the Leaders and Persons Responsible for the Administration of Employer Association

Law on Amendment to Law on Trade Union

Cambodian nationals who are leaders and persons responsible for the administration of an employer association must meet the following requirements:

(a) Be at least 18 (eighteen) years of age; and

(b) Make a self-declaration on a specific and lawful residential address.

Foreign employers who are eligible to stand for election to be leaders and persons responsible for the administration of an employer association must meet the following requirements:

(a) Be at least 18 (eighteen) years of age;

(b) Have the right to reside and have a permanent residence in the Kingdom of Cambodia in compliance with the Law on Immigration of the Kingdom of Cambodia; and

(c) Have been investing or working in the Kingdom of Cambodia for at least 2 (two) consecutive years.

Article 27. *New* Keeping of Financial Records

Law on Amendment to Law on Trade Union

All worker unions or employer associations must keep financial records in compliance with the format as set forth in the *Prakas* of the Minister of the Ministry in charge of labour and must present this financial statement to its members in accordance with its statute, and must be audited by an independent audit firm legally registered in the Kingdom of Cambodia in case there is a request from:

- At least 10% (ten percent) of its total members or its donor for the local worker union and employer association.
- At least 5% (five percent) of its total members or any of its donor for federation of worker unions, confederation of worker unions and federation of employers.

Trade Union's Comments/Concerns

See comments under Article 17.

Cambodia's Explanation by Article

See our clarification in Article 17.

Article 28. *New* Dissolution of Worker Union or Employer Association

Law on Amendment to Law on Trade Union

A worker union or an employer association may be dissolved by any of the followings:

(1) A worker union or an employer association is dissolved in accordance with its statute;

(2) A [local] worker union is automatically dissolved in the event of a complete closure of its enterprise or establishment and its workers are fully paid their wages and other benefits; or

(3) A worker union or an employer association is dissolved by the court.

Trade Union's Comments/Concerns

Article 28.2 allows for automatic dissolution of a trade union organization in the event of closure of the enterprise, if there are no outstanding salaries or benefits.

CEACR has already repeatedly asked the GoC to remove Article 28.2. Dissolution of a union should only be decided under the procedures laid down by their statutes, or by a court ruling. A trade union may have a legitimate interest to continue to operate after the dissolution of the enterprise concerned –for example, to defend claims of its members which are not limited to unpaid salaries and benefits.

Cambodia's Explanation by Article

1. The amendment was already made in accordance with the comments from CEACR and the suggestion from trade unions during the tripartite consultation workshops.

2. Under this amendment, a local worker union will not be dissolved immediately even though the enterprise is closed. It will be dissolved only when the employer's obligations towards their workers had been fulfilled in accordance with the court decision.

Article 29. *New* Grounds for Dissolution by the Labour Court

Law on Amendment to Law on Trade Union

The party concerned or 50% (fifty percent) of the total members of a worker union or an employer association has the right to file a complaint to the Labour Court for dissolving that worker union or employer association.

A worker union or an employer association shall be dissolved by the Labour Court on any of the following grounds:

(a) The formation or nature of activities of the worker union or employer association contravenes the law or the objective of the worker union or employer association as stipulated in its statute; or

(b) A worker union is no longer independent from the employers and it is unable to restore its independence.

The Labour Court may determine a time frame for the worker union or employer association to rectify the shortcomings as set forth in points "a" and "b" above before making its decision.

Trade Union's Comments/Concerns

Article 29 regulates the manner in which members may request dissolution of a trade union organization. This article further provides for broad grounds to request dissolution by Court, including in cases where the activities "of the union" (without specifying the attribution mechanism) contravene the law or the statutory objectives of note, trade unions are not free to decide the contents of their statutes, since the MOLVT continues to impose a detailed, standardized form of a union statute (Annex 2A1 annexed to Prakas 249). The standard form goes as far as dictating the contents of the particular clauses, including a closed list of acceptable statutory objectives.

CEACR has already repeatedly asked the GoC to revise these provisions. The manner in which members may request dissolution concerns the internal functioning of the trade unions and should be left to the trade union organization's by-laws.

Acts such as excesses going beyond the limits of normal trade union activity committed by certain members or eg. irregularities in financial management by leaders should be subject to the legal action against the persons responsible, without involving dissolution of the entire trade union movement.

Cambodia's Explanation by Article

1. In response to the recommendation of ILO, point (C) of this article [c)-leaders and persons responsible for the administration are found guilty of committing a serious offense in the capacity of the trade union or employer association] has been deleted. This means that a trade union will not be dissolved by the court if the trade union leader or the person responsible for administration committed serious offense in the capacity of the trade union.

This personal issue would be settled separately and would not lead to the trade union dissolution.

2. Under this provision, any registered worker union or employer association may be dissolved solely by Labour Court while it can be deregistered by the administrative authority in most ASEAN countries, i.e. in Thailand, Singapore, Philippines, and Myanmar. The allegation that the Article 29 of the LTU is incompatible with the principles of the Convention No. 87 is a misunderstanding. Article 29 of the LTU stipulates that the Labour Court, before making its decision, may determine a timeframe for the worker union or the employer association to rectify any shortcoming that could be considered as ground for dissolution.

Article 54. *New* The Most Representative Status at the Enterprise or Establishment Level

Law on Amendment to Law on Trade Union

The most representative status of a worker union is recognised within the framework of the enterprise or establishment. For the purpose of the collective bargaining or collective labour dispute resolution, the most representative worker union has the exclusive rights.

A worker union may acquire the most representative status if it meets the following criteria:

(a) Being duly registered;

(b) Having programs and activities indicating that the worker union is capable of providing professional, cultural and educational services to its members, as provided for in this law; and

(c) Having the list of the most members from whom union dues have been deducted or having received the largest number of votes in the enterprise or establishment as follows:

- The worker union having members at least 30% (thirty percent) of the total workers in an enterprise or establishment where there is only one worker union; or
- Any worker union having secured the most support from other worker unions with more than 30% (thirty percent) of the total workers in the enterprise or establishment where there is more than 1 (one) worker union; or
- In the event where any worker union is unable to secure the support from members of at least 30% (thirty percent) of the total workers, an election shall be organised to secure the most votes of more than 30% (thirty percent) of the total workers in that enterprise or establishment. The implementation procedures of such election shall be determined by Prakas of the Minister of the Ministry in charge of labour.

In the event where, within an enterprise or establishment, there are many discrete local worker unions which fail to meet all the criteria as stipulated in the above paragraphs of this Article and fail to secure the most representative status recognition, the negotiation of a collective bargaining agreement shall be strictly carried out in accordance with Article 72 (Bargaining Council) of this law.

Trade Union's Comments/Concerns

Article 54 establishes a 30% enterprise threshold for determination of exclusive bargaining agent. A union that meets the threshold is granted exclusive right to negotiate on behalf of all workers. In case no union meets the 30% threshold the collective agreement is carried out within a bargaining council (defined under Article 72). Minority unions do not have the right to represent their members in matters that emanate from the collective bargaining agreements (Article 59). Accordingly, the minority unions do not have the right to bargain on behalf of their members.

According to the Committee on Freedom of Association (CFA) the granting of exclusive rights to the most representative organization should not mean that the existence of other unions to which certain involved workers might wish to belong is prohibited or does not lead to effective representation of members. All unions in the enterprise, including minority organizations, should be permitted to carry out their activities and at least to have the right to speak on behalf of their members and to represent them.

Limiting the rights of minority unions Articles 54-55 and 59 is not conducive to promotion of collective bargaining and might affect the right of workers to join the union of own choosing.

Cambodia's Explanation by Article

1. The amendment was made by replacing **"**having the most members with membership identification cards and a proper name list of membership**"** with **"**having the list of the most members from whom union dues have been deducted**"** in Point (c) in order to make a trade union get the MRS more easily so that it can make a CBA with employer.

2. Similar to other jurisdictions, obtaining a most representative status (MRS) will provide an exclusive right to represent the workers in collective disputes and to negotiate collective bargaining agreements. With these rights, it requires that the MRS worker union having proper representation to avoid any misuse of such right, which could affect the rights and benefits of all workers within an enterprise. Even though the MRS worker union is entitled to an exclusive right to represent the workers in negotiating collective bargaining agreements and in settlement of collective disputes, there is no prohibition in the law that the minority unions cannot represent their members in labour dispute settlement. As stipulated in the LTU, minority unions have the same rights to advise their members in any collective dispute. Conferring an exclusive right on the MRS worker union to represent all workers in collective disputes does not prevent the minority unions from representing their members to do so by seeking assistance from the MRS worker union.

3. It is important to note that if the MRS worker union fails to perform their duties as prescribed in the LTU, workers or minority unions can file a complaint to revoke this status. The LTU provides double protection to workers, even if they are members of MRS worker unions or minority unions. While the MRS worker union has an exclusive right to represent all workers, the minority unions can also provide advice to their members in complement to the exercise of an exclusive right by the MRS worker union. The Government do not believe that this should be a concern.

4. In order to provide a better understanding and to avoid further concerns on this matter, the MLVT issued Prakas No. 303 to clarify that the minority unions can represent their members in individual and collective labour disputes, not arising out of the collective bargaining agreement (CBA) implementation. In this regard, minority worker unions or representatives of workers in case of no worker union have rights to represent members or workers in collective labour disputes in all dispute settlement procedures, including the conciliation at the MLVT and the AC.

Article 55. *New* The Most Representative Status in a Profession or an Economic Activity or a Sector

Law on Amendment to Law on Trade Union

In a profession or an economic activity or a sector where there are many worker unions, these worker unions shall seek the most representative status recognition by satisfying the criteria stipulated in points "a" and "b" of Article 54 (The Most Representative Status at the Enterprise or Establishment Level) of this law, plus an additional criterion of having the list of the members at least 30% (thirty percent) of its total members from whom union dues have been deducted in the profession or economic activity or sector wherein they apply for the certification of the most representative status.

The most representative worker union has the exclusive right to represent all workers in negotiating collective bargaining agreement or in resolving collective labour dispute with

the employer or employer association of such particular profession or economic activity or sector.

If there are many worker unions in a profession, an economic activity or a sector, which fail to meet all the criteria as stipulated in the above paragraphs of this Article, and fail to secure the most representative status recognition, the negotiation of a collective bargaining agreement shall be strictly carried out in accordance with Article 72 (Bargaining Council) of this law.

Trade Union's Comments/Concerns

See comments under Article 54.

Cambodia's Explanation by Article

See our clarification in Article 54.

Article 59. *New* Rights and Roles of Minority Worker Unions in Enterprise or Establishment where there is the Most Representative Worker Union

Law on Amendment to Law on Trade Union

Minority worker unions in an enterprise or establishment where the most representative status worker union has been certified, and where such status remains valid, are prohibited from demanding the right to collective bargaining, and the rights or benefits beyond those provided for in laws, regulations, and collective bargaining agreements remain in force, or internal rules. The rights and roles of the minority worker unions include the followings:

(a) Providing literacy training on legal and professional matters;

(b) Providing legal and practical advice to its members;

(c) Representing its members in resolving individual labour disputes;

(d) Participating in ongoing workplace cooperation mechanisms;

(e) Participating in consultations on labour market mechanisms;

(f) Providing information regarding its membership;

(g) Organising cooperatives which could be shop, canteen, or health care etc., to help improving the living standards of its members;

(h) Having an administrative role in handing out benefits to members in the case of unemployment; and

(i) Representing in good faith its members in collective labour dispute settlement not arising out of an execution of the collective bargaining agreement.

The most representative worker union can also carry out the roles as defined from points "a" to "i" above.

Trade Union's Comments/Concerns

See comments under Article 54.

Cambodia's Explanation by Article

This article is amended by adding Point (i)- (representing in good faith its members in collective labour dispute settlement not arising out of an execution of the collective bargaining agreement) to this Article. The amendment aims at further clarify the misinterpretation that minority union does not have the right to represent their members in collective labour dispute.

For further clarification, please see our explanation in Article 54.

Factual Comment from the Ministry of Education, Youth and Sport

MoEYS' Comments: Ethnic minorities in Cambodia enjoy the same rights and freedom to education like the general Cambodian nationals. The same education application is given to ethnic minority learners. School infrastructure both hard and soft has been given to all ethnic communities nationwide. Ethnic Vietnamese children are able to receive access to inclusive and equitable quality education with no discrimination. In particular, ethnic Vietnamese who lived in Kampong Chhnang province (Phsar Krom in Kampong Chhnang downtown, Yukunthor school in Boribo district and Thnal Chheu Teal in Kampong Leng district) have been relocated upland for better living condition. The schools in these communities are also moved upland and are equipped with adequate necessary infrastructure. The Royal Government of Cambodia has taken into consideration on all aspects of their educational health, safety and well-being.

Factual Comments from Ministry of Information

Comments and clarification to: "Roles and achievements of the Office of the United Nations High Commissioner for Human rights in assisting the Government and people of Cambodia in the promotion and protection of human rights"

Point 1. III. Enhancing participations and protecting civil space

- Point 16: "In other legislative development, the Ministry of information held consultations on a draft law on access to information. While acknowledging the important of such a law, OHCHR has raised concerns on the specific draft under considerations, which contains vague definitions on the type of information subject to disclosure and exclusion, and does not provide for an independent oversight body. The Ministry of Interior reported progress on its development of a draft cybercrime law, but civil society has expressed concerned at the potential impact of the draft law on freedom of expression online and at the lack of transparency in the progress. OHCHR remains

Comments:

- "In other legislative development, the Ministry of information held consultations on a draft law on access to information which had participated by UN agencies in Cambodia (UNESCO and OHCHR's representatives) and civil society organizations working on human rights through the establishment of a "Technical Working Group for Drafting the Access to Information Law". While acknowledging the important of such a law, OHCHR has raised concerns on the specific draft under considerations, which contains vague definitions on the type of information subject to disclosure and exclusion, and does not provide for an independent oversight body. The Ministry of Interior reported progress on its development of a draft cybercrime law, but civil society has expressed concerned at the potential impact of the draft law on freedom of expression online and at the lack of transparency in the progress. OHCHR remains concerned about lack of progress towards addressing the key human rights concerns raised by civil society organizations."

Point 2. IX. Conclusions and recommendations

- Point78.(c). " Encourage the Government to ensure that draft law on access to information is developed in a participatory manner and complies with international human rights norm and standards. It should also include clearly defined categories of exceptions to disclosure, define types of information subject to disclosure, and establish an independent oversight boday."

Clarification:

- "Reference to the conclusions and recommendations mentioned in point 78.(c), the Ministry of Information would like to clarify that the process of drafting the Access to Information Law, the Ministry of Information have widely consulted with relevant stakeholders through the establishment of the Technical Working Group for Drafting the Access to Information Law (TWG-A2I) with the participatory from UN agencies in Cambodia such as UNESCO and OHCHR's representatives and civil society organizations working on human rights in Cambodia. In addition, most comments raised by all members in the TWG-A2I have been taken into account and put into the draft law. In the term of the establishment of an independent oversight body, the Ministry of Information would also like to clarify that based on the study research to the countries which adapted the Access to Information Law, it was noticed that some countries have the body and some do not. Therefore, it is meant that not all countries which adapted the law need to establish the independent oversight body. Moreover, the final procedure in order to solve the conflicts of

requesting information is decided by the court. In addition, based on its limitation of the budget expenditure, the Royal Government of Cambodia have decided not to establish the new body which will spend a lot of money to run it and for new staff.